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## Guidance Rules and Enforcement Rules: A Better View of the Cathedral

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# ARTICLE

## GUIDANCE RULES AND ENFORCEMENT RULES: A BETTER VIEW OF THE CATHEDRAL

Dale A. Nance\*

*Contemporary economic analysis of law is a product of the confluence of standard microeconomic analysis with a legal tradition heavily influenced by American Legal Realism. The effect of this merger has often been an analysis of legal institutions from the perspective of the Holmesian "bad man," who sees predicted legal actions as merely costs or benefits to be taken into account. This approach might be illuminating for the purposes of an "outsider," such as a behavioral sociologist or perhaps even a legal advisor alerting her "bad man" client to the risks of adverse legal consequences. But it produces bizarre results when used to understand basic legal concepts, such as the notion of property, that in fact reflect the perspective of "insiders," that is, persons who try to shape the law to achieve various purposes and those citizens who willingly conform their conduct to the law's requirements. The resulting distortion is demonstrated by an analysis of one of the most important articles in the literature of law and economics. Reexamination of that article forms the basis of an improved understanding of the relationship between economic analysis and such legal concepts.*

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## INTRODUCTION

ONE of the challenges of legal theory is to articulate a core set of concepts, not too large in number, that can be used to analyze the enormous variety of particular laws. Some theorists have sought to reveal the recurring patterns in legal relations while paying no particular attention to the broad institutional goals served by such patterns. For example, early in this century, Wesley Hohfeld analyzed jural relations as falling into one of eight related categories or combinations thereof.<sup>1</sup> Al-

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<sup>1</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913). For future reference, it is convenient to summarize his entitlement forms here. The categories are: right, duty, privilege, no-right, power, immunity, disability, and liability. *Id.* at 30. All start with the primitive notion that A can have a *duty* to B with respect to act X if A is obligated to B to do or refrain from doing X. One can then say that B has a *right* (also sometimes called a *claim-right*) against A with respect to X. But if B has no such right against A, then B has a *no-right* against A with respect to X, and A has a *privilege* as against B with

though some have criticized his work as mere formalism, there can be little doubt that Hohfeld's analysis of entitlement forms provides considerable insight for those who are willing to take the time to study it carefully.<sup>2</sup>

On the other hand, some theorists, while laboring over more macroscopic issues concerning the nature and functions of law in general, have also done much to advance our understanding of the relationship between such big questions and more mundane analytical questions. For example, starting with the notion that law is the enterprise of subjecting human conduct to the governance of rules, Lon Fuller dedicated much of his career to the elaboration of principles to answer questions like "What kinds of conduct are suitable to be governed by rules?" and "What kinds of rules are most appropriate in each of the various domains of social life?"<sup>3</sup> Answers to such questions inevitably involve exploration of the ways that various kinds of rules function.

With the increasing importance of economics in the analysis of legal rules, one article has emerged in recent decades as perhaps the most influential piece of scholarship relating the macroscopic to the microscopic. In 1972, building on the work of other pioneers in the field, Guido Calabresi and Douglas Melamed identified a particular typology of legal rules—distinguishing among property, liability, and inalienability rules—and analyzed those rule types with respect to efficiency goals, distributional goals, and "other justice considerations."<sup>4</sup> Their frame-

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respect to X. *Id.* at 30-33. If C has the authority to change the existing relationship between A and B with respect to X, such as changing B's right into a no-right, then C has a *power* with respect to A, B, and X, and A and B each have a *liability* with respect to C and X. *Id.* at 44-53. But if C has no such authority, then C has a *disability* with respect to A, B, and X, and A and B each have an *immunity* with respect to C and X. *Id.* at 55. (As a special case, C can be either A or B.) While Hohfeld clearly and rightly believed that clarity in the use of these conceptions is helpful in resolving practical legal problems, he made no attempt to relate his conceptions to macro-level governmental policies. See *id.* at 20.

<sup>2</sup> See, e.g., J. M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 *U. Miami L. Rev.* 1119 (1990) (illustrating the radical antiformalism inherent in Hohfeld's analysis).

<sup>3</sup> See generally Lon L. Fuller, *The Morality of Law* (rev. ed. 1969); *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Kenneth I. Winston ed., 1981).

<sup>4</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089 (1972) [hereinafter C&M].

work has since been used in countless law school classes to explain and critique substantive doctrines like the law of adverse possession, the law of nuisance, and the law of eminent domain,<sup>5</sup> as well as remedial doctrines governing the choice between damages and injunctive relief in any substantive area.<sup>6</sup> It has also found its way into an enormous number of scholarly writings on these and many other subjects.<sup>7</sup>

The impact of their article indicates the importance of a clear understanding of the typology that Calabresi and Melamed ("C&M") articulated. Unfortunately, a careful reexamination of the original work reveals that it is flawed in an important and fundamental way. Ultimately, the flaw can be attributed to the authors' failure to appreciate a distinction long recognized in the work of the "macro" legal theorists—the distinction between guidance rules and enforcement rules. In this Article, I will identify this mistake, trace some of its unfortunate consequences, and suggest its cause. What results is an enriched typology that distinguishes between rules for the *guidance* of the law-abiding citizen and rules for the *enforcement* of such guidance rules against the not-so-law-abiding. The resulting perspective complements similar work by Jules Coleman and Jody Kraus<sup>8</sup> and sheds additional light on the distinctions between

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<sup>5</sup> See, e.g., Olin L. Browder et al., *Basic Property Law* 997-1000 (5th ed. 1989) (eminent domain); Jesse Dukeminier & James E. Krier, *Property* 140 n.19, 985 (3d ed. 1993) (adverse possession); Charles M. Haar & Lance Liebman, *Property and Law* 103-04 (2d ed. 1985) (nuisance); Sandra H. Johnson et al., *Property Law: Cases, Materials and Problems* 763-66 (1992) (nuisance); Sheldon F. Kurtz & Herbert Hovencamp, *Cases and Materials on American Property Law* 769-71 (nuisance); Grant S. Nelson et al., *Contemporary Property* 140-41 (1996) (nuisance).

<sup>6</sup> See, e.g., Douglas Laycock, *Modern American Remedies: Cases and Materials* 355-56 (2d ed. 1994).

<sup>7</sup> In fact, theirs is one of the most frequently cited of all law review articles. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 *Chi.-Kent. L. Rev.* 751, 767 tbl.I (1996) (reporting that C&M was the eleventh most frequently cited article in the surveyed journals during the 1956-1995 period, which includes sixteen years before the article was even published).

<sup>8</sup> Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *Yale L.J.* 1335 (1986).

tort and crime and between distributive and corrective justice, both matters of enduring scholarly interest.<sup>9</sup>

It will be evident that the argument presented here could be developed more abstractly as constructive criticism of various strands of modern legal theory not limited to law and economics. Indeed, the later Parts of the Article move far away from the details of the contribution by C&M. I have nonetheless chosen to ground my discussion in a critique of their work, both because of the analytical precision that is made possible by focusing on a specific example of post-Realist theorizing and because of the continuing importance of their contribution.<sup>10</sup>

In Parts I and II, I reexamine the typology presented by C&M, identify an important ambiguity in their scheme, and explain the best way to resolve that ambiguity. The key, it will be seen, is to identify their rule types as guidance rules rather than enforcement rules, exactly the opposite of the prevailing view. In Part III, I relate this result to the distinction between a price and a sanction, illustrating the untoward consequences of conflating the guidance and enforcement functions. In Part IV, I discuss the contribution of Professors Coleman and Kraus and present another possible resolution of C&M's ambiguity. In Part V, I further demonstrate the importance of the distinction between guidance rules and enforcement rules by illustrating certain features of the analysis of legal norms that tend to be masked by the usual understanding of C&M's framework.

C&M welcomed the potential results of taking a different view. Likening the matter to Claude Monet's famous paintings of the Rouen Cathedral, they acknowledged that their typology was only "One View of the Cathedral."<sup>11</sup> In that spirit, and with

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<sup>9</sup> See, e.g., Symposium, *The Intersection of Tort and Criminal Law*, 76 B.U. L. Rev. 1 (1996); Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 Iowa L. Rev. 403 (1992).

<sup>10</sup> Several articles, the most notable of which are discussed hereafter, have appeared in the last couple of years continuing the debate largely initiated by Calabresi and Melamed. The continuing influence of C&M is also evidenced by a collection of papers presented as a twenty-fifth anniversary retrospective on that piece and its influence at the Annual Meeting of the Association of American Law Schools on January 5, 1997, and published as Symposium, *Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective*, 106 Yale L.J. 2081 (1997).

<sup>11</sup> C&M, *supra* note 4, at 1090 n.2.

the undeniable benefit of much hindsight, I offer another view of the law's domain. It is not so much a *different* perspective, however, as a *broader* one: I offer an  $n+m$  dimensional view that includes two interpretations of C&M's view, one  $n$  dimensional and the other  $m$  dimensional, as special cases.

Moreover, the significance of this expanded focus is not merely analytical. It allows one to correct a severe distortion present in C&M's scheme of analysis, considered as a component of legal theory for a liberal state. That distortion arises from the peculiar blending of an interest in the incentives that affect behavior with a skepticism about substantive legal rules. In other words, it reflects the marriage of economic rationalism with American Legal Realism. Whatever one thinks of these two theoretical orientations taken separately, their merger has produced a theory, conventional law and economics, that can hardly avoid missing the forest for the trees because it presupposes a model of human behavior at odds with the liberal institutions it is used to interpret. Any comprehensive legal theory must come to grips with the nature of man and of the law as a human institution. Going back to the basics of legal ordering and seeing C&M's contribution in that light make possible an improved conceptual framework of liberalism's legal entitlements.

## I. A CRUCIAL AMBIGUITY

In this Part, I restate C&M's typology of rules (Section A), identify the ambiguity of interest (Section B), and demonstrate the unsatisfactory nature of C&M's statements relating to this ambiguity (Section C). The discussion in the last Section also points the way toward the solution offered in Part II.

### A. *The Rule Typology Revisited*

Starting with the proposition that the law chooses among citizens in the allocation of entitlements, C&M identified three distinct ways in which those entitlements are protected:

An entitlement is protected by a *property rule* to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. . . .

Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a *liability rule*. . . .

An entitlement is *inalienable* to the extent that its transfer is not permitted between a willing buyer and a willing seller.<sup>12</sup>

The authors then exemplified these rule types in the course of explaining some relationships among them:

It should be clear that most entitlements to most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain, and by a rule of inalienability in situations where Taney is drunk or incompetent.<sup>13</sup>

This passage suggests, although it does not exactly say, that in a given context, with respect to a given issue, only one of the three rules can apply. For example, if Taney's relationship to Marshall in regard to Marshall's interest in owning the house is governed by a property rule, then it cannot also be governed on the same issue by a rule of inalienability. Inalienability denies the power of Taney and Marshall to transfer the entitlement by agreement, yet the power to transfer seems implicit in the definition of a property rule. Of course, C&M's definition of a property rule does not actually say that such a power to transfer exists; it says only that if a transfer is to occur, it must be by

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<sup>12</sup> C&M, *supra* note 4, at 1092 (emphasis added). C&M did not write with the analytical precision of a Hohfeld, and one should not read this passage as intended to provide detailed necessary and sufficient conditions for the use of the concepts of property rules, liability rules, and inalienability rules. Indeed, I shall point later to qualifications that seem to be implicit in their discussion.

<sup>13</sup> *Id.* at 1093. One conspicuous ambiguity in the C&M formulation is the reference to an "objectively" determined price under liability rules. See *id.* at 1092. The objective-subjective distinction can mean many things, but in this context the authors make clear that all that is meant by "objective" is that it is determined by a third person, the adjudicator, rather than by agreement between the parties. *Id.* Their eminent domain example illustrates this point. Whether this is a good way to use the term "objective" is subject to doubt. I would have preferred a phrase like "publicly imposed value" instead of "objectively determined value." But no harm is done as long as one keeps in mind the intended distinction. C&M certainly did not mean to suggest that "objective" (publicly imposed) valuation is inherently superior to "subjective" (privately agreed) valuation. Indeed, they emphasized that the latter often generates more efficient outcomes. See *id.* at 1124-27.



agreement.<sup>14</sup> But the authors clearly intended the power to transfer to be an aspect or implicit corollary of a property rule.<sup>15</sup>

Similarly, if Taney's relationship to the government with regard to its interest in owning the house for a particular purpose is governed by a liability rule, then it cannot also be governed on the same issue by a property rule. For if the government may take the house upon payment of compensation, then it is not true that the government may *only* acquire it by voluntary, negotiated transfer. Significantly, it does not matter whether the government *might* obtain the entitlement by a voluntary, negotiated purchase. That alone does not make the relationship one governed by a property rule.<sup>16</sup> On the other hand, it appears that a *power* to make a voluntary transfer is implicit in the concept of a liability rule, just as it is implicit in the concept of a property rule.<sup>17</sup>

Finally, this power to make a voluntary transfer serves to differentiate both property and liability rules from inalienability rules. Accordingly, an entitlement governed by an inalienability rule cannot also be governed by a property or liability rule as between the same persons. As far as is indicated by the quoted definitions, a rule of inalienability might be constructed so as to allow for an unconsented taking, or such a taking might be pro-

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<sup>14</sup> Actually, what it says is that someone who "wishes" to "remove" an entitlement governed by a property rule "must buy it," *id.* at 1092, but of course C&M could not really have meant that: If anyone who merely "wishes" to have property belonging to someone else must buy it, then the law would be compelling unwanted sales all over the place, which is inconsistent with the authors' further specification that the sale be a *voluntary* transaction. Thus, what C&M surely meant was that a property rule is in place only if, in order to acquire the entitlement or damage its *res*, one must obtain the consent of its present holder.

<sup>15</sup> See Coleman & Kraus, *supra* note 8, at 1345 (asserting but not arguing the point); Madeline Morris, *The Structure of Entitlements*, 78 *Cornell L. Rev.* 822, 835, 844, 849-51 (1993) (assuming but not arguing the point).

<sup>16</sup> Of course, if the government's purpose in acquiring the entitlement does not satisfy constitutional requirements for the exercise of eminent domain so that an involuntary taking is not allowed, then with respect to that purpose the relationship between Taney and the government will be governed by a property rule. But that is just to restate the truism that two persons may be related by a different type of rule with regard to the same object when a different issue is at stake.

<sup>17</sup> See Morris, *supra* note 15, at 845 (again assuming but not arguing the point).

hibited. In this respect, an inalienability rule might operate more like a liability rule or more like a property rule.<sup>18</sup>

Exploring issues of mutual exclusivity suggests a different issue: exhaustiveness. Clearly C&M did not mean that these three rules are the only ones that can apply. Other configurations of duties, privileges, powers, and immunities can be imagined, even when limiting one's attention—as did C&M—to rules governing the transfer of entitlements.<sup>19</sup> Indeed, later in their article C&M added what they themselves regarded as a previously neglected rule, although they did not characterize it as a distinct *type* of rule.<sup>20</sup> It can be illustrated by taking the case of Taney, whose burning of leaves on his land causes smoke and odors to pass over to Marshall's. Putting aside inalienability, there are actually four readily identifiable configurations of property and liability rules.

First, if we conclude that Taney is free to do so without accounting to his neighbor, we recognize a property rule in regard to leaf burning, as long as Taney and Marshall are free to enter an agreement to stop the burning.<sup>21</sup> If, however, we conclude that Taney may not burn the leaves unless Marshall agrees to allow it, we again recognize a property rule, except that now the property rule favors Marshall by supporting his interest in enjoying his land free of the smoke and odors of leaf burning.<sup>22</sup>

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<sup>18</sup> See *infra* notes 94-100 and accompanying text.

<sup>19</sup> For a thorough discussion see Morris, *supra* note 15.

<sup>20</sup> See C&M, *supra* note 4, at 1116.

<sup>21</sup> See *id.* at 1115-16.

<sup>22</sup> See *id.* In the first case, Taney's Hohfeldian privilege is governed by a property rule, while in the second case, Marshall's Hohfeldian claim-right is governed by a property rule. See *supra* note 1. Since both are property rules, we might describe this difference by saying that in the first instance Taney has the property right with respect to leaf burning, and in the second Marshall has such a right. Notice, however, that in each of these cases, we could look at the matter from the point of view of the "loser," that is, we could ask about the nature of the entitlement held by the person who does not have the property right. It might appear as if that person has nothing at all. See, e.g., Carol M. Rose, *The Shadow of The Cathedral*, 106 *Yale L.J.* 2175, 2178-79 (1997) (referring to the loser in each case as having nothing). But sometimes this is mistaken: In the first case, for example, Marshall enjoys the rightful use of the unpolluted air so long as Taney chooses not to pollute, at least so long as Taney has no distinct claim-right against Marshall's enjoyment of the unpolluted air. Thus, Marshall has *something* in such a case, although C&M did not recognize that fact by

As a third possibility, if we conclude that Taney is free to burn the leaves provided he compensates Marshall for any harm thereby done to Marshall's interests, then we recognize a liability rule with respect to Marshall's entitlement to unpolluted air. Indeed, along with eminent domain, such conditionally privileged nuisances constitute the paradigmatic liability rules.<sup>23</sup>

Finally, the fourth possible rule arises if we conclude that Taney is free to burn the leaves so long as Marshall does not compensate Taney for the damage to Taney's interests in not being able to burn the leaves (e.g., the cost of having the leaves removed to be disposed of elsewhere). In that case, we recognize a different liability rule, one protecting Taney's leaf burning.<sup>24</sup>

All of the foregoing seems to have been intended by C&M and is now quite familiar to students of property law. And the most important observation to be made about this scheme is that its novelty consists entirely of the specification of liability rules as coequal to the more familiar property and inalienability rules.<sup>25</sup> Indeed, much of the interest in, and influence of, C&M's typology arises from this fact.<sup>26</sup> It is significant, therefore, that a

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giving a distinct name to this jural relationship. An exclusive focus on transfer relationships obscures this asymmetry.

<sup>23</sup> See C&M, *supra* note 4, at 1116 & n.55 (citing *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (polluting cement plant could continue operations upon payment of permanent damages)).

<sup>24</sup> According to C&M, "[t]he fourth rule, really a kind of partial eminent domain coupled with a benefits tax, can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney." *Id.* at 1116. Although in subsequent passages they explain why the fourth rule type is not encountered in common-law adjudication, *id.* at 1116-17, students of property will recognize that this is a plausible characterization of the rule in *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972), a case, coincidentally decided the same year that C&M published their article, in which the court ordered the defendant, an operator of cattle feedlots, to move and the plaintiff, the developer of a neighboring retirement community, to pay for it.

<sup>25</sup> Under an efficiency analysis, these liability rules are explained as responding to the existence of transaction costs, holdouts, or free riders that otherwise would impede the voluntary and Pareto efficient transfer of entitlements. See C&M, *supra* note 4, at 1105-10.

<sup>26</sup> There is an enduring controversy over the breadth of the circumstances calling for the use of liability rules on efficiency grounds. Compare Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *Yale L.J.* 1027 (1995) (arguing that liability rules can improve efficiency even in low transaction costs contexts by encouraging parties' disclosure of accurate information concerning their evaluations of entitlements), with James E. Krier & Stewart

crucial ambiguity in their typology involves the nature of liability rules.

### B. The Ambiguity Identified

Consider another hypothetical regarding Taney's entitlement in his house:

Marshall, in a hurry to make an important conference on the subject of judicial review, drives at a greatly excessive rate of speed, misses a turn, and crashes through the bay window of Taney's house.

Assume that the evidence would warrant, if not require, a finding that Marshall's driving was reckless. If Taney is entitled to compensation for the damages, how shall we describe the result in terms of the C&M typology? The lawyer's instinct is to describe the situation as entailing a liability rule, since Marshall is "liable" for the proximate consequences of his negligent or reckless conduct. Indeed, academics commonly reach this conclusion.<sup>27</sup> But this description is problematic and, I will argue, ultimately mistaken, at least for C&M's conception of a liability rule.

If one returns to their definition of such rules, one finds that a liability rule would cover this situation only if Marshall *may* drive recklessly provided compensation is paid.<sup>28</sup> Note the per-

J. Schwab, Property Rules and Liability Rules: The Cathedral in Another Light, 70 N.Y.U. L. Rev. 440 (1995) (arguing that factors like high transaction costs, which favor liability rules, are often offset by the high costs of judicial assessments of "damages" under liability rules and the need to encourage private parties to find ways to reduce transaction costs).

<sup>27</sup> Consider, for example, the following attempt to restate C&M's concept of a liability rule: "*Liability Rule*: My right to X (my security against being harmed by the reckless driving of others, say) requires that others compensate me (pay me damages) for crossing the border defined by my right to X." Jeffrie G. Murphy & Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* 112 (rev. ed. 1990). See also Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 715, 715 (1996) (describing liability rules as ones by which the state "discourages violations by requiring transgressors to pay victims for harms suffered" (emphasis added)); id. at 753 (characterizing negligence liability of drivers as involving a liability rule when driving is negligent). Such views are understandable considering C&M's own discussion of the accident situation. See *infra* notes 47-60 and accompanying text.

<sup>28</sup> Actually, C&M wrote in terms of what a Marshall "may" do if "he is willing" to pay compensation. See *supra* text accompanying note 12. If this is to be sensible as an interpretation of our practices, it must preclude the possibility that Marshall is

missive word “may,” implying social acceptance, if not outright approval, of the taking of the entitlement. This understanding is reinforced by the paradigm examples C&M offered: eminent domain and those nuisances that are allowed to continue (upon payment of compensation) because of the social good of the activities in question.<sup>29</sup> In the hypothetical, however, Marshall’s conduct is not socially desirable; it is not a privileged tort. Marshall is “liable,” in part, because society deems his conduct *wrongful*, the sort of activity that ought to be discouraged.<sup>30</sup> The definition of a liability rule does *not* read:

An entitlement is protected by a liability rule whenever someone *in fact* destroys the initial entitlement, or is able to do so, and is required because of such conduct to pay an objectively determined value for it.

Thus the fact that Marshall *can* act so as to impose this loss on Taney subject only to a damage award does not mean that the scenario instantiates a liability rule.<sup>31</sup>

*willing* but *unable* to pay. The state would not, for example, ordinarily be permitted to take private property without the constitutionally mandated compensation on the excuse that it has no money with which to pay it. See 3 Julius L. Sackman & Russel D. Van Brunt, Nichols’ *The Law of Eminent Domain* §§ 8.9-10 (rev. 3d ed. 1994). So C&M’s reference to the actor’s willingness to pay was probably intended to indicate either the existence of a legal duty to compensate or actual compensation. Which of these is the right way to understand “willingness” depends upon the resolution of the ambiguity addressed in the text.

<sup>29</sup> See C&M, *supra* note 4, at 1093, 1105, 1106-07, 1119-20. By “paradigm example” I mean an example that is so conspicuously employed to illustrate the concept that one may properly look to the example to help resolve ambiguities in the concept’s explanation or definition. Clearly, eminent domain is such an example in C&M’s article, and the conditionally privileged nuisance is at least very close to paradigmatic. In the following Section, I examine C&M’s comparatively brief and (I argue) non-paradigmatic treatment of accident law.

<sup>30</sup> See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 31, at 169-73, § 33, at 193-208 (5th ed. 1984). To be sure, negligence liability is also based on compensating the injured party. Whether these two ideas can be separated is one of the most fundamental theoretical issues in the law of torts, but its resolution does not affect the present point. Compare, e.g., Ernest J. Weinrib, *The Idea of Private Law* 56-83 (1995) (developing an Aristotelian account of the “intrinsic unity” of the plaintiff-defendant relationship) with Jules L. Coleman, *Risks and Wrongs* 386-406 (1992) (arguing that such separation can legitimately be maintained despite the plaintiff-defendant linkage inherent in our usual notion of corrective justice).

<sup>31</sup> Of course, it is true that after the fact we “accept” the injury, in the sense that the law is unable to undo the accident. But that does not mean that we accept, let alone condone, all the actions that brought the injury about. The same point likely is true

Perhaps then Taney's entitlement is protected in this context by a property rule. After all, we do allow people to agree to accept the consequences of reckless behavior, as in race car driving. Taney could have sold his permission to Marshall, thereby waiving any right to compensation. It is not, therefore, incoherent to say that Marshall should not have driven recklessly without Taney's consent. Of course, obtaining such permission would be practically infeasible, since probably neither Marshall nor Taney would have known in advance with whom to deal, even if they had the time to negotiate. But that is not the point here. The question is not whether transaction costs of negotiation are so high that as a practical matter the entitlement cannot be alienated in this context;<sup>32</sup> rather, it is simply whether it is correct under C&M's definitions to say that Taney's interest is protected by a (practically inalienable) property rule, as opposed to a liability rule.

Indeed, the only difficulty with characterizing the matter as involving a property rule is an ambiguous word in C&M's definition: Property rules are said to be in place when the acquiring party (Marshall) "must" buy the entitlement in a voluntary transaction.<sup>33</sup> In our example, Marshall in fact has, in one sense, taken Taney's entitlement (to be free of reckless damage to his house) without first negotiating a deal with Taney. Consequently, one would infer that the situation does not exemplify a property rule if the word "must" in the definition signifies an empirical proposition about what can be done by the Marshalls of the world rather than an imperative or prescription that only consensual transfers should occur.

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of some, but not all, nuisance cases in which an injunction is denied in favor of damages for fear of causing substantial waste or harm. Thus in a case like *Boomer*, see supra note 23, prospective, injunctive relief might be denied only because the polluting company has made a significant investment that cannot be reversed without serious costs; if the issue were to arise *before* such investment occurs, an injunction might issue if the anticipated pollution is considered wrongful. See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1, 15-18 (1989) (so interpreting *Boomer*).

<sup>32</sup> Cf. C&M, supra note 4, at 1100-01 (discussing the assignment of entitlements to "merit goods" and noting that high transaction costs can make such goods practically inalienable).

<sup>33</sup> Id. at 1092.

Notice that the interpretive assumption one would use to exclude Taney's entitlement from the property rule category is the same one that serves to include the entitlement in the liability rule category. If we take the rule types as referring to what persons are empirically capable of doing—what the law does or does not prevent them from doing—then we get the result that Taney is protected by a liability rule and not a property rule. However, if we take these rule types as referring to what the law prescribes—what the law directs that it is proper or improper to do—then we get the result that Taney is protected by a property rule and not a liability rule.<sup>34</sup> How shall we resolve this ambiguity?

### C. Wrestling with the Ambiguity

Of course, in one sense C&M were free to stipulate whatever definitions they wanted. Nonetheless, their choices may be criticized if, for example, they cause confusion or are internally inconsistent. Moreover, in the absence of any clear indication as to whether a prescriptive or descriptive definition was intended, we are faced with an interpretive question: Which definition makes more sense of what is otherwise presented in their paper? And even if one can determine what was intended, at least in particular passages taken by themselves, the ambiguity allows us to ask the interpretive question, especially because C&M's subject is the explanation of social practices.<sup>35</sup> Thus, although C&M's concrete intentions are relevant to the discussion, our ultimate concern is with the question of how to make C&M's scheme most coherent and enlightening as an account of legal practices.

We may start by noting the way in which C&M characterized all of their rule types: They referred to them as ways of "protecting" entitlements.<sup>36</sup> And "protection" might be thought to be coincident with enforcement. That is, an entitlement is not "protected" except to the extent it is enforced, and C&M's rule types

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<sup>34</sup> Another logical possibility is that C&M's rule types refer to what the law is prepared to enforce, whether or not that enforcement is actually successful as to any particular person. This possibility is discussed *infra* Section IV.B.

<sup>35</sup> See Ronald Dworkin, *Law's Empire* 53-65 (1986) (discussing the role of author's intention in interpretation).

<sup>36</sup> See C&M, *supra* note 4, at 1089, 1105, 1106.

are thus seen as marking different ways that society enforces entitlements. Indeed, this is today the generally accepted view of the matter. Although variations and ambiguities are legion, it is fair to say that the prevailing account identifies C&M's rule types with particular, assumedly effective remedies: Liability rules are identified with the actual payment of compensation if an unconsented taking occurs, and property rules are identified with the effective prevention of unconsented taking, usually by an injunction, which forces parties to negotiate any transfer of the entitlement.<sup>37</sup>

There is no logical difficulty, however, in distinguishing between a rule that is designed to protect an entitlement and one that succeeds in doing so. This raises the possibility of identifying the rule types with remedies that are not necessarily effective.<sup>38</sup> Furthermore, it is not at all clear that C&M were really considering the specification of various rule types designed to protect otherwise well-defined entitlements. It is also plausible, despite C&M's characterization, to think of these rule types as different ways a general sense of entitlement can be given concrete form. This is the position taken by a small minority of scholars.<sup>39</sup>

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<sup>37</sup> See, e.g., Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 *Yale L.J.* 2149, 2150-51 (1997) (identifying liability rules with tort damages and property rules with injunctions); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 *J. Legal Stud.* 13, 19 (1985) ("[T]he property rule/liability rule distinction goes only to the question of remedies to protect substantive rights."). The matter is often presented to students in this way. See, e.g., Robert Cooter & Thomas Ulen, *Law and Economics* 102-08 (1988); Dukeminier & Krier, *supra* note 5, at 140 n.19, 985; Kurtz & Hovenkamp, *supra* note 5, at 769-71; A. Mitchell Polinsky, *An Introduction to Law and Economics* 15-16 (2d ed. 1989). Although the effectiveness of the remedies is usually only implicit in the discussions, its definitional significance is sometimes made quite explicit. See *infra* notes 175-177 and accompanying text.

<sup>38</sup> This possibility is taken up in Section IV.B, *infra*, but for now it is worth noting that if one allows for a gap between remedies and behavior, one complicates the drawing of efficiency implications from the type of rule employed.

<sup>39</sup> See Coleman and Kraus, *supra* note 8, at 1340-47; see also Morris, *supra* note 15, at 842-44, criticizing C&M's use of the "protection" terminology and concluding that:

rules—such as property, liability, and inalienability rules—that determine entitlement forms are best thought of as the rules constituting or defining the structure of particular entitlements rather than as rules providing for the protection of pre-existing "general" entitlements. Calabresi and Melamed's three



We can obtain some help here by looking more closely at the passages that implicitly define the various rule types. Consider in particular a more complete version of the passage relating to inalienability rules:

An entitlement is inalienable to the extent that its transfer is *not permitted* between a willing buyer and a willing seller. The state intervenes not only to determine who is initially entitled . . . , but also to *forbid* its sale under some or all circumstances.<sup>40</sup>

The italicized words indicate a prescriptive focus. They certainly do not require that the prohibition be *effective*. If they did, a prohibition of prostitution would involve an inalienability rule only in those cases where the act of prostitution is deterred; in cases where the prohibited sale takes place we would be forced to say that a property rule is exemplified.<sup>41</sup> Nothing in their article suggests that C&M would really want to say that a rule forbidding prostitution is sometimes an inalienability rule and sometimes a property rule, depending upon whether a sale is in fact deterred. And if they would, what would they then say about a situation in which the prohibited sale occurs but the parties are caught and prosecuted?<sup>42</sup>

The same point applies to ordinary items of personal property. C&M assert that "much of what is generally called private property can be viewed as an entitlement which is protected by

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rules thus constitute three forms of entitlement, rather than one general kind of entitlement protected in three different ways.

Id. at 844 (footnote omitted).

<sup>40</sup> See C&M, *supra* note 4, at 1092-93 (emphasis added). The significance of the omitted material indicated by ellipses is taken up in Section II.B, *infra*.

<sup>41</sup> Because bans on prostitution prohibit only compensated exchanges of sex, they generate only a partial inalienability rule, one that applies when the price between willing buyer and willing seller is relatively explicit and non-zero. It is sometimes useful, therefore, to distinguish between compensated and uncompensated transfers and between the inalienability rules that may govern each. See Morris, *supra* note 15, at 837-38. See generally Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987).

<sup>42</sup> A thoroughly descriptive approach would presumably speak in terms of statistical regularities, and the fact that a given act is *generally* deterred might be enough to speak of the existence of an effective rule. However, C&M's treatment does not otherwise take such a disengaged anthropological stance, and there is no evidence whatsoever of statistical generalization in their arguments.

a property rule.”<sup>43</sup> But is this true if we go with the descriptive form of the definitions? Recall the word “must” in C&M’s definition of property rules.<sup>44</sup> Clearly there are rules against theft, and equally clearly most people honor such rules most of the time. But is it true that they “must” honor those rules, in the sense that they realistically have no option but to do so? In this same passage, C&M go on to write, “No one *can* take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property.”<sup>45</sup> Yet, if we take the word “can” literally, rather than as an inartful way of saying “is allowed to,” the proposition becomes rather ludicrous.<sup>46</sup> In fact, if we take the empirical question seriously, it will be true in a considerable variety of contexts that the individual who in most lawyers’ and lay persons’ ordinary reckoning “owns” an item of personalty does not even have the protection of a liability rule, since another person *could* take the thing, avoid detection, and not even have to pay compensation. Presumably this is not what C&M meant to follow from their definitions. Certainly, it is not what they *should* have meant to follow if, as the assertion quoted above confirms, they wanted their definitions to resemble even loosely our more ordinary conceptions.

These considerations suggest that property, liability, and inalienability rules should be considered prescriptions concerning what people should do, not descriptions of what they can or must do. Consider, however, what C&M have to say about cases like that of the recklessly driving Marshall:

The example of eminent domain is simply one of numerous instances in which society uses liability rules. Accidents is another. If we were to give victims a property entitlement not to be accidentally injured we would have to require all who en-

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<sup>43</sup> C&M, *supra* note 4, at 1105.

<sup>44</sup> *Id.* at 1092.

<sup>45</sup> *Id.* at 1105 (emphasis added).

<sup>46</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453, 458-64 & tbl.1 (1997) (arguing that the threat of criminal punishment is a weak deterrent in view of the small probability that perpetrators of even serious crimes will be successfully prosecuted and presenting in particular data indicating a one percent chance of such for larceny or motor vehicle theft).

gage in activities that may injure individuals to negotiate with them before an accident, and to buy the right to knock off an arm or a leg. Such pre-accident negotiations would be extremely expensive, often prohibitively so. To require them would thus preclude many activities that might, in fact, be worth having.<sup>47</sup>

In this curious passage C&M make an empirical claim, namely that society in fact uses liability rules in regard to the allocation of accident costs.<sup>48</sup> Now the general rule, in this society at least, is that the accident costs of someone unintentionally injured by the act of another are to be shifted to the other if, but only if, the other was negligent, a compensation premised on fault.<sup>49</sup> How does this relate to the scheme of definitions offered by C&M? In particular, does it illustrate the employment of a liability rule as they claim?

If we assume that their rule types are attuned to the law's prescriptions, then for non-faulty accidents the actor has a property right in the activity, whereas for faulty accidents the victim has a property right against injury.<sup>50</sup> The law's prescription is that Marshall should not act recklessly, at least not without his potential victim's consent, and if he does so then he should pay for the consequences. The latter part of this rule is a rule of compensation, to be sure, but it is not a liability rule as defined. The law does *not* say that it is good, or even acceptable, for Marshall to drive recklessly provided he pays for the consequences.<sup>51</sup>

On the other hand, if we assume that their rule types are descriptive, referring to what Marshall *can* do rather than what he is *supposed* to do, then it might seem that Taney has only liabil-

<sup>47</sup> C&M, *supra* note 4, at 1108-09 (footnotes omitted).

<sup>48</sup> Of course, the fact that this claim is empirical does not necessarily mean that the rule types at issue are descriptive in the sense we have been discussing. C&M could be making an empirical claim about society's use of prescriptively understood rules.

<sup>49</sup> See Keeton et al., *supra* note 30, § 29, at 162-64 (describing the unavoidable accident doctrine). For simplicity, this assumes away affirmative defenses as well as issues of causal proximity. One subtle qualification is discussed *infra* at notes 221-223 and accompanying text.

<sup>50</sup> See *supra* note 22.

<sup>51</sup> Once again, one might reply that to say that we will do nothing to stop reckless driving other than require compensation, if that were the case, is to "accept" reckless driving. But that is true only in the limited sense that we would accept the fact that the law should do nothing more in terms of coercive responses to reckless driving. See *supra* note 31; *infra* Section IV.B.

ity rule protection of his house. And this would suggest, given the empirical claim made by C&M, that they really had the descriptive notion of rules in mind. But what then shall we say, for example, about a Marshall who is judgment proof? Since no compensation can be collected from him, Taney does not have even liability rule protection. Once again, surely C&M did not mean, and should not have meant, for their definitions to depend upon such fortuities.

What then are we to make of the efficiency argument that underlies C&M's discussion of accident costs? If one takes the prescriptive interpretation of the rule types, as the foregoing analysis suggests one should, then accident law is governed in the general case by property rules. Are C&M correct that this would be inefficient because the transaction costs of bargaining will "preclude many activities that might, in fact, be worth having"?<sup>52</sup>

To answer that question, one must be more precise than C&M were about the identification of the activity that is supposed to be "worth having." For example, the driving of automobiles is certainly an activity worth having, but how would this be precluded by a property rule that "protects" Taney's entitlement to be free of injury caused by negligent driving? If C&M were contemplating an activity, say driving *simpliciter*, that simply poses the risk that someone will drive negligently, then it may well be important on efficiency grounds not to have a property entitlement in Taney to be free of such an activity. In fact, the Taney's of our society do not have such property entitlements. But they do have property entitlements against negligent driving, with no impairment of efficiency along the lines adduced by C&M.<sup>53</sup>

Thus, to the extent it is valid at all, C&M's efficiency argument works only against certain configurations of property entitlements, and it does *not* work against the particular property

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<sup>52</sup> See C&M, *supra* note 4, at 1109.

<sup>53</sup> Of course, there may be other reasons that fault-based liability is inefficient, at least in a particular context. For example, the administrative costs associated with determining fault may be higher than those associated with some no-fault systems. See generally Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970) (undertaking a general critique of the fault system); Steven Shavell, *Economic Analysis of Accident Law* (1987) (same).

rules that our society in fact recognizes with regard to accidents.<sup>54</sup> Liability rules, in the prescriptive sense, are certainly used in our law, but they are not nearly so common as C&M seem to suggest.<sup>55</sup> Only by conflating the lawyer's ordinary sense of liability with C&M's technical sense of (prescriptive) liability rules does one get the false impression that liability rules, in the latter technical sense, are so widespread.<sup>56</sup>

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<sup>54</sup> Indeed, there is a substantial literature illustrating the efficiency of a fault-based system of accident compensation, as well as the limits thereof. See, e.g., John Prather Brown, *Toward an Economic Theory of Liability*, 2 *J. Legal Stud.* 323 (1973); Richard A. Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29 (1972); Steven Shavell, *Strict Liability Versus Negligence*, 9 *J. Legal Stud.* 1 (1980).

<sup>55</sup> There may be cases of excused speeding, for example in the case of an ambulance, but in such cases it would be odd to say that the driving was faulty at all. Rarely applied examples of liability rules, on the prescriptive understanding, are the rules prescribing compensation for damages occurring during privileged intentional invasions of property interests and the rules requiring compensation for damages accidentally caused by important but ultrahazardous activities. See Keeton et al., *supra* note 30, § 16, at 108-09, § 78, at 545-59.

<sup>56</sup> Indeed, it would have been less confusing had C&M used a different terminology for what they called liability rules. Cf. Krier & Schwab, *supra* note 26, at 443 (commenting that rules allowing forced sales are not very aptly called "liability rules"). More descriptive, though less convenient, would have been a term like "compensated taking" rules. Cf. Morris, *supra* note 15, at 847, 876-80 (retaining the term "liability" rule and contrasting it with an "uncompensated taking" rule); Rose, *supra* note 22, at 2178-79 (characterizing a liability rule as involving a "property right subject to an option"). In earlier work, Calabresi had referred to both the nuisance and negligence rules of liability as "liability rules" without characterizing the latter notion except by tacit reference to the lawyer's conventional meaning of liability. See, e.g., Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 *J. Law & Econ.* 67 (1968). To be sure, part of the blame for this particular confusion must be placed on Hohfeld, who used the notion of "liability" in the similarly technical sense of being subject to a power. See *supra* note 1. There is, however, no evidence that C&M relied on Hohfeld in formulating their conception of liability rules. Moreover, Hohfeld's conception of a liability is quite different in other respects. In particular, the requirement of payment is irrelevant to whether or not something is a Hohfeldian liability, as illustrated by the donative creation and uncompensated exercise of a power of appointment. Applying Hohfeld's framework to the reckless driving case, if Marshall drives recklessly into Taney's house and is required to pay for the resulting damage, Marshall's ability to impose this change does not entail an Hohfeldian liability in Taney with respect to the house, since Taney's legal rights in the house are not changed thereby. (The physical attributes and the value of the house are changed, but these are distinct matters.) Rather, that ability (arguably) entails a Hohfeldian power in Marshall to create a new claim-right in Taney with respect to a different thing, Marshall's assets. This assumes that a Hohfeldian power can be exercised by an act that only *risks* an unintended change in legal relations. In this nonparadigmatic Hohfeldian sense, Taney's property in the

Evidently C&M were confused on this point. Their various arguments and characterizations lead in conflicting directions, although the confusion generally goes completely unnoticed.<sup>57</sup> This may be attributable to a desire to illustrate liability rules as more commonly employed than people were inclined to admit, at least at the time their article was published. Thus, the idea that a nuisance would be allowed to continue for the sake of some overriding public good sounds like a form of eminent domain exercised by a private party, a practice fraught with difficulties.<sup>58</sup> C&M were careful to point out such uses of what are liability rules, even on the prescriptive understanding of their rule typology.<sup>59</sup> Nonetheless, when one moves to the problem of "accidents," such an understanding of their definitions entails

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house is "protected" by a liability rule, and this is true even though the law neither authorizes nor approves of Marshall's exposing Taney to the risk of recklessly inflicted damage without Taney's prior consent. See Hohfeld, *supra* note 1, at 52-53 (indicating that a holder of a legal power may be under a legal duty not to exercise that power, but not indicating whether the exercise of a power in violation of such a duty is necessarily a nullity).

<sup>57</sup> For example, one commentator cites C&M in support of the proposition that "we could conceptualize strict liability as an entitlement protected only by a liability rule (damages) and negligence as an entitlement potentially protected by a property rule (an injunction)." Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. Rev. 113, 135 (1990). As I argue, this is certainly the right way to categorize the negligence regime (aside from the apparent identification of property rules with injunctive relief), but it is decidedly not how C&M categorized it. Undoubtedly, C&M's categorization reflects the fact that negligence can almost never be so anticipated as to make injunctive relief practicable. But we have seen that this fact is not determinative. See *supra* note 32 and accompanying text.

<sup>58</sup> See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 876 (N.Y. 1970) (Jasen, J., dissenting) (arguing that permitting a nuisance to continue upon payment of permanent damages amounts to illegitimate private exercise of eminent domain); *Somerville v. Jacobs*, 170 S.E.2d 805, 816-17 (W. Va. 1969) (Caplan, J., dissenting) (arguing that permitting innocent improver to take land of neighbor upon payment of permanent damages amounts to same). The claim of a private taking in such cases is less convincing when the putative taker makes the investment that is being protected without knowledge that his actions violate the property rights of another. In such cases, the moral power of the argument against compensated private takings suffers from the weakness, or even absence, of perverse incentives. Nonetheless, such dissents express legitimate concern about even unintentional but negligent invasions of property interests.

<sup>59</sup> See C&M, *supra* note 4, at 1105-06.

the conclusion, contrary to C&M, that liability rules are rather unusual.<sup>60</sup>

## II. THE AMBIGUITY RESOLVED

### A. Guidance Rules and Enforcement Rules

A reader deeply imbued with the spirit of American Legal Realism and the pragmatic instrumentalism that has been its legacy will undoubtedly be impatient with this discussion. She will argue as follows. What is the point of this quibble over terminology, over "may" instead of "can"? What, after all, is the difference between the following laws:

Law #1: Do not act negligently. If you do act negligently, you must pay for consequent injuries.

Law #2: You are permitted to act negligently, provided you pay for any consequent injuries.

Under each law, she will argue, one is required to pay if (and only if) one negligently causes injury.<sup>61</sup> Of course, if some other legal consequence, besides compensating victims, is attached to negligence in the context of Law #1 but not in the context of Law #2, then there would be an obvious difference between the

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<sup>60</sup> One of the interesting puzzles in this regard concerns strict liability for defective products. Assuming that defectiveness can be meaningfully distinguished from the results of a negligence analysis, then such rules may indeed satisfy the prescriptive definition of a liability rule. The familiar implication is that manufacturers are not acting improperly by (non-negligently) producing defective products, since the rule is simply one compelling that a contract of insurance be sold with the product in question, with whatever market-induced deterrence of defects that results therefrom. See Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. Legal Stud. 645 (1985); Samuel A. Rea, Jr., *Comments on Epstein*, 14 J. Legal Stud. 671 (1985); Michael J. Trebilcock, *Comment on Epstein*, 14 J. Legal Stud. 675 (1985); Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. Legal Stud. 681 (1985). However, the assumption that defectiveness is meaningfully distinguishable from negligence is certainly subject to challenge, especially in the context of design defects. See Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593 (1980). See also Restatement (Third) of Torts: Products Liability §§ 1, 2 (Proposed Final Draft 1997) (effectively precluding non-fault-based liability for defects in design or failure to warn).

<sup>61</sup> The "only if" necessity clause does not, of course, follow analytically from the statement of the rules, but from the unstated premise that no *other* rule requires payment if one is non-negligent or if one's negligence does not proximately cause harm.

way these rules operate.<sup>62</sup> Conversely, if social practice has evolved so as to undermine the prohibition formally expressed in a provision like Law #1, then the applicable real rule under such a nominal law may well be equivalent to Law #2. But let us put these possibilities aside and limit our attention to the quoted laws.<sup>63</sup> Even as stated are they not, practically speaking, inevitably the same rule? If so, what is the point of categorizing them differently?

To answer these questions, one must recognize a fact long familiar to legal philosophers, going back at least to Aquinas, and before him to Aristotle. Rules of law are aimed at two theoretically distinguishable types of citizen, each of which can and generally does exist in varying degrees in real people. Sometimes a rule is directed at the citizen who is law-abiding, who turns to the law for guidance as to his responsibilities and who would not knowingly disobey the law. On the other hand, sometimes a rule is directed at the disobedient citizen, the recalcitrant who looks to the law only in order to discern what material consequences will attend his breach of the law's requirements.<sup>64</sup> As H.L.A. Hart reminded us a good ten years before C&M published their article:

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<sup>62</sup> For example, criminal punishment is often prescribed for reckless behavior in some contexts, including automobile driving. See Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* § 3.7 (2d ed. 1986).

<sup>63</sup> One might also question whether Law #2 makes any sense on its face. After all, why would the state permit someone to act in a way that is negligent, which is to say unreasonable? There are many possible answers to that question. For example, if unreasonableness is determined by a community standard, then the law might express a decision to override that community standard, authorize the conduct, and insulate the negligent actor from any more serious consequences, legal or otherwise, that might result from a determination that the actor has violated that standard. This determination could arise because lawmakers are convinced that the prevailing community standard of care is too stringent. This may be bad policy, as reflected in the fact that our law of negligence looks more like Law #1 than Law #2, but Law #2 is certainly not incoherent.

<sup>64</sup> For a quick summary with citations to both Aristotle and Aquinas, see John Finnis, *Natural Law and Natural Rights* 28-29 (1980) (distinguishing between law as needed to solve "the co-ordination problems of communal life" and law as needed "to force selfish people to act reasonably"). Kant emphasized that sometimes the state must resolve good faith disagreements among law-abiding individuals over matters of principle. See Immanuel Kant, *The Metaphysics of Morals* \*312 (1797).



At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence.<sup>65</sup>

Nor is this just the armchair idealism of philosophers. Empirical work supports the proposition that, in general, people obey the law at least as much out of a sense of the legitimacy of legal authority and the fairness of the laws that it generates as out of a fear of punishment.<sup>66</sup>

With this in mind, it is easy to answer the question posed by our legal realist. The two laws quoted above are the same from the perspective of the recalcitrant, since the information about potential legal consequences is the same.<sup>67</sup> Yet they are profoundly different for the law-abiding citizen. True, such a citizen might still ask for further guidance on the question of what constitutes "negligence" in driving, but given an answer to that question, or even given an instruction simply to use the citizen's

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<sup>65</sup> H.L.A. Hart, *The Concept of Law* 88 (1961). Lon Fuller illustrated the significance of this distinction most effectively in his famous allegory of King Rex, whose subjects were steadfastly loyal and willing to comply with the law but nonetheless found it impossible to regulate their conduct according to the law because of the serious mistakes that Rex made in attempting to develop, express, and apply rules. See Fuller, *supra* note 3, at 33-94. Fuller's arguments demonstrate the importance of various considerations, such as the norm that rules should not be contradictory, see *id.* at 65-70, that tend to be overlooked when one focuses only on law as a means of controlling society's miscreants.

<sup>66</sup> See generally Tom R. Tyler, *Why People Obey the Law* (1990) (presenting an empirical study of people's attitudes toward compliance with the law). For a quick and more recent summary of the empirical literature see Robinson & Darley, *supra* note 46, at 468-71.

<sup>67</sup> Of course, the recalcitrant might view the two laws as carrying different consequences in terms of nonlegal reactions by other citizens to the recalcitrant's conduct. Notice, however, that such a consideration by the recalcitrant presupposes that the two laws carry different social messages for at least some other citizens—citizens who, therefore, must not themselves be recalcitrant.

own best judgment about the matter, this citizen stands in a very different relationship to the first law than he does to the second.<sup>68</sup>

Thus, one can distinguish between *guidance rules*, rules designed for law-abiding citizens, and *enforcement rules*, rules designed to deal with recalcitrants.<sup>69</sup> To avoid confusion, it should be added that a given rule can be directed at both audiences and so function as both a guidance rule and an enforcement rule. For example, the first sentence in Law #1 is primarily a guidance rule, while the second states only an enforcement rule. Law #2, however, principally states a guidance rule, although an enforcement rule would probably be implied in the event that an actor refused to compensate someone injured by his negligence. In any event, the important point here is to recognize that Law #2 is not simply a function-merged restatement of Law #1, because the guidance aspect of Law #2 is not the same as the guidance aspect of Law #1.<sup>70</sup>

Legal realists have difficulty seeing this difference because they tend to operate under the famous "bad man" postulate articulated by Oliver Wendell Holmes a century ago:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good

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<sup>68</sup> See Judith Jarvis Thomson, *Rights and Compensation*, 14 *Noûs* 3 (1980) (distinguishing between cases in which A *justifiably* invades B's rights and cases in which A *impermissibly* invades B's rights, in each case A owing B compensation for the invasion). Of course, negligence is a notoriously tricky concept. For recent work laying out theories not based on efficiency, see Richard W. Wright, *The Standards of Care in Negligence Law*, in *Philosophical Foundations of Tort Law* (David G. Owen ed., 1995) (articulating a Kantian-Aristotelian theory); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *Stan. L. Rev.* 311 (1996) (articulating a social contractarian theory).

<sup>69</sup> I do not mean to suggest that enforcement rules have no effect of inducing a greater degree of *law-abiding* behavior. In other words, enforcement at time  $t_1$  can have the effect of increasing the percentage of the population for whom enforcement is unnecessary at a later time  $t_2$ . I discuss aspects of this dynamic feature of the legal system in Section V.B, *infra*.

<sup>70</sup> This is not, of course, an unexplored phenomenon. For example, Hans Kelsen has been criticized for his view that a law is nothing but a direction to officials to apply a sanction under specified conditions, for such a conception ignores the role of rules in speaking to the people whose conduct is ultimately of importance. See Hart, *supra* note 65, at 35-41.

one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . .  
 . . . The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.<sup>71</sup>

During this century, this point of view has exercised tremendous influence over many legal scholars and practitioners.<sup>72</sup> It has also been subjected to withering criticism in the general jurisprudential literature, most of which underscores the fact that under a Holmesian conception of law it is impossible even to make sense of the idea that someone might violate the law. Holmes' theory strips the law of its normativity, without which "duty" and "violation" become meaningless. All that remains is "choice" and the non-normative factors that affect it.<sup>73</sup> Indeed, this provides a convincing explanation for why the Holmesian view was incorporated wholesale into the economic analysis of law. It remains there today, largely untouched by critical com-

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<sup>71</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459-461 (1897). There are, of course, many other interesting themes in Holmes's famous article that are only tangentially relevant to the present discussion, such as the rejection of formalism and antiquarianism in law and the importance of scientific policy analysis. See *id.* at 464-78. For comments on these themes, see Symposium, *The Path of the Law After One Hundred Years*, 110 Harv. L. Rev. 989 (1997).

<sup>72</sup> Its influence on the legal realists is obvious. See, e.g., Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 8-10, 12-15 (3d ed. 1960) (articulating and maintaining essentially the same view while recognizing at least some of its limitations). But it has gone beyond this to become an integral part of the dominant instrumentalism of American legal thought. See Robert Samuel Summers, *Instrumentalism and American Legal Theory* 36-37, 116-18 (1982) (differentiating legal realism from the broader category of pragmatic instrumentalism, but maintaining that Holmesian predictivism is typical of both); William H. Wilcox, *Taking a Good Look at the Bad Man's Point of View*, 66 Cornell L. Rev. 1058, 1058 (1981) (opining that this viewpoint "has survived as the accepted legal theory within the American legal profession for much of this century").

<sup>73</sup> See generally Summers, *supra* note 72, at 101-35 (summarizing and expanding upon the criticisms of "state power predictivism" as a theory of law). This effect was fully intended by Holmes. To be sure, he did not deny normativity itself; he denied only that *law* has this feature. Thus, for him decisionmaking could involve considerations of moral duty as well as prudence, but the law entered into the matter only as affecting the latter by way of material costs and benefits. See Holmes, *supra* note 71, at 459-64 (arguing that such a framework is the consequence of the need to distinguish between law and morality). Thus, Holmes' framework does not admit of even the *possibility* that a directive by government, however legitimate, can impose a moral obligation. He thus implicitly denies the basis of much governmental activity. See *supra* note 64 and accompanying text.

mentary, either in the form of the discredited theory of what the law “really” is or as an empirical proposition about how people in fact relate to the law. In fact, the connection between these two variants of the Holmesian viewpoint can be seen in C&M’s seminal discussion.

The bad man view, considered as an empirical proposition, is quite evident in C&M’s introduction to their rule typology. They begin their paper with assertions like the following:

Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of “might makes right”— whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.<sup>74</sup>

This is a strikingly pessimistic view of human nature, more so than even Hobbes would endorse.<sup>75</sup> It ignores the existence of private institutions that serve to settle disputes as well as the willingness of individuals or groups to find alternative methods by which to reach fair resolutions that will allow them to continue to live together in society.<sup>76</sup>

But more important for our purposes than the response of citizens to a vacuum of state authority is the response of citizens to the exercise of such authority. C&M continue:

Having made its initial choice, society must enforce that choice. Simply setting the entitlement does not avoid the problem of “might makes right”; a minimum of state intervention is

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<sup>74</sup> C&M, *supra* note 4, at 1090 (footnote omitted).

<sup>75</sup> Hobbes’ arguments for a strong sovereign assume only that *some* people would treat others in such short-sightedly instrumentalist ways. See Gregory S. Kavka, *Hobbesian Moral and Political Theory* 96-102 (1986).

<sup>76</sup> There have since been many developments in the understanding of social ordering without the state, or in the minimally significant shadow of the state, or even in competition with the state. Some are particularized studies of social practices. See, e.g., Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115 (1992). Others are exercises in grand-scale social and historical theory. See, e.g., Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); 1 F.A. Hayek, *Law, Legislation and Liberty: Rules and Order* (1973).

always necessary. Our conventional notions make this easy to comprehend with respect to private property. If Taney owns a cabbage patch and Marshall, who is bigger, wants a cabbage, he will get it unless the state intervenes.<sup>77</sup>

So the citizenry is assumed to be not only incapable of decent social life in the absence of exercised state authority but also unwilling to accept such authority even when exercised, except to the extent it is backed by further state intervention, presumably involving the threatened or actual use of force.

With such views, false though they be,<sup>78</sup> it is easy to see why C&M slipped into a vocabulary that conflates the idea of rule types based on prescriptions of what people are supposed to do or refrain from doing and the idea of rule types based on descriptions of what people are in fact compelled to do or not do. Their treatment of accident law is illustrative. Indeed, once one assumes, or believes, that the law has no behavioral impact beyond the effect of the law's coercive force, the Holmesian view becomes inevitable. Like Holmes, one then perceives no difference between meaningful legal authority and the risks, positive or negative, of exposure to the state's coercive power. The empirical version of the Holmesian attitude thus comes back to his discredited jurisprudence.<sup>79</sup>

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<sup>77</sup> C&M, *supra* note 4, at 1090-91 (footnote omitted).

<sup>78</sup> For a powerful critique of the bad man idea as a behavioral assumption in law and economics, see Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 *UCLA L. Rev.* 1309 (1986) (marshaling argument and empirical evidence against any such assumption as universally applicable). Even the occasional modern defense of Holmesian bad man theory accepts the importance of relatively law-abiding citizens. See, e.g., Wilcox, *supra* note 72, at 1061 (arguing that the "good man" and the "bad man" at least share an interest in predicting the state's material interference with their activities). While it is true that the "good man" has such an interest in predicting the state's use of coercive power, he will generally have no trouble in this regard because he follows the law's guidance rules. Problems arise only if the law is perverse, as when enforcement rules punish conduct that is ostensibly permitted under the guidance rules. If the messages are thus seriously conflicting, fidelity to law is undermined. See Fuller, *supra* note 3, at 65-70 (discussing the problem of contradictory laws). Conversely, well-designed legal systems will avoid such difficulties.

<sup>79</sup> Interestingly, if the jurisprudential version of Holmes were valid, one could coherently deny the empirical version, for one could believe that the law really is just the coercive force that the government exerts and yet also believe that some or all of the people (always excepting oneself, of course) are simply unaware of that fact,

Moreover, this explains the tendency in the literature to identify C&M's rule types with remedial devices that are effective. If the remedy is less than perfectly effective because an award of damages is not paid or an injunction is not obeyed, then the remedy does not in fact by its terms give an accurate prediction of the state's use of its coercive powers. A court order, after all, is just words, which might well be a very unreliable indicator of the state's actual employment of force. A complete Holmesian bad man will not necessarily comply with a court order to pay damages or to refrain from a particular act. From the Holmesian point of view, the nominal remedy cannot be determinative of conduct unless it is effective.<sup>80</sup>

Nonetheless, the counterfactual reductionism of Holmesian jurisprudence is not the inevitable consequence of an economic viewpoint. One can employ a theory of rational economic decisionmaking within the framework of constraints imposed by legal duty or moral duty or both. Optimization strategies need not be "unconstrained," nor need they be constrained only by physical forces or the pain or unhappiness that they cause.<sup>81</sup> Indeed, if one looks at paradigmatic examples of conventional economic analysis, one does not find a general assumption of recalcitrance. Rather, what one finds is an assumption of compliance with the prescriptions of law, with special analysis of

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choosing out of their ignorance to obey the meaningless directives to which the real laws—the predicted positive or negative exercises of state power—happen to be attached. But at some point this must be self-defeating, taken as a theory of law, because the effect of compliance with those directives by a significant number of people is to give life to those very directives, so that they cannot be considered meaningless at all. Of course, if we take the Holmesian view not as a theory of law, but as a recommendation to view the law in a certain way, it is not incoherent. It is at least intelligible to advise someone to ignore features of the law that others rightly take to be important. Such advice may well be unethical, but it is not self-contradictory. Cf. Holmes, *supra* note 71, at 459 (characterizing his bad man as one "who cares nothing for an ethical rule which is believed and practised by his neighbors").

<sup>80</sup> See, e.g., C&M *supra* note 4, at 1106-24 (implicitly assuming effectiveness of sanctions in discussing relative merits of property, liability, and inalienability rules).

<sup>81</sup> See, e.g., Robert Nozick, *Anarchy, State and Utopia* 32-34 (1974) (discussing end-state maximizing political theories and the significance of side-constraints to the articulation of rights); *id.* at 171 ("The central core of the notion of a property right in X . . . is the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realized or attempted. The constraints are set by other principles or laws operating in the society . . ." (footnote omitted)).

situations in which one can specify an economically significant group of recalcitrants whose behavior will affect the allocation of goods and services.<sup>82</sup> In other words, the standard economic analysis concerns optimizing behavior in choices among lawful alternatives. Once again, this is “just” an assumption, one that can be relaxed if and when conditions indicate illegal conduct is taking place. But it is nonetheless significant that many, if not most, economists outside the law and economics discipline do not use the Holmesian behavioral assumption as a working proposition.<sup>83</sup> The contrary working assumption of law-abiding conduct is not arbitrary, for it is made with good reason.<sup>84</sup>

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<sup>82</sup> A perusal of almost any standard text on microeconomics will illustrate the point. See, e.g., Michael Parkin, *Microeconomics* 125-49 (2d ed. 1994) (discussing rent control, minimum wage laws, and sales taxes, and assuming for the most part that citizens will comply with these laws, while nonetheless indicating that illegal “black markets” sometimes arise). Another text illustrates the point nicely in the course of describing the economist’s sensitivity to unintended consequences:

Bob, 16 years old, currently works after school at a grocery store. He earns \$5.50 an hour. Suppose the state legislature passes a law specifying that the minimum dollar wage a person can be paid to do a job is \$6.00 an hour. The legislators say their intention in passing the law is to help people like Bob earn more income.

Will the \$6.00 an hour legislation have the intended effect? Perhaps not. The manager of the grocery store may not find it worthwhile to continue employing Bob at \$6.00 an hour. . . . If the law specifies that no one will earn less than \$6.00 an hour, and the manager of the grocery store decides to fire Bob rather than pay this amount, Bob’s losing his job is an unintended effect of the \$6.00 an hour legislation.

Roger A. Arnold, *Microeconomics* 15 (3d ed. 1996). Notice how the assumed choice is paying the minimum wage or not employing Bob; employing Bob illegally is not even addressed, nor is there any discussion of the severity of the sanction for violation of the minimum wage rule. The general assumption, in other words, is that the parties involved will choose from among alternatives *permitted* by the law. See also *id.* at 89 (illustrating same assumption). Of course, the possibility of relaxing the assumption in appropriate cases is also noted. See, e.g., *id.* at 86 (“Buyers and sellers may regularly get around a price ceiling by making their exchanges ‘under the table.’”).

<sup>83</sup> One area of inquiry that might seem to be exceptional is game theory. Considered as part of economics or of political science there is no doubting the influence game theory has had on work in law and economics. However, it is important to recognize that the very goal of game theory has been to model behavior abstracted from the constraints of an existing normative order, often in order to explain the emergence of such orders. In other words, there is typically no normative structure, let alone a legal structure, toward which one can meaningfully say that the actors adopt the Holmesian bad man’s view. See generally Robert Axelrod, *The Evolution of Cooperation* (1984); Edna Ullmann-Margalit, *The Emergence of Norms* (1977).

Consequently, one must consider the implications of relaxing C&M's excessively Holmesian assumptions. It thus becomes necessary to locate their rule typology within a background that distinguishes between guidance and enforcement rules. In that context, the prescriptive mode expressed by words like "may" and "must" comes to the fore. This holds true for a wide range of possible compositions of the population. For example, if

$\alpha$  = the proportion of the population that is perfectly law-abiding,

$\beta$  = the proportion of the population that is perfectly recalcitrant, i.e., those who are Holmesian bad men, and

$\gamma$  = the proportion of the population that is neither perfectly law-abiding nor perfectly recalcitrant,

then the prescriptive interpretation is practically important so long as  $(\alpha + \gamma) = (1 - \beta)$  is not trivially small. In any such case, it makes a difference whether a law is expressed as Law #1 or as Law #2. The difference matters even for those members of the  $(\alpha + \gamma)$  portion who have less than purely altruistic reasons to comply with the law; they may act for any mixture of reasons, as long as the presence of an authoritative legal directive counts *at all* as a reason for compliance distinct from the direct material costs of non-compliance that may be imposed by the state.<sup>85</sup> In

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Whether or not the analysis of purely self-regarding behavior under special conditions, such as the repeated play of a game, can succeed in reproducing the salient features of a normative order, such analysis is quite different from that which applies when one shifts to the context of behavior embedded in an extant normative order, the kind of context germane to almost all modern legal issues. The usual microeconomic analysis reflects this difference.

<sup>84</sup> See generally Dale A. Nance, *Civility and the Burden of Proof*, 17 Harv. J.L. & Pub. Pol'y 647 (1994) (arguing that there is a duty, variously reflected in both civil and criminal law, to assume a citizen's compliance with serious social norms until evidence clearly indicates otherwise, and grounding this duty in both descriptive and normative considerations including the economics of decisionmaking).

<sup>85</sup> Only the  $\alpha$  portion of the population treats legal duty as lexically superior to their self-interest, narrowly understood; the  $\gamma$  portion treats legal obligation in some more complex manner as competing with (and possibly commensurate with) such self-interest. Cf. Harrison, *supra* note 78, at 1328-38 (discussing lexical priorities and other preference structures that do not reduce to self-interest narrowly conceived).



other words, the present argument does not depend on naïve or even unduly optimistic assumptions about human behavior.<sup>86</sup>

How then shall we reformulate C&M's rule typology under the modest and certainly more realistic assumption that  $(\alpha + \gamma)$  is not trivially small? The strange and counterintuitive implications of a descriptive interpretation of these rule types, canvassed in the previous Part, strongly suggest that they should be understood as types of guidance rules rather than types of enforcement rules. Certainly guidance rules must be part of the legal structuring of entitlements, or a lacuna will result: The law will fail to address important concerns of law-abiding citizens.<sup>87</sup> On the other hand, enforcement rules must also be part of the picture if the law is to deal with recalcitrants.<sup>88</sup> So before we

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<sup>86</sup> Once again, Hobbes is illustrative. He distinguished between the "just" and "unjust man": The former "fulfils the law because it is law and not for fear of punishment or for the sake of reputation." Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Its Genesis* 23 (Phoenix Books 1963) (1936). More precisely, Hobbes distinguished between

the attitude of the unjust man who obeys the laws of the State for fear of punishment, i.e. without inner conviction, and the attitude of the just man, who for fear of death [likely to result from a state of anarchy], and therefore from inner conviction, as it were once more accomplishing in himself the founding of the State, obeys the laws of the State. Fear of death and fear of punishment remain as different as far-sighted consistent fear, which determines life in its depth and its entirety, is from short-sighted momentary fear which sees only the next step.

Id. at 25-26.

<sup>87</sup> Nor is it sufficient to say, in defense of ignoring the distinction between guidance and enforcement rules, that one need only concern oneself with the marginal actors who are perfectly recalcitrant. That is true, at least approximately, as to some decisions, such as the level of penalty to be attached to violations of guidance rules. But it is decidedly not true about the choice, for example, between Law #1 and Law #2. That choice will affect not only the marginal actor, but all non-recalcitrants as well, for the latter will understand Law #2 as authorizing a pure, private cost-benefit maximization concerning the question of the degree of care to be taken; the side-constraint form of Law #1 partially precludes such an understanding. In other words, replacing Law #1 with Law #2 entails shifting the citizen from constrained private optimization to unconstrained private optimization.

<sup>88</sup> In principle, even enforcement rules are prescriptive in the sense we have been discussing. As *rules*, rather than empirical generalizations, they refer to what officials and citizens *should* do, not to what they *will* do. On the other hand, at some point prescription must converge with description, at least at a statistical level, or the system will be both morally defective and practically ineffective. See Fuller, *supra* note 3, at 81-91 (discussing the congruence between official behavior and announced rule as an important feature of the internal morality of law); Hart, *supra* note 65, at 100

conclude that C&M's rule types are categories of guidance rules, we should review what they had to say on the question of enforcement.

*B. Calabresi and Melamed on the Enforcement of  
Transaction Rules*

As one would expect, given their Holmesian premises, C&M were not silent on the question of enforcement. As already mentioned, they characterized property, liability, and inalienability rules as providing different forms of "protection" for entitlements. Our analysis has indicated, however, the ambiguity that remains despite this characterization. So we must look further to discern C&M's views on enforcement.

The most striking feature of C&M's article, given prevailing views, is that they did not define their rule types with reference to specific methods of enforcing these "protection" devices. With one exception to be noted below, legal remedies—effective or not—were not an explicit part of their definitional statements.<sup>89</sup> Indeed, at later points, they wrote in contrary terms when the exposition required them to do so. Thus, they analyzed situations in which, they concluded, property rules are appropriate, adding that such rules should be "supported by injunctions or

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(arguing that if disregard of the primary rules of a legal system is sufficiently widespread it becomes "pointless . . . to assess the rights and duties of particular persons by reference to the primary rules").

<sup>89</sup> Long after C&M provide their presumably definitional statements, they do comment in ways that relate the rule types to remedies. For example, they indicate injunctive relief has something to do with property entitlements, but the exact relationship is unclear:

Yet a nuisance with sufficient public utility to avoid injunction has, in effect, the right to take property with compensation. In such a circumstance the entitlement to property is protected only by what we call a liability rule: an external, objective standard of value is used to facilitate the transfer of the entitlement from the holder to the nuisance [maker].

C&M, *supra* note 4, at 1105-06. The ambiguity remains: There is no indication here whether the shift from property to liability rule protection is analytically determined by the "sufficient public utility" (indicating a prescriptive conception of the rule types) or by the fact that it "avoid[s] injunction" (indicating a descriptive conception). However, to speak of "facilitating the transfer" certainly signifies social approval of the nuisance-creating activity, suggesting the dominance of the prescriptive conception.

criminal sanctions."<sup>90</sup> This locution presupposes that the specification of a property rule is logically distinct from the specification of the particular means of its enforcement, at least insofar as the enforcement is to take the form of injunction or criminal sanction.<sup>91</sup>

Moreover, this passage appears at the end of a section devoted to an analysis of criminal sanctions.<sup>92</sup> Presented as an application of the previously developed ideas to the topic of criminal law, C&M's argument proceeds by demonstrating the importance of using the criminal sanction to enforce property rules against what I have called recalcitrants. Specifically, they argue that the criminal sanction is employed to prevent recalcitrants from effectively treating property rules as if they were mere liability rules.<sup>93</sup> But if protecting an entitlement with a property rule *entails* effective enforcement of the limitation to consensual transfers, then by definition recalcitrants could not take or damage the entitlement without such consent, and further sanctions would be unnecessary. In other words, C&M's argument here presupposes the prescriptive understanding of their rule types. They assume the entitlement has been defined for citizens for

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<sup>90</sup> *Id.* at 1127.

<sup>91</sup> One could instead try to read the indicated passage as an inartful way of spelling out what is *entailed* by the attribution of a property rule. But this will not work, since cases will arise in which neither injunctive relief nor criminal punishment is appropriate, yet the entitlement must surely fall within the property rule category. For example, intentional nuisances that are not conditionally privileged upon payment of damages are governed by a property rule, as we have seen. Yet such nuisances might cause injury even though in a particular case the activity has ceased before legal action is taken. If there is no risk of continuing injury, an injunction will generally be denied. See 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 5.7(2), at 763-64 (2d ed. 1993). At the same time, any criminal prohibition of public nuisances might fail to apply because of the private nature of the conflict or because there is insufficient evidence of intent to satisfy criminal law standards. In such a case, the only remedy that is called for under conventional law is one of damages for injury already suffered. See generally *id.* § 5.6(2), at 755-60 (discussing elements of damage awards). Punitive damages might or might not be available, depending on proof of malice or other requirements, see *id.* § 5.12(3), at 833-34, but either way the transaction remains governed by a property rule.

<sup>92</sup> See C&M, *supra* note 4, at 1124-27.

<sup>93</sup> *Id.* at 1126. The significance of this argument is examined more fully in Section V.B, *infra*.

whom something other than the criminal sanction (or the possibility of injunctive relief) is relevant.

The most plausible candidate for this other something is the authoritative guidance that the rule provides: Even the perfectly law-abiding citizen may well want to know, for example, whether or not a given entitlement is subject to compensated, involuntary taking. Thus, both the language and the structure of C&M's argument suggest that, despite their explicit Holmesian assumptions about the citizenry, such a specification of rules for the law-abiding citizen is meaningful and important.

But what about other corrective justice measures, such as requiring compensation for a victim? How do these fit into C&M's scheme? Unless such measures are to be regarded as implemented by liability rules, this kind of enforcement seems to be completely absent from their discussion. But not quite. Return once again to the definition of a rule of inalienability:

An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller. The state intervenes not only to determine who is initially entitled *and to determine the compensation that must be paid if the entitlement is taken or destroyed*, but also to forbid its sale under some or all circumstances.<sup>94</sup>

The emphasized portion suffers from an ambiguity that follows from the conflation of guidance rules and enforcement rules. It could mean that part of the very definition of an inalienability rule is an aspect of liability rule protection. Or it could mean that, quite apart from the specification of an inalienability rule, there must as a practical matter be enforcement by way of a rule of compensation for involuntary takings. Which is the better way to construe this passage?

Interestingly, C&M's definition of property rules does not include similar language about compensating the holder.<sup>95</sup> Since entitlements defined by prescriptive property rules would also require enforcement to deal with recalcitrants, the passage concerning inalienability rules would thus seem to be of a different nature, suggesting that it indicates a joinder of a prescriptively

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<sup>94</sup> Id. at 1092-93 (emphasis added).

<sup>95</sup> See id. at 1092.

understood liability rule feature with the inalienability feature. This is paradoxical because, however one interprets C&M's liability rules, such rules either condone or at least permit the taking of the entitlement, provided compensation is paid. Yet an inalienability rule would seem to work as a desirable entitlement form only if it prohibits involuntary transfers as well as voluntary ones. Indeed, later in their discussion C&M make it clear that an inalienability rule would be the rule of choice for particularly important entitlements that we do not want people to be without.<sup>96</sup> If this is so, then it is likely we would want to prohibit involuntary transfers as well as voluntary ones. Can the italicized language be understood as trying to accomplish this?

It can if we take this reference to compensation as implying a sanction that is imposed for violating the inalienability rule. The "not only" language suggests that the compensation requirement is also true elsewhere, and as just indicated, property rules would as a practical matter also need to be protected by compensatory damages.<sup>97</sup> But that fact need not be definitional for either type of rule. Indeed, it *should* not be definitional because in some cases compensatory damages are inappropriate for the protection of an entitlement that is undeniably governed by a property or inalienability rule.<sup>98</sup>

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<sup>96</sup> See *id.* at 1100 (discussing "merit goods," such as minimum levels of education, clothing, and bodily integrity, that are considered essential); *id.* at 1111-15 (discussing freedom from enslavement and other entitlements that society might want to prevent the holder from selling).

<sup>97</sup> For example, when an ongoing activity is found to be a nuisance and the "balancing of equities" does not render the nuisance specially privileged to continue upon payment of compensation, an injunction is appropriate under conventional doctrine. But such prospective relief by itself is inadequate when injury has already been incurred, in which case an award of damages will often be appropriate. See *Mel Foster Co. Properties, Inc. v. American Oil Co.*, 427 N.W.2d 171, 175-76 (Iowa 1988) (discussing the measure of damages when nuisance-causing activity has been abated); *Morgan v. High Penn Oil Co.*, 77 S.E.2d 683 (N.C. 1953) (awarding both injunction and damages); see generally Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 7.2, at 421 (2d ed. 1993).

<sup>98</sup> Professor Levmore rightly observes that compensatory damages are sometimes but not always appropriately used to protect what is ordinarily considered property. However, following the usual identification of C&M's rule types with remedies, he infers that compensatory damages for past injury are implicit in C&M's definition of property rules. This in turn requires Levmore to designate a new rule type for

Consequently, the italicized portion of the passage quoted above would not appear to refer to an implicit liability rule feature of inalienability rules so much as it refers to the practical remedial consequences of an immunity from such involuntary taking. Yet, notwithstanding C&M's discussion, there might also be some contexts in which such an immunity would be undesirable.<sup>99</sup> So the better interpretation is that the indicated passage refers: (a) primarily to an enforcement rule—not necessarily part of the conception of inalienability itself—that specifies a right to compensation held by the person whose inalienable right (or property right) has been taken contrary to the rule's immunity; and (b) secondarily to a prescriptive liability feature in those special contexts where inalienability does not involve such an immunity. The former we may call a *remedial compensation rule* in order to distinguish it from liability rules and from the liability to involuntary taking that may be a feature of some inalienability rules.<sup>100</sup>

This distinction, and C&M's failure to draw it clearly and consistently, explains their peculiar treatment of the law of compensation for accident costs. The greater part of that law involves

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property-like interests not protected by a remedy of damages. See Levmore, *supra* note 37, at 2153-61.

<sup>99</sup> Certainly it would not be logically incoherent to have a rule that prohibits voluntary transfers but permits involuntary, compensated transfers (takings). One can imagine an entitlement that should not be marketable but which should be subject to compensated takings, on the distributive ground that the surplus of cooperation in the transfer should always go to the "purchaser," or on the paternalistic ground that the holder would sell the entitlement at what the government considers too low a price if given the chance. See Coleman & Kraus, *supra* note 8, at 1349 n.20 and accompanying text (noting the paternalistic possibility). There certainly are exceptional situations, not addressed by C&M, in which an ordinarily inalienable right may be taken against the will of its holder with the full support of the law. For example, the courts have had no difficulty allowing involuntary servitude for the state, notwithstanding the explicit language of the Thirteenth Amendment. See, e.g., *Butler v. Perry*, 240 U.S. 328 (1916) (validating public conscription for road construction). Thus, it would be better to have a notion of inalienability rules that leaves open the question of the permissibility of compensated involuntary transfers. Professor Morris refers to situations where neither voluntary nor involuntary transfers are allowed as "full inalienability" rules. See Morris, *supra* note 15, at 881-83.

<sup>100</sup> Again, even remedial compensation rules are, in the first instance, prescriptive in the sense we have been discussing. They refer to what the obligor *should* pay, not to what he *will* pay. See *supra* note 88. But they are nonetheless very different, even as prescriptive rules, in their focus upon correcting a situation that should not have occurred in the first place.

both a substantive norm—a property rule, as we have seen—and a remedial norm requiring payment of damages. That is, it involves both guidance and enforcement rules. C&M's characterization of this arrangement as instantiating a liability rule flows from their Holmesian premises, premises that obscure the distinction between the contents of the substantive norm and the costs imposed pursuant to the associated remedial norm. Yet this distinction cannot be avoided if we are to render the whole of their argument intelligible.<sup>101</sup>

This analysis supports the inferences developed in previous sections. Despite the confusion in their article, it is better to understand C&M's rule types as categories of prescriptive judgments imposed by the law. Under this reconstruction of their work, property, liability, and inalienability are categories of guidance rules—directives about what people are supposed to do—rather than descriptions of what the law in fact forces people to do. Remedial responses to the non-compliant are quite distinct.

A similar thesis was presented in 1986 by Professors Coleman and Kraus, who distinguished between rules specifying the normative *content* of entitlements—such as property, liability, and inalienability rules—and enforcement rules prescribing remedies for the violation of the former.<sup>102</sup> Strikingly, theorists mak-

<sup>101</sup> In an interesting passage, Carol Rose comments:

When some unidentified person accidentally smashes your car and pays you damages in compensation, you do not think that this person has an "option" while you have a PRSTO [a property right subject to an option]. You think that you and she are caught in a muddle, where rights have suddenly and accidentally gotten all confused. A liability rule is the best that you can do after your car is wrecked. Your property in the car has turned into a PRSTO, not because anybody thinks it is a good idea to define it that way, but because nobody can do anything better for you now that it is ruined.

Rose, *supra* note 22, at 2181. Professor Rose's sense that this is not the kind of case to characterize in terms of C&M's liability rules is correct. But she is confusing the prescriptive sense of C&M's "liability rule"—which *can* be construed as entailing an option, see *supra* note 56—with what I have called a remedial compensation rule. Once one sees this, one need not accept the proposition that the property in the car was "turned into a PRSTO" by the accident; the paradoxical element simply disappears.

<sup>102</sup> They expressed the matter this way:

The point we are anxious to emphasize is that property, liability and inalienability rules are best thought of as constituting a subset of the set of norms governing the transfer of lawful holdings. They are transaction-norms. . . .

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ing use of C&M's framework have either ignored or misconstrued the point. In Part IV, I will substantiate this claim and address the question of why Coleman and Kraus were less successful than they might have been in redirecting the discourse. Meanwhile, it will be useful to examine one way in which the confusion between guidance and enforcement is routinely manifested. This examination will illustrate that the issue of liability for negligence is only one of many problems inherent in C&M's theory.

### III. SANCTIONS AND PRICES

#### A. *The Distinction between a Sanction and a Price and the Standard Holmesian Mistake*

The distinction between guidance rules and enforcement rules has many implications. One that is central to the theme of this Article concerns the difference between a "sanction" and a "price." According to a common and reasonable understanding of the terms, a sanction is "a detriment imposed for doing what is *forbidden*, such as failing to perform an obligation,"<sup>103</sup> whereas a price is the "payment of money which is required in order to do what is *permitted*."<sup>104</sup> The upshot of our previous discussion is that the tort law of negligence imposes sanctions rather than prices on faulty conduct that causes harm, whereas the law of

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... [I]t is unhelpful to think of them as tools or instruments for protecting entitlements. Thus, we insist upon a distinction between the rules by which claims are generated and the rules that create the institutions for enforcing those claims: a distinction all too often blurred in previous work on the property-liability rule distinction.

Coleman & Kraus, *supra* note 8, at 1344, 1346-47. Professor Morris makes the same point tangentially in regard to her very valuable elaboration of the C&M typology, but she does not draw the kind of implications addressed here. See Morris, *supra* note 15, at 845 n.59.

<sup>103</sup> Robert Cooter, *Prices and Sanctions*, 84 *Colum. L. Rev.* 1523, 1524 (1984).

<sup>104</sup> *Id.* at 1525. For a sophisticated and historically informed analysis of this distinction, see Finnis, *supra* note 64, at 325-37. While Cooter's definition of a price is relatively narrow in restricting the concept to situations in which the required payment is to be made in "money," as opposed to other things of value, his definition is broad in embracing both action that is permitted without the other's consent, as under liability rules, and action that is permitted only with such consent, as under property rules. By the same token, his definition of sanction is relatively broad in that it does not presuppose a punitive purpose in imposing the sanction.



eminent domain imposes prices rather than sanctions on legitimate governmental takings, and the law of nuisance sometimes imposes sanctions and sometimes imposes prices depending on the social value of the nuisance-creating activity.

To reinforce this conclusion and amplify its significance, let us change the context. Consider now the difference between the following two environmental laws:

Law #3: Discharge of chemical XYZ into the air, water, or ground is hereby prohibited. If you make such a discharge, you shall be liable to the State Environmental Agency for \$5,000 per ounce of XYZ discharged.

Law #4: You may discharge chemical XYZ into the air, water, or ground provided you pay to the State Environmental Agency \$5,000 per ounce of XYZ discharged.

Once again, the law-abiding citizen receives a very different message from these two laws. She will see the first law as directing her not to pollute in the specified manner and creating a sanction for violation of that directive; she will see the second as creating a pricing system for such pollution, so that it is appropriate—as far as the law is concerned—for her to pollute to the extent that payment is compatible with her other goals.<sup>105</sup>

Not surprisingly, followers of the Holmesian approach are inclined to say that there is no real difference between these two

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<sup>105</sup> See Thomas C. Schelling, Prices as Regulatory Instruments, in *Incentives for Environmental Protection* 1, 6-7 (Thomas C. Schelling ed., 1983) (elaborating on the distinction between a “fee” or “charge,” on the one hand, and a “fine” or “penalty,” on the other). A price charged by the government can also be called a tax, especially when the obligor does not receive a *quid pro quo* distinct from the benefits enjoyed by citizens generally. Thus:

The distinction [between a fine and a tax] is that if engaging in a course of conduct will result in a fine, then the conduct violates the law; but if a tax is levied the conduct does not violate the law (though, as we shall see, we might have to say that where a tax is levied the conduct *usually* does not violate the law). Fines are connected with legal wrongdoing; taxes are (usually) not. Hence, fines are sanctions whereas taxes are not, even though the point of a tax may be to discourage conduct (such as smoking cigarettes).

Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* 148-49 (1978). Benditt's parenthetical qualifications concerning a tax arise from the fact that taxes can be imposed on acts that are otherwise illegal. See *id.* at 149. Even in such cases, the imposition of the tax is not the feature that makes the conduct illegal.

laws.<sup>106</sup> This in turn can lead to the conclusion that a citizen should view Law #3 as equivalent to Law #4. As expressed by Frank Easterbrook and Daniel Fischel:

[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.<sup>107</sup>

Of course, this view is incoherent when applied to Law #4; discharging chemical XYZ does not violate the rule or incur a sanction. There simply is no "disobedience," as long as the price is paid.<sup>108</sup> So if the authors' assertion makes any sense with regard to the decision whether to discharge chemical XYZ, it

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<sup>106</sup> See Holmes, *supra* note 71, at 461 ("[F]rom [the bad man's] point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? . . . If it matters at all, still speaking from the bad man's point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law."). Thus, even the Holmesian bad man might see a difference if it is probable that Law #3, but not Law #4, will be construed as a criminal prohibition and thereby subject to special procedural restrictions on enforcement not applicable to Law #4. Ironically, the bad man might then see Law #3 as imposing *less* of a constraint upon discharge, since the probability of its enforcement would be reduced by the additional procedural protections enjoyed by a criminal defendant. In any event, for our purposes we may assume away this difference by stipulating that both laws are noncriminal provisions.

Alternatively, the legal realist might argue that any difference between the two laws arises from the fact that a judge would enjoin XYZ pollution under Law #3 but not under Law #4. But that depends upon the judge's receiving different messages from the two laws; we cannot explain the judge's willingness to grant an injunction by the fact that she is willing to do so. Moreover, injunctive relief is not always practically feasible even when it would be theoretically appropriate, as when the polluting discharge cannot be anticipated by others. Yet the law-abiding will want guidance even in such instances.

<sup>107</sup> Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155, 1177 n.57 (1982). The authors cite C&M in the course of their argument. See *id.* at 1156 n.5.

<sup>108</sup> If one takes the Holmesian approach to its logical conclusion, the managers should not pay the price prescribed in Law #4 unless they believe that the costs of paying such a price are less than the costs of not doing so, which will depend on things like the probability of detection of the discharge. For one can make the same argument about those rules, distinct from Law #4, that specify the remedial consequences if someone fails to pay as provided in the given price regime.

must be in the context of a rule like Law #3.<sup>109</sup> Given such a law, discharge of the chemical would be "disobedience," would "violate the rules," and would incur a sanction, at least if detected. Clearly, it is in the context of laws like Law #3 that Easterbrook and Fischel are making their assertion, which treats Law #3 as though it were Law #4.

Observe carefully the implications of their claim. They assert that managers have no ethical duty not to discharge the chemical. This claim goes beyond the mere assumption of pervasive recalcitrance. The Holmesian bad man is actually *praised* as performing his ethical obligation by engaging in his narrowly self-interested calculations, not only in the context of Law #4 where cost-benefit trade-offs are contemplated if not encouraged, but also in the context of Law #3, where the law ostensibly denies the citizen such trade-offs. Something is seriously amiss.

The nature of the problem can be discerned from a careful reading of one of the articles upon which Easterbrook and Fischel rely. In 1979 David Engel argued that, even assuming legislative legitimacy, management has no moral obligation to obey civil or even criminal prohibitions if it is profitable to disobey them, given the probability of detection and prosecution and the economic detriments potentially imposed by society.<sup>110</sup> Professor Engel's arguments reveal a view of management as incapable of

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<sup>109</sup> One might quibble over whether environmental protection laws are within the category of "economic regulatory laws" described by Easterbrook and Fischel. However, elsewhere these authors express the matter in a more general way:

Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm, because the sanctions set by the legislature and courts are a measure of how much firms should spend to achieve compliance. Easterbrook & Fischel, *supra* note 107, at 1168 n.36. Even if one were to limit attention to prohibitions designed solely to improve economic efficiency, it would not follow that a business undermines efficiency by obeying the prohibition when it is more profitable to disobey it. An effective prohibition can have long-run or indirect economic benefits that are not reflected in the particular business' revenues.

<sup>110</sup> David L. Engel, *An Approach to Corporate Social Responsibility*, 32 *Stan. L. Rev.* 1, 37-58 (1979) (cited with approval in Easterbrook & Fischel, *supra* note 107, at 1168 n.36). To be sure, Engel acknowledged that a stronger case could be made for a corporate duty to disclose harmful corporate activities, beyond that level of disclosure which would be profit-maximizing. See *id.* at 70-85. And he noted that such voluntary disclosure would likely lead to "substantive" corporate voluntarism: "Altruistic abstention from prohibited substantive conduct is likely to be cheaper than, for example, committing a crime and then disclosing it." *Id.* at 43.

understanding a law's content or purpose apart from the material detriments that it imposes. Implicitly, he posits a radical separation of the manager's social epistemology from that of the political community, so that management views government not as a part of the same social system but rather as a set of morally inscrutable exogenous forces, like hurricanes or droughts, that impinge on the business.<sup>111</sup> These forces lack normative significance in themselves, so their significance is measurable only by reference to material consequences such as costs.<sup>112</sup>

This suggests an explanation for Easterbrook and Fischel's unelaborated qualification, "We put to one side laws concerning violence or other acts thought to be *malum in se*."<sup>113</sup> The obvious purpose of this qualification is to avoid a *reductio ad absurdum* from the application of their reasoning to decisions about whether to engage in violence, fraud, or other such acts as means to the end of profit maximization. One might try to argue that acts *malum in se* will be understood by managers as acts that ought not to be done, whether profitable or not. But even if we can give a noncircular meaning to the notion of *malum in se*, the *reductio* cannot be avoided. For the clarity and predictability of prohibitions are not uniformly greater for prohibitions of acts

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<sup>111</sup> As Robert Gordon has recently observed:

Probably the most common reading of [*The Path of the Law*] is that it sets forth a purely positivist theory of law—a deflated, de-moralized, "disenchanted" view (to use Max Weber's term) of the legal system. To those who like this view, the "bad man" is just the rational man—*Homo law-and-economicus*—who treats all legal rules as prices on conduct. To less approving eyes, Holmes recommends that the lawyer regard the legal system in a wholly alienated and instrumental fashion—not as a set of norms established for common membership in a political community, nor an attempt to realize (however imperfectly) ideals of justice or social integration, but simply as random and arbitrary outputs of state force, which are opportunities for or obstacles to realizing his client's self-interested projects.

Robert W. Gordon, *The Path of the Lawyer*, 110 Harv. L. Rev. 1013, 1014 (1997).

<sup>112</sup> A similar argument might be offered to explain the identification of property, liability, and inalienability rules with specific remedies. The remedies might be understood as the only available measure of the importance of the entitlements they protect, which implies an agnosticism about the meaning of the substantive prescriptions, even in light of the purposes they serve. As discussed in the following text, such an attitude is unjustifiable in most cases.

<sup>113</sup> Easterbrook & Fischel, *supra* note 107, at 1168 n.36.

*malum in se*. Indeed, often the opposite is true.<sup>114</sup> Even if it were true that prohibitions of acts *malum in se* are generally more understandable and predictable than other prohibitions, managers' moral obligations as to any particular law cannot be determined by such a statistical fact. In any event, as a general matter neither the rationale nor the reach of prohibitory laws, even those *not* addressing acts *malum in se*, are so incomprehensible as to drive managers and their lawyers to such agnosticism, self-serving protestations notwithstanding.<sup>115</sup> Many such laws may be ill-advised, but that is another matter entirely.<sup>116</sup>

Of course, a clear understanding of the difference between a sanction and a price does not obviate policymakers' difficulty in choosing which to employ in response to a particular problem. It may be highly controversial whether a particular activity should be sanctioned in some way, priced in some way, or handled in yet some other fashion. Considerations of justice or efficiency may indicate that pricing is appropriate in contexts that might naïvely be thought to call for sanctions.<sup>117</sup> And if considerations

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<sup>114</sup> Some may believe, for example, that negligent driving is *malum in se* while polluting with a particular chemical that poses dubious, long-term risks is *malum prohibitum*. Yet the laws governing the former may be much more vague and less predictable than laws governing the latter. Compare, for example, Law #1 with Law #3.

<sup>115</sup> Although skeptical complaints about our ability to discern the law from nominally authoritative sources have generally come from the critical legal theorists of the political left, the replies to their arguments apply as well to the extreme skepticism evidenced in Professor Engel's arguments and reiterated by Easterbrook and Fischel. See generally Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283 (1989) (arguing that the frequency of cases in which a determinate answer is not readily available is not large enough to undermine the claim of adjudicative legitimacy); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987) (arguing that the moderate indeterminacy in judicial decisionmaking does not delegitimize the liberal state). My argument leaves open the possibility that particular subclasses of regulatory laws are so vague and of such dubious purpose as to warrant the agnostic response. But there is nothing to indicate that Professors Engel, Easterbrook, and Fischel had any such modest claim in mind.

<sup>116</sup> One reason such laws might be considered ill-advised is that they do not facilitate the maximization of wealth, a substantive consideration related to the economic question of whether particular entitlements are more efficient if constructed as property rules or as liability rules. See *supra* notes 25-26.

<sup>117</sup> For example, to the extent that liability for the crimes of a corporation's agents is vicarious and therefore strict, an argument can be made that pricing is the better way to govern corporate efforts to monitor and control the agents' conduct unless management is complicit in the criminal conduct. See John C. Coffee, Jr., *Does "Unlawful"*

of justice are unhelpful or inconclusive in resolving a particular question, one may well turn to considerations of efficiency as the primary determinants.<sup>118</sup> But any such analysis must still recognize the difference between a sanction and a price if it is to gauge accurately the effects of the choice upon the behavior of a population that does not consist entirely of Holmesian bad men. If one wants to encourage nonconsensual takings in a particular context, then one will do so less effectively with a sanction than with a price, *ceteris paribus*. Conversely, if one wants to discourage nonconsensual takings, then one will do so less effectively with a price than with a sanction, again *ceteris paribus*.<sup>119</sup>

### B. Rediscovering the Distinction: Cooter's Theory of Sanctions and Prices

These points are strengthened and refined by an examination of one of the most explicit and systematic treatments of the subject of prices and sanctions in the law and economics literature, an article published by Robert Cooter in 1984.<sup>120</sup> Using the definitions of sanction and price quoted above,<sup>121</sup> Cooter argues persuasively that even the narrowly self-interested citizen will experience a difference between the two.<sup>122</sup> The difference arises from the fact that the paradigmatic sanction will involve a substantial discontinuity in the private cost function of the affected citizen, whereas the paradigmatic price will involve a con-

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Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 228-30 (1991).

<sup>118</sup> This is one way to understand the enormous literature on nuisance law spawned by Ronald Coase's seminal article, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960).

<sup>119</sup> See, e.g., Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 Duke L.J. 1, 29-36 (arguing, *inter alia*, that by adopting a stance of moral neutrality, pricing may undercut informal moral norms against polluting). For a recent study emphasizing the important role of a sense of moral duty in white collar crime, see Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 L. & Soc'y Rev. 549 (1996).

<sup>120</sup> Cooter, *supra* note 103.

<sup>121</sup> See *supra* text accompanying notes 103-104.

<sup>122</sup> Actually, the way he describes this point of view is as "rationally self-interested." Cooter, *supra* note 103, at 1527. I would not so readily concede the term "rational" to the Holmesian legal realists. It is clear, however, that Professor Cooter means to refer to someone who acts to minimize private costs in a narrow economic sense.

tinuous tradeoff between the payment of the price and the cost of conduct necessary to avoid payment.<sup>123</sup>

For example, a rule prescribing liability for negligently inflicted injuries will create a discontinuity at the point where the level of precaution drops below the legal standard; at lower levels, a substantial liability will be added to the costs of precaution, whereas at higher levels of precaution, the private cost will be only the significantly lower cost of precaution. In contrast, a rule that simply prescribes that one should pay for the costs of accidents that one causes, or some subset of such accidents not defined with reference to a standard of conduct, produces a relatively continuous private cost curve that is the sum of the costs of precaution and the costs of the damages done.<sup>124</sup> Cooter's point is that the first kind of rule will produce a different set of incentives for conduct than the second. Under the first kind of rule, the self-interested actor will be driven to comply just barely with the standard of care necessary to avoid the extra costs associated with liability, however those costs are related to the costs that the actor imposes on others. On the other hand, under the second kind of rule, the actor will engage in a tradeoff at the margin in order to choose a level of precaution that minimizes the sum of precaution costs and external costs.<sup>125</sup>

Professor Cooter goes on to argue that there are reasons to believe that, in a context like automobile accidents, a sanction rule based on community standards of due care will operate more efficiently than a pricing rule,<sup>126</sup> whereas in a context like pollution control a pricing system will operate more efficiently

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<sup>123</sup> See *id.* at 1525-31.

<sup>124</sup> *Id.* at 1526-27.

<sup>125</sup> *Id.* at 1529-30. Cooter's argument depends on the existence of a continuous behavioral variable that is within the control of the actor, the chosen quantity of which both affects the likelihood of the occurrence of an externality and determines the imposition of any applicable legal sanction. These conditions may be met in some contexts, such as the choice of a level of precaution in driving an automobile, but they may not model well the actor's choices in other contexts, especially dichotomous choices about whether or not to act. Late in his article, Cooter does try to adjust his model to account for dichotomous choice. See *id.* at 1548-50 (discussing criminal law).

<sup>126</sup> See *id.* at 1533-34 (arguing that auto accidents will generate an efficient community standard of care because of the symmetry of risks inflicted and endured by drivers).

than sanctions.<sup>127</sup> More generally, Cooter prescribes when to select a sanction rule and when to select a price rule based on contextual features such as the ability of private and public actors to discern the relevant cost conditions. He summarizes his conclusions this way:

If obtaining accurate information about external costs is cheaper for officials than obtaining accurate information about socially optimal behavior, then [lawmakers] should control the activity by pricing it; if the converse is true, then they should control the activity by sanctioning it.<sup>128</sup>

Cooter's argument is certainly insightful. On the empirical side, he confirms our rejection of C&M's claim by observing that negligence law in fact operates as sanctions and not as prices.<sup>129</sup> In other words, negligence law exemplifies property and compensation rules rather than liability rules.<sup>130</sup>

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<sup>127</sup> See *id.* at 1150-51 (arguing that pollution may require pricing because officials lack the information about external private costs necessary to impose a publicly determined and sanction-backed standard of care). Cooter does not address the possibility that the community standard that emerges from accidents, for example, might reflect some notion of reciprocity that diverges from that required for efficiency. His basic point would remain intact, however, provided that the increased costs of public determination of the efficient standard of precaution are greater than the costs resulting from a divergence of the community standard from the efficient level of precaution.

<sup>128</sup> *Id.* at 1533 (emphasis omitted).

<sup>129</sup> See *id.* at 1538-40 (contrasting negligence as sanction with strict liability as price).

<sup>130</sup> Professor Coffee errs, therefore, in the first half of his assertion: "Characteristically, tort law prices, while criminal law prohibits." Coffee, *supra* note 117, at 194. Only if one takes strict, no-fault liability as the "characteristic" form of tort liability may one reach such a conclusion. Contrary to Coffee's claims, see *id.* at 197, 226-28, Cooter's argument does not provide support for such a theory of the distinction between tort and crime. To be sure, Coffee is much less explicit than Cooter about what is meant by "pricing." At certain points, for example, Coffee seems to equate pricing with the effort "to force the defendant to internalize the costs [he] imposes on others." *Id.* at 228; see also *id.* at 238 n.157. This conception may more readily allow one to subsume negligence law under pricing rules, but it is not the more ordinary notion of price that I, together with Cooter, have followed. Under this more ordinary notion, while pricing tends to internalize the costs of action under both property and liability rules, the converse is not true; not all means of internalizing costs are prices. I should note, however, that the deficiencies in Coffee's theory of the tort/crime distinction that are thus revealed do not seriously undermine his central practical conclusions about the overextension of the criminal law. This is because the primary target of his argument is vicarious criminal liability, which is typically strict, no-fault



On the other hand, Cooter's argument does not completely respond to the problem articulated here. Returning to the negligence issue, the first rule described by Cooter closely matches the negligence standard of liability prescribed by our

Law #1: Do not act negligently. If you do drive negligently, you must pay for consequent injuries.<sup>131</sup>

But the second rule Cooter discusses is a rule of compensation that does not depend for its incidence upon the presence of negligence, quite unlike our

Law #2: You are permitted to act negligently, provided you pay for any consequent injuries.<sup>132</sup>

Indeed, the economic cost conditions, whatever they are for a given context, will generate precisely the same incentives under Law #1 as under Law #2. Cooter's argument, therefore, does not allow us to distinguish between these two laws. Under his discontinuity theory, both Law #1 and Law #2 are sanctions, since they equally involve a "jump" in the costs imposed on the actor as her precaution level drops below the standard for negligence. Yet, under Cooter's definitions of sanction and price,<sup>133</sup> Law #2 is not a sanction, at least not if one takes at all seriously the language in which the law is expressed.<sup>134</sup>

Conversely, neither Law #3 nor Law #4 is a sanction under the discontinuity theory, since they both entail a private cost curve that is essentially continuous.<sup>135</sup> Nonetheless, Law #3 clearly qualifies as a sanction under Cooter's definition.<sup>136</sup> Again,

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liability, in the context of which pricing under liability rules will sometimes be appropriate. See *supra* note 117 and accompanying text.

<sup>131</sup> See *supra* Section II.A.

<sup>132</sup> See *supra* Section II.A.

<sup>133</sup> See *supra* text accompanying notes 103-104.

<sup>134</sup> Of course, one might argue that, language notwithstanding, Law #2 was "intended" to create a detriment for doing what is forbidden, but for our purposes we can assume that the legislative history is quite explicit in expressing legislative approval of conduct that by community standards is negligent. See *supra* note 63.

<sup>135</sup> See *supra* Section III.A. These laws are discontinuous only to the extent that the money paid for discharge cannot be prorated for partial ounces of discharge.

<sup>136</sup> Again, one might argue based on legislative or enforcement history that Law #3 is a *de facto* pricing scheme, its language notwithstanding. But we may assume for purposes of discussion that the legislative intent, if meaningfully expressed at all

Cooter provides no explanation for this result, except to acknowledge that the discontinuity feature is *characteristic*, not definitional, of sanctions, commenting in a footnote that, "Someone who acts from duty and obeys the law out of respect will also satisfy the legal standard, but not in order to minimize private costs."<sup>137</sup>

To be sure, Cooter's results indicate important considerations that affect the choice of a sanction system or a price system from the point of view of inducing appropriate conduct by the Holmesian bad man. From that point of view, Law #2 is defective as an attempt to price behavior, and Law #3 is defective as an attempt to sanction it. These facts may help to explain why rules like Law #2 and Law #3 are not frequently encountered. Of course, Law #2 is not encountered for the even more obvious reason that it would be very unusual, though not inconceivable, for the law to condone action by citizens that is unreasonably dangerous when measured by community standards.<sup>138</sup> In contrast, Law #3 does not suffer from such internal moral tension, and its defectiveness *qua* sanction can be cured by aggravating the penalty according to willfulness or recurrence of the discharge.<sup>139</sup>

Consider, however, how Professor Cooter characterizes his contribution:

Scholars of jurisprudence traditionally view law as a set of obligations backed by sanctions, or commands backed by threats. In contrast, economists tend to view law as a set of official prices. Associated with each of these viewpoints is a characteristic blindness. The jurisprudential perspective blinds lawyers to the fact that officials cannot regulate the economy efficiently by giving orders. Instead, they must rely upon legal instruments similar to prices. Conversely, the economic perspective is blind to the distinctively normative aspect of law, viewing a sanction for doing what is forbidden merely as the price of doing what is permitted. In brief, the economic analysis of law lacks a clear account of sanctions, and the jurisprudential tradition lacks a good account of prices. This Article at-

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beyond the language of the law, was clearly expressed to the opposite effect and has not been undermined by subsequent events.

<sup>137</sup> Cooter, *supra* note 103, at 1527 n.9.

<sup>138</sup> See *supra* note 63.

<sup>139</sup> See Cooter, *supra* note 103, at 1551.

tempts to bridge the two traditions by developing a theory about the difference between the effect of prices and sanctions upon behavior.<sup>140</sup>

Cooter is about half right: The standard economic analysis has lacked an adequate account of sanctions, and Cooter has contributed to that account from within the tradition of economic analysis. On the other hand, his account does not fully bridge the gap because it leaves unexplained the differences between Law #1 and Law #2 and between Law #3 and Law #4. That is, in his account—notwithstanding the qualification mentioned earlier<sup>141</sup>—the citizen is still assumed to view all of these laws as only imposing costs on behavior, instead of providing authoritative directives for the guidance of conduct. Cooter's identification of sanctions as typically involving discontinuities in private cost functions does not change that. Indeed, in the end he does not provide the "distinctively normative aspect" that he promises.<sup>142</sup> A significant part of the economist's blindness endures.<sup>143</sup>

The other prong of Cooter's criticism is less accurate. He is certainly right that a tendency to consider laws only in terms of flat prohibitions of conduct might blind one to the need to price certain conduct instead of sanctioning it. However, this blindness does not arise from anything in the "jurisprudential perspective." If what is prohibited is not the performance of an act that needs to be priced but the refusal to pay a price that has been or should be established for an act, then even an impoverished jurisprudence of pure criminal law can allow for pricing

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<sup>140</sup> *Id.* at 1523 (footnotes omitted).

<sup>141</sup> See *supra* text accompanying note 137.

<sup>142</sup> See *supra* text accompanying note 140.

<sup>143</sup> This is further illustrated by Cooter's interesting clarification:

This Article distinguishes two kinds of rules and identifies one of them with prices and the other with sanctions. Of course, it is possible to expand the definition of a price to cover sanctions by defining a sanction as a discontinuous price, or to expand the definition of a sanction to cover prices by defining a price as a continuous sanction. However, the important point is not to argue about names but to understand the differences in the behavior caused by [the first kind of rule] and [the second kind of rule].

Cooter, *supra* note 103, at 1527 n.10. Cooter does not explore how to reconcile such definitional restructuring with his own earlier articulated distinction between sanction and price. See *supra* note 104 and accompanying text.

structures, both those consensually determined prices associated with property rules and those imposed prices associated with liability rules. In any event, jurisprudence has long been more sophisticated than such a view allows, as Professor Cooter is certainly aware.<sup>144</sup> The culprit here, responsible for using draconian prohibitions of actions that should be priced, is not simplistic jurisprudence. It is simplistic politics and a lack of the imagination needed to set up markets where they have not previously existed.<sup>145</sup>

### *C. Reclaiming the Distinction: Brennan and Buchanan on Rules of the Game*

Much of the preceding discussion is critical of the methodology of law and economics practitioners. To conclude this Part, I offer a brief illustration of the fact that economists who study law, especially those who were not trained as lawyers, sometimes do get it right. The illustration comes from the work of two leading proponents of the economic analysis of political behavior, the "public choice" school of thought.<sup>146</sup>

In 1985, Geoffrey Brennan and James Buchanan published a work addressing, among other things, the methodological and jurisprudential foundations of their theories of political economy.<sup>147</sup> They defended the use of *Homo economicus* to model the behavior of political actors, arguing that parsimony and symmetry require the same assumptions about political actors that apply to non-political ones:

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<sup>144</sup> See, e.g., *id.* at 1524 n.4 (noting distinction between commands backed by threats and the more general idea of norms backed by sanctions).

<sup>145</sup> For discussions of market-oriented solutions to environmental problems arising from the absence of the property rights necessary to give rise to markets, see Symposium, *Free Market Environmentalism: The Role of the Market in Environmental Protection*, 15 *Harv. J.L. & Pub. Pol'y* 297 (1992). For discussions of the use of prescriptively understood liability rules in environmental law, compare Schelling, *supra* note 105 (emphasizing the advantages of pricing structures), with Rose, *supra* note 119 (articulating, and perhaps overstating, the offsetting disadvantages of pricing structures).

<sup>146</sup> For a quick overview of this relatively new field of study, see Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 *J. Legal Educ.* 490 (1996).

<sup>147</sup> Geoffrey Brennan & James M. Buchanan, *The Reason of Rules: Constitutional Political Economy* (1985).

If an individual in a market setting is to be presumed to exercise any power he possesses (within the limits of market rules) so as to maximize his net wealth, then an individual in a corresponding political setting must also be presumed to exercise any power he possesses (within the limits of political rules) in precisely the same way. If political agents do not exercise discretionary power in a manner analogous to market agents, then this result must follow because the rules of the political game constrain the exercise of power in ways the rules of the market do not . . . .<sup>148</sup>

Now, whether or not one agrees with this particular argument, or any of the other arguments they offer for modeling political actors as profit maximizers, these economists clearly recognize the idea of constrained optimization and the fact that "rules" form a crucial part of the constraints.

Of course one might reply that these economists use the idea of "rules" metaphorically, as a simplified and approximate substitute for the Holmesian specification of costs and benefits of predictable exercises of public power. But elsewhere they address this point quite clearly, rejecting the Holmesian refinement. Following Hobbes they propose, also controversially, that "just conduct" is nothing more nor less than conduct "that does not violate rules to which one has given prior consent."<sup>149</sup> They then explain more precisely what it means not to violate such rules:

[A]lthough the rules will typically include instructions as to how violations are to be handled and what punishments are to attach to such violations, and although these instructions are therefore contained within the inclusive agreement, it seems wrongheaded to say that agreement implies only a willingness to accept the defined punishment for violations. Consent is to the *rules*, and the moral force of promise keeping is such that one is obligated to other players to play by those rules. To violate the rules may sometimes be personally profitable, but it will not be "just," and it will not become "just" simply by virtue of one's acceptance of punishment. "Just conduct" will consist in keeping one's promises to other players, that is, in abiding by

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<sup>148</sup> *Id.* at 48-49.

<sup>149</sup> *Id.* at 97.

agreed-on rules. A player, for example, who punches another with his fist in American football concedes a fifteen-yard penalty. But he also endures the moral opprobrium of having committed an "unjust" act, and it is expected that this purely moral dimension—the player's sense of justice—will carry weight in moderating his behavior.

It is important to make this point because, in some economists' discussions of the law, one obtains the impression that choosing whether to abide by the rules is like selecting a drink at a soft-drink machine; that is, one either abides by the rules and pays no penalty or fails to abide by the rules and simply pays the price of so doing, as reflected in the rules. But the legislated punishment is not to be construed simply as the "price" of an alternative course of action; it also symbolizes the fact that a "wrong" has been committed.<sup>150</sup>

One need not endorse a purely contractarian theory of justice, or the indicated moral significance of promises, in order to appreciate the force of these points. In a society where respect for law is not totally absent, sanctions are not simply prices. Put another way, guidance rules are distinguishable from enforcement rules; both have behavioral significance as well as theoretical importance.<sup>151</sup>

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<sup>150</sup> *Id.* at 101.

<sup>151</sup> Other economics-oriented theorists are moving in a similar direction. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *Duke L.J.* 1 (arguing that the law can discourage criminal behavior not only by raising its cost but also by instilling aversion to the criminalized behavior). In this, they recapture at least part of the insights of an older, less economics-oriented generation of scholars. See, e.g., Herbert L. Packer, *The Limits of the Criminal Sanction* 64-65 (1968) (arguing for an expansion from the Benthamite conception of deterrence as "the propensity of punishment to scare people," adopted to address the "rational hedonist who will do anything that promises to enhance his well-being if he thinks he can get away with it," to a broader conception as a "complex psychological phenomenon meant primarily to create and reinforce the conscious morality and the unconscious habitual controls of the law-abiding"). Professor Dau-Schmidt has also extended this analysis to certain elements of civil law, but curiously seems to stop short of calling ordinary fault-based civil damages "preference shaping." See Kenneth G. Dau-Schmidt, *Legal Prohibitions as More than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in *Law and Economics: New and Critical Perspectives* 153 (Robin Paul Malloy & Christopher K. Braun eds., 1995).

#### IV. CONCEPTUAL PRAGMATISM: AN ALTERNATIVE RESOLUTION?

Perhaps, however, one ought not draw so sharp a contrast between guidance and enforcement rules. To be sure, the two kinds of rules—or two functions of a given rule—are distinguishable, but they are also related, both as a matter of historical development and as a matter of normative theory. In this Part, I explore certain consequences of this relationship. As a way of introducing the matter, and in order to answer a residual question from Part II, I start with a brief treatment of the impact of the work of philosophers Jules Coleman and Jody Kraus.

##### A. *Recent Work on Transaction Structures*

As already noted, Coleman and Kraus have argued that property rules, liability rules, and inalienability rules should be construed as rules of a different type than enforcement rules: The former are various ways of specifying the *content* of entitlements, in particular the “transaction structures” applicable to such entitlements.<sup>152</sup> The question of structuring entitlements, they argued, is quite distinct from the question of how to enforce the structure that is chosen. The distinction they drew is essentially the same as the one I have drawn here. Yet most scholarship concerning entitlement transaction structures continues to ignore their argument.<sup>153</sup>

A good example is an article recently published by Louis Kaplow and Steven Shavell.<sup>154</sup> Purporting to follow C&M, they define a property rule as involving “absolute protection” of an otherwise specified entitlement, such that a potential actor “would not dare to cause [the harm protected against].”<sup>155</sup> It is

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<sup>152</sup> See *supra* note 102 and accompanying text.

<sup>153</sup> An exception is Akhil Reed Amar, Foreword: Sixth Amendment First Principles, 84 *Geo. L.J.* 641, 674-77 (1996) (citing Coleman and Kraus in support of an argument that monetary remedies for Fourth Amendment violations do not necessarily condone police misconduct by simply adding a “cost of doing business”).

<sup>154</sup> Kaplow & Shavell, *supra* note 27.

<sup>155</sup> *Id.* at 723; see also *id.* at 723 n.27 (“The characterization of a property rule as a choice of who should enjoy an entitlement, coupled with its absolute protection, is emphasized in Calabresi and Melamed . . .”) (failing to identify exactly where C&M “emphasized” such absoluteness). Elsewhere, Kaplow and Shavell define property

hard to imagine a clearer endorsement of the descriptive conception of a property rule: It refers not to what citizens are told they should do, but to what the citizens are in fact coerced into doing. The Coleman and Kraus article is not discussed or even cited.

In another recent article, Ian Ayres and Eric Talley explicitly distinguish between the "ownership structure" of entitlements and their "degree of protection," refer to C&M's typology as addressing the latter issue, and identify liability rules with "remedies at law" and property rules with "equitable relief."<sup>156</sup> Misleadingly, they cite Coleman and Kraus for the proposition that the type of protection determines the content of an entitlement.<sup>157</sup> Essentially the same remedy-based definitions are employed, with no attention paid to the Coleman and Kraus thesis, in a still more recent essay by James Krier and Stewart Schwab.<sup>158</sup>

A more perplexing example is provided by a philosopher. Jeremy Waldron at least responds at some length to the Coleman and Kraus thesis.<sup>159</sup> But even after an obviously careful reading of their article, Waldron professes not to understand why it is important to determine whether a particular rule is part of the contents of a transaction rule or part of the means of its enforcement.<sup>160</sup> So it is not surprising that Professor Waldron's restatement of C&M's scheme reflects no cognizance of the ambiguities analyzed in the foregoing pages:

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rules more ambiguously as ones in which the state "guarantees property right assignments against infringement through the threatened use of its police powers," *id.* at 715, without indicating whether the threat is invariably successful as deterrence or whether the state's "guarantee" is anything more than the threat itself.

<sup>156</sup> Ayres & Talley, *supra* note 26, at 1031. Elsewhere, they expand their conception of a property rule to include "specific performance . . . and certain types of punitive sanctions," *id.* at 1037, or indeed any sanction "severe enough to deter all nonconsensual takings." *Id.* at 1036. This makes their conception essentially equivalent to that of Professors Kaplow and Shavell.

<sup>157</sup> See *id.* at 1041 n.50. While Coleman and Kraus did argue that what C&M called the type of protection partly determines the entitlement's content—because it is actually part of that content—this connection dissolves once one identifies the type of protection with particular remedial devices.

<sup>158</sup> Krier & Schwab, *supra* note 26, at 442-43.

<sup>159</sup> Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 *Yale L.J.* 1441 (1990) (reviewing Jules L. Coleman, *Markets, Morals, and the Law* (1988), which reprints the article by Coleman and Kraus).

<sup>160</sup> See *id.* at 1448-49.



A right is protected by a *property* rule if the right-holder may, with the support of society, enjoin any infringement that takes place without his consent; a right is protected by an *inalienability* rule if it is legally impossible for even an apparently willing right-holder to sell or give away his entitlement; and a right is protected with a *liability* rule if a person other than the right-holder may invade or reduce the value of an entitlement provided he compensates the right-holder afterwards.<sup>161</sup>

Notice that, as in the pieces written by Ayres and Talley and Krier and Schwab, property rules are here defined in terms of one of the many possible coercive remedies (the injunction) that the right-holder can obtain from the state. Again, this was not the way C&M originally defined such rules.<sup>162</sup> Nor does Professor Waldron's reformulation make any more sense of the matter than C&M did. For example, it implies that a prescription requiring consensual transfer supported by a criminal prohibition of an unconsented taking would not create a property rule if injunctive relief were unavailable.<sup>163</sup>

Waldron also seems to define inalienability rules in terms of one particular kind of sanction, the sanction of *nullity* in the state's refusal to recognize the de facto transfer of an inalienable entitlement.<sup>164</sup> But C&M wrote no such thing; they specified only that "[a]n entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing

<sup>161</sup> Id. at 1444 n.3 (citing C&M).

<sup>162</sup> See *supra* Part I and Section II.B.

<sup>163</sup> See *supra* note 91 (discussing the unavailability of injunctive relief when a nuisance has been discontinued); cf. Coleman & Kraus, *supra* note 8, at 1366-67 (rejecting the idea that property rules should be defined in terms of the availability of injunctive relief). Of course, Waldron might reply that I take him too technically, that he means "enjoin" in a non-technical sense closer to "prohibit." If he means it in this way, and if the "support of society" to which he refers means simply the moral support provided by social authority, then he would be using a notion of property rules that is very close, if not identical, to the prescriptive interpretation of C&M for which I have argued here. If, however, the social support is a matter of coercive sanctions, then his notion of property is somewhat different, a notion that I consider *infra* in Section IV.B.

<sup>164</sup> Another possible interpretation of Waldron's "legal impossibility" is that the law makes it *factually impossible* to make the transfer in question. At best, this reading would make Waldron's notion equivalent to the descriptive form of the rule types shown wanting in Parts I and II *supra*.

seller.”<sup>165</sup> More importantly, a nullity approach leads to the odd conclusion that an explicit prohibition of alienation would not create an inalienability rule if a *de facto* transfer would be legally accepted after the fact, even if criminal punishment were imposed for the transfer.<sup>166</sup>

To be sure, Waldron defines liability rules with somewhat greater precision than did C&M: He specifies that the actor must compensate in order to remain within the bounds of social approval, whereas C&M confusingly specified that the actor must be “willing” to compensate.<sup>167</sup> But this improvement only reinforces the prescriptive theory advanced here and the corresponding distinction between the content of a prescription and the issue of its enforcement.<sup>168</sup> Waldron’s definition of liability rules, though coherent in itself, thus stands in sharp, perhaps unintended, contrast to his remedy-based definitions of property and inalienability rules. In other words, the confusion persists.

What accounts for these intransigent responses to the Coleman and Kraus thesis? I suggest several contributing factors. First, mistakes in exposition may have led readers to dismiss the arguments of Coleman and Kraus as providing merely an alternative account of transaction rules, an account others are entirely free to disregard in preference for C&M’s original, presumably coherent account. As one illustration, Coleman and Kraus characterized liability rules as rules legitimating a transfer of the entitlement in question if and only if *ex post* compensation is paid therefor.<sup>169</sup> It is clear that under their conception of

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<sup>165</sup> C&M, *supra* note 4, at 1092. See *supra* notes 40-42 and accompanying text; *supra* notes 94-100 and accompanying text.

<sup>166</sup> In the context of prostitution laws, for example, one can imagine concluding that the restitution of money paid for illegal sex should not be required because of the inability to undo the sexual experience, and yet at the same time deciding to punish one or both parties for violating the rule against selling sex. Cf. *Cougler v. Fackler*, 510 S.W.2d 16 (Ky. 1974) (holding that the civil remedy of restitution is inappropriate where part of consideration for payment is an illicit sexual relationship).

<sup>167</sup> See *supra* note 28 and accompanying text.

<sup>168</sup> Unfortunately, Waldron adds a temporal dimension to the definition by requiring that the compensation be paid “afterwards.” Waldron, *supra* note 159, at 1444 n.3. This is another mistake, one that Waldron apparently picked up from Coleman and Kraus. See *infra* notes 169-172 and accompanying text.

<sup>169</sup> See Coleman & Kraus, *supra* note 8, at 1345; see also *id.* at 1345 n.15 (asserting without documentation, that this view “follows closely [the] standard meaning since

a liability rule, the holder of the entitlement has no power to make a voluntary sale to the other party.<sup>170</sup> This must have come as quite a surprise to anyone working with C&M's scheme, since their first and paradigmatic example of liability rules was the power of eminent domain.<sup>171</sup> In the context of such governmental acquisition, the parties *are* free to negotiate a voluntary sale if they wish, so that legitimate transfer does not proceed *only* nonconsensually. Moreover, in the event of a forced sale, the compensation is typically paid in the same way, temporally speaking, as for voluntary sales, even though it is sometimes permissible that it be paid *ex post*.<sup>172</sup> Similar points apply to C&M's other principal example of liability rules: nuisances conditionally privileged by their accompanying social benefits.<sup>173</sup> It

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Calabresi-Melamed," with the obvious qualification that in their view "transaction rules specify the content of particular rights").

<sup>170</sup> See *id.* at 1347-49 (noting that liability rules *could* be defined so as to allow for the possibility of voluntary sale, expressed as an "alternative" to their view of the concept of a liability rule, but not attributing this alternative view to C&M).

<sup>171</sup> See C&M, *supra* note 4, at 1093, 1106-07. But see Kaplow & Shavell, *supra* note 27, at 758 n.143 ("Eminent domain is usually viewed independently, rather than as part of the subject of property versus liability rules. . . . Nonetheless, some authors have cited this example in the present context [of liability rules]." (citation omitted)). And what is the example Kaplow and Shavell give for the "unusual" use of eminent domain as an example of liability rules? Answer: C&M!

<sup>172</sup> See Sackman & Van Brunt, *supra* note 29, §§ 8.10-14 (describing limited and conditional judicial acceptance of *ex post* compensation and a variety of state laws requiring prepayment). While landowners occasionally are successful in claiming that past government action has "taken" the owner's property without just compensation, a so-called "inverse condemnation" action, the presumptive remedy for such a claim is the reversal of the government action (unless the government chooses to exercise eminent domain). See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (recognizing landowner's right to compensation only for losses incurred pending reversal of the governmental action, at least when such reversal is practically possible).

<sup>173</sup> See C&M, *supra* note 4, at 1105. Certainly nuisance easements can be purchased before the fact. While I am not aware of modern American cases in which such an easement has been taken without consent but for *ex ante* compensation, such takings are not inconceivable. Indeed, a historical example exists in the allowance of private eminent domain by milling companies flooding private lands in order to provide services considered important to the public. See, e.g., John F. Hart, *The Maryland Mill Act, 1669-1766: Economic Policy and the Confiscatory Redistribution of Private Property*, 39 *Am. J. Legal Hist.* 1, 3-5 (1995) (discussing such a statutory rule widely used for a century in colonial Maryland and contrasting it with the colonial law of Virginia, which also provided for compensation to be paid *ex ante*). Virginia still retains statutory provisions for such private takings, although they are phrased in terms of a taking in fee rather than by easement, lease, or other lesser interest. See

does not seem, therefore, that Coleman and Kraus were reworking C&M's scheme so much as providing an entirely new scheme that they believed would be a more useful way to think about transaction rules. Their readers may simply disagree about its superior usefulness.<sup>174</sup>

Relatedly, Coleman and Kraus did not stress as much as I have here the strange consequences, indeed the virtual incoherence, of a scheme that identifies property, liability, and inalienability rules with categories of effective enforcement. To rehearse the point in the context of a recent article, consider the implications of Kaplow and Shavell's characterization of a property rule:

We will suppose that a *property rule* involves two elements: the grant of an entitlement to either the victim or the injurer and absolute protection of that entitlement. Specifically, if the victim has the entitlement to be free from harm, the injurer is precluded from causing harm. We might imagine, for instance, that an injurer would suffer such a stringent sanction if he

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Va. Code Ann. §§ 62.1-116 to 62.1-127 (Michie 1992). There are numerous other occasions on which private companies have been, and still are, permitted to take easements or fee interests for a judicially determined amount of compensation. Historically and economically most important is the example of takings of rights of way by canal and railroad companies. See, e.g., Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. Econ. Hist. 232, 237 (1973). It would be very odd not to consider such practices as involving liability rules under C&M's rule typology just because the compensation is paid *ex ante*.

<sup>174</sup> In retrospect, Coleman and Kraus were attempting to accomplish part of what Madeline Morris more effectively achieved several years later. See Morris, *supra* note 15 (expanding and recategorizing C&M's typology). For example, one confusing aspect of the article by Coleman and Kraus is the use of the term "combination" to refer to the creation of new rule structures out of property, liability, and inalienability rules. See Coleman and Kraus, *supra* note 8, at 1345-52. If I am correct in my analysis of these rule types, they cannot be "combined" in the sense of creating a rule that is "both a property and a liability rule," *id.* at 1348 (their rule (3)), because each rule type is logically incompatible with each other; combination thus produces a rule that cannot apply to anything. The same mutual exclusivity applies even more clearly to the definitions of these rule types as provided by Coleman and Kraus. See *id.* (their rules (1) and (2)). Presumably, therefore, they were addressing the creation of *hybrids* rather than combinations, which is facilitated by identifying the components that make up property, liability, and inalienability rules. See Morris, *supra* note 15 at 831-38 (analyzing these and other mutually exclusive rule types in terms of their "initiation choice," "veto power," "monetary compensation," and "in-kind enjoyment" components).

caused harm that he would not dare to cause it, or that the state would directly prevent the injurer from acting to cause harm (for example, by closing down a plant that did not stop polluting). Similarly, if the injurer possesses the entitlement to cause harm, the victim cannot stop him from doing so.<sup>175</sup>

As already mentioned, all ambiguity about the prescriptive or descriptive character of C&M's rule types has been resolved here in favor of the descriptive version. Thus, A's entitlement relative to B is governed by a property rule if and only if B is in fact so scared by the threat of sanction that he "would not dare" to take the thing without A's consent. If C is not so scared by that threat, for reasons entirely personal to C or otherwise unrelated to the normative features of the entitlement, A's relationship to C is governed by, at most, a liability rule.<sup>176</sup>

The resulting conceptual scheme does not even come close to the notions of property actually in use in law and in everyday discourse. In particular, it means that A's right to, say, his automobile is governed by a property rule as to many private citizens, but not as to many others who have no different moral or legal claim to be privileged in their acquisition of it. If Coleman

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<sup>175</sup> Kaplow & Shavell, *supra* note 27, at 723. Notice that they do not assume, separate from the specification of property rules, that persons will be too scared to violate such rules; rather, they posit that an entitlement is governed by a property rule only as to those persons who are too scared to violate it.

<sup>176</sup> Once again, C might not even be subject to a liability rule, under Kaplow and Shavell's formulation, if she can somehow avoid the state's demand to pay compensation. However, their characterization of liability rules is less clear in terms of the issues discussed here. At one point, for example, they write, "We will presume that under a *liability rule*, the injurer is permitted to cause harm but must compensate the victim for the harm, or the court's best estimate of it." *Id.* (footnotes omitted). Notice their use of the word "permitted" instead of the word "able," thus suggesting a guidance rule, but also their use of the ambiguous word "must," which, given their conception of property rules, probably denotes that the taker cannot avoid paying the compensation. Elsewhere, they write, "[T]he state may employ *liability rules*, under which it merely discourages violations by requiring transgressors to pay victims for harms suffered." *Id.* at 715. Once again, the word "requiring" is ambiguous, and the phrase "discourages violations" stands in sharp contrast with the language of permission used in the former characterization. The former is clearly closer to that of C&M, since it covers eminent domain; under the latter characterization, while it is probably true that the requirement of compensation discourages the use of that power, such use cannot be said to "violate" the landowner's legal rights. The latter characterization matches more closely what I have called a remedial compensation rule, such as that governing tort liability for negligence.

and Kraus had emphasized such bizarre implications of the descriptive interpretation of C&M's typology perhaps they would have had greater impact, even among the economists.<sup>177</sup>

Finally, Coleman and Kraus did not explain at any length exactly why it is that one *needs* to provide "content" to entitlements.<sup>178</sup> For consequentialists in general, and law and economics practitioners in particular, consequences are everything, or nearly so. By the same token, conceptual pragmatists will question whether there is any meaning in a rule aside from its associated consequences. Why, they might ask, does one need more than the existence of a general sense of entitlement coupled with the specific enforcement mechanisms that support or deter its transfer? Doesn't this provide all we need to know in order to understand transaction structures?

I have suggested the importance of "content" rules by referring to them as "guidance" rules and distinguishing between the law-abiding citizen and the recalcitrant. Guidance rules are important for law-abiding citizens; for the most part, enforcement rules are not.<sup>179</sup> Thus, one view of the cathedral is obtained by

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<sup>177</sup> To be sure, Kaplow and Shavell did seem to be aware of a problem. Acknowledging this lack of correspondence with ordinary conceptions, they were forced to qualify their notion of a property rule by commenting in a footnote, "Of course, possessory rights are in fact often insecure; theft of one sort or another is frequently a serious problem. The *social intent*, however, is ordinarily for possessory rights to be inviolate, and for ease of exposition, this Article will usually analyze them as such." Id. at 716 n.3 (emphasis added). But what does this mean? The authors' characterization of property rules as providing "absolute protection"—adopted, we are told, "for ease of exposition"—is fundamentally incompatible with their retreat to the prescriptive concept of social intent as the key to the property concept. If Kaplow and Shavell are really operating within the framework of social intent, relevant if not determinative in a world of law-abiding citizens, their language of fear and physical restraint is inappropriate as a component of the rule typology; but if they are really addressing protection against Holmesian bad men, as that language implies, then social intent is of no behavioral significance. As we shall see, it is possible to combine the idea of social intent with the interest in controlling recalcitrants, see *infra* Section IV.B, but that requires two distinct components of the rule typology rather than a single but equivocal component.

<sup>178</sup> They did give brief attention to the matter in a footnote. See Coleman & Kraus, *supra* note 8, at 1347 n.17.

<sup>179</sup> There are secondary or derivative ways in which enforcement rules become relevant to fully law-abiding citizens, as when such citizens must interact with recalcitrants, or otherwise consider their behavior. Even for interactions among law-abiding citizens, enforcement rules will matter for some purposes on some occasions.

supposing a society populated entirely by such citizens. Even in such a society, there would be a need for authoritative answers to questions about the structure of entitlements. Well-behaved citizens are not necessarily omniscient, nor do they always agree. So problems of coordination and conflict resolution would still arise, as would good faith differences of opinion on matters of principle.<sup>180</sup> As long as there are controversial questions on such matters that need to be settled for all or most citizens, there will be a need for guidance rules.<sup>181</sup> Of course, as one moves away from the admittedly unrealistic assumption of no recalcitrance, the importance of enforcement rules increases and the importance of guidance rules decreases. But guidance rules remain behaviorally significant short of the also unrealistic assumption of perfect recalcitrance.<sup>182</sup> Greater emphasis on these points would help to convince even the most ardent consequentialist of the importance of taking seriously the distinction between guidance rules and enforcement rules.

It would also help to overcome the analytical difficulty encountered by Professor Waldron. His inability to see why it matters whether a given norm is part of the content of a rule or

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For example, despite the implicit assumption made throughout the text, it is possible for a guidance rule and an enforcement rule to conflict so that the enforcement rule imposes a sanction on an act that the guidance rule permits or even requires a person to perform. This represents extraordinarily bad law, possibly so bad as not to be law at all, despite any positivist claims of pedigree. Cf. Fuller, *supra* note 3, at 65-70 (discussing the related problem of contradiction in the guidance rules themselves). But however we characterize the situation, the law-abiding citizen will then have to attend both to his privileges and duties under the guidance rule and to the potential consequences of his being sanctioned under the enforcement rule.

<sup>180</sup> For interesting work on the problems of coordination and the relevance of norms thereto, see, e.g., David K. Lewis, *Convention: A Philosophical Study* (1969); Ullmann-Margalit, *supra* note 83. On the public resolution of good faith disagreements on matters of principle, see, e.g., Ronald Dworkin, *supra* note 35, at 164-224 (discussing a theory of legislative integrity and how it affects the resolution of such disagreements).

<sup>181</sup> To avoid misinterpretation, I should add that the notion of "guidance" involved here does not presuppose that the state acts in a paternalistic way, though of course that is possible. A good faith difference of opinion among citizens as to the appropriate rule to govern a particular context may require resolution without necessarily implying that the state's lawmakers know better than the citizens what the right result is, let alone that the rules adopted will neglect the importance of individual autonomy.

<sup>182</sup> See Laycock, *supra* note 6, at 8-9 (noting the importance of non-remedial substantive law to the law-abiding citizen and accordingly criticizing the tendency to collapse the distinction between such law and the law of remedies).

part of its enforcement structure can perhaps be attributed to the uninformative nature of the term "content" employed by Coleman and Kraus. Whereas "enforcement" speaks clearly to the purpose of dealing with recalcitrants, "content" is opaque in terms of purpose. To put the matter differently, guidance rules have content, but so do enforcement rules, and the importance of content is determined by the purpose to be served. Once one sees this, it is clear why one needs to know whether a given provision is part of the (content of the) guidance rule or part of the (content of its) enforcement provisions.

For example, we have seen that a monetary exaction that is part of a guidance rule operates as a price, as in Law #2 and Law #4, whereas one that is part of an enforcement rule operates as a sanction, as in Law #1 and Law #3.<sup>183</sup> And that difference, once again, matters to the law-abiding citizen. Thus, when a law is ambiguous, some interpretive effort is required to decide which canonical form is involved. Consider:

Law #5: Any person who discharges chemical XYZ into the air, water, or ground in excess of the amounts specified in the foregoing provisions must pay to the State Environmental Agency \$5,000 per ounce of excess XYZ discharged.

A law expressed in this manner must be construed by the law-abiding citizen to determine whether the discharge of chemical XYZ is prohibited, as in Law #3, or conditionally permissible, as in Law #4. Only by making that judgment can such a citizen understand the law and conform her conduct to its requirements.<sup>184</sup>

With the benefit of these clarifications, the significance of the Coleman and Kraus thesis should be more widely appreciated. In Part V, I take some preliminary steps toward incorporating into a general analytic theory of law the insight that C&M pro-

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<sup>183</sup> See *supra* Section III.A.

<sup>184</sup> For example, if the "foregoing provisions" prohibit the discharge of XYZ beyond stated amounts, then Law #5 would be interpreted as a sanction, especially (but not only) if the \$5,000 figure is disproportionate to the costs imposed by the discharge. If, on the other hand, the discharge of XYZ is not expressly prohibited and if discharges within the stated limits are probably of *de minimis* impact, and the \$5,000 figure approximates the environmental harm of larger discharges, then Law #5 would be more sensibly interpreted as a price. Other assumptions can make interpretation more difficult.



vided a typology of guidance rules. Before doing so, however, I address more fully the jurisprudential significance of enforcement rules in relation to the reconstructed typology of guidance rules.

### B. *The Pragmatic Significance of Enforcement*

The persistent attention to consequences nevertheless raises the possibility of a third conception of what C&M's transaction rules are about. To see how, one must recognize the interdependence of guidance and enforcement issues. For any normative legal theory—including, in particular, any form of liberalism—in which the question of the moral validity of a rule is, at least in part, a function of the means of its enforcement, to address the content of a legal rule is unavoidably to address the question of enforcement. When we ask whether to make a law against particular conduct, ordinarily we are not simply asking whether that conduct is desirable and whether a rule should exist to discourage it, but rather whether it is so undesirable, or so undesirable in particular ways, as to warrant a prohibition backed by coercive sanctions.<sup>185</sup> *Distinguishing* between guidance rules and enforcement rules carries the potential to be understood, or rather misunderstood, as necessarily *separating* the process of generating guidance rules from the process of generating the associated enforcement rules.

I have argued elsewhere that any radical separation of this sort is a misleading way of thinking about legal issues.<sup>186</sup> The ability to distinguish analytically the problem of formulating guidance rules from the problem of formulating enforcement rules should not lead to the conclusion that the former task can be undertaken without regard to the latter. This is true not only

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<sup>185</sup> To be sure, the state can and sometimes does act in ways that are not coercive, at least not in the physical sense, and one should avoid the conceptual mistake of thinking that a particular norm is "law" only to the extent that it is backed by such coercive sanctions. See generally Hart, *supra* note 65, at 26-48 (developing objections to the simple model of law as coercive orders). Thus, it would be a mistake to say that Law #1 and Law #2 are identical *qua* law even though they are admittedly different *qua* guidance rules.

<sup>186</sup> Dale A. Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. Colo. L. Rev. 1 (1985) (arguing that the paradigmatic conception of law is the governance of human conduct by coercively enforced rules and criticizing tendencies in modern jurisprudence to downplay the significance of coercion).

for practical reasons, such as the need to shape guidance rules in ways conducive to enforcement, but also for the important theoretical reason that the "moral jurisdiction" of an institution to promulgate guidance rules is affected by the nature of the enforcement rules that will be brought to bear.<sup>187</sup> It may be morally legitimate to condemn the white supremacist's advocacy, yet morally illegitimate to incarcerate him for that advocacy. Moreover, persons recalcitrant in a particular context are not necessarily selfishly free riding on a system of social cooperation. They might be civil disobedients acting entirely in good faith, or they might be morally in the right, or they might be both.<sup>188</sup> Inevitably, the use of coercive sanctions to deal with recalcitrants affects the nature of the guidance rules that an institution may properly promulgate, at least in a liberal order.<sup>189</sup>

The desire to structure our concepts so as to retain at least the possibility of such liberal discourse may help to explain the persistence of attempts to connect the different rule types with particular coercive remedies or sanctions. As indicated above, these attempts have so far been imprecise and largely unsuccessful, but that does not mean that they necessarily must be so. The idea would be to interpret the various rule types as being stated

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<sup>187</sup> To amplify this point, two potential errors can creep into the process of lawmaking when the formulation of guidance rules is separated from the process of generating enforcement rules. First, the issue of enforcement may come to be seen as of quite secondary importance, so that any good guidance rule is automatically seen as worthy of enforcement—the problem of the overenforcement of morality. Second, one may fail to recognize that the content of the guidance rule may be rightly affected by the means of enforcement that is chosen. In other words, one cannot assume that the set of properly enforceable guidance rules is simply a subset of the set of guidance rules that would be proper if enforcement were unnecessary. As the history of the common law amply demonstrates, the evolution of enforced guidance rules is affected by the interaction of guidance rules with the particular means of enforcement employed. Or, to put the matter differently, rights have evolved in the context of remedies.

<sup>188</sup> A classic statement of the liberal ethos is Justice Brennan's majority opinion in the Texas flag burning case. See *Texas v. Johnson*, 491 U.S. 397 (1989) (holding unconstitutional a statute criminalizing the offensive burning of the national flag).

<sup>189</sup> Although the examples in the text are drawn from the context of governmental restrictions on speech, similar concerns undoubtedly affect seemingly more mundane topics like property rights. See, e.g., Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 771 (1964) (emphasizing the importance of private property in protecting a sphere of privacy and autonomy within which the state may not reach).

with implicit reference to the use of the full panoply of coercive remedies.

Thus, when C&M wrote that under a liability rule a person "may destroy" the entitlement conditioned on payment of compensation,<sup>190</sup> perhaps they were trying to capture the idea that no coercive state action may be employed as a consequence of the taking or damaging except to assure a public determination of appropriate compensation and, if necessary, to induce its payment. If that is *all* that the permissive locution means, then it is silent on the question of governmental approval or disapproval of the action, for the permission is directed at officials. So construed, the definition offered by C&M would embrace both situations in which the activity is condoned, such as eminent domain, and those in which the activity is proscribed, such as negligent driving. On the other hand, it would not cover the application of criminal sanctions or punitive damage awards to reckless driving.

A more complicated adjustment would be necessary to make coherent the definition of property rules. One would need to indicate that property rules involve the use of coercive remedies even when appropriate compensation is paid, if consent to the transfer is not obtained. But which coercive remedies? Once again, the availability of injunctive relief is an inadequate criterion, since one can imagine protecting property guidance rules with only criminal sanctions. Conversely, a definition solely in terms of criminal sanctions will not do, since one can easily imagine protecting property guidance rules with only civil remedies. So we are driven to something like the following: A property rule is in place whenever some coercive state action (other than those permitted under liability rules) may be employed against a person who takes or damages an entitlement if and only if the taking or damaging is without the consent of the holder of the entitlement.<sup>191</sup> Inalienability rules would in turn be characterized as operating whenever some coercive state action (other than those permitted under liability rules) may be em-

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<sup>190</sup> C&M, *supra* note 4, at 1092.

<sup>191</sup> The parenthetical qualification is necessary to preserve the mutual exclusivity of the rule types, as C&M clearly intended; the "only if" restriction is necessary to prevent the definition from embracing what we will want to call inalienability rules.

ployed in the event of a putative transfer, taking, or damaging of an entitlement with the consent of the holder of the entitlement.

Scholars working in this tradition may have been groping toward a set of definitions like these, definitions that place the coercive remedies in a predominant position in the very conception of transaction rules.<sup>192</sup> As an interpretation of C&M's original work, this description has the virtue already described of subsuming two very different kinds of "liability" rules under the same category, seemingly in accord with C&M's applications. But what has really been gained by this reformulation? On closer inspection, very little.

In the first place, this pragmatic approach does not speak in terms of what citizens are *in fact* forced to do, but rather in terms of what the law is *prepared to try* to force them to do. The latter is morally relevant, but it is of very little help to those interested in efficiency comparisons, since it is impossible to say anything meaningful in a world of non-negligible recalcitrance about the relative efficiency of the various rule types unless one adds empirical information, or at least empirical assumptions, about the nature, extent of use, and effectiveness of the coercive measures that are in fact available in each context. For example, it would be impossible to conclude that a liability rule is more efficient than a property rule—even if there are high transfer transaction costs and low damages assessment costs—until one knows much more about the coercive remedies that would be applied to enforce them. In particular, enforcement of the liability rule might be so weak that it does not deter recalcitrants from taking without paying the required compensation, in which case a property rule could be more efficient than a liability rule whether or not the property rule deters takings. So the pragmatic consequentialist approach, or at least this particular one, leaves too much unspecified for the economist's purposes.<sup>193</sup>

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<sup>192</sup> See *supra* notes 5, 37, 154, 156, 158, 161 and accompanying text.

<sup>193</sup> The same point remains true even if the definitions are changed by specifying not when coercive sanctions *may* be employed but when they *will* be employed. This compromise descriptive approach eliminates, definitionally speaking, uncertainty about sanction employment in trying to discern the effects of a rule, but the seriousness of the sanctions remain too indefinite to allow accurate conclusions about

In the second place, such remedy-based grouping of guidance rules loses important information about the subject norms. In particular, since both Law #1 and Law #2 fall within this pragmatic categorization of "liability" rules, neither the citizen nor the analyst can discern, just from knowing that it is governed by a "liability" rule, whether the conduct is socially approved or socially condemned.<sup>194</sup> The grouping does not respond, therefore, to the needs of the law-abiding citizenry or to the concerns of the analyst who would take such citizens into account. Of course, the actual rules that fall into this grouping may provide the needed information. But as long as there are significant numbers of law-abiding citizens in the society, empirical generalizations about their behavior will be in part a function of the content of those rules in a way that is not captured by the fact that they both fall within the category of "liability" rules. And that further complicates the task of making any useful generalizations about the relative efficiency of those rules.

This second category of problems can be handled by fusing guidance rules with coercive sanctions. More precisely, one could define each rule type by reference to both (1) its content as a pure guidance rule, and (2) conditions on the use of coercive sanctions. Such hybrid rule types would preserve the focus on guidance for the law-abiding and, at the same time, serve to highlight the moral issues raised by the use of state coercion to deal with recalcitrants. For example, one could interpret C&M's property rule category as follows:

*Pragmatic Conception of Property Rules in Law:* A's entitlement relative to B is governed by a *property rule* if and only if (1) B is permitted to take or damage the entitlement only with A's consent, and (2) some state-authorized coercive sanction may be employed against B on account of B's taking or damaging the entitlement in violation of (1).

Thinking in terms of such Janus-faced structures may well be the most philosophically illuminating way to understand many

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efficiency in the face of recalcitrance. A formal demonstration of this point is presented in the Appendix.

<sup>194</sup> In other words, some instances of conventional property, those protected only by a monetary damage remedy, would fall within the liability rule category.

legal rules.<sup>195</sup> Certainly, this conception of property rules is far closer to conventional use of the idea of property, that of lay persons as well as lawyers, than the remedy-focused conceptions articulated above.<sup>196</sup> But once again, without empirical information or assumptions about the effectiveness of the coercive sanctions as well as the extent of recalcitrance among the population—information that is no part of this conception of property rules—one is unable to make any significant generalizations about the efficiency of such rules as compared to similarly defined liability or inalienability rules.<sup>197</sup>

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<sup>195</sup> Compare this Pragmatic Conception with the following now classic definition of property:

[T]hat is property to which the following label can be attached:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private citizen

Endorsed: The state

Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954). Of course, neither the Pragmatic Conception in the text nor Professor Cohen's more picturesque formulation captures the liberal concept of full *ownership* of a thing, though for different reasons. For example, to obtain the notion of A's ownership of Blackacre, one must specify not only that A may keep B off Blackacre, but also that A may herself use Blackacre without B's consent. The Pragmatic Conception, like all versions of C&M's typology, leaves open the nature of the entitlement at issue; it can refer to A's Hohfeldian liberty vis-à-vis B to use a thing or to A's Hohfeldian claim-right that B *not* use the thing. Nevertheless, ownership entails more than just a particular form of transaction rule. See generally A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* (A.G. Guest ed., 1961).

<sup>196</sup> Notice that conventional property rights, even those protected only by damages remedies, are back in the property rule category where they belong.

<sup>197</sup> To complete the story, such definitions are included here:

*Pragmatic Conception of Liability Rules in Law:* A's entitlement relative to B is governed by a *liability rule* if and only if (1) B is permitted to take or damage the entitlement with or without A's consent, provided that if done without A's consent then B must compensate A for the value of the loss in an amount and under terms publicly determined, and (2) some state-authorized coercive sanction may be employed against B on account of B's taking or damaging the entitlement in violation of (1).

*Pragmatic Conception of Inalienability Rules in Law:* A's entitlement relative to B is governed by an *inalienability rule* if and only if (1) B is not permitted to take or damage the entitlement with A's consent, and (2) some state-authorized coercive sanction may be employed against B on account of B's taking or damaging the entitlement in violation of (1).

The present argument certainly does not rule out on conceptual grounds a comparative efficiency analysis, even one that proceeds by making simplifying assumptions. It insists only that concepts be employed in a coherent and sensible fashion. Up until now, the most common simplification facilitating efficiency comparisons has been to assume, either implicitly or explicitly, the operation of perfectly effective sanctions, whether as part of the meaning of transaction rules or as a separate social parameter. As in C&M's arguments, damages are assumed to be paid, injunctions are assumed to be obeyed, and criminal prohibitions are assumed to be effective, at least until the question of "optimal enforcement" is addressed specifically, usually in the context of criminal sanctions.<sup>198</sup>

The principal difficulty with this approach is that the assumption about remedial effectiveness, however quickly it is abandoned, is in tension with the Holmesian assumption about the citizenry, the assumption that makes it superficially plausible to ignore the distinction between guidance and enforcement. Does it make sense after all to assume that all citizens will ignore any legal rule to the extent it is not backed by a coercive sanction and, at the same time, to assume that they will obey the rule to the extent it *is* backed by such a sanction? Such a world is peculiar indeed. The examples that come to mind are the legal

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Notice that under these Pragmatic Conceptions not all structures involving remedies limited to compensation are liability rules, but only those that, like conventional options, B is permitted to exercise. On the other hand, the traditional option does *not* involve a liability rule, because the option exercise price, as distinct from the price of the option itself, is privately determined. Such options simply constitute a form of property rule. Thus, all liability rules involve a kind of option, but not all options involve liability rules. Cf. Rose, *supra* note 22, at 2178-79 (characterizing a liability rule as a property right subject to an option). Notice also that the Pragmatic Conception of inalienability includes, but is not limited to, structures under which the entitlement may be taken without A's consent for a publicly determined price. As noted earlier, it might be better to separate such rules from rules that provide for full inalienability, that is, from entitlements that may not be taken *with or without* A's consent. See *supra* note 99. This has the virtue of isolating two logically independent binary variables, A's power to transfer voluntarily to B, or its absence, and A's liability to involuntary transfer to B, or its absence.

<sup>198</sup> Compare C&M, *supra* note 4, at 1106-24 (apparently assuming effectiveness of sanctions in discussing relative merits of property, liability, and inalienability rules) with *id.* at 1093 (noting that economic considerations include questions of administrative costs of enforcement) and *id.* at 1124-27 (acknowledging that enforcement of criminal sanctions is less than perfect).

system of an unjust and illegitimate state populated by moral yet cowardly citizens, or alternatively that of an omnipotent state, however just, populated by narrowly self-interested citizens. Evidently, the latter is the image that hovers in the back of more than one scholar's mind.<sup>199</sup> Still, why either such system should be used as a model from which to learn about our own is in considerable need of explanation.

Economic analysis can proceed, however, without the Holmesian baggage. One need not assume ubiquitous recalcitrance. Starting with our Pragmatic Conceptions, which avoid the confusions that attend building effectiveness into the rule types themselves, one can separately assume that the sanctions brought to bear are in fact sufficiently powerful to persuade all recalcitrants, or at least those of interest, not to violate the rules' prescriptions. Since the law-abiding need no compulsion, this would produce a situation of uniformly law-conforming behavior that can be analyzed in terms of transaction costs, compensation assessment costs, and so forth.<sup>200</sup> Some, but by no means all, of the conclusions that law and economics writers have advanced can be restated in such terms.<sup>201</sup> A major difference identified in the course of the present analysis is that sanctions will not be treated as prices by the law-abiding, a fact that will be of practical significance as the assumption about the strength of the sanctions is relaxed. Failure to recognize this fact, and a resulting underestimation of the behavioral impact of guidance rules backed by relatively weak sanctions, have been recurring features of extant law and economics literature.

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<sup>199</sup> Recall C&M's assumptions about the behavior of people in the absence of state authority. See *supra* notes 71-76 and accompanying text.

<sup>200</sup> In particular, this is the best way to reconstruct the confused yet laudably explicit conceptual scheme employed by Professors Kaplow and Shavell. See *supra* notes 175-177 and accompanying text. For example, A's entitlement to her automobile can be felicitously described as governed by a property rule by noting that the prescriptive norm is that others are not allowed to take her car without her permission. It is also true, as a contingent and assumed fact, that recalcitrants who would not honor this prescription are prevented from taking the car without her permission by the presence of sanctions. This way, when the assumption of perfect effectiveness of sanctions is relaxed, it is still correct to say that A's entitlement is governed by a property rule even as to a person who is willing to take A's car without her consent.

<sup>201</sup> This point will be illustrated further in Part V, *infra*.



Rather than continue this line of analysis, I want to suggest a different, and I think more useful, way to approach the design of transaction structures. Instead of assuming initially a nonubiquitous recalcitrance that is entirely offset by powerful threats of coercive sanctions, it is in many ways more illuminating to assume initially *no recalcitrance at all*. Although in theory one should generate the same results from either direction, this assumption requires one to focus more explicit attention on law's relevance to the neglected "silent majority" of citizens who are generally law-abiding.

#### V. THE DESIGN OF GUIDANCE AND ENFORCEMENT RULES

Consider the simplifying assumption that all persons, or at least those persons of interest in the particular analysis, are completely law-abiding. This eliminates the need to assume the uniform effectiveness of coercive remedies and allows a direct comparison of the efficiency of property, liability, and inalienability rules on terms not terribly dissimilar to that of C&M (provided one filters out the language of recalcitrance). Indeed, this is the best way to reconstruct C&M's argument.<sup>202</sup> As we have seen, one then works with the prescriptive concepts of such rule types, as reflected in the first component of our Pragmatic Conceptions. There is no conceptual tension of the sort encountered in the more usual analysis, built on the Holmesian perspective. Of course, one need not limit the arguments to efficiency considerations; the assumption of no recalcitrance facilitates, but does not require, a focus on efficiency. In any case, the model of society from which this analysis works is considerably less cynical, and in most contexts substantially closer to reality, than those associated with the Holmesian perspective.<sup>203</sup>

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<sup>202</sup> Recall that C&M proceed by first addressing the allocation of entitlements, based on considerations of economic efficiency, distributional preferences, and other concerns, see C&M *supra* note 4, at 1093-1105, and then addressing the protection of those entitlements by property rules, liability rules, or inalienability rules, see *id.* at 1105-15. The analysis in the text parallels this approach but does not duplicate it.

<sup>203</sup> It is interesting to contrast this model with those that economists consider optimistic. Professor Polinsky, in an oft-cited early article elaborating and qualifying the C&M framework, started with a set of unusually explicit assumptions that he called "the best of all possible worlds," one of "cooperative behavior, costless

In the following Sections, I illustrate the value of approaching the analysis of entitlements in this way. After developing several thoughts about how the law would be articulated in the context of no recalcitrance, the assumption is relaxed to allow for some, but never complete, recalcitrance. Only a cursory analysis is attempted here, as this subject amounts to the reconstruction of law in a liberal state.

### *A. Guidance Rules in a World of No Recalcitrance*

Guidance will be of value even to the most scrupulously law-abiding citizens. Our assumption does not require that citizens have shared values, other than recognition of the importance of the rule of law, nor does it require that citizens have perfect, or even imperfect but shared, information about the world.<sup>204</sup> Assuming a world of persons of varying interests, values, and information, in some contexts people will need to know whether a certain entitlement is alienable. If so, they may consider options for alienation. If it is not, they will not attempt to alienate. In some contexts people will need to know whether a certain entitlement can be adversely affected, destroyed, or taken, without the consent of its holder, provided compensation is paid. If not, they will not take. If so, they will choose, on whatever grounds of utility or fairness that matter to them, whether or not to take the entitlement. But if they do take, they will voluntarily pay the necessary compensation. Some form of adjudication may be necessary in order to determine an "objective" value of the entitlement, but declaratory relief will suffice; enforcement of the debt so generated will not be necessary. In this manner, C&M's

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redistribution, and perfect information." A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 *Stan. L. Rev.* 1075, 1080 (1980). Moreover, it is clear from his discussion that "cooperative behavior" does not mean law-abiding behavior, but rather the absence of often self-defeating and efficiency-defeating strategic hold-out behavior. See *id.* at 1078. Polinsky was, of course, precluded from considering law-abiding behavior as part of the "best of all possible worlds" because he followed the usual identification of rule types with remedy types, in the context of which recalcitrance is implicitly assumed. See *id.* at 1076 (identifying property rules with injunctive relief and liability rules with damages).

<sup>204</sup> See *supra* notes 180-181 and accompanying text.

property rules, liability rules, and inalienability rules should be seen as among the various ways that social life can be structured.

Problems such as the overuse of resources held in common, transaction costs, holdouts, and free riders—the principal issues underlying C&M's analysis—would exist as well in the hypothesized world. Consequently, in considering how particular classes of entitlements should be structured, the various considerations of static efficiency, dynamic efficiency, and distributional preferences that C&M describe would still come into play.<sup>205</sup> Personally, I find C&M's framework rather impoverished in its failure to take seriously justice-based arguments that do not depend ultimately on the idea of preferences. But that is another story. I do not pretend to offer here a comprehensive normative theory of transaction structures.<sup>206</sup> Certainly, it is difficult to envision a system that emphasizes property rules and inalienability rules without presupposing some form of liberal legal order, wherever situated on the political spectrum. And that has important implications. The most obvious is that liability rules should be disfavored, involving as they do a clear incursion on the autonomy of the entitlement holder. Of course, as communitarians would be quick to observe, property rules involve an incursion on the autonomy of the non-holder in that they eliminate the freedom to take without the holder's consent. But economists will surely recognize that the two incursions are not symmetric: The holder may invest time and energy in the *res* governed by the rule and thus stands to lose under a liability rule in a way that is not applicable to the non-holder under a property rule.<sup>207</sup> Thus, liabil-

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<sup>205</sup> In many cases, work by scholars in the law and economics tradition can be "translated" into versions relevant to such an assumed world. See Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. Rev. 215, 225-26 (1996) (indicating that C&M's article, as well as more recent work by Ayres and Talley and by Kaplow and Shavell, may be understood as relevant to a world in which full compliance is assumed).

<sup>206</sup> This would, of course, be a Herculean undertaking. As Professor Marks notes in connection with his assumed world of full compliance, we can imagine working out the details of "property law, contract law, corporation law, the law of estates and trusts, tax law, commercial law, and securities law," among others. See *id.* at 226.

<sup>207</sup> And this is true even if the investment of time and energy by the holder is not reflected in the economic value of the *res*. Professors Coleman and Kraus distinguish the classical liberal conception of property rights, motivated by a concern to protect autonomy, from the economic conception of property rights premised on pro-

ity rules should be limited to situations in which there is a demonstrable and convincing need to override the holder's choice to refuse alienation. Further, as between property and inalienability rules, property rules should be the default preference, in this context out of respect for the autonomy of the willing holder and the willing transferee. The precise conditions under which a convincing need arises to override these default preferences are of course controversial, but a mere gain in economic efficiency may not be enough.<sup>208</sup> Moreover, the reality of the claimed needs, even on narrow economic grounds, is often subject to challenge.<sup>209</sup>

The main point for present purposes, however, is that the entire thrust of the questions to be addressed changes dramatically as one shifts focus, however incrementally, to consider the recalcitrant citizen. In particular, it should now be clear that in discussing the various guidance rule types, one can raise the question of what form of enforcement is best as to each. Thus it is perfectly coherent, if not always desirable, to speak of property rules that are enforced only by compensatory damage awards, or only by punitive damage awards, or by both; of liability rules that are enforced only by injunctions, or only by criminal sanctions, or by both; and of inalienability rules that are enforced by any of these, singly or in combination. The combinations are obviously many. Indeed, if there are, say, six primary remedial options (e.g., criminal sanction, civil compensation, restitution, civil punitive awards, injunctive relief, and recovery of litigation expenses) that can each be used or not used to protect a given entitlement, then sixty-four basic reme-

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tecting only the (economic) value of the entitlement. See Coleman & Kraus, *supra* note 8, at 1356-65.

<sup>208</sup> Professor Dworkin has argued, for example, that even if certain rights, like property rights, are causally attributable to the economic advantages to society derived therefrom, those rights generate claims that need not be defeasible in the interest of policies such as achieving economic efficiency. See Ronald Dworkin, *Taking Rights Seriously* 90-100 (1978).

<sup>209</sup> For example, a recent article demonstrates that the need to allow buyers to take intellectual property without enduring high transaction costs, a problem that has led to proposals for compulsory licensing schemes, can be and is being handled under property rules by parties' contracting into schemes that allow subsequent compensated takings. See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal. L. Rev. 1293 (1996).

dial combinations are possible.<sup>210</sup> For each guidance rule category, one can therefore consider which combination of remedies is appropriate.<sup>211</sup>

A recent article by Stephen Marks illustrates several of these points nicely.<sup>212</sup> Professor Marks employs a set of simplifying assumptions in order to investigate the relationship of the C&M scheme to tort and criminal law. He assumes "shared values" in the sense of views about what constitutes a good society, "shared knowledge" about the facts of the world, and voluntary "full compliance" with the authoritatively announced rules.<sup>213</sup> After analyzing how entitlements might be structured in this assumed world, he relaxes first the assumption of full-compliance and then the assumption of shared knowledge. In particular, Marks recognizes the crucial if obvious point that the question of coercive remedies only enters the picture when the former assumption is relaxed. This analysis is offered for the ultimate purpose of illustrating how utilitarian theorists can explain the now prominent idea of excluding from the social utility to be maximized the utility resulting for criminals from their criminal acts.<sup>214</sup> Marks' solution is that we collectively choose rules so as to maximize social utility in the full compliance world, but we strip criminally derived utility from the social welfare function

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<sup>210</sup> A remedial dimensionality of  $m = 6$ , meaning six binary variables that can be combined in any way, yields  $(2)^6 = 64$  possible remedial combinations, not all of which would necessarily be meaningful or practical. In Section IV.B, *infra*, I try to outline some practical considerations identifying the most important combinations. For a good discussion of some remedial subtleties inspired by the C&M framework, see Levmore, *supra* note 37.

<sup>211</sup> According to Professor Morris' elaboration of the C&M scheme, the three (or four, if one distinguishes between partial and full inalienability, see *supra* note 99) C&M rule types are just some of the 14 meaningful entitlement forms (out of a possible  $(2)^6 = 64$  forms) that can be generated by different combinations of three binary variables with respect to transfer applicable to either party: "initiation choice," "veto power," and "monetary compensation." See Morris, *supra* note 15, at 838-49. Thus, C&M's scheme of transfer rules is based on a guidance rule dimensionality of  $n = 6$ , meaning six independent binary variables, even though not all combinations are meaningful.

<sup>212</sup> See Marks, *supra* note 205.

<sup>213</sup> *Id.* at 223-24. This is the only such use of the full-compliance assumption that I have encountered in the work of theorists making explicit use of the C&M rule typology.

<sup>214</sup> See *id.* at 221-23.

once the full-compliance assumption is relaxed and the issue is simply one of optimal enforcement levels.<sup>215</sup>

Despite the insightful use of a full-compliance model, Marks' argument suffers from confusing features and incomplete arguments. Foremost is the question of why, in a world with all these assumptions, one would need rules at all. With shared knowledge, shared social values, and well-behaved citizens, why would people not simply know and do what is best without the aid of rules? Perhaps there is an answer to this question, but Marks does not provide it.<sup>216</sup> My suggestion that the need for authoritative rules arises from problems of coordination in a world of imperfect information and from good faith disagreements on matters of moral principle provides the basis for the promulgation of rules, compliance with which Marks initially assumes. Thus, in constructing models for an analysis of law, however ideal, one must not lose sight of the problems that make law an important, if not necessary, social institution.<sup>217</sup>

Notwithstanding the assumption of no recalcitrance, whatever scheme of property, liability, and inalienability rules is chosen for the law-abiding citizenry will include a class of remedial rules concerning transfers that can be subsumed only with some

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<sup>215</sup> See *id.* at 228-29.

<sup>216</sup> See *id.* at 224 (asserting, without explanation, that inhabitants of such a world would promulgate rules). Because of the assumptions of shared knowledge and shared social values, the answer cannot lie in the claim that individuals will have differing opinions about how social utility should be maximized. Perhaps the answer lies in the proposition that the full-compliance assumption, which pertains only to rules, presupposes that authoritative rules are adopted, so that without such rules there will be no assurance that people will choose to maximize social utility in their actions even though they all know what actions would lead to such a result *and* all value such a result. It is not clear how this can be fleshed out.

<sup>217</sup> One cannot tell exactly what Professor Marks intends by his assumption of shared values, because he does not go through the exercise of relaxing that assumption. See *id.* at 217 n.7. Such an exercise would give needed contextual definition to the original assumption as well as to its relationship to the assumption of shared information. Similarly, his main argument for the possible usefulness of liability rules—rules conditioning the permissibility of some acts upon the payment of compensation—in a world of full compliance depends upon the public's being unable to observe directly the actor's personal utility, so that compensation is used to test the value of the act to the actor. See *id.* at 225. But Marks does not explain how this problem even arises in a world of completely shared information, which he also assumes at this point in his argument. See *id.* at 224.

work under the prescriptive version of the C&M typology or a suitable elaboration thereof. These are rules that deal with the innocent mistakes that even law-abiding citizens will occasionally make. For example, suppose Taney sends money to Marshall by mistake; the money was meant to go to Chase in discharge of a debt. Assuming that the social judgment is that Marshall must return the money, Marshall has a duty that is a not so obvious feature of Taney's property right in the money. Not only must Marshall refrain from intentionally or negligently taking or destroying Taney's money, the more obvious kind of duty, but he must also return such money when mistakenly given to him without any fault on his part.<sup>218</sup>

Similarly, suppose Taney destroys the object of Marshall's property right under the reasonable but mistaken belief that the *res* was within Taney's property rights or that their relationship with regard to the *res* was governed by a liability rule.<sup>219</sup> Assuming that the social judgment is that the burden of such mishaps should fall on the destroyer, Taney may be required to compensate Marshall for the loss.<sup>220</sup>

To be sure, one might conclude from the preceding that the law of negligence, in its remedial dimensions, would have no role at all in a world of law-abiding citizens; negligence is faulty conduct, and such conduct would not occur in the hypothesized world. Individuals' property interests in not being harmed negligently would be respected, so the law of negligence would consist simply of a prohibition or set of prohibitions against unreasonably risky acts. The problem of innocent mistakes, however, forces us to qualify this conclusion to a small but perceptible ex-

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<sup>218</sup> See Dobbs, *supra* note 91, § 4.1(1), at 553. By the same token, an innocent finder must return the thing found to its previous holder. See Ray Andrews Brown, *The Law of Personal Property* § 3.1, at 24 (Walter B. Raushenush ed., 3d ed. 1975).

<sup>219</sup> As these possibilities illustrate, there can be uncertainty among a wholly law-abiding citizenry even after guidance rules are promulgated on a given subject. Devices such as declaratory relief are of value in such cases. See Hart, *supra* note 65, at 89-96 (discussing uncertainty as one of the central problems that developed legal institutions attempt to solve, and distinguishing this issue from the problem of developing efficient sanctions to enforce obligations).

<sup>220</sup> See Keeton et al., *supra* note 30, § 17, at 110 (noting that reasonable mistake is rarely an effective defense to a claim for damages resulting from otherwise intentional torts).

tent. Negligence liability under current law is often said to be, in theory and perhaps in practice, a matter of *objective* fault, with conduct measured by what is reasonable for the hypothetical person of ordinary prudence, not what would or did seem reasonable to the actual actor.<sup>221</sup> Consequently, such liability may be imposed upon someone who has acted in utmost good faith. Of course, the presence of good faith does not mean that the actor is without fault, even in a subjective sense, because a mistake that led to those good faith beliefs might itself have been one that ought not to have been made. But in the case of actions of children or the insane, for example, fault-based liability under negligence law might well entail no plausible claim that the actual actor should have acted otherwise.<sup>222</sup> Thus, to the limited extent that subjective fault is not mirrored by objective fault, the compensatory demands of conventional negligence liability might be necessary even in the hypothetical society of completely law-abiding citizens.<sup>223</sup>

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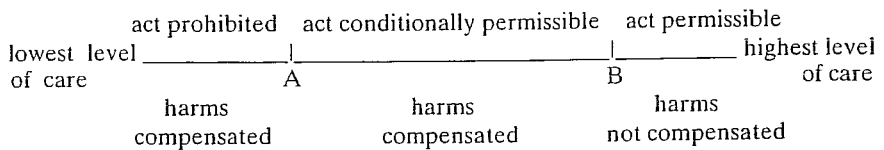
<sup>221</sup> See *id.* § 32, at 173-75.

<sup>222</sup> See *id.* at 176-82. Use of an objective standard might be a consequence of underlying principles of moral responsibility, as distinct from moral fault, or it might simply be a consequence of concerns about the difficulties of proving subjective fault, with objective fault being used as a proxy. See *id.* § 4, at 21-23. To the extent that this use of an objective standard is the result of proof difficulties, it would be largely unnecessary in a world of law-abiding citizens, who would not make perjurious denials about material facts.

<sup>223</sup> It is instructive to contrast this point with what Professor Marks has to say about compensation rules when he relaxes the full-compliance assumption. Marks draws the following conclusion about the respective roles of strict and fault-based tort liability: "Tort law has a dual nature, encompassing both prohibited and conditionally permissible acts. However, this duality does not correspond to the divide between strict liability and negligence." Marks, *supra* note 205, at 233. The first of these conclusions is entirely consistent with the arguments of the present Article. The second is consistent with the present arguments only to the extent that negligence liability covers conditionally permissible acts as described in the text or to the extent that strict liability is a misnomer. See *supra* note 60. These are not, however, the considerations that led Marks to his conclusion, for he concedes that compensation based on negligence is a form of fault-based liability that is introduced as a possible legal response only with the relaxation of the full-compliance assumption. See *id.* at 228 n.39 and accompanying text. Rather, he reaches this conclusion by hypothesizing a world without full compliance in which the following transaction structure is put in place:



These various obligations of restitution and compensation for mistakes might be construed as prescriptive liability rules, since they do not involve the social judgment that the action giving rise to the obligation was improper. On the other hand, this is not to say that the law condones those actions. In the context of negligent or intentional (but good faith) harms, it is surely true that, could those harms or mistakes be publicly anticipated, the social judgment would be that the act should not be performed; indeed, if such anticipation were communicated to the actor before the action is taken, it would change the conditions that render the act not improper. Even in the context of a mistaken delivery of an item to another, communication of the anticipated burdening of the innocent recipient might well deprive the actor of the benefit of the rule requiring restitution. Such features are not part of the paradigms of liability rule invoked by C&M, such as eminent domain, and there is no reason to think C&M intended their conception to extend to the restitutionary obligations outlined here.



*Id.* at 231 exhibit 3G. Under this structure, actions with the lowest levels of precaution (less than A) are prohibited and violations of the prohibition are subject to a requirement of compensation; actions with the highest levels of precaution (greater than B) are unconditionally permitted; and actions with intermediate levels of precaution are permitted subject to a duty to compensate. This and similar structures, Marks concludes, “resemble activities subject to negligence,” *id.* at 231, yet it entails conditionally permissible action (between A and B). Given his earlier concession that negligence entails fault, it is not clear why Marks concludes that the structure as a whole “resembles” negligence, except that it is true that the requirement of compensation is discontinuous as a function of precaution, with the discontinuity occurring at point B. He does not explain why it would not be more accurate to say that the structure is a mixed system of negligence and strict liability, with negligence liability below level A and strict liability at levels between A and B. For there are *two* discontinuities in the structure, one that determines fault (at point A) and one that determines the duty to compensate (at point B). Similar problems affect Marks’ conclusion that strict liability does not “exclusively” price behavior. See *id.* That conclusion appears to entail the implicit assumption that what defines strict liability is the negation of the discontinuity in compensation as a function of precaution, whereas it would be more accurate to say that strict liability is defined by a duty to compensate without the violation of a fault-based prohibition.

This suggests a more general point. I have deliberately referred to an assumption of "law-abiding" conduct rather than one of "moral" conduct. Yet many non-legal social norms would provide all the guidance that is needed for law-abiding citizens who are also reasonably moral persons. Moral norms prohibit murder, for example, and most people do not need to be guided on that subject by legal rules. Consequently, legal guidance rules concerning murder are, for the most part, unnecessary until one takes account of those who are significantly recalcitrant. But this is true only because guidance rules exist in a different form. Moreover, to reiterate a point made earlier, there can be legitimate differences of opinion about the morality of killing in special circumstances, such as euthanasia and abortion. Such problems often call for legal guidance because of the authority that derives from deliberative resolution and the need for a clear, or at least uniform, answer.<sup>224</sup>

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<sup>224</sup> Omitted from the text is a consideration of breach of contract and the difficult issue of whether damages for breach are a price—the "efficient breach" theory, see Holmes, *supra* note 71, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.")—or a sanction. This can be rephrased as asking whether the breach of a contractual promise is socially approved when the breaching party is prepared to compensate the other party for the loss. Compare Cooter, *supra* note 103, at 1544-47 (contending that, because expectation damages vary with the extent of the harm, and not with the state of mind of the breaching party, damages for breach of contract are a price), with Finnis, *supra* note 64, at 320-25 (criticizing the Holmesian version of contractual obligation and asserting that the common good requires performance of contracts). Daniel Friedmann makes a powerful case against the efficient breach theory, emphasizing the presumptive authority of the contracting parties to choose whether to permit efficient breach and the lack of convincing evidence or argument showing that permitting compensated breaches is more efficient than not permitting them. See Friedmann, *supra* note 31. He does not, however, specifically address the issue of a default rule, a rule determining the permissibility of compensated breach in the absence of evidence of the parties' intentions on the question. Perhaps he assumes that the parties' hypothetical intentions would be to prohibit even efficient breach, given the moral force of promise-keeping and the need to plan one's activities. The popularity of the efficient breach theory attests to the proposition that Friedmann's case for the inefficiency of permitting compensated breach is not entirely irresistible. In any event, the issue of a default rule warrants a clear and authoritative resolution upon which contracting parties can rely. Friedmann's description of the current state of the law suggests a default rule against intentional compensated breach. See *id.* at 18-23.

*B. Enforcement Rules in a World of Imperfect Recalcitrance*

Obviously, innocent mistakes are not the only problems a society encounters in the real world. Consideration of recalcitrants leads to a number of predictably necessary enforcement measures. In light of the importance attributed to such remedial structures in the post-C&M literature, I develop in this Section a somewhat more explicit account of the content of enforcement measures than I did of the guidance rules they are there to support.

C&M's treatment emphasized criminal sanctions as the means of supporting the property rule/liability rule framework.<sup>225</sup> As we have seen, their analysis of damages, injunctions, and other civil remedies is torn between the problem of defining entitlements and the problem of enforcing them. Confusion continues to flow from the former emphasis and the latter tension.<sup>226</sup> So it is important to reemphasize that any particular form of enforcement—whether it be a criminal sanction, a civil punitive sanction, a civil compensatory sanction, or only social stigmatization—might in principle be brought to bear to protect any one of the three rule types that C&M explicitly discuss, as well as other types they did not address.

Before turning to the draconian level of criminal sanctions, it is both just and prudent to consider what can be accomplished by the use of civil remedies. Justice requires this because a society committed to individual freedom, however that idea is expressed, must have a powerful justification for the imposition of such burdens on individual interests as those that result from

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<sup>225</sup> See C&M, *supra* note 4, at 1124-27.

<sup>226</sup> Note, for example, the implicit identification of property rules with the criminal sanction and liability rules with compensatory sanctions in the use by Professors Murphy and Coleman of the C&M framework:

The criminal law [in contrast to "other branches of the law"] functions to *prohibit* and thus to go beyond requirements of mere negotiation and liability. (If you willfully injure me, you may have to pay me compensation, but you are *also* very likely to suffer criminal punishment for what you have done to me.)

Murphy & Coleman, *supra* note 27, at 112. In other words, we are told that civil law rules do *not* "prohibit" violations of property or inalienability rules; they provide only for compensation under liability rules. For these authors' further views on civil versus criminal awards, see *id.* at 143-61.

the application of the criminal sanction.<sup>227</sup> Prudence requires it as well, in view of the enormous public costs associated with the prosecution of crime and the execution of criminal sentences.<sup>228</sup> Moderate recalcitrance might be controlled by less serious sanctions than those corporal punishments, including incarceration, associated with the criminal law. Several categories of issues readily come to mind.

First, a recalcitrant might not respect property rules. To be effective such rules require some sort of enforcement, perhaps by a rule requiring compensation for violating the property entitlement. Second, recalcitrants might not accept inalienability rules, so there will be a similar need to provide for compensation to someone whose inalienable entitlement has been violated, as C&M explicitly recognized.<sup>229</sup> Third, a recalcitrant might refuse to honor a duty to compensate under a liability rule that he has invoked by an unconsented taking. In each such case, further efforts to enforce the payment of compensation might take a non-punitive form such as empowering a court or other agency to seize assets of the recalcitrant in order to pay off the debt.<sup>230</sup>

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<sup>227</sup> See *id.* at 109 (arguing that measures less intrusive than criminal punishment should be considered in the interest of protecting individual liberty and avoiding the harshness of criminal sanctions).

<sup>228</sup> The direct financial costs of incarceration and the judicial costs that result from understandable efforts to resist incarceration are obviously enormous. For a recent contribution addressing some of the less obvious negative implications of incarceration, see Stephen D. Soble, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. Rev. