

Crimes and Transactions

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Professor Finkelstein's paper focuses on perhaps the most basic question one could ask about the criminal law: What explains the existence of the criminal category, as distinct from other kinds of mischief? Assuming that society has good reason to deter mischievous conduct or to sanction those responsible for it, we might still ask why either goal should require a distinctively criminal category. The problem was brought to contemporary prominence by Robert Nozick, who, in *Anarchy, State and Utopia*,¹ asked: Why not simply compensate? If we begin with the (contestable) premise that every kind of wrong that we might want to deter or to sanction consists in a rights violation, then the question is, why don't we simply have a scheme in which those who are the victims of rights violations secure compensation from those who have wronged them? In the language of the law, why not torts alone?

While a variety of plausible responses have been offered (beginning with Nozick's own), the question poses a particularly acute challenge for those who defend an economic analysis of the law. Since they seek to explain the law in terms of a relatively narrow range of concepts, these theorists find their explanatory resources correspondingly limited; they cannot avail themselves of the most familiar philosophical solutions. Roughly, they have proposed the following sort of account. We begin with a system of property rights or entitlements; the justification for having any such set of entitlements is to be conceived of in economic terms. For example, ownership encourages investment and reduces uncertainty; for those and other reasons, ownership is wealth enhancing or productive. The degree to which a system of property ownership can be efficient is limited, however, since having a right to something does not yet permit one to alienate it. Without the right to alienate, individuals may be unable to make mutually advantageous—and therefore efficient—exchanges. Thus, it is desirable (in economic terms) to supplement the scheme of initial

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1. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 59 (1974).

entitlements with a system of “property rules.” Property rules protect rights by conferring on right-holders a power to alienate as they see fit, and to guard against nonconsensual takings. The same economic considerations that support a scheme of property entitlements mandate a system of property rules.

Of course, sometimes the costs of transacting voluntarily are very high, and a system of property rules in conjunction with a scheme of property holdings may be inadequate to capture all the gains that might otherwise be available. The classic problem is exemplified in the automobile-driving context. Suppose each person is entitled to bodily security, and that this basic entitlement is secured by a system of property rules. It follows that while each individual is empowered to “exchange” this right to security, any activity that might threaten it is precluded unless the actor has first entered into the appropriate exchange relationship with the threatened party. Since the person who is about to put the pedal to the metal cannot know the identity of each and every individual whose security will be thus placed at risk, the driver cannot in advance purchase the right to endanger those other individuals. Thus it seems she would be precluded from venturing beyond the garage.

The standard economic solution to this problem is to put a system of so-called “liability rules” in place. Liability rules protect or secure an initial set of entitlements in a complex way. Those who would “take”—that is, compel a transfer of—resources or entitlements are at liberty to do so; but they are required to compensate those whose entitlements are thus involuntarily reduced in value. Compensation should, in principle, be set to offset the loss in value, so that the right-holder is no worse off *ex post* (that is, after the taking plus the compensation) than she was *ex ante* (prior to the taking). Liability rules thus allow individuals to secure gains which they would otherwise be precluded from securing under the more restrictive regime of property rules alone. The same considerations that drive a commitment to a scheme of property holdings thus warrant a system of liability rules as well.

We can—roughly, but without too much violence to our concepts and categories—think about property and liability rules as mapping onto our practices of contract and tort. Together, these rules seem sufficient to create and sustain an efficient allocation of resources. The problem then is to explain why, from an economic standpoint, we would ever need a criminal law. Proponents of a general economic analysis of law have offered three related but different kinds of answers to this question. The most familiar is Posner’s. In his account, a criminal law is necessary to deter individuals from pursuing nonmarket alternatives when a market solution is available and feasible.² For example, suppose I want your 1958 Les Paul gold top

2. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 165-66 (1972).

guitar. There is no bar in principle to my seeking an exchange with you. But suppose I am disinclined to negotiate for the purchase of your guitar, and prefer instead simply to take it from you. A couple of factors might lead me to act on this preference. First, it is not certain that I will be found out as the taker of your property. Second, even if I am unable to avoid detection, the probability of your winning a liability judgment against me—though very high—is nevertheless less than one. Weighing these risks against my desire to possess your guitar without paying for it, I may find it advantageous to take it.

Evidently, some additional cost must be imposed upon me—something that extends beyond compensatory damages alone—in order to deter me from pursuing my strategy of taking rather than negotiating. Let us call this other cost “punishment,” and let us refer to my taking as a “crime.” We now have the ingredients for an explanation of the criminal category. It is required so as to make available “kickers”—that is, additional costs that act as deterrents. These are necessary in order to prevent individuals from pursuing nonmarket, “forced” transfers when the market alternatives are available and feasible. We can express this familiar point in the lingo of “property rules and liability rules” by saying that the criminal law is necessary to prevent individuals from treating property rules as liability rules: that is, from treating rights secured by a system of property rules as if they were rights secured by a system of liability rules.³

Expanding on this explanation, Calabresi and Melamed have noted that in the absence of a criminal law, some individuals might be inclined to treat liability rules as if they were property rules⁴—which is an awkward way of saying that individuals may sometimes have undesirable incentives to treat rights secured by liability rules as if they were rights secured by property rules. For example, suppose you live downstream from a polluter and that you are entitled to compensation for the harm his pollution causes you; your right to be free of pollution is protected by a liability rule. The polluter may have an incentive to purchase that entitlement from you, eliminating his risk of bearing higher costs should you successfully recover under a liability-rule regime. The net effect of allowing such transactions, however, may be too much pollution. In that case, we would want a criminal law not to deter him from treating a property rule as if it were a liability

3. We might think of punitive damages as alternative kinds of kickers. Note, however, that we describe such damages as “punitive.” Moreover, we want to reserve their use to special occasions, because there may be perverse consequences of providing the victim of mischief with compensation in excess of his actual losses. The criminal penalty imposes a cost on the injurer that is not thereby a gain to the victim. And that is an important difference between punitive damage awards and criminal sanctions.

4. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

rule, but to discourage him from treating a liability rule as if it were a property rule.

Alvin Klevorick provides what is perhaps the most sophisticated treatment of the problem. He notes that it is not simply that a criminal law is necessary to deter this or that action—whether it is an instance of treating a property rule as a liability rule or vice versa. Rather, the point of the criminal law is to sustain and protect the scheme of property and liability rules. Even if it were efficient in a particular case to allow such actions, it is not generally so; and that is why we create a system of property and liability rules. The point of the criminal law is not to deter a particular actor, but to sustain the “transaction structure”—the set of norms that determines the forms of legitimate holdings and transfers.⁵

Klevorick’s point can be too easily missed by those wedded to an economic approach. The purpose of the criminal law may be to protect the transaction structure; but what makes actions that undermine that structure *criminal* is the fact that in such cases the actor has illicitly taken upon himself a certain authority to determine the terms of legitimate transfer. The criminal category is understood functionally, in terms of its role in sustaining the transaction structure, but the essence of criminality is understood in terms of its moral/political character; what makes the conduct criminal is that someone who violates the transaction structure has asserted an authority that he does not possess. The power to set the terms of legitimate transfer resides in the political sovereignty and not in ordinary folk.

Regardless of which variant one is considering, the economic approach faces a range of insurmountable problems.⁶ First, it trades on an impossibly strained notion of what it could mean to protect a right. Property rules are said to protect rights by conferring powers to alienate and exclude; liability rules by providing for ex post compensation in the event of a nonconsensual transfer; and inalienability rules (following Calabresi and Melamed) by precluding an individual from transferring that to which he is entitled. It would be difficult to overstate the perversity of this story. Even if one believed that a system of property rules could be thought of as a scheme for protecting rights, it is awfully hard to see how a liability rule “protects” your right to X by giving someone else (everyone else, actually) the privilege to take X from you without your consent—provided he or she compensates you for the taking after the fact. This is just not the way the notion of a right, or of protecting a right, is commonly understood. On a more natural reading of the role of compensation in securing a system of

5. See Alvin K. Klevorick, *On the Economic Theory of Crime*, in *CRIMINAL JUSTICE: NOMOS XXVII* 289, 301-04 (J. Roland Pennock & John W. Chapman eds., 1985).

6. I have long been at pains to point out the inadequacies of this approach, and must confess to a certain puzzlement. While most defenders of the economic analysis of the law grant my objections (and while none, so far as I know, has ever ventured a response to them) the economic analysis of the criminal law continues to lumber forward—evidently impervious to the force of argument.

rights, we would say that if you take *X* from me without my consent, then you have violated a right of mine—or in other words, have acted wrongly or unjustifiably towards me. Because you have acted wrongly towards me, you owe me compensation. Compensation is what you owe me because you wronged me; it is not something you pay in order to exercise a privilege to disregard my rightful claims. If we are to understand liability rules as the economic model suggests we do, then it is bizarre to speak of those rules as a way of “protecting rights.”

The problem runs deeper, though, for the manner in which the economist conceptualizes the issue is confused, bordering on the incoherent. If property and liability rules are instruments for protecting rights, then how are we to think of the content of the rights that they are protecting? In fact, property and liability rules are not ways of protecting rights at all; these rules are norms that help to determine or specify the content of rights with respect to the transactional domain. A property rule does not protect a right whose content is otherwise specified; rather, it tells us that certain rights include, as part of their content, certain terms of transfer—certain powers and privileges, such as a power to exclude and to alienate on agreeable terms. It is because a right is so constituted—that is, as having such content—that it is appropriately protected in certain ways. It is because my right to *X* gives me a power to alienate and exclude, when you take *X* without my consent, I have a right to demand repair or seek injunctive relief.⁷

The second major problem with the economic approach is that it deeply mischaracterizes the nature of the criminal offense. Once again this is a failing in the conceptualization of the problem. On the economic analysis, all crimes are conceived as transaction-based. As Posner has it, crimes are attempts to treat property rules as liability rules;⁸ in the Calabresi-Melamed extension, crimes are attempts to treat one kind of protective rule as if it were another kind of protective rule (protective, that is, of the conditions or terms of transfer).⁹ Finally, even in Klevorick's much more sophisticated formulation, crimes are inappropriate assertions of authority with respect to the domain of transfer or the transactional structure.¹⁰

This just begs the question. Once one thinks of the world in terms of transactions, it is not surprising to find that one's explanation of the criminal law would be given in terms of transactions. The problem comes in the initial formulation. Had one asked instead, what is distinctive about our standard or paradigmatic examples of criminal conduct—murder, assault,

7. For a fuller discussion, see Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *YALE L.J.* 1335 (1986).

8. See POSNER, *supra* note 2.

9. See Calabresi & Melamed, *supra* note 4.

10. See Klevorick, *supra* note 5.

battery, and rape, as well as theft—one might well have looked elsewhere for an answer. It is impossible to take seriously the idea that the primary failing in cases of murder, rape, or battery is transactional (though Judge Posner has from time to time been prepared to offer up such an account).¹¹ And while it is obvious that both Posner and Calabresi and Melamed are committed to understanding the nature of crime in terms of failures to abide by transactional rules, even Klevorick's more sophisticated version of the argument understands crimes in terms of transactions, for on his view the essence of crime is someone taking upon himself an authority to set the terms of transfer when in fact he has no such authority.¹² In the end, even Klevorick's argument fails—on two grounds. First, a crime is not a kind of political action: a taking of political authority that one does not have. After all, an intention to violate a rule is not thereby an intention to assert authority or to deny the authority of others to determine the rules.¹³ Second, though crimes are violations of rules, the rules that constitute the criminal law extend far beyond the realm of transactions, nor are transactional concerns at the core of our concept of criminal mischief.

Of course, to claim that economic analysis fails to provide a plausible account of the criminal law is not to suggest that economic analysis is without value. Quite the contrary. There is much to be said for determining, understanding, and evaluating the consequences of various legal rules. The problem is that economic analysts continue to present their accounts as explanations of various parts of the law, and as such they often fail.¹⁴ This is not to say that there might not be an economic account that could explain why some hypothetical legal system might have a criminal category. I am denying simply that the economist of law can give anything resembling a plausible explanation of our criminal law. The argument I have offered has focused on the inappropriateness of their conceptualization of the issues given the limited resources available in the economic conceptual scheme and the fixation on transactions as the core of the criminal offense.

Professor Finkelstein takes the economist of law to task along similar lines, but her argument differs, in interesting ways, from the one I have pressed. Where I have worked along with the economist—granting the framework of analysis to which the economist is committed—only to show that one cannot derive the desired explanation, Finkelstein begins by defending the view that a certain mental state is central to our practices of criminal law: Someone is liable for criminal mischief only if she

11. See POSNER, *supra* note 2, at 163.

12. See Klevorick, *supra* note 5.

13. To think otherwise is merely groundlessly to inflate criminality or mischief.

14. This is a problem that extends beyond the economic analysis of the criminal law; the same problem arises in tort law. Whatever else it may be, economic analysis is not a plausible explanatory account of either area of law. For further discussion, see JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: A DEFENSE OF THE PRAGMATIC APPROACH TO LEGAL THEORY* (forthcoming 2000).

knowingly violated a prohibitory norm. Thus, while I have focused on the nature of the norms whose violation is criminalized, Finkelstein focuses her attention on the mental state that is necessary for the violation of any such norm to count as a grounds for being liable to criminal sanction. Finkelstein's argument is that while the mental state of "knowingly violating a prohibitory norm" is essential to our criminal category, the economist is incapable of explaining the normative significance of that mental state. From the point of view of reducing the level of criminal mischief, it is not obvious what role the fact that someone knowingly violated a prohibitory norm would play.

Roughly the same point was first made (to my knowledge) by H.L.A. Hart, in conjunction with his discussion of utilitarian theories of excuses.¹⁵ Utilitarianism is a kissing cousin of economic analysis; and in this context, there is nothing that separates them. Hart quite rightly pointed out that from a purely forward-looking or utilitarian perspective, the mental states relevant to the criminal category are those that bear on whether a person is deterrable, and not those that bear on responsibility as such. This seems to be Professor Finkelstein's point as well. Whereas our actual criminal practice emphasizes the knowledge component—which itself appears to reflect a concern for the agent's responsibility—economic analysis cannot explain why knowledge is more appropriate to criminality than is inadvertence or carelessness. Indeed, it is not obvious why any mental state that bears on an agent's responsibility, and not on his deterrability, would have any role in an economic explanation. Thus, economic analysis cannot account for our criminal category because it simply cannot account for the normative significance of some of the concepts that are central to it. Finkelstein may be making even a stronger claim than this. It may be her view that the mental state of knowledge is central to the very concept of criminality, in which case the economic analysis would fail not just simply as an account of our practice, but as a putative account of the very possibility of a criminal category as such. I do not know if Professor Finkelstein means to make this stronger claim, or if she does, whether I find the argument persuasive. The less bold claim, however, seems to me altogether correct, and Finkelstein's argument for it compelling.

We have, then, at least two arguments that are pretty decisive against the economic analysis of the criminal law. My argument shows that the economic analyst's conceptualization of the problem is fundamentally flawed. The economic account rests on an impoverished, nearly unanalyzed, and altogether undeveloped concept of what it is to be a right and what it means to have rights. It then proceeds to mischaracterize liability rules as ways of securing rights, while in effect maintaining that liability rules confer power on non-right holders to violate or "take" rights on the

15. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 19 (1968).

condition that they compensate for doing so. More fundamentally, it mistakenly characterizes the system of property, liability, and inalienability rules as ways of protecting rights, when these rules are best thought of as norms that help to specify the content of rights. This conceptual morass leads to a picture of the criminal law as a kind of second-order form of rights protection: The criminal law protects rights by protecting the transaction structure that protects rights more directly. But in fact the criminal law protects rights directly. Its focus is rights and the rights-structured normative relations between persons; the focus of the criminal law is not simply, let alone essentially, the transactional aspects of human interaction.

By contrast, Professor Finkelstein's argument begins with a certain thesis about the essential nature of the criminal law: Conduct is not subject to criminal sanction unless an individual knowingly violates one of its norms. Economic analysis cannot explain the significance of the knowledge requirement. To the extent the knowledge requirement is an essential feature of our criminal law, economic analysis fails as an account of our criminal law. To the extent that the knowledge requirement represents an essential component of criminality as such, economic analysis is incapable of explaining the very existence of the criminal law category. Though different in these ways, Professor Finkelstein's argument and mine make, at bottom, the same general point: namely, that on its own terms, the economic analysis lacks the resources plausibly to explain the criminal law. If there is a good argument to the contrary, I have yet to see it.

An economic analysis of the criminal law attempts to explain it in terms of a certain conception of the law's function. As we have seen, the function economists ascribe to the criminal law is that of protecting or securing a transaction structure. Both Professor Finkelstein and I maintain that this putative function of the criminal law cannot explain basic features of the criminal category.

Someone convinced by either her objections or mine might think that where the economist has gone wrong is in ascribing or positing the wrong function to the criminal law. A better or more apt characterization of its function would, one might think, successfully illuminate the nature of the criminal law and of criminality, and would explain the emergence of the criminal law and the shape it takes in mature legal systems. I cannot speak for Professor Finkelstein, but in closing I want to say that I am generally skeptical with regard to functional explanations of the law; it may serve no function, in the relevant sense.¹⁶ Rather than seeking out a putative function, I have argued elsewhere that we can gain useful insight by explaining

16. Of course, in a different sense, the law serves all sorts of functions; the sense in which we are concerned here is that of a function which can *explain* the characteristic institutional shape of the law and of its parts, as well as providing an analysis of the contents of its central organizing concepts and their relations.

the law in terms of the concepts embedded in it and their relationship to one another. This is not a functional explanation, but a *conceptual analysis* of the law.¹⁷

To sketch the method briefly: We begin with the idea that the content of a concept can be analyzed in terms of the inferential role it plays in the variety of practices in which it figures. The inferential roles our concepts play reveal the holistic (or nonatomistic) web of relations in which they stand to one another, and it is this web that determines a concept's content. Suppose, for example, that I say to Smith, "I promise to meet you for lunch today." Understanding this as a promise means knowing that it warrants a variety of inferences—for example that Smith expects me to show up for lunch; that I predict I will show up for lunch; that I have a duty to show up; that Smith has a right that I show up, and so on. The content of the concept "promise" is revealed in the range of inferences warranted by the belief that a promise has been made; and to grasp the concept of a promise is to be able to project the inferences it warrants.¹⁸

In certain kinds of practices, the inferential roles of concepts may be seen to hang together in a way that reflects a general principle. The principle can then be said to be embodied in the practice and, at the same time, to explain it.¹⁹ In arguing (as I have) that tort law embodies a principle of corrective justice, for example, I mean that the principle identifies certain elements of the practice as normatively significant and tells us what that significance is.²⁰

My objections to economic analysis—whether of torts or of the criminal law—do not rest on the claim that any adequate explanation of a legal practice must take the form of conceptual analysis. Although the economic analysis of the criminal law is certainly inadequate as an existing body of theory, it is conceivable that an adequate functional explanation could be

17. The next couple of paragraphs follow the discussion in the first chapter of *THE PRACTICE OF PRINCIPLE*, *supra* note 14.

18. Two features of the example are noteworthy. First, while some of the inferences are theoretical, others are practical. Some state predictions; others state responsibilities and rights. The second noteworthy feature is that the inferences in question are not formal. A formal inference is one that follows according to rules governing the logical operators. For example, from "I promise," we may infer formally "I promise, or snow is white." That inference is warranted by the rules governing the logical operator "or." The inferences in the example, however, are not formal in this sense; they are grounded not in the rules of logic, but in our grasp of a concept. Some would say that this grasp takes the form of knowing a large set of formal rules for applying the concept, but this raises daunting philosophical problems. What we know, in the first instance, is not a set of rules, but simply *how* to engage in a variety of practices in which promises are made. This kind of "knowing-how" is not necessarily reducible to "knowing-that."

19. When the knowledge expressed in such a principle is (in the sense indicated in the previous note) irreducibly practical, the actual practices themselves are needed to *realize*, *articulate*, or *make explicit* the principle or principles they embody.

20. It is natural to suppose that we cannot explain a set of concepts in terms that employ any of the same concepts. Part of the view that explanation can take the form of revealing a kind of embodiment relationship denies this. For an extended discussion, see COLEMAN, *supra* note 14.

developed, in economic or other terms. Such an account would be perfectly compatible with a conceptual-embodiment explanation of the type I have sketched. Still, if experience is any indicator, we should not hold our breath waiting for such a functional account. Having argued at length that the method of conceptual analysis illuminates central features of our tort practice, I hope in the future to show how this same approach can deepen our understanding of the criminal law, as well as of its relationship to torts and to other parts of the law.