



## TAXPAYERS AS VICTIMS: TAXPAYER HARM & CRIMINALIZATION

**Brenner M. Fissell\***

### INTRODUCTION

The majority of criminal statutes deal with force and fraud, or their attempt, when employed against *another individual*. Whenever conduct is understood to affect only the individual actor, many people become uncomfortable and suspicious by its criminalization. The recent smoking debate is illustrative of this instinct: it is now a crime to smoke in most places that expose *others* to one's secondhand smoke, but no jurisdiction has gone so far as to criminalize smoking in all cases, for the good of the individual smoker.<sup>1</sup> How, then, can we account for the proliferation of personal safety crimes, all ostensibly aimed solely at the good of the actor? Why, for

---

\* Georgetown University Law Center, J.D. Candidate 2013. A.B. Georgetown University, 2009; M.Phil. Cambridge, 2010. The author thanks Profs. Guyora Binder, Silas Wasserstrom, Albert Lauber, Neha Jain, and John Hasnas of Georgetown, as well as Jordan Blair Woods and Sandy Steel of Cambridge for their comments and criticism.

<sup>1</sup> See, e.g., N.Y. Pub. Health Law § 1399n-x (McKinney 2002 & Supp. 2004) (banning smoking only in public places).

example, is it a crime not to wear a seatbelt? Why can we be arrested for failing to evacuate our homes during a disaster? To rebut the charge of intrusive paternalism, and avoid arousing the suspicion mentioned above, lawmakers in this area have found it necessary to buttress “sanctity of life” arguments with something more. They have strained to justify these proposed or existing criminal prohibitions as really affecting the lives of other people besides the actor, and in a detrimental way. In doing this, they have sought to bring these prohibitions squarely within the heartland of the predominating individualistic sentiments of many citizens.

Over the past fifty years, a new argument has arisen that enables lawmakers to do just that. I call it the *taxpayer-harm*<sup>2</sup> argument, and remarkably, it has received almost no attention by legal scholarship. It generally looks like this: Because the government now provides a great many services to individuals, and yet these services must inevitably be paid for through taxes, it makes sense to say that any individual conduct that leads to the provision of those services ultimately affects everyone else—such conduct incurs government spending, which is in turn a cost borne by the taxpayers. While the taxpayer-harm argument can be (and has been) used to justify a great myriad of governmental restrictions,<sup>3</sup> this Article will focus on

---

<sup>2</sup> The term is my own.

<sup>3</sup> Most prominently, it has appeared in the recent debate over the Affordable Care Act, which created a tax penalty and not a criminal sanction. See Brief for Petitioner, Dep’t. of Health & Human Serv. v. Florida, 132 S. Ct. (2012) (No. 11-398). (“As a class, the uninsured actively participate in the health care market, but they pay only a fraction of the cost of the services they consume . . . . The minimum coverage provision addresses those defects [and] creates a financial incentive (by means of a tax penalty) for uninsured participants in the health care market to internalize their own risks and costs, rather than externalizing them to others.”) (citations omitted). This rationale was also discussed in Chief Justice Roberts’ opinion:

“According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health

how it has been used by legislators, judges, and commentators to justify *criminal* statutes. Overall, I argue that this reliance is mistaken, and that civil, not criminal law, is the more appropriate mechanism to use when addressing taxpayer-harming conduct.

This Article proceeds as follows. In Section I, I will provide the intellectual background that has preceded this new development, putting the argument in context. In Section II, I will show evidence of the argument as it has actually played out in courts, legislatures, and academic circles with respect to four major examples: seatbelt laws, motorcycle helmet laws, dangerous sport restrictions, and mandatory evacuations.<sup>4</sup> From these examples, a general argument

---

care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay . . . hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums.” *NFIB v. Sebelius*, 132 S.Ct. 2566, 2585 (2012).

An older example involves wrongful death actions. The Supreme Court found the creation of this cause of action within the police power because “while in the interest of the public, it also tends to avert the dependency or pauperism of the survivors by shifting the burden of their support, in part at least, from the community to the authors of the wrong.” *Hess v. United States*, 361 U.S. 314, 331-32 (1960) (quoting *The City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893)), *modified sub nom.* *The Transfer No. 4*, 61 F. 364 (2d Cir. 1894)). Evidence can also be found in the well-known case striking down Lochnerian substantive due process – taxpayer harm here justifies a minimum wage law: “What these workers lose in wages the taxpayers are called upon to pay.” *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937). These variants are not what is at issue in this paper, which is criminalization.

<sup>4</sup> The argument is also likely to be found in discussions regulating the consumption of harmful substances, such as tobacco and drugs, but for various reasons these will not be discussed here. With cigarettes and drugs, the argument muddies because of the effect the substance has on the cognitive abilities of the actor (addiction or worse), and also the easier attribution of harm to others through second-hand smoke or increased propensity to commit crimes or act violently. For these reasons

can be distilled and will be classified by its appropriate theoretical labels.

In Section III, I will offer a critique of the taxpayer-harm argument from the standpoint of contemporary criminal law theory. While such a justification for criminalization might make sense within the most extreme utilitarian understanding of the criminal law's purpose, under prevailing views it cannot hold water for three reasons. First, the argument is unable to satisfy the requirement that a legally cognizable *harm* has been inflicted, as no interest has been set back by engaging in the conduct at issue. Second, no *wrong* has been committed, as the taxpayers possess no right to avoid payment of taxes, and the mental state associated with the conduct does not rise to the necessary level of culpability. Third, and finally, even if a harmful wrong has been committed, the argument prevents it from being seen as one of *public* concern, as the conception of the wrongful harm is framed in such a narrow way that it cannot be said to affect the substantial number of people who pay no taxes. Beyond these problems in theory, I will also discuss the practical absurdities that arise in the application of this argument. Even though most of the laws it has justified have small penalties, they are nevertheless criminal prohibitions in a system where police investigatory and detention powers are vast whatever the crime may be. It is not that these laws are totally unjustifiable – they could rest upon arguments that emphasize the value of human life, or perhaps public order<sup>5</sup> – but that their use of *this argument* does not justify the *criminal sanction*.

---

cigarettes and drugs are less pure examples of the “hard” paternalism at issue, and are therefore omitted. See JOEL FEINBERG, HARM TO SELF 12 (1986); Amartya Sen, *Unrestrained Smoking is a Libertarian Half-Way House*, FIN. TIMES, Feb. 12, 2007 (discussing problem of addiction in the analysis).

<sup>5</sup> Gerald Dworkin, *Paternalism*, in MORALITY AND THE LAW 108 (R. Wasserstrom ed., 1971). Indeed, most laws are supported by multiple justificatory arguments.

In Section IV, I will offer a solution by advocating for a shift from the criminal paradigm to that of civil liability. Civil law, with its compensatory and morally neutral purpose, along with its results-focused attachment of liability, is more appropriately tailored to address taxpayer harms than criminal law, which has a punitive and morally-charged aim, and an emphasis on mental states over results. Importantly, this shift would end the practical absurdities created by the criminal law's investigatory powers when applied to such innocuous conduct. By modifying our conception of the taxpayer harm to be one of a civil violation, and not criminal offense, we find solutions both in theory and in practice, and all without sacrificing the proffered impetus behind the original statutes – the preservation of the government's financial well-being.

### I. BACKGROUND

A brief look at the intellectual history of the taxpayer-harm argument will help to place it in the context of a gradually expanding "Harm Principle." John Stuart Mill was one of the earliest and most notable proponents of this idea: the State may interfere with individual liberty only when the exercise of that liberty harms someone other than the individual exercising it.<sup>6</sup> While this is an extreme form of the argument, and makes harm to others a *necessary* condition of interference, most everyone agrees that harm to others is at least "always a good reason" to interfere.<sup>7</sup>

---

<sup>6</sup> "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others," Mill famously wrote. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978) (1859).

<sup>7</sup> This is Joel Feinberg's position. See JOEL FEINBERG, HARM TO OTHERS 26 (1984).

Because of the Harm Principle's widespread popular appeal, a strange phenomenon began to occur. Instead of truly working as a limiting principle upon State interference, political actors merely recast their arguments for interference so as to satisfy its terms—the ambiguous idea of “harm” led to the principle's inevitable expansion,<sup>8</sup> and the concept came to mean whatever was most exigent for a given advocate.<sup>9</sup> In legal scholarship, Richard Epstein was one of the first to observe and analyze this phenomenon in depth:<sup>10</sup>

“During the nineteenth century, the principle served as a bulwark of liberty and a limitation on the scope of government power. By degrees, however, it has been transformed towards the end of the twentieth century into an engine of social control that is said to justify major government intervention in all its manifestations. . . . While the general form of the principle has remained unchanged, far more content has been poured into the exception ‘harm or evil to others.’ The principle that was once a shield of individual liberty has been forged into a sword against it.”<sup>11</sup>

Epstein went on to note two salient examples—environmental “harms” and economic “harms.”<sup>12</sup> By conceiving of some overarch-

---

<sup>8</sup> There is “a natural tilt in the original, simple harm principle—a natural tilt that favors a finding of harm.” Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & Criminology 109, 186 (1999).

<sup>9</sup> As Feinberg mentions, almost in passing, “[m]ost of the controversial criminal statutes that receive apparent blessing from the principles alternative to the harm principle, however, have often been said to have support also from the harm principle itself”; this is accomplished by an appeal to “partially concealed or indirect causal process[es].” Feinberg, *supra* note 7, at 13.

<sup>10</sup> See Richard Epstein, *The Harm Principle – And How it Grew*, 45 U. TORONTO L.J. 369, 375-97 (1995).

<sup>11</sup> *Id.* at 371.

<sup>12</sup> *Id.* at 408.

ing, universal interests, it was possible to understand traditionally harmless activity as harmful to *others*. The distinction between harm to self and harm to others was “relax[ed].”<sup>13</sup>

Four years later, the Harm Principle came into focus again in an article by Bernard Harcourt.<sup>14</sup> Harcourt observed that traditionally moralistic initiatives, such as pornography prohibitions, began to appeal increasingly to a justification devoid of any mention of morality: namely, the Harm Principle.<sup>15</sup> Harm, and not morality, was what warranted the restrictions – or so it was argued. While Epstein called this a growth, Harcourt called it collapse: “The harm principle is effectively collapsing under the weight of its own success.”<sup>16</sup> With the Principle co-opted and forced to serve ends traditionally foreign to it, he noted that it no longer functioned as a true delineator between moralism and liberalism.<sup>17</sup> Now, the observer is presented with “a harm free-for-all: a cacophony of competing harm arguments.”<sup>18</sup>

This Article continues the project of Epstein and Harcourt, and adds yet another class of unexpected “harms” to the growing list, and one that has so far been unanalyzed by scholars: taxpayer harms. As alluded to earlier, the taxpayer-harm notion understands any activity that increases government spending (through services provided to the individual engaging in it) to be a “harm” to the community that meets the demands of the Harm Principle. The taxpayer-harm argument expands individuals’ scope of vulnerability to harm through the intermediary of the government apparatus, linking all into a commonly shared undertaking of loss or reward. It

---

<sup>13</sup> *Id.*

<sup>14</sup> *See generally*, Harcourt, *supra*, note 8.

<sup>15</sup> *Id.* at 110.

<sup>16</sup> *Id.* at 113.

<sup>17</sup> *Id.* at 114.

<sup>18</sup> *Id.* at 119.

is only through this intermediary that the essential demand of the Harm Principle—that *another* person be harmed—can be met in the context of what would normally be seen as completely self-regarding activity. The Harm Principle, then, is now used to justify, beyond moralism, another philosophical position that is traditionally opposed to it: paternalism. The collapse (or expansion) of the Principle continues.

For all its prevalence, though, the argument has received little serious attention by major commentators. Donald Regan,<sup>19</sup> Gerald Dworkin,<sup>20</sup> John Kleinig,<sup>21</sup> and Joel Feinberg<sup>22</sup> all seem to dismiss it. A statement by Regan sums up their collective attitude: “the tenuousness of the connection between the conduct and the harm gives the argument something of the false ring of rationalization.”<sup>23</sup> Overall, these major theorists of criminal law brush off the argument in a cursory way. None, it appears, believe that criminaliza-

---

<sup>19</sup> Donald Regan, *Paternalism, Freedom, Identity, and Commitment*, in PATERNALISM 113, 123 (Rolf Sartorius ed., 1983).

<sup>20</sup> “Ultimately I am left with the feeling that these arguments either are not relevant to justifying restrictions on behavior . . . or, if they are relevant, do not seem strong enough to tip the scale by themselves.” Gerald Dworkin, *Paternalism: Some Second Thoughts*, in PATERNALISM 105, 110 (Rolf Sartorius ed., 1983). In another place he writes that the argument rests on “reasoning of a very dubious nature.” Dworkin, *supra* note 5, at 110.

<sup>21</sup> He states that the argument evinces “considerable coyness,” and shows “strenuous efforts” at justification. See Feinberg, *supra* note 4, at 135.

<sup>22</sup> Feinberg calls it “evasive,” and labels the harm a “relatively remote and indirect public harm[.]” *Id.* at 141. He even seems to suggest that such an argument is so extreme that, if accepted, it swallows up the entire debate. *Id.* at 22 (“It must be a presupposition of the present discussion . . . that there is no necessity that public harm be caused . . . whenever an individual deliberately injures himself or assumes a high risk of so doing . . . . If this assumption is false, then there is no interesting problem concerning legal paternalism, and certainly no practical legislative problem, since all ‘paternalistic’ restrictions, in that case, could be defended as necessary to protect persons other than those restricted, and hence would not be (wholly) paternalistic.”).

<sup>23</sup> Donald Regan, *Paternalism, Freedom, Identity, and Commitment*, in PATERNALISM 113, 123 (Rolf Sartorius ed., 1983).



tion is the appropriate approach for rectifying this social problem. In what follows, I pick up where they left off.

## II. THE ARGUMENT

### A. ACTUAL MANIFESTATIONS

#### 1. *Seatbelt Laws*

Besides masturbation, perhaps no other “victimless crime” has provoked more public discussion than the seatbelt laws.<sup>24</sup> Today, mandatory use laws are the norm, and my own state survey has shown that at least twenty-five states employ them.<sup>25</sup> While the first justification for these laws was usually posited to be safety, at some point their adherents were forced to come to terms with the individualistic current that pervades American political opinion: In the “Land of the Free,” how can an activity that ostensibly harms no one but one’s self be criminal? Weak, preliminary attempts were made in the form of arguments about loss of vehicle control, but eventually the tenuousness of this secondary justification made obvious that there was a primary concern lurking in the foreground: the protection of the rider himself.<sup>26</sup>

From here, there was only one way to proceed, only one way of somehow implicating harm to others: *taxpayer harm*. At the time of the Federal DOT regulation’s promulgation, the counsel for Reagan’s Task Force for Regulatory Relief took pains to explain how such an ostensibly paternalistic rule could be reconciled with

---

<sup>24</sup> See generally Howard Leichter, *Saving Lives and Protecting Liberty: A Comparative Study of the Seat-Belt Debate*, 11 J. HEALTH POL. POL’Y & L. 323, 329 (1986).

<sup>25</sup> See, e.g., FLA. STAT. § 316.614 (2009); MICH. COMP. LAWS § 257.710(e) (2008); MINN. STAT. § 169.686 (2009); N.J. STAT. ANN. § 39:3-76.2(f) (West 1973); OHIO REV. CODE ANN. § 4513.263 (West 2011).

<sup>26</sup> See Leichter, *supra*, note 24 at 337.

the conservative agenda of the Task Force and of the Reagan Administration more generally. “[Failure to wear a seatbelt] isn’t a classic example of purely private behavior that has no external consequences,” he explained, “[and] [t]he whole question of highway accidents does put a very heavy burden on medical bills, which all taxpayers have to pay.”<sup>27</sup>

Meanwhile, the States had their own constituencies to win over. In the Texas legislature, the proponents of the criminalization of seat belt omissions emphasized their impact upon the public treasury:

“Estimates are that nationwide about \$57 billion in hospital costs, work time lost, and other variables could be saved if safety belts were used. Motorists in this state pay those bills through steeper insurance rates and higher taxes, so it would be in their interest to impose a direct incentive in the form of a criminal fine [to use seatbelts]. . . . The higher insurance premiums and taxes required to pay for hospitals and other facilities demonstrate that persons who insist on the ‘freedom’ to die or be maimed also unavoidably affect others.”<sup>28</sup>

Another state where the debate took on substantial proportions was Illinois, and again this justification came up. Both from the legislative floor<sup>29</sup> and the governor’s mansion,<sup>30</sup> taxpayer-harm arguments

---

<sup>27</sup> Kenneth B. Noble, *The Politics of Safety Has a Life of Its Own*, N.Y.TIMES, July 15, 1984.

<sup>28</sup> H. STUDY GROUP B. ANALYSIS, SB 500, 69<sup>th</sup> Sess., at 13-14 (Tx. 1985).

<sup>29</sup> On the legislative floor, one representative argued that seatbelts “would clearly save money,” and that “it cost[s] the State over 800,000 dollars for a 26 year old person who is made a paraplegic as a result of a car crash.” 83d ILL.GEN.ASSEM., House Debates, May 16, 1984, at 212 (statement of Representative John Cullerton). Others echoed this rationale. “We’re not talking about somebody’s own individual decision to end up in a car crash and find him or herself in a hospital for 20 years with that

were utilized, and when the law was ultimately challenged through litigation, the state's supreme court endorsed the reasoning.<sup>31</sup> Similarly, in Iowa, the state supreme court validated the taxpayer-harm rationale used by that State's governor.<sup>32</sup> A more exhaustive search would surely uncover similar statements in the dusty tomes of state legislative history.<sup>33</sup>

Alongside these judicial, legislative, and executive manifestations of the taxpayer-harm argument in the seatbelt context are those advanced by academics. Most illustriously, Lawrence Tribe wrote that in "a society unwilling to abandon bleeding bodies on the highway, the motorcyclist or driver who endangers himself plainly imposes costs on others."<sup>34</sup> A public health commentator

---

individual paying the bill. It's the taxpayers that are going to be paying those bills." 83d ILL.GEN.ASSEM., House Debates, May 16, 1984, at 220 (statement of Representative Barbara Currie); 83d ILL.GEN.ASSEM., Senate Debates, June 21, 1984, at 162 (statement of Senator Dawn Netsch) ("We intrude because the consequences of the thousands of people . . . who are injured and whose afflictions then are passed on to their families, to all of us in society . . .").

<sup>30</sup> Governor James R. Thompson said that the law will "save more than \$400 million in costs." Letter from James R. Thompson, Governor of Illinois, to the General Assembly (Jan. 8, 1985) (indicating his intent to sign House Bill 2800), *quoted in* People v. Kohrig, 113 Ill.2d 384, 401-404 (1986).

<sup>31</sup> "[I]n the interest of general welfare, the police power . . . may be exercised to protect the government itself against potential financial loss." People v. Kohrig, 498 N.E.2d 1158, 1159 (Ill. 1986) (internal citations and quotation marks omitted).

<sup>32</sup> The court cited with approval the governor's statement that "[i]n addition to saving lives and reducing the severity of traffic accidents, this legislation will also save the motoring public, society, and state and local government millions of dollars." State v. Hartog, 440 N.W.2d 852, 853 (Iowa 1989) (upholding argument) (quoting Governor's Signing Statement at 859).

<sup>33</sup> Take, for example, Oregon. Cf. Leichter, *supra*, note 24 at 337 (quoting statement by State Senator Roberts) ("We are saying that it is wrong to impose the penalties, the unnecessary penalties, upon individuals, their families, and society, not only because of the pain we suffer, but because of the economic effect we suffer.").

<sup>34</sup> LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-12, at 1372 (2d ed. 1988).

also weighed in and invoked the argument,<sup>35</sup> as well as a legal academic employing a law and economics approach.<sup>36</sup>

## 2. *Motorcycle Helmet Laws*

For whatever reason, the 1960's and 1970's were witness to a proliferation of challenges to the helmet laws, and in almost all of the cases the challenge was made based upon the limits of the police power. Because a valid exercise of the police power requires some nexus to *public* interest,<sup>37</sup> and the most obvious case of having an interest in conduct is when it is harmful, the defenders of the helmet laws were forced to rebut Harm-Principle-based objections, and like with seatbelts, they resorted to taxpayer harm.

The most influential of all the helmet cases is *Simon v. Sargent*.<sup>38</sup> While only a district court case, it was decided by a three-judge panel (including a circuit judge), and was summarily affirmed by

---

<sup>35</sup> Responding to opponents' invocation of Mill's "Harm Principle" and the distinction between "other-regarding" and "self-regarding" behavior, Howard Leichter replied "[f]ailure to use a seat belt is other-regarding in another sense: society must pay for this imprudent behavior not only in loss of lives, but in loss of money as well." Leichter, *supra*, note 24 at 337.

<sup>36</sup> Stephen Werber, as early as 1980, decried "the massive costs incurred by public agencies involved in automobile accident situations (such as police, fire, and ambulance services, and the judiciary)." Stephen Werber, *A Multi-Displinary Approach to Seat Belt Issues*, 29 CLEV. ST. L. REV. 217, 222 (1980). Applying a Calabresian law and economics analysis, he argued that "[t]o . . . make the economic benefits practical instead of theoretical, a commensurate duty must be imposed on the best cost avoider, the consumer." *Id.* at 224. Because the solution was so easy and cheap, and yet the potential cost of non-use so great, he boldly concluded that "no reasonable economic or legal argument can be raised to refute seat belt use legislation." *Id.* The value in the mandatory use criminalization was "the deterrent effect of [a] liability rul[e]." *Id.* He must have meant an "alienability" rule if he was discussing criminalization, though.

<sup>37</sup> *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962).

<sup>38</sup> *Simon v. Sargent*, 346 F. Supp. 277, 279 (D. Mass. 1972), *aff'd*, 409 U.S. 1020 (1972).

the Supreme Court.<sup>39</sup> Explicitly quoting *On Liberty*, the plaintiff argued that the limits of the police power mapped onto Mill's Harm Principle.<sup>40</sup> The court declined to accept this, but noted that even assuming the Harm Principle *was* binding law, the helmet crime was still justified – “at least in present day society”<sup>41</sup>:

“For while we agree with plaintiff that the act's only realistic purpose is the prevention of head injuries incurred in motorcycle mishaps, we cannot agree that the consequences of such injuries are limited to the individual who sustains the injury. . . . From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned.”<sup>42</sup>

Even under the Harm Principle, then, the plaintiff should be convicted for failing to wear his helmet. The court could have ignored the relevance of the Harm Principle, but instead confronted it on its own ground, and did so with the taxpayer variant.

Another federal case that addressed the issue was *Picou v. Gillum*, an Eleventh Circuit decision written by retired Associate Justice Lewis Powell, sitting by designation.<sup>43</sup> Powell conceded that “a

---

<sup>39</sup> *Id.* Summary affirmance denotes a disposition on the merits of the case by the Supreme Court. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

<sup>40</sup> *Simon*, 346 F. Supp. at 279.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Picou v. Gillum*, 874 F.2d 1519, 1519 (11th Cir. 1989).

primary aim of the helmet law is prevention of unnecessary injury to the cyclist himself," and then, in a classic taxpayer-harm movement, rejoined, "[b]ut the costs of this injury may be borne by the public."<sup>44</sup> Because "governments provide police and ambulance services," and because "the injured cyclist may be hospitalized at public expense," Powell asserted, this personal injury is not merely of personal concern.<sup>45</sup> Again, taxpayer harm results from ostensibly self-regarding activity.<sup>46</sup>

Decisions on the helmet issue proliferated in state high courts, often invoking taxpayer-harm theories. In Colorado, the state supreme court wrote, "We would point out that this Court has held that the police power relates not merely to the public health and public physical safety, but also to public financial safety, and that laws may be passed within the police power to protect the public from financial loss."<sup>47</sup> Other states' high and intermediate appellate courts have similarly advanced robust manifestations of the taxpayer-harm argument: Tennessee,<sup>48</sup> Utah,<sup>49</sup> Washington,<sup>50</sup> California,<sup>51</sup>

---

<sup>44</sup> *Id.* at 1522.

<sup>45</sup> *Id.*

<sup>46</sup> Curiously, Powell then closes by explicitly referencing J.S. Mill and the Harm Principle from *On Liberty*, but states that "the impressive pedigree of this political ideal does not readily translate into a constitutional right." *Id.* After attempting to work within the bounds of Mill's principle by advancing a theory of taxpayer harm, he in the end demotes that same principle.

<sup>47</sup> *Love v. Bell*, 465 P.2d 118, 120 (Colo. 1970) (en banc).

<sup>48</sup> *Arutanoff v. Metro. Govt. of Nashville and Davidson Cnty.*, 448 S.W.2d 408, 410 (Tenn. 1969).

<sup>49</sup> "Both hospitals and relief rolls are crowded, and it is a proper exercise of police power for the legislature to enact statutes which would tend to keep citizens out of the one and off of the other." *State v. Acker*, 485 P.2d 1038, 1039 (Utah 1971).

<sup>50</sup> "The legislature found that 'The costs of head injury treatment and rehabilitation are extensive and resultant disabilities are long and indeterminate. These costs are often borne by public programs such as medicaid.'" *City of Bremerton v. Spears*, 949 P.2d 347, 350 (Wash. 1998) (en banc) (quoting WASH. REV. CODE § 43.70.400). *See also State v. Laitinen*, 459 P.2d 789, 791-92 (Wash. 1969) ("The greater the number of

New York,<sup>52</sup> North Carolina,<sup>53</sup> New Hampshire,<sup>54</sup> Nebraska,<sup>55</sup> Rhode Island,<sup>56</sup> Vermont,<sup>57</sup> and Hawaii.<sup>58</sup>

### 3. *Dangerous Sports*

The next area where the taxpayer-harm argument has surfaced is in regulations surrounding dangerous or risky sports. These can take the form of requirements regarding safety-enhancing instrumentalities (much like seatbelt and helmet laws in transportation), or outright prohibition. While one could think of many examples of

serious injuries to the head and upper spine suffered by motorcycle riders, the greater the burdens it can reasonably be said are imposed on the publicly supplied or regulated medical, hospital, ambulance and police services.”).

<sup>51</sup> *Buhl v. Hannigan*, 16 Cal. App. 4th 1612, 1628 (Cal. Dist. Ct. App. 1993).

<sup>52</sup> See generally *People v. Weber*, 494 N.Y.S.2d 960, 963 (N.Y. Town Ct. 1985).

<sup>53</sup> “Death on the highway can no longer be considered as a personal and individual tragedy alone.” *State v. Anderson*, 164 S.E.2d 48, 50 (N.C. Ct. App. 1968), *aff’d*, 166 S.E.2d 49 (N.C. 1969).

<sup>54</sup> *State v. Merski*, 307 A.2d 825, 826 (N.H. 1973) (supporting).

<sup>55</sup> *Robotham v. State*, 488 N.W.2d 533, 541 (Neb. 1992) (upholding argument).

<sup>56</sup> “We are not persuaded that the legislature is powerless to prohibit individuals from pursuing a course of conduct which could conceivably result in their becoming public charges.” *State ex rel. Colvin v. Lombardi*, 241 A.2d 625, 626 (R.I. 1968).

<sup>57</sup> “Although plaintiffs argue that the only person affected by the failure to wear a helmet is the operator of the motorcycle, the impact of that decision would be felt well beyond that individual. . . . Whether in taxes or insurance rates, our costs are linked to the actions of others and are driven up when others fail to take preventive steps that would minimize health care consumption.” *Benning v. State*, 641 A.2d 757, 758 (Vt. 1994).

<sup>58</sup> “There may be significant secondary harms to society as a whole which it is the purpose of the statute to remedy and which, if realistic, bottom the statute in policies which are constitutionally acceptable . . . [including] the ‘public ward’ theory, [that] helmet laws, by limiting the extent of motorcycle injuries, curtail public expenditures for emergency and hospital care for the cyclist and also minimize welfare costs resulting from the cyclist’s post-accident inability to care for himself and his dependents.” *State v. Cotton*, 516 P.2d 709, 709 (Haw. 1973).

such laws<sup>59</sup> and could probably find evidence of the taxpayer-harm argument working to justify them, only the most salient and common examples are highlighted below.

We can begin with a risky sport that is extremely popular in rural areas: hunting. It is now common that the failure of a hunter to wear bright “hunter orange” is a criminal omission.<sup>60</sup> The increased visibility cannot be meant to protect others: mistaking *another* hunter for a wild animal has no impact upon the shooter’s own safety. To overcome this apparent limitation, and bring the statutes more in line with predominating individualistic sentiments, one must resort to taxpayer harm. Take, for example, an Ohio case, *State v. Bontrager*, where an “Old Order Amish” man challenged the constitutionality of his conviction under the hunter-orange requirement of the state, primarily based upon First Amendment grounds.<sup>61</sup> In dismissing the case, the court noted that the regulation was within

---

<sup>59</sup> For example, in many States, divers are required to display a warning flag in the area in which they will be submerged. *See, e.g.*, N.C. GEN. STAT § 75A-13.1 (2011); R.I. GEN. LAWS § 46-22-24 (1978); VT. STAT. ANN. tit. 23, § 3381 (1987). A recreational activity called “teak surfing” (body surfing behind a boat by holding its stern board) recently received legislative attention and was prohibited in certain states because of its dangerousness. *See* CAL. HARB. & NAV. CODE § 681 (West 2005); WASH. REV. CODE § 79A.60.660 (2006). Other examples abound. *See* ARK. CODE ANN. § 23-89-512 (2001) (prohibiting certain type of bungee jumping); 625 ILL. COMP. STAT. 45/5-19 (1998) (skin diving in certain areas); MICH. COMP. LAWS § 324.80198(b) (2007) (swimming beyond the buoys); MICH. COMP. LAWS § 750.493(e) (1983) (jumping from bridges); MINN. STAT. § 86B.601(4) (2005) (night diving with a spear); N.Y. ARTS & CULT. AFF. LAW § 37.09 (McKinney 1984) (performing on a trapeze or tightrope without certain equipment); S.C. CODE ANN. § 50-25-210 (1976) (surfing in certain areas); S.C. CODE ANN. § 50-25-310 (1976) (boating below a dam); S.C. CODE ANN. § 52-19-30 (1976) (prohibiting certain type of bungee jumping); S.D. CODIFIED LAWS § 31-4-15.1 (1987) (jumping from bridges); TENN. CODE ANN. § 42-2-106 (1974) (parachuting from airplanes).

<sup>60</sup> *See, e.g.*, OH. Admin. CODE 1501:31-15-11 (2011).

<sup>61</sup> *State v. Bontrager*, 683 N.E.2d 126, 126 (Ohio Ct. App.1996).



the State's police powers: "Overall, because of the impact serious accidents have on public agencies, such as the cost of ambulances, physicians, hospitals, and law enforcement personnel, the regulation validly attempted to improve the health, safety, and general welfare of the state's residents."<sup>62</sup> Again, through the taxpayer-harm rationale ostensibly private concerns become public.

Perhaps more risky than hunting are the practices of skydiving and parachuting. Barring the possibility of striking a third party or his property while landing, malfunctions and accidents that occur when undertaking this activity would traditionally "harm" only the parachutist himself. Again, though, legislation has been enacted to restrict this activity, and in some cases it relies upon taxpayer-harm theories. In *Malone Parachute Club, Inc. v. Town of Malone*, a local government passed a law prohibiting the use of the municipal airport for parachuting activities unless a participant first obtained personal liability insurance.<sup>63</sup> The club attacked this law in court as unconstitutional, but the court noted with approval "the Town's explanation that it cannot afford to bear the risk of liability created by petitioner's activities."<sup>64</sup>

Another potentially dangerous sport is boating and rafting, and nearly ubiquitous is the requirement that personal flotation devices be present or worn when engaging in the activity.<sup>65</sup> Again, one can imagine only the most tenuous hypothetical scenarios in which failure to wear a flotation device could somehow physically harm *another* person, and perhaps because of this, laws requiring their us-

---

<sup>62</sup> *Id.*

<sup>63</sup> 610 N.Y.S.2d 686, 687-88 (N.Y. App. Div. 1994).

<sup>64</sup> *Id.* at 688. This case is slightly different in that the harm is created by personal injury judgments against the government, and not by the provision of services, but the underlying rationale is similar: *taxpayer* harm warrants criminalization.

<sup>65</sup> See e.g., ARIZ. REV. STAT. ANN. § 5-331 (2011); MD. CODE ANN., NAT. RES. § 8-725 (West 2011); MISS. CODE ANN. § 59-21-81 (2011).

age have similarly been justified upon bases of taxpayer harm: “Sen. Ferrioli said the bill will save lives, save taxpayer dollars, and bolster law enforcement efforts on Oregon waters.”<sup>66</sup> The debate in New York<sup>67</sup> and in Nevada<sup>68</sup> contains similar arguments.

#### 4. *Mandatory Evacuations*

Our final example is quite different from the first two. The power to compel evacuations seems to inhere in the idea of “public order;” a decision to disobey such an order looks like less of an isolated decision than a failure to buckle up. However, if we think critically about mandatory evacuations, the distinction between this and other paternalistic laws becomes less salient. It is not hard to imagine that a homeowner might, upon hearing the warnings, be so adequately prepared for a disaster that his decision to leave or stay has absolutely no impact upon anyone but himself, or in the alternative, that one might accept the risk and not ask for rescue, thus incurring no costs. As in our other examples, the taxpayer-harm argument comes in here usually as a makeweight, so as to dispel any individualistic or civil-liberty-based objections that might be raised. My own state survey finds twenty-eight states with mandatory evacuation, and one with a special option for voluntary evacu-

---

<sup>66</sup> Press Release, Oregon House Republicans, Senate Passes Rep. Huffman’s Bill to Increase Safety on Oregon’s Rivers (May 5, 2009), [http://www.leg.state.or.us/press\\_releases/hro\\_050509.html](http://www.leg.state.or.us/press_releases/hro_050509.html)

<sup>67</sup> In the bill jacket accompanying a similar New York law, a legislator posits, “[a]ny additional cost is obviously outweighed by the benefits to the public that will result from these safety enhancements.” Introdurers Memorandum In Support, in NY Bill Jacket, 2007 S.B. 4242, Ch. 320 (N.Y. 2007).

<sup>68</sup> The sponsor of the Nevada bill requiring flotation devices stated in committee, “I’m here this afternoon in support of this bill. I think A.B. 112 represents an opportunity, at minor expense, to achieve some phenomenal cost benefits in terms of safety.” COMM. ON NAT. RES., AG., & MINING, 73D SESS., NEV. ASSEM. COMM. MINS., at 17 (Mar. 14, 2005).

ation.<sup>69</sup> These are usually in the form of emergency grants of power to the state's executive—only a few states (Utah, Texas, and Louisiana) have drawn their attention specifically to the issue of evacuation, and created more nuanced rules and penalties.<sup>70</sup>

The state where evacuations have been most debated is Texas. Following a series of hurricanes and other disasters, Texas enacted a law allowing for the use of “reasonable force” in compelling citizens to evacuate should they refuse, and for the imposition of civil liability for the costs of any later rescue.<sup>71</sup> The bill's sponsor, Senator Carona (along with others), “argued that when residents who stay need to be rescued, they not only cost taxpayers money, they endanger the lives of those who are required to rescue them.”<sup>72</sup> The argument behind giving evacuation orders the “teeth” to be truly effective—“reasonable force”—was not really concern for the resident being evacuated, but that somehow his remaining in place *harms* everyone else, through imperiling rescuers and costing taxpayers. Here, taxpayer-harm works in tandem with physical harm to specific individuals. A nearly identical bill in Mississippi, allow-

---

<sup>69</sup> See, e.g., KAN. STAT. ANN. § 48-925 (2012); KY. REV. STAT. ANN. § 39A.100 (West 2010); OR. REV. STAT. § 401.309 (1997). The state where evacuation can be voluntary is disaster-prone Louisiana, but provisions exist for compelled evacuation as well. LA. REV. STAT. ANN. § 29:730.3 (2008).

<sup>70</sup> LA. REV. STAT. ANN. § 29:730.3 (2008); TEX. GOV'T CODE ANN. § 418.185 (West 2009); UTAH CODE ANN. § 76-8-317 (West 2010).

<sup>71</sup> See TEX. GOV'T CODE ANN. § 418.185; see also Margaret Toal, *Proposed Bill Would Allow 'Force' in Storm Evacuation, Bills for Rescues*, BEAUMONT ENTERPRISE, May 5, 2009, <http://www.beaumontenterprise.com/news/article/Proposed-bill-would-allow-force-in-storm-746317.php>. Prior to this, local officials could give an order, but there was no enforcement mechanism or even penalty. 2005 Tex. Gen. Laws 766.

<sup>72</sup> See Sarah Moore, *To Go or Not in Evacuation? Legislation Wrestles with Making Mandatory a Must*, BEAUMONT ENTERPRISE, May 6, 2009, <http://www.beaumontenterprise.com/news/article/To-go-or-not-in-evacuation-Legislature-wrestles-745433.php>.

ing for “reasonable force” in evacuation, was proposed early in 2011, but seems unlikely to be successful.<sup>73</sup>

Two federal cases also bring to light the presence of taxpayer-harm arguments in the mandatory evacuation debate. The first, *Thames Shipyard & Repair Co. v. United States*, presents a fascinating microcosm of a larger disaster scenario: a ship in peril at sea, the Coast Guard ordering the crew to abandon it and its precious cargo, with the Captain nevertheless hoping to remedy the mechanical problems and ride out the storm.<sup>74</sup> The captain believed he could do more to save his ship, but the Coast Guard officer threatened to use physical force should he resist the evacuation order.<sup>75</sup> In affirming the Coast Guard’s immunity from suit for the loss, the First Circuit mentions, almost in passing, “[i]f the ship had capsized, trapping the men inside or putting them overboard, the Coast Guard would have been faced with a riskier, more costly rescue operation . . . .”<sup>76</sup> Yet again, it is increased *cost* that adds to the case for interference. Cost supplements physical risk in the justificatory endeavor. While admittedly in a context quite removed from mandatory evacuations—admiralty law—the Northern Voyager can be analogized to any private, valuable home in the path of a hurricane or wildfire.

A second federal case more directly on point involved the evacuation of New Orleans during Hurricane Katrina. In *Reynolds v.*

---

<sup>73</sup> H.B. 680, 2011 Leg., 126th Sess. (Miss. 2011).

<sup>74</sup> 350 F.3d 247, 250 (1st Cir. 2003) (“Captain Haggerty opposed the Coast Guard’s decision to evacuate his vessel and wanted to talk about other options for pumping and salvage, including commercial salvage. Dittes . . . refused to discuss any other options for salvage aboard the NORTHERN VOYAGER, and, again, ordered Haggerty and his men off the boat. According to Captain Haggerty, Connors informed him that if he did not cooperate, the Coast Guard would ‘subdue [him] physically’ in order to take him off the NORTHERN VOYAGER. All Coast Guard personnel and the remaining NORTHERN VOYAGER officers were then transferred to the Coast Guard 47-footer.”).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 257 n.6.

*New Orleans City*, residents were removed from their homes against their will, and filed suit under various Constitutional theories.<sup>77</sup> Ironically, none of the plaintiffs' homes were ever damaged by the flooding at all, and some of them had made significant preparations so as to ride out the disaster without need for third party assistance.<sup>78</sup> Still, they were forced to leave by the National Guard (one was even held at gunpoint and searched), and were unable to return to their homes for nearly a month.<sup>79</sup> The Fifth Circuit dismissed the case without addressing the underlying questions very deeply.<sup>80</sup> What is important for our purposes is that the Court implicitly supported the mayor's evacuation order, and its text is revealing: "Whereas the presence of individuals not specifically engaged . . . to assist in the remediation and recovery effort would distract, impede, or divert essential resources from the recovery effort," he wrote, "I . . . do hereby promulgate and issue the following mandatory evacuation order."<sup>81</sup> Nothing is said about the evacuee's personal safety or well-being, and the argument is reframed into one of taxpayer harm: remaining would "divert essential resources."

#### B. THE ARGUMENT DISTILLED & CLASSIFIED

After synthesizing all of the above, the taxpayer-harm argument can be laid out more abstractly:

---

<sup>77</sup> 272 Fed. App'x 331, 334 (5th Cir. 2008).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 339-40.

<sup>80</sup> For example, the Substantive Due Process challenge to the order was held to be moot, as the evacuation order itself had since been lifted. *Id.* The Fourth Amendment claim was dismissed because no municipal "custom or policy" could be established, as required by §1983. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

<sup>81</sup> See *id.*

1. A State's police power extends at least as far as is necessary to protect the public from harm, and police power contains the power to criminalize.
2. Conduct that creates the necessity of governmental service provision depletes the public treasury, causing harm to all taxpayers.
3. Therefore, taxpayer-harming conduct may be criminalized.

A few general comments are in order. The taxpayer-harm argument is, at bottom, an attempt to justify paternalistic safety regulations using a classically liberal makeweight: the Harm Principle. But for the taxpayer-harm theory, these laws would otherwise be called in Feinbergian terminology "legal paternalism" of the "benevolent" and "hard" species—that is, they seek to prevent harm to the actor himself, for his own good, when he has no informational or rational deficiencies.<sup>82</sup> Moreover, they are "one-party" cases that need no extra actor for the infliction of the harm to self, and most often are "active" in that they require certain steps be

---

<sup>82</sup> See Feinberg, *supra* note 4, at 4, 5, 12. The major theorists have shown some reluctance in admitting that this is "hard" and not "soft" paternalism. Gerald Dworkin believes that in the case of helmet laws, no one with the correct information would choose not to wear them. Dworkin, *supra*, note 20 at 109. In my estimation, this is an easy case of hard paternalism: actors have merely rationally weighed the magnitude of the risk with that of the annoyance of the safety measure.

taken to mitigate or prevent harm (thus, punishing omissions).<sup>83</sup>

The taxpayer-harm argument, though, removes these cases from this schema. It is not merely a shift from benevolent to non-benevolent paternalism—constraining of liberty for the sake of a larger project<sup>84</sup>—but an attempt to escape the parameters of paternalism altogether: prohibition is justified because of harm to *others*. The argument allows for the expansion of human vulnerability to harm, locking all members of the polity in a common undertaking of harm or benefit. This harm is an economic harm, and it is diffuse—*everyone else* is a victim. However, it also relies on aggregation of perpetrators to rise above the objection of triviality.<sup>85</sup> Finally, it is important to remember that the vast majority of the taxpayer-harm statutes punish *endangerment* and not just results.<sup>86</sup>

### III. THE ARGUMENT EVALUATED

Before testing the taxpayer harm argument using a criminalization framework, it is worth saying just a brief word about the *political* theory that underlies it. It was observed that this argument is an attempt to satisfy the demands of classical liberals and retributivists, both of whom look for “harm to others” when proscribing con-

---

<sup>83</sup> See Feinberg, *supra* note 4, at 8, 9. It should be noted that the traditional, 18th Century Harm Principle did not allow for the punishment of omissions. See Epstein, *supra* note 10, at 395-96.

<sup>84</sup> Feinberg uses the example of paternalism in prisons, armies, and athletic teams. Personal liberty is constrained so as to benefit a larger goal. A “demeaning spirit” pervades these regimes of authority. Feinberg, *supra* note 4, at 5.

<sup>85</sup> Feinberg, *supra* note 7, at 193.

<sup>86</sup> This is consistent with the Harm Principle. “Since the Harm Principle posits the prevention of harm as the proper aim of the criminal law, it sanctions the criminalization of dangerous as well as actually harmful conduct.” R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 44 n.14 (2001).

duct. Conclusion (3) above follows from an acceptance of the liberal conceptual restraint of Premise (1). However, the crucial intermediate premise is not conceptual, but empirical—or, so it is presupposed to be by those who advocate for taxpayer harm criminalization. But is Premise (2)—the reality of government cost creation—purely an empirical observation, analogous to a brute fact?

If we investigate it more carefully, it becomes obvious that it is not: *normative* commitments, not any ineluctable aspects of reality, are ultimately the causes of that supposedly “empirical” fact. These normative commitments flow from a version of the distributive justice theory that undergirds much of the modern welfare state. In other words, the only reason that what is normally self-regarding conduct becomes other-regarding is because our society has taken it upon itself to cover the costs.<sup>87</sup> The motorist who incurs governmental cost does so only because we have chosen to support him. All this is well and good (after all, most allegedly “empirical” phenomena in the political realm have some normative roots).

What is strange, though, is that this normative commitment is decidedly *non-liberal*. In fact, it is antithetical to liberalism—it is *paternalistic* in its concern for those who cannot take care of themselves. Thus, the taxpayer harm argument for government regulation of conduct is structured along liberal parameters (harm to others), but relies upon a crucial premise that is itself paternalistic. At the very least, this is paradoxical; at worst, it might reveal incoherence.

Political theory is not the subject of this Article, though, and our primary concern is the argument’s comportment with the substantive requirements for criminalization. It is axiomatic in punishment theory that at least two good reasons can be advanced for punitive

---

<sup>87</sup> Note, the same point has been made in economics literature touching on tax-paying externalities: the externalities come not from the conduct itself, but instead from the decision to publicly subsidize the costs of the conduct. See generally Edgar K. Browning, *The Myth of Fiscal Externalities*, 27 PUBLIC FINANCE REVIEW 3 (1999).



sanctions and criminalization: deterrence and retribution.<sup>88</sup> Taxpayer harm is easily cognizable under a deterrence-based theory, as its primary goal, after all, is to provide incentives for individuals to act in a manner that is most efficient for society and for the state. Under this theory, legislators have laudably calculated the costs of the conduct to society, weighed them against the benefits of the enjoined safety measures, and concluded that a criminal sanction is the most effective tool to persuade individuals to adopt their utility-maximizing conclusions. Think of the law and economics argument for seatbelts: a deterrent in the form of a criminal sanction places the burden on the least cost avoider.<sup>89</sup> However, for those who believe that retribution must play at least some role in the decision to criminalize (this is easily the majority position),<sup>90</sup> taxpayer harm has a far tougher row to hoe. In what follows, I will analyze how well the argument can stand up against the traditional demands of this theory: the existence of a harmful wrong that is of public concern. It is important to remember, as we proceed, that these critiques are aimed solely at the taxpayer-harm argument, and not at the laws themselves, more generally (which could have multiple or alternative justifications). While, in practice, the argument has taken on the form of a makeweight, buttressing paternalistic concern over the intrinsic value of human life, it needs to be analyzed in isolation – any justificatory foundation must stand or fall *on its own*.

---

<sup>88</sup> See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955)

<sup>89</sup> See generally Werber, *supra* note 36.

<sup>90</sup> Husak's recent assessment of the law and economics literature on crime shows that this movement, and its deterrence-theory manifestation, "has made almost no contributions in the criminal domain." DOUGLAS Husak, *OVERCRIMINALIZATION* 180 (Oxford: OUP, 2008). See also GEORGE FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 59 n.140 (New York: OUP, 2007) (Leading law and economics theorists have "nothing to say about substantive criminal law").

## A. THEORETICAL COHERENCE

There are enduring, commonly shared lineaments of a retributive theory of criminal law that can help us to assess our argument. First is the element of “harm.” While some argue that harm is, or should be, absolutely *necessary* for an act or omission to be criminalized,<sup>91</sup> we can take, with Feinberg, a more philosophically cautious approach—the causation of harm is always at least a *good reason* for criminalization.<sup>92</sup> But a great majority of human actions somehow set back the interests of others,<sup>93</sup> and therefore the criminal law needs additional requirements. This is why most theorists (and traditional doctrine) believe that more than mere harm is required, and demand that harms also be *wrongfully* inflicted.<sup>94</sup> Thus, harms and wrongs have distinctive meanings, and only when a harm violates a right in a blameworthy way is it *also* a wrong.<sup>95</sup> While some theorists would look solely to wrongfulness when determining

---

<sup>91</sup> This was Mill’s position, and that of most libertarians. See Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEG. ISSUES 157 (1994). Hurd reads Mill as admitting that there can be harmless “wrongs,” but that this category of actions does not deserve state punishment. *Id.* at 215.

<sup>92</sup> Mill said harm is the *only* reason to interfere with liberty, while Feinberg says it is just a “good reason.” Feinberg, *supra* note 7, at 12.

<sup>93</sup> See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>94</sup> Hurd, *supra* note 91, at 210; Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1537 (1997).

<sup>95</sup> See Hurd, *supra* note 91, at 214 (arguing that it is really wrongs and not harms that justify criminalization) (“While the category of wrongs may well be dominated by actions that unjustifiably cause harm, it is not exhausted by such actions...because many actions that cause harm are justified...[and] many actions that are morally wrong and criminally prohibited do not cause harm.”). On the distinction between harms and wrongs, see R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 17-18 (2001) (“On the one hand, wrongs are not in themselves harms, though they typically cause harm, since they typically involve an invasion of, and a setback to, the wronged person’s interests.”). I adopt Hurd’s taxonomy. Hurd, *supra* note 91, at 211.

criminalization,<sup>96</sup> we will simply add it as another criterion. Still, though, there is another factor, as there is a vast body of harmful wrongs that the criminal law does not concern itself with (contract breaches are the best example). The final criterion to add is that which makes a harmful wrong distinctly criminal: its public nature.<sup>97</sup> Altogether, these make up the major features of what criminal conduct should implicate: a wrongful harm that concerns the public.<sup>98</sup>

### 1. Harmfulness

The most influential understanding of harm (advanced by Joel Feinberg) is “harm conceived as the thwarting, setting back, or defeating of an interest,” with an interest meaning having a “stake in [something’s] well-being.”<sup>99</sup> It seems clear that the causation of an aggravated financial expenditure<sup>100</sup> by a victim would constitute a setback to the victim’s interests, but who is the true victim in the

---

<sup>96</sup> Hurd, *supra* note 91, at 214.

<sup>97</sup> Jerome Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 971 (1943).

<sup>98</sup> “To show that it should even in principle be criminalized, we would need to show that it is: (1) a matter that should concern the law at all, rather than being a purely private matter to be dealt with by those involved; and (2) that it should be a matter for the criminal law, rather than for the civil law . . . . This would involve showing that the conduct in question is not just (potentially) harmful, but wrong, and that the wrong is a ‘public’ wrong that merits recognition and condemnation by the polity . . . .” R. A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 952-53 (2005).

<sup>99</sup> Feinberg, *supra* note 7, at 33. Of course there are other formulations; the concept is inherently ambiguous. See E.M. SCHUR & H.A. BEDAU, *VICTIMLESS CRIMES* 77 (Prentice Hall ed., 1974).

<sup>100</sup> A paradox of many safety measures is that they might increase costs by prolonging life just enough for the provision of costly medical care, as opposed to permitting quick death, which, unfortunately, is far cheaper. Dworkin, *supra* note 20, at 109.

taxpayer-harm argument? Is it that the State's interests are set back, or those of the taxpayers, merely filtered intermediately through the State? Because the nature of the victim will determine the nature of its interests, and because something must possess an interest to have that interest set back, this is important.

It seems unlikely that the State governing apparatus is itself the "victim," or that it can possess its own interests cognizable by the criminal law. Feinberg writes of "governmental interests" that are directly correlated with state functions.<sup>101</sup> "Governmental interests are 'those generated in the very activities of governing,' such as collecting taxes, registering aliens, conscripting an army . . .," he states, and they are violated by "impersonal crimes" like tax fraud, contempt of court, failure to register, bribery of officials, escaping from prison, etc.<sup>102</sup> However, he notes that these "governmental interests . . . in the last analysis belong to individual citizens," although they "may be highly dilute."<sup>103</sup> In committing these offenses, no single victim is directly harmed, but were they to become widespread, they would undermine the stability of government to the point at which it would directly affect the individual citizen: the system would break down.<sup>104</sup> According to this exposition, our taxpayers themselves must be the victims, as even with setbacks to "governmental interests," the government is merely an intermediary whereby the harm is diffused. With Feinberg, I agree that we must be somewhat reductionist when ascertaining what interests are cognizable by the *criminal* law: there can be no State "interests" that

---

<sup>101</sup> Feinberg, *supra* note 7, at 63

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> A violation "endangers the operation of government systems in whose efficient normal functioning we all have a stake." *Id.* at 64.

make sense in a retributivist framework when totally unmoored from any impact upon natural persons.<sup>105</sup>

But what “government interest” does taxpayer harm set back that then cascades down to the citizens as harm? Feinberg’s examples, and his explanation of how the admittedly “impersonal” crimes harm the citizens, do not relate to expenditure or fiscal concerns, but to a respect for the rule of law – they are about obedience of rules that, if disobeyed, flout the authority and the legitimacy of the State as legal sovereign. The most pecuniary of all – tax evasion – sets back the “government interest” not by causing others to shoulder more of the burden, but because it evinces disrespect for the duties one owes to one’s nation. All of these “impersonal crimes,” if ubiquitous, would result in a reversion to anarchy – they threaten the very existence of the State. What does taxpayer harm threaten, though? It only threatens the State with having to perform more of its functions, and spend more resources. The “government interest” is an interest in the perpetuity of the rule of law; requiring government to spend more does not implicate this. Whatever interest taxpayer harm *can* be said to set back, it is not a legally cognizable “government interest.”

Perhaps we could look at the taxpayer more individually, and ignore the intermediary: are his individual financial interests set back, even if his governmental interests are not? With payment of taxes, the difficulty (perhaps even impossibility) is drawing a line precisely where the individual’s interests stop being advanced and start being set back. It is of course in the taxpayer’s interests to pay

---

<sup>105</sup> See MARKUS D. DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS* 116 (2006) (describing difficulties with viewing the State as a victim, in that “The state is apersonal because it ostensibly, and simply, manifests the interests of the community it governs. It is a bureaucratic institution with no identity and no function, except the maintenance of ‘public welfare’ through the protection of ‘social interests.’”).

taxes generally, because he benefits from the existence of the State; only an anarchist would controvert this. Can he pay *too* much, though, and begin to face diminishing returns? The problem with this cost-benefit analysis is that it ignores the multitude of intangible, incalculable benefits that the taxpayer receives from the preservation of a functioning government. Just because he does not directly receive goods or services of monetary value does not mean that he is literally wasting his taxes, getting nothing in return. The State's mere existence as a framework for enabling the pursuit of "ordered liberty"<sup>106</sup> is the overall benefit the taxpayer receives. The preservation of public order and stable markets are two elements of this, but so also is the social "safety net," even should he never need to use it himself (climbers do not see their safety nets as wasted simply because they never fall). It is only at an extreme point that the payment of taxes becomes obviously prejudicial to the taxpayer's interests. Confiscatory taxation for the pleasures of a dictator might implicate this harm; there, what would be naked theft is clothed by color of law. Here, though, our aggravated taxation is used for more *governing*. More rescue efforts, more welfare, more healthcare. The only way that the argument might possibly survive is to craft a taxpayer interest in paying as little tax money as is *necessary* for the preservation of this government framework. But this is really an empty proposition: in providing the services that the State has deemed to be its essential functions—the pillars of its framework—it is inherently acting only out of necessity.

Looking directly at the individual taxpayer as the victim of taxpayer-harming conduct raises another issue: *de minimis* effects. *De minimis* has long been a defense in the criminal law, and is incorporated by the Model Penal Code.<sup>107</sup> In writing on the variable of

---

<sup>106</sup> This term is from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>107</sup> MODEL PENAL CODE § 2.12.

harm's "magnitude," Feinberg states, "[a]s the venerable legal maxim has it, *de minimis non curat lex* ('The law does not concern itself with trifles')." <sup>108</sup> Even were a reckless boater to require a great deal of medical care, the impact upon an individual taxpayer of that one boater's care is so small as to be negligible. Taxpayer harm only rises above the level of a trivial offense by aggregating victims and offenders, which is problematic in criminal law. <sup>109</sup>

A related difficulty is the universality of criminalization, which paints with such broad strokes that many harmless or even beneficial acts might be proscribed. <sup>110</sup> Some interests may be set back, but there might be a net gain being ignored. For example, imagine a blanket prohibition on skydiving or scuba diving (activities that, while quite dangerous, bring great enjoyment to those who safely engage in them). Richard Epstein wrote of such skewed harm-benefit analyses in his own article on the Harm Principle: "The current view sees *externalities everywhere*. In effect it isolates one negative consequence of any action on third parties and uses it to justify prohibition of that action . . . no matter how large the gains for others." <sup>111</sup> In short, the good is thrown out with the bad, even when the former outweighs the latter. The argument makes less sense when thinking of somewhat valueless activities <sup>112</sup> such as seat belt omissions, but Epstein's point is well taken in other areas.

---

<sup>108</sup> Feinberg, *supra* note 7, at 189.

<sup>109</sup> *Id.* at 225.

<sup>110</sup> "Specific instances of generally harmful activities are sometimes themselves quite harmless. . . . In these cases a blanket prohibition will (probably) diminish or eliminate the general harm but only at the cost of preventing the harmless or beneficial instances too." *Id.* at 193.

<sup>111</sup> Epstein, *supra* note 10, at 417. He goes on to say, "[t]his skewed form of social accounting has a predictable, if perverse, result: every action generates some harm under the expanded harm principle." *Id.*

<sup>112</sup> Feinberg writes, beyond magnitude and probability of harm, there is the "crucial third factor [which] is the independent value of the risk-creating conduct both to

To repeat, taxpayer-harming conduct, being concerned solely with financial expenditure for *essential government services*, cannot be said to set back a taxpayer's "governmental interest," nor are the taxpayer's individual financial interests set back, as there can be no intelligible line drawn beyond which the financial support of the governmental structure becomes inimical to that taxpayer's interests. Additionally, problems of *de minimis* effects and suppression of valuable activities arise. Overall, it is hard to see this conduct as "harmful."

## 2. Wrongfulness

Our next criterion of analysis is wrongfulness; it is the unabashedly (im)moral aspect of a crime.<sup>113</sup> Feinberg writes that a wrong is a harm that is unjustly inflicted (it violates a victim's right), and is perpetrated with a blameworthy mental state.<sup>114</sup> This only begs further questions, though, of the content of those two sets: rights and mental states. In proceeding we take for granted, of course, that mere violation of the law cannot alone make conduct wrongful.<sup>115</sup>

---

the actor himself, to others directly affected by it, and to society in general." Feinberg, *supra* note 7, at 191. Cf. Dworkin, *supra* note 5, at 125.

<sup>113</sup> As we have alluded to, taxpayer harm is unproblematic under a consequentialist ethic (where what is "wrong" is what is costly or not useful)—especially when the value being maximized is social utility. In addressing this issue, though, we continue to use a retributive, deontological framework, where the conduct takes on a different character.

<sup>114</sup> Feinberg, *supra* note 7 at 108, 109, 114.

<sup>115</sup> This would make the discussion rather brief indeed, but such a position represents one side of a debate that goes far deeper than criminal law, and extends into jurisprudence and political philosophy. See generally THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS (Oxford: Rowan & Littlefield, 1999). This debate makes its way into the criminal law most saliently when the topic of *mala prohibita* is being addressed. See generally Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997) (giving a good discussion of the parameters of the debate, and offering a specific defense of *mala prohibita* crimes).



For our purposes, the issue of rights is an easy one. Do the taxpayers have a right not to pay higher taxes? We begin by noting that the State has a duty to provide the services that it assumes as its essential functions, and to do so for all people. To hold otherwise would be to revert to what Nozick called the “ultra-minimal state,” where even policing and protection from attack are provided only to those who pay.<sup>116</sup> If the provision of these services is part of the duties of the state, part of its essential function and *raison d'être*, then the payment of taxes is similarly a duty. In Hohfeldian terminology, if the taxpayers have a “duty” to pay, they cannot simultaneously possess the jural opposite—a “privilege” to not pay.<sup>117</sup> In fact, someone else holds a correlative *right* to receive the services whose funding is the *duty* of the taxpayers.<sup>118</sup> The citizen *qua* taxpayer has a duty, but citizen *qua* service-beneficiary has a right, or a claim. The citizen’s right, then, is to receive, and not to escape payment. If payment of taxes is a duty, it follows that the non-payment of taxes cannot be a right, and therefore taxpayer harm incursion violates no right, and is no “wrong.”<sup>119</sup>

---

<sup>116</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974).

<sup>117</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-32 (1913); see also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986-87 (1982).

<sup>118</sup> See Hohfeld, *supra* note 1177, at 30-32.

<sup>119</sup> It may seem that I am committing an error by appealing to a schizophrenic understanding of rights and duties—that, in seeking to critique a perversion of the Harm Principle in the name of a more robust preservation of individual liberty, I have invoked rights and duties that only make sense within a more substantial vision of community relationships which is antithetical to that individualism. However, the two duties that are crucial to vitiating taxpayer harm are basic, and inhere in nearly every conception of the State, both minimal and expansive: (1) the duty of the State to provide its essential services to all of its citizens free of charge (and the citizen’s correlative right to receive them), and (2) the duty of the citizen to pay taxes so as to support that State. What differentiates the minimal state from a modern distributivist state is not any change in these two fundamental demands, but in what

What of Feinberg's second element of a wrong: a perpetrator's blameworthy mental state? None of the statutes we have surveyed contain the explicit result element of pecuniary harm to the taxpayers (as does a typical homicide statute with the result of death)—this harm is a background motivation, not a statutory element. Because of this, it is doctrinally correct to say that taxpayer harm perpetrators possess a blameworthy mental state with respect to their conduct. In short, there is no *mens rea* problem. However, if we go beyond doctrine and inquire into what wrongfulness means on a more theoretical level, we might ask whether or not their mental state is at all tied to the *interests* being sought to be protected—here, financial well-being.<sup>120</sup>

Because taxpayer-harming conduct almost always requires an injury to the perpetrator, it is highly unlikely that that perpetrator's mental state with respect to the financial harm is ever intentional: few are the drivers who fail to buckle up with the conscious objective of incurring government costs. At most, given their general awareness of the government's obligations, taxpayer-harm perpetrators have a *reckless* mental state with respect to the ultimate interest: they consciously take a substantial and unjustifiable risk of creating the detrimental financial effect.<sup>121</sup> This will not always be true, though, if the actor has taken proper precautions (e.g. the motorist who has his own insurance, or the resident who has prepared his home for disaster). This person does not act recklessly at all.<sup>122</sup>

---

each chooses to take on as its essential services—how it chooses to spend its tax money, essentially.

<sup>120</sup> In his discussion of wrongs, Feinberg posits that the injustice, the wrong, occurs when the culpable mental state is related to “an adverse effect on [the victim's] interests.” See Feinberg, *supra* note 7, at 107.

<sup>121</sup> See MODEL PENAL CODE § 2.02(2)(C) (defining recklessness).

<sup>122</sup> See, e.g., *Arkansas man saves home from rising floodwaters by building epic levee and MOAT around his property*, DAILY MAIL (May 14, 2011),

Even granting that recklessness is present, this is problematic and somewhat novel given the following observation from Heidi Hurd:

Criminal law does not make criminal any and all negligent and reckless actions; it makes criminal only negligent and reckless actions that risk a special set of interests. Thus, it embodies prohibitions against reckless endangerment and negligent homicide that protect the interest in life and limb, and in some jurisdictions it embodies a prohibition against negligent rape that protects the interest in sexual autonomy and bodily integrity.<sup>123</sup>

A survey of the generalized “reckless endangerment” statutes reveals that all of them require that the risk be correlated to “death or serious bodily injury.”<sup>124</sup> Only one state criminalizes recklessness with respect to the endangerment of property.<sup>125</sup> Such an observation about the traditional ends of recklessness statutes ought to at least give the legislator pause in the case of taxpayer harm. Recklessness with respect to another’s life and limb certainly seems to be an instance where unintentional conduct may be criminalized, but recklessness with respect to *financial* well-being—does this rise to the same level of wrongfulness?<sup>126</sup> Yet again, the taxpayer-harm

---

<http://www.dailymail.co.uk/news/article-1387110/DeValls-Bluff-Arkansas-man-Russell-Petty-saves-home-flooding-building-levee-MOAT.html>.

<sup>123</sup> Hurd, *supra* note 91 at 198. As she writes elsewhere, the requirement that recklessness be related to endangerment of *life and limb* “finds doctrinal expression in the criminal law.” Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 261 (1996).

<sup>124</sup> See, e.g., MONT. CODE ANN. § 45-5-207 (2011); 18 PA. CONS. STAT. § 2705 (2011); TENN. CODE ANN. § 39-13-103 (2011); V.I. CODE ANN. tit. 14, § 31-625 (2011); MODEL PENAL CODE § 211.2.

<sup>125</sup> N.Y. PENAL LAW § 145.25 (McKinney 2011).

<sup>126</sup> Overcriminalization theorists have understood the explosion in the number of “risk-prevention” statutes to be one of the phenomenon’s primary causes. Husak writes, “there is virtually no limit to how far the state might go in protecting persons

argument introduces a novelty to the criminal law, and such novelty makes it presumptively suspect.

Even ignoring the problem inherent in recklessness, we are confronted with the more abstract question: how can *any* mental state with respect to the State's financial well-being alter the State and taxpayer duty to provide the service—in other words, how can it be that one element of wrongfulness, the mental state, somehow changes the other, which is the right-invasion.<sup>127</sup> Examples abound showing that such a distinction does not exist in the areas of State-provided services,<sup>128</sup> and that the drawing of it would lead to absurdities. Take public education, for example: here, the family that has a large number of children knowingly puts a greater strain upon the public school system, and so does the young adult that chooses a State university over a private one. Of course, these activities are not criminalized, despite the mental state associated with their aggravation of government expenditure. While few would *purposively* increase taxpayer costs, it is obvious from our examples that a great deal of conduct takes place in which the actor *knowingly* aggravates expenditure, and sometimes in neutral or beneficial activity. It cannot be, then, that a less culpable mental state—our tax-

---

from novel ways that harm might be risked." Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 771 (2004).

<sup>127</sup> It must be noted that the Supreme Court has held that, "[a]s a general matter, a State is under no [federal] *constitutional* duty to provide substantive services for those within its border." *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (emphasis added). The duties we speak of here have either been assumed voluntarily by the State, are required by the State constitution, or inhere in the notion of a political community more generally—they are not grounded in the United States Constitution.

<sup>128</sup> With transportation, those who use the roads more frequently also increase the maintenance costs associated with them. In public safety, the victim who intentionally resists a robbery greatly increases the chance of a public disturbance through the escalation, and therefore increases policing costs. Those who choose to live in a high-crime area, or those who wear flashy clothing and drive expensive cars, can both be said to risk the same.

payer-harm recklessness – can possibly suffice to change the character of conduct so as to demand criminal liability. Most services, it seems, we just expect the State (through its taxpayers) to pay for without consideration of how the cost arises, and the recipient’s state of mind is totally irrelevant.<sup>129</sup> By attempting to carve out an area where this expectation is diminished, the taxpayer-harm argument creates an inconsistency in the law, but without an adequate explanation.

To sum up, the taxpayer has no right to withhold his taxes when they are being expended upon what the government has deemed to be its essential services, and the perpetrator’s merely reckless mental state with respect to the infliction of financial burdens (if it exists at all) seems insufficient, and cannot somehow alter the boundaries of the aforementioned right: this conduct is not “wrongful.”

### 3. *Public Character*

The final requirement for criminality, public character, is the most complex. The idea has an impressive intellectual pedigree – Blackstone noted long ago that while crimes “strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity,” civil wrongs are “imma-

---

<sup>129</sup> This is probably because the very purpose of the State, and the justification for the provision of most of the “services” we have discussed so much, is precisely to remedy individuals’ deficiencies. I am referring to the notion of the collective action problem, which is itself created by certain features of human nature. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 231-32 (Oxford ed., 1980) (concluding also that “co-ordination” problems give rise to the need for common authority as well); JOHN RAWLS, *A THEORY OF JUSTICE* 267-70 (Harvard ed., 1971). Because the very purpose of the State is somehow bound up with human deficiency and comes about as an albeit imperfect solution to that problem, it makes sense that the execution and provision of essential State functions – the instruments of that solution – do not require their recipients to be perfect or even innocent.

terial to the public.”<sup>130</sup> Various theoretical approaches can help to articulate what is meant by a “public” harmful wrong.

One approach, advanced most notably by Nozick and Becker, emphasizes the harmfulness aspect, and attempts to understand how this can be cognizable at a public level. Nozick highlights the generalized fear that is created by a crime, no matter how particularized the victim, and sees this as what “publicizes” the act and its effect.<sup>131</sup> In Becker’s theory, it is “the potential for destructive disturbance of fundamental social structures” that is the harmful public effect of a crime—the “social volatility” that is created leads to citizens’ anxiety that they might need to resort to anti-social behavior out of self-defense.<sup>132</sup> Crimes inject a tenor of Hobbesian preoccupation with the possibility of *bellum omnium contra omnes*. Under both theories, crime is much like the invasions of “government interest” described by Feinberg: it is inimical to public order.

A second approach, notably proposed by communitarians Marshall and Duff, emphasizes the wrongfulness aspect in making crime public.<sup>133</sup> “The point is not just that we realise that other

---

<sup>130</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*4; see also 3 WILLIAM BLACKSTONE, COMMENTARIES \*2; Grant Lamond, *What Is A Crime?*, 27 OXFORD J. LEG. STUD. 609, 614-15 (2007) (“The most influential approach to understanding the nature of crimes has been in terms of their being public, as opposed to private, wrongs. The conception of crimes as ‘public’ has a long tradition in common law thought. Crimes were regarded as violations of the King’s Peace, and, as such, were liable to being pursued as pleas of the crown. In its modern incarnation, the place of the sovereign as the embodiment of the public is taken by the community, which is regarded as affected by crimes in a way that it is not by civil law wrongs, thus making it the appropriate body to pursue such wrongs.”).

<sup>131</sup> Nozick, *supra* note 116, at 65-71; see Lamond, *supra* note 130, at 615.

<sup>132</sup> Lawrence C. Becker, *Criminal Attempts and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262, 273 (1974); Lamond, *supra* note 130, at 615 .

<sup>133</sup> See S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J. OF L. AND JURISPRUDENCE 7, 20 (1998). An elaboration of Duff’s position is presented in R.A. DUFF, ANSWERING FOR CRIME 140 (Oxford: Hart, 2007).

members of the group are also vulnerable to such attacks," they argue, "or that we want to warn other potential assailants that they cannot attack members of the group with impunity . . . : it is that the attack on this individual victim is itself also an attack on us — on her as a member of the group and on us as fellow members."<sup>134</sup> Such a theory relies upon a robust conception of community. When a community is "united by mutual concern, by genuinely shared . . . values and interests, and by the shared recognition that its members' goods . . . are bound up with their membership of the community," groups can "share the wrongs done to its individual members."<sup>135</sup>

Feinberg also notes other possible manners of understanding wrongful harms as "public." Beyond the "government interest" discussed earlier, he notes that if "a collection of specific interests of the same kind [is] possessed by a large and indefinite number of private individuals," this could be public harm.<sup>136</sup> His example is that of a bomb in a transit station — the point is that certain dangerous activities "threaten[] no specific person namable in advance."<sup>137</sup> Another possibility is that of a "'common,' or widely shared, specific interest": all people have an interest in one definable thing, such as continuance of government or economic prosperity.<sup>138</sup>

How can our argument fare under these frameworks of analysis? We can incorporate the discussion of "government interests" here, and conclude immediately that taxpayer harm is not "public" under Becker or Nozick's theories. It does not implicate the existence and legitimacy of the rule of law and the State, nor does it create any fear. What of Marshall and Duff? Here, taxpayer harm

---

<sup>134</sup> *Id.* at 20.

<sup>135</sup> *Id.*

<sup>136</sup> Feinberg, *supra* note 7, at 222-23.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

might have some more traction as a reckless wrong imposed upon the community in general: an attack on the goods, values, and interests of the public. But it seems unlikely that such a morally animated theory can permit the sterile, fiscally oriented conduct of taxpayer harm to be imbued with a public quality – also, the conception of “community” is not very strong if costs are construed as “harm” when expended to save others from themselves. Even under Feinberg’s formulations, the argument is unable to make headway. The public-because-dangerous-to-random-individuals theory (subway station bomb) seems blatantly inapposite; the “common[ly]” shared “specific interest” is probably the only way to proceed. But this would also likely be our “government interests” discussed in the “harm” section, and therefore fails for the same reasons Becker’s theory does.

Even were we to grant that some narrower, fiscal version of “government interests” is implicated by taxpayer harm – one that does not implicate the rule of law or continuity of government – I would be skeptical that these interests are in fact public. The problem is that this vision of fiscal governmental interests – interests that can somehow be set back by the provision of its essential services – relies on a very thin conception of the State as somewhat like a corporation. Such a conception is necessary in order to overcome the objections stated in the past two sections, and make taxpayer-harming conduct cognizable as a harmful wrong, but it ironically narrows the scope of that harmful wrong’s effects. If pecuniary loss is the sole issue, and not some larger understanding of governmental interest, then only those who gain and lose *monetarily* because of that loss are truly affected by the conduct. However, as is known all too well, the sets of “public” and “taxpayer” are not entirely coterminous – not even mostly. It is widely reported that



nearly half of Americans do not pay Federal income tax,<sup>139</sup> and the non-paying percentage is likely to be high in the individual states as well. Thus, taxpayer-harming activity is still not truly “public,” but is precisely what it says it is—a harmful wrong to *taxpayers*. Taxpayer harm arguments uncritically assume the public nature of the harmful wrong because of the entity that is wronged, but proceed to specify that harmful wrong in such a way that the scope of those who can be affected is narrowed. Narrowed, I think, to the point that it is no longer of “public” concern. When we realize that taxpayer-harming conduct really only “harms” (and wrongs) a subset of the “public,” the entire edifice smacks more of a private dispute between a corporation and an individual.<sup>140</sup>

All of the taxpayer-harm arguments surveyed in our first section seemed to take for granted that if an activity depletes the public treasury, it is of course wrongfully harming (or risking harm to) the “public,” but under all of the prevalent theories, the “public” quality of the conduct is of dubious validity. As Feinberg warns, “[t]he harms produced by [impersonal] crimes can be labeled ‘public’ as opposed to ‘private’ harms provided it is kept in mind that the public is composed of private individuals standing in complex social and legal relations to one another.”<sup>141</sup> A good way of summing up the previous discussion is to conclude that the taxpayer-harm argument, for all its common-sense vigor, fails to appreciate the

---

<sup>139</sup> See Rachel Johnson et. al., *Why Some Tax Units Pay No Income Tax*, TAX POLICY CTR. 1-2 (July 27, 2011), <http://www.urban.org/uploadedpdf/1001547-Why-No-Income-Tax.pdf>.

<sup>140</sup> This is especially true of the massive nations of today, where even an additional detriment to the taxpayers may be completely unfelt by the rest. It is theoretically possible, though, that a community might be so small that any harm felt by the taxpayers is concomitantly felt by the non-payers. See Feinberg, *supra* note 4, at 23 (“The closer any society is to what we might call ‘the garrison threshold,’ the more the harm principle comes into play . . .”). The smaller the community, the more we feel the effects of harm on others.

<sup>141</sup> Feinberg, *supra* note 7, at 11.

“complex[ity]” noted by Feinberg—because we are dealing with *the State* and *the citizen*, the analysis requires great nuance. This nuance seems lost upon the argument. Taxpayer-harming conduct fails to satisfy the requirements of most theories of “publicness,” as it creates no fear, does not constitute a moral affront to the community, and can only even be said to financially impact a portion of the population.

#### B. PRACTICAL EFFECTS

The above-discussed critiques of the taxpayer-harm argument would probably mean little to most people, and probably little to most lawyers as well. Often, the small penalties associated with the violation of these statutes lead many to see this criminalization as having only trivial impact upon their lives—a \$25 ticket is nothing more than a nuisance, after all. Beyond this, many are content to rely upon common sense judgment in enforcement. With Fletcher, though, I believe we must be unwilling to “retreat to prosecutorial discretion as a surrogate for the principled solution of human conflict.”<sup>142</sup> In any case, it is important to remember that law enforcement’s constitutional investigatory powers expand exponentially whenever an activity is a “crime,” no matter how small the penalty—there can be real practical liberty implications at stake. In what follows, I will discuss the practical absurdities that can result from the criminalization of taxpayer-harming conduct. Hopefully, this will show why even the non-theorist should be concerned about the argument. Again, in making this critique I am aware that these laws can be justified using various other arguments, but remember that the theory must stand or fall on its own. In taking note of these

---

<sup>142</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 769 (Little, Brown & Co. 1978).

practical effects of criminalization, then, imagine that the sole justification for the ultimate law is taxpayer-harm. Is it enough?

First, once conduct becomes “criminal” a whole host of state interferences become permissible. Criminal investigatory powers are intrusive because crimes are normally associated with violence, and there is a compelling need to prevent it before it happens. For example, even when a crime cannot ultimately be punished with imprisonment, probable cause alone permits arrest and “booking” in a jail until a *Gerstein* hearing; this can be for up to 48 hours.<sup>143</sup> Just this term, a case went before the Supreme Court that highlighted the problematic practice of uniform body cavity searches for all processed prison inmates, regardless of their dangerousness, or the “crime” they were brought in for.<sup>144</sup> The petitioner’s brief notes that this practice was used against a twelve-year-old girl who was caught eating a french fry on the Metro.<sup>145</sup> Unfortunately, the Court declined to create any distinctions between “crimes” and police investigative power.<sup>146</sup> In another Metro-food-eating case, a woman reacted emotionally to her body cavity search, and was then locked in an isolation cell for fifteen hours wearing only her underwear.<sup>147</sup> As Stuntz reminds us, “People may not mind making drunk driv-

---

<sup>143</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001); *Gerstein v. Pugh*, 420 U.S. 103, 124-126 (1975).

<sup>144</sup> Brief for Petitioner at 23-25, *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510 (2011) (No. 10-945).

<sup>145</sup> *Id.* at 25 (citing *Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004)).

<sup>146</sup> *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1520-21 (2012)

<sup>147</sup> Karlyn Barker, *Woman Arrested for Eating on Metro Sues Over Strip Search*, WASH. POST., Oct. 1, 1980, at C1; see also Brief for American Civil Liberties Union et. al as Amici Curiae Supporting Petitioner at 7-8, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (reporting arrests for littering, riding a bicycle without a bell or gong, operating a business without a license, and walking as to create a hazard).

ing a crime, but they would surely rebel if police had the same power over jaywalkers that they sought to use on [drunk drivers]. Yet the police do have that power, and no one rebels.”<sup>148</sup> Although most do not know it (as officers’ common sense and prosecutorial discretion usually prevails), we can indeed be deprived of liberty and dignity for trivial offenses.

The seminal Supreme Court case is *Atwater v. City of Lago Vista*.<sup>149</sup> In *Atwater*, a police officer with a grudge decided to arrest a woman in front of her terrified children for a seatbelt omission. He handcuffed her, placed her in his squad car, and processed her in the jail, where she spent an hour in a cell alone. The Court held that the punishments for a crime did not have bearing upon the reasonableness of the decision to make a custodial arrest.<sup>150</sup> While the Court clearly permitted an absurd result to go un-redressed, in my mind it has some merit: the solution is not to make it more difficult for police to apprehend criminals, but to take greater care when delineating between who is and who is not acting criminally. The same powers can be used against the taxpayer-harm violator—is this appropriate?

There is another familiar problem that arises—ubiquitous, trivial offenses provide a window through which the investigative power of the State can enter and expand. They are like a hair trigger that, once pulled, irreversibly begins a chain reaction allowing for greater intrusion. Trivial offenses “function[] as a grant of authority to the police.”<sup>151</sup> Once the law has some justification to intrude, it can

---

<sup>148</sup> William Stuntz, *Substance, Process, and the Criminal-Civil Line*, 7 CONTEMP. LEGAL ISSUES 1, 10 (1996).

<sup>149</sup> 532 U.S. 318 (2001).

<sup>150</sup> *Id.* at 318

<sup>151</sup> See *People v. Kail*, 501 N.E.2d 979 (Ill. App. Ct. 1986) (upholding enforcement of law criminalizing riding of bicycle without bell, which then lead to a search-incident-to-lawful-arrest revealing contraband); Stuntz, *supra* note 148, at 1 (It is

find more and more, and privacy shrinks while the powers of investigation expand. If a trivial offense is committed in an officer's presence, he can effect a custodial arrest, and along with it a search incident to lawful arrest.<sup>152</sup> Should he find contraband, he has cause to look for more.<sup>153</sup> Beyond being this hair trigger, the ubiquity of the offenses gives rise to all the discrimination problems inherent to any system of discretion. The often-cited example is the traffic code, long criticized as a tool to be manipulated against minorities,<sup>154</sup> and our taxpayer-harm offenses are of the same ilk—violators are so numerous that arrest decisions are left up to the naked discretion of the officer on the beat. Justice Scalia rightly notes that, if the rule of law is to have meaning, even an “exorbitant” code cannot have certain parts deprived of effect.<sup>155</sup> Again, though, this means that the solution is at the legislative juncture—avoid prolixity.

On a final “practical” note, it should be remembered that the more we extend criminalization beyond the “core,” the more we drain it of its moral weight. Radical positivists might be content to jettison appeals to such extra-textual foundations of the written criminal statutes, but for most people there is at least some discomfort with the idea of *mala prohibita*. As one commentator wrote long

---

attractive to expand substantive crimes, because this reduces the need to follow elaborate procedural rules; “[trivial offenses] function[] as a grant of authority to the police.”).

<sup>152</sup> See *United States v. Robinson*, 414 U.S. 218, 234-35 (1973).

<sup>153</sup> See *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>154</sup> See *Whren v. U.S.*, 517 U.S. 806, 818-19 (1996) (“Petitioners urge as an extraordinary factor in this case that the ‘multitude of applicable traffic and equipment regulations’ is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.”); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 726 (2005).

<sup>155</sup> See *Whren*, 517 U.S. at 818-19.

ago, "Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped."<sup>156</sup> In addition, enforcement efforts directed at these minor crimes, given the all too limited resources of police agencies, distract from those violent crimes that *do* threaten public order.<sup>157</sup>

All of these problems and absurdities can arise when conduct that is generally understood to be of trivial effect is nevertheless criminalized: the investigatory "hair trigger," temporary detention that is degrading to dignity and restrictive of liberty, and the sapping of the moral force of the criminal label. Because of this, legislators addressing taxpayer-harming conduct should resist the knee-jerk resort to criminalization for deterrence's sake<sup>158</sup> — they must remember that in doing this, they bring in the procedural baggage of a criminal law traditionally concerned with violence and public order. This "baggage" will inhere no matter what the crime is, or its punishment. We risk what Justice Harlan called "the deployment of all the incidental machinery of the criminal law," and in an area

---

<sup>156</sup> Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79-80 (1933).

<sup>157</sup> See Luna, *supra* note 154, at 727.

<sup>158</sup> See Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 417 (1958) ("The legislature simply wants certain things done and certain other things not done because it believes that the doing or the not doing of them will secure some ultimate social advantage, and not at all because it thinks the immediate conduct involved is either rightful or wrongful in itself. It employs the threat of criminal condemnation and punishment as an especially forceful way of saying that it really wants to be obeyed, or else simply from lack of enough imagination to think of a more appropriate sanction."). William Stuntz has written extensively about the causes behind the overcriminalization phenomenon, in William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2011), and has condemned legislatures and courts that, in focusing exclusively on procedure, have failed to create any *substantive* limits on crime. See also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

where it seems least suited.<sup>159</sup> Both in theory and in practice, then, the taxpayer-harm argument is cause for concern.<sup>160</sup>

### C. SUMMARY

As has been explained, the taxpayer-harm argument is seriously problematic when scrutinized by criminal law theory, and it is also worrisome in the practical effects it allows. Central to the theoretical problem is the argument's denuded conception of the State as simply another corporate collective. This is done ostensibly to make the attribution of a harmful wrong easier, but it ignores the complex structure of the citizen-State relationship, which contains certain bedrock duties and rights. Once this is brought back into focus, it seems unlikely that any interests are set back by taxpayer "harms," or that any rights are violated. Moreover, the appeal to a certain mental state (if it exists at all) to somehow change the duties of the State and taxpayers in the provision and funding of essential services is unknown in other areas of law—the nascent distinction is unexplained by the argument, and this is probably because it is in-

---

<sup>159</sup> See *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

<sup>160</sup> It should be recognized that some states have been creative in addressing taxpayer harming conduct, and have gone a long way towards avoiding the problems we have mentioned. Georgia, for example, explicitly states that a seatbelt violation is not a crime, and cannot constitute probable cause for additional police intrusions. See GA. CODE ANN. § 40-8-76.1 (2011). Idaho takes another route in addressing the pretext stop problem, and provides that its seatbelt law may only be enforced as a "secondary action," when another violation of the law has been observed. See IDAHO CODE ANN. § 49-673 (2011). Tennessee makes a violation a misdemeanor, but prohibits its police from arresting violators or taking them into custody. See TENN. CODE ANN. §55-9-603 (2011). Finally, in South Carolina, violations of seatbelt laws carry civil fines, and are explicitly not criminal offenses, and do not justify custodial arrest. See S.C. CODE ANN. § 56-5-6540 (2011). In the evacuation context, Louisiana has enacted a law that, while preventing forcible removal, gives notice that no later rescue will be attempted, and makes the government immune from damages. See LA. REV. STAT. ANN. § 29:730.3 (2011).

defensible. This new conception of the State is also problematic, though, for the requirement that the conduct have a public character: those who do not financially contribute are unaffected, and therefore any harmful wrong appears more like a private one. Finally, the criminalization of this innocuous conduct permits practical absurdities: the harsh implements of the criminal law's investigatory powers are permitted to be applied indiscriminately. The taxpayer-harm argument does not justify criminalization.

#### IV. PARADIGM SHIFT

To say that taxpayer-harm does not justify criminalization is not to say that the government should be at a loss when addressing the problem. In what follows, I will discuss what I believe is an excellent alternative to the criminal sanction, and one that solves problems both in theory and in practice: civil liability.

##### A. THE IMPORT OF THE CRIMINAL-CIVIL DISTINCTION: CRIME AS LAST RESORT

Whenever a polity is presented with a social problem, it has a diverse number of tools with which it can attempt to confront it. Legislatively, these generally fall within two distinct categories: criminal and civil. While much has been written about the gradual erosion of any hermetic seal between them,<sup>161</sup> the distinction has deep theoretical bases that in turn manifest themselves in practice. Conflation, or inversion (as is our case here) of the two is then likely

---

<sup>161</sup> See generally Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 793-95 (1997).



to produce major inconsistencies—all of the issues analyzed above bear this thesis out. As the Supreme Court has written, “The States have long been able to plan their own procedures around the traditional distinction between civil and criminal remedies. The abandonment of this clear dividing line in favor of a general assessment of the manifold and complex purposes that lie behind a court’s action would create novel problems where now there are rarely any—novel problems that could infect many different areas of the law.”<sup>162</sup> This is true, as we have seen, both theoretically and in practice.

Criminal punishment, of course, should be the last resort, the *ultima ratio* in the State’s toolbox. This idea has been most forcefully espoused by Douglas Husak, who fleshes out such a common sense conclusion in this manner: “The criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed.”<sup>163</sup> Handcuffs and prison bars are simply more regrettable implements in a free society than are taxes, lawsuits, or fees. But beyond liberty, there is a stigma.<sup>164</sup> Because of these reasons, far

---

<sup>162</sup> Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 636-37 (1988). Similarly, in the classic article on the civil-criminal line, Jerome Hall writes, “the two fields of law differ in very important respects and . . . their unification . . . would be [possibly] dangerous to certain values presently implemented by the prevailing legal distinctions.” Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 755 (1943).

<sup>163</sup> Douglas Husak, *The Criminal Law As Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004). See generally Nils Jareborg, *Criminalisation as Last Resort (Ultima Ratio)*, 2 OHIO ST. L. J. 521 (2005).

<sup>164</sup> Hart writes, “[criminal conduct] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.” Hart, *supra* note 158, at 405; see also John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991) (“[T]he factor that most distinguishes the criminal law is its operation as a system of moral education and socialization.”).

from instinctively jumping to criminalization,<sup>165</sup> we ought to strain ourselves to find alternatives to it. Thus, Feinberg admonishes, “[f]or every criminal prohibition designed to prevent some social evil, there is a range of alternative techniques for achieving, at somewhat less drastic cost, the same purpose.”<sup>166</sup> Such a position depends, of course, upon a non-consequentialist punitive theory, which does not see the civil-criminal “distinction” as merely one of quantitative difference in deterrent value.<sup>167</sup> Taking the retributive position, we can incorporate Jerome Hall’s central thesis: “[The] elementary principle [is] that the nature of the harm should bear a rational relation to the sanction . . . [and] that sanctions resemble harms not only formally, but also in substance.”<sup>168</sup> Is the uninten-

---

<sup>165</sup> See Coffee, *supra* note 164, at 219 (“Public concern about a newly perceived social problem . . . seems to trigger a recurring social response: namely, an almost reflexive resort to criminal prosecution.”).

<sup>166</sup> Feinberg, *supra* note 7, at 25. Feinberg gives an example of taxation as an incentive or disincentive, such as with smoking. *Id.* This is the route taken by the Affordable Care Act. See *supra* note 3. See also Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 8 (1996) (“In principle it would seem that when tort law normally remedies the relevant harm, civil fines should be the preferred public response.”); Dworkin, *supra* note 5, at 126 (proposing adoption of “principle of least restrictive alternative,” where “[i]f there is an alternative way of accomplishing the deserved end without restricting liberty, although it may involve great expense, inconvenience, etc., the society must adopt it.”).

<sup>167</sup> “The deterrence approach largely accepts the reductionist view. There is no significant difference between civil and criminal sanctions, except that a rational government will classify certain conduct as qualifying for potential imprisonment as well as for compensatory relief. Fines, taxes, and forfeitures are all of a piece.” Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 200 (1996). *C.f.* Steiker, *supra* note 161, at 784 (noting that the major “intellectual challenge” to the criminal-civil line is consequentialism, which sees the two as “related parts of a unitary scheme of state control of private behavior.”).

<sup>168</sup> Hall, *supra* note 97, at 999. “[I]n penal law . . . the immorality of the actor’s conduct is essential—whereas pecuniary damage is irrelevant,” Hall writes later, and “individual harm can be rationally evaluated in money whereas this is impossible as to . . . social harm” *Id.* at 971, 974.

tional, pecuniary “harm” we have described truly related to the punitive sanctions of the criminal law, or is it more akin to the compensatory sanction of civil liability?

#### B. THE CRIMINAL-CIVIL LINE & TAXPAYER HARMS

I think the answer is clear: civil liability.<sup>169</sup> “If one engages in conduct  $\theta$ , one is civilly liable for the governmental costs incurred.” This simple formulation is the type of statute or regulation I am proposing.<sup>170</sup> Here, the traditional justification for invoking criminal law that we found so wanting—a wrongful public harm—drops out of the picture, and is replaced with the lower demands of civil law: fault, causation, and damage.<sup>171</sup> The first is easily satisfied by the public promulgation of the civil regulation, with its violation constituting

---

<sup>169</sup> There are other non-criminal regulatory alternatives, but I pass over them. Simester and Von Hirsch describe them well: taxes, statutory torts (my chosen alternative), public information campaigns, licensing, civil regulatory agencies, and “specialized prohibitions” on non-ordinary actors such as corporations. See A.P. SIMESTER & A. VON HIRSCH, *CRIMES, HARMS, AND WRONGS* 193-96 (Oxford: Hart, 2011).

<sup>170</sup> There is a robust debate in legal scholarship over the wisdom of the reigning “free public services doctrine”—the tort principle that prevents a government from suing to recoup losses incurred through the provision of its services. Compare Michael I. Krauss, *Public Services Meet Private Law*, 44 *SAN DIEGO L. REV.* 1 (2007) (arguing in favor of doctrine), with Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 *WASH. & LEE L. REV.* 1019 (2001) (arguing against the doctrine), and Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 *TUL. L. REV.* 727 (2002) (same). However, my proposal avoids the imbroglia of this debate, which is essentially about the judicial extension or contraction of *common law* tort doctrines. See Krauss, *supra*, at 22. My proposal asks for legislative modification, and legislative modification of the common law has always been unquestioned.

<sup>171</sup> See *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928); *RESTATEMENT (SECOND) OF TORTS* § 281 (1965); Ernest J. Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403, 418 (1992).

*per se* fault.<sup>172</sup> The problems inherent in the use of a reckless mental state are obviated; unintentional recklessness has never been problematic in civil tort law, which requires only negligence (and sometimes not even that),<sup>173</sup> and the civil regulation has the advantages of notice.<sup>174</sup> Causation is easily established as well: the conduct will be the cause in fact of the aggravated cost, and this aggravation is clearly foreseeable given the promulgation just mentioned and the ubiquitous social facts that all should be aware of.<sup>175</sup> Finally, the damage inflicted is more cognizable in the civil law than as a criminal law “harm.” Now, the narrow, private-law-like financial concerns of the State *qua* corporation are unproblematic. Now, the State is not leveling its cause of action *as the State*, with all of its concomitant moral authority, but simply as another entity that has been financially damaged.

In comparing the requirements for liability to attach in the criminal and civil laws, we could summarize by saying that civil law is concerned with “objective liability”: an act that actually causes a harmful result, “actual damage to an individual interest,” irrespective of any blameworthiness as manifested by a mental state.<sup>176</sup> This is unlike the “subjective liability” of crime, which gives primacy of place to *mens rea* when assessing liability, and is far less preoccu-

---

<sup>172</sup> See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (2010) (describing doctrine of negligence *per se*).

<sup>173</sup> See RESTATEMENT (SECOND) OF TORTS § 519 (1977) (permitting strict liability in certain cases); RESTATEMENT (SECOND) OF TORTS § 281 (1965) (establishing floor of negligence).

<sup>174</sup> When compared to the common law creation of a tort.

<sup>175</sup> See Richard Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1741-50 (1985) (describing proximate cause and factual causation inquiries).

<sup>176</sup> See Mann, *supra* note 161, at 1805.

pied with results.<sup>177</sup> All this supports our argument. With taxpayer harms, it is not the mental state or even the risky act that gives rise to the concern animating the theory—it is the actually inflicted monetary deprivation, the *result*. While this actual resultant harm is arguably addressed by *ex ante* deterrence of a trivial criminal penalty, it is more precisely addressed by the *ex post* compensatory action typical of the civil law (which itself has deterrent value as well): the damages sought will equal the deprivation caused. An emphasis on results, while more directly addressing the damage inflicted, also has the advantage of being less restrictive of liberty, as liability inheres only when the cost is actually incurred.

This relaxation of the theoretical requirements that occurs in the shift from criminal to civil law ultimately flows from their differing *purposes* and *remedies*, and an examination of these similarly supports our argument for paradigm shift. In civil law, compensation is the aim, not punishment, and money damages are the usual remedy, not stigmatization and incarceration.<sup>178</sup> In a criminal context, an irreparable loss to social utility has usually been suffered, and because of this the only response to it can be a further loss of social utility through punishment. With taxpayer harms in civil law, though, all that has happened is misplacement (not destruction) of social utility, and all that is required to make things right is a reallocation. Taxpayer-harming conduct, with its pervasively pecuniary and morally neutral focus, is precisely the type of misdistribution of social utility that demands monetary rectification, not punishment. If accidental fiscal loss is the problem animating this legislative project, then the solution is a fiscal payment in the actual amount of the

---

<sup>177</sup> “Within the criminal paradigm, wrongful acts are sanctioned because they are public wrongs, violating a collective rather than an individual interest . . . even if no individual interest has suffered direct injury.” *Id.*

<sup>178</sup> *See id.* at 1808-09.

loss inflicted.<sup>179</sup> There is no need for those additional consequences that the criminal law provides, stigmatization or moral education.<sup>180</sup> The statutes we have surveyed do not bring opprobrium to those convicted, and have done little if anything to correct the characters of the offenders or society more generally: usually, the effect is iatrogenic, with the enforcing officers becoming the object of ridicule, and general respect for law diminished.<sup>181</sup>

Given all of the above discussion about the different purposes and remedies of the two types of law, it is unsurprising that the *enforcement powers* of each differ vastly. In the civil law, the “practical” problems of police investigation completely drop out, as those powers attach only when the conduct being investigated is criminal—now the police will not be involved at all. The shift to civil law would remove the constitutional-procedural “trigger” that taxpayer-harm violations have become, and those intrusive investigatory techniques of the criminal law that smack of such absurdity when

---

<sup>179</sup> The most basic objection to this compensatory schema is a practical one—the judgment-proof plaintiff. However, even assuming this problem, there is no reason to believe that there will be a net financial gain by a resort to the criminal sanction. Such an assumption relies upon the idea of *ex ante* deterrence, but it is likely the case that the potential of civil liability will deter as much if not more than that of a petty criminal fine. In any case, the soundness of legal theories should not be impugned simply because of a presumption that some people will not obey their prescriptions.

<sup>180</sup> See JEAN HAMPTON, *THE INTRINSIC WORTH OF PERSONS* 111-12, (Daniel Farnham ed., 2007) (arguing that the difference between a wrongful harm requiring retribution and a wrongful harm requiring compensation is a “moral injury” that expresses an affront to the victim’s value or dignity). Clearly, such a framework supports our paradigm shift.

<sup>181</sup> When the American Law Institute recommended the abolishment of crimes prohibiting consensual sexual activity, it gave three reasons: ubiquitous violations undermined respect for the rule of law; the conduct was private and not harmful to others, and; the criminalization of such behavior created danger of arbitrary enforcement. MODEL PENAL CODE § 213.2 cmt. 2 (1980); see also *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (citing comment approvingly). All three observations apply equally to taxpayer harm crimes.

applied to certain conduct would be prohibited. The greatest nuisance that could be visited upon a defendant is that enabled through discovery and subpoenas.<sup>182</sup>

### C. ALIENABILITY RULE TO LIABILITY RULE, SANCTION TO PRICE

As has been discussed, the purposes, remedies, requirements for liability, and procedures of the civil law make it an altogether more appropriate tool to use in addressing taxpayer-harming conduct than those of criminal law. A broader view of the distinction further supports this conclusion, and can be illustrated by looking to some theoretical schemas.

In Calabresian terminology, for example, the shift from criminal to civil paradigm is basically a modification of an inalienability rule into a liability rule.<sup>183</sup> An inalienability rule is appropriate, Calabresi and Melamed argue, when external costs are “non-monetizeable” or when any transaction of an entitlement creates significant externalities.<sup>184</sup> Thus, most crimes<sup>185</sup> are inalienability rules: the cost of conduct that is *malum in se* cannot be priced, and it always produces disutility. Liability rules, however, arise when “holdout” and “free-loader” problems prevent the value of entitlements from being collectively agreed upon, or when that value is unavailable in advance.<sup>186</sup> It is no surprise, then, that the paradigmatically appropriate case for a liability rule is when addressing the cost of an “acci-

---

<sup>182</sup> See Mann, *supra* note 161, at 1810-11.

<sup>183</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-25 (1972).

<sup>184</sup> *Id.* at 1111-14.

<sup>185</sup> Some crimes involve property rules, such as rape and theft.

<sup>186</sup> See Calabresi & Melamed, *supra* note 183, at 1106-10.

dent.”<sup>187</sup> Taxpayer-harming conduct creates precisely monetizeable external costs (the medical or the rescue bill), and can be undertaken without producing any negative externalities at all (e.g. the seat-belt scofflaw who arrives home safely), so an inalienability rule seems unduly restrictive. The problems that do attend to this conduct are precisely those of the “accident” that makes a liability rule appropriate: holdout and freeloader problems abound in the case of the brazen non-evacuee or the motorist lacking medical insurance, and the value of the entitlement is simply impossible to gauge before the point at which it becomes useful (for example, no one knows what the extent of one’s injuries will be).

We could also call this conversion a shift from a *sanction* to a *price*. In an influential article, Robert Cooter writes: “A sanction is a detriment imposed for doing what is forbidden, and a price is an amount of money exacted for doing what is permitted.”<sup>188</sup> Typically, he argues, activities should be “sanctioned” when there is some clear community standard against the conduct, and unclear external costs associated with said conduct – this is true of core criminal acts, such as homicide – and “priced” when the opposite is true.<sup>189</sup> Given that the conduct behind taxpayer harms implicates no clear moral standard and imposes costs that *can* be precisely calculated, a price-rule makes the most sense. John Coffee sums up the distinction in layman’s terms: “The difference is between saying ‘[p]roceed at [y]our [o]wn [r]isk’ and ‘[h]alt.’”<sup>190</sup> Because we are not truly con-

---

<sup>187</sup> *Id.*

<sup>188</sup> Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1552 (1984).

<sup>189</sup> *Id.*

<sup>190</sup> Coffee, *supra* note 164, at 208. Simester and Von Hirsch note that a tort is an “[in]complete alternative” precisely *because* it can only price: it “lacks the mandatory and condemnatory character of the criminal law.” A.P. SIMESTER & A. VON HIRSCH, *CRIMES, HARMS, AND WRONGS* 194 (Oxford: Hart, 2011). In the case of taxpayer harms, though, I find this incompleteness to be a virtue.



cerned about the *conduct itself*, but rather with the attenuated financial effects of that conduct being inappropriately imposed on a third party, it makes far more sense to craft legal rules that force the actor to simply assume the risk, and not categorically stop him from acting at all.

#### D. SUMMARY

In summation, a shift from criminal to civil liability is advantageous for a number of reasons. First, the theoretical, substantive requirements for criminality that were problematic for taxpayer-harming conduct (harmfulness, publicness, and wrongfulness) drop out, and are replaced by the more lax demands of civil law (fault, causation, damage). This conduct can easily meet the latter requirements in the wake of a promulgated civil liability regulation. This shift to a system of objective, results-based liability is also less restrictive on individual liberty—liability and sanction only attach when actual harm is inflicted. An *ex post* compensation, the price, also more directly addresses the actual damage created than do trivial *ex ante* criminal fines. The underlying purposes that animate the criminal-civil distinction (and shape their different remedies) also counsel placing these restrictions within the civil paradigm, as the compensatory aim and the utilization of money damages is precisely what addresses the problem complained of by the taxpayer-harm argument: a misallocation of social utility in the form of money. Taxpayer harms, of all *mala prohibita*, are especially cognizable by the civil law. While monetary compensation might do little to address the social problems that motivate prohibitions on tainted meat, for example, it is the perfect answer when the social evil the prohibition seeks to eradicate is purely a financial loss. The objections that normally attend to the criminalization of morally neutral activity are also obviated, as there is no drain on the moral significance of the criminal law as an educational and stigmatizing tool. Finally, while litigative procedural hurdles are significantly lowered, intrusive police investigatory powers are entirely curtailed.

Theorists that demarcate between alienability rules and liability rules, and between sanctions and prices, provide guideposts for choosing one or the other, and these support my position.

#### CONCLUSION

The taxpayer-harm argument is a tremendously powerful tool: it allows for the individualistic impulses of most citizens to be pacified by rationalizing paternalistic criminal statutes as necessary to prevent harm to the public more generally. However, the argument has a number of weaknesses when scrutinized by criminal law theory, and does not seem to hold water except under the most radical utilitarian deterrence jurisprudence. Under more mainstream views, though, the conduct punished by taxpayer-harm statutes must be shown to be harmful in a legally cognizable way, wrongful, and of concern to the public. Taxpayer harm fails to meet these requirements, and it is no surprise that theoretical inconsistencies lead to practical absurdities, with intrusive police investigatory powers permitted in innocuous spheres of behavior. If the concern over taxpayer harm is genuinely central, and not just a makeweight for paternalism, then legislators should roll back criminalization in these areas. A solution to problems both in principle and practice—and one that does not ignore the underlying pecuniary concerns animating the legislation—is found in moving the regulation of taxpayer-harming conduct from the punitive-criminal to the compensatory-civil paradigm. If, on the other hand, legislators' invocation of the taxpayer-harm argument in criminalization is really just a supplement to paternalistic arguments emphasizing the intrinsic value of human life, our preceding discussion still has value: it means that the this makeweight cannot do the work it must, and should be wholly abandoned.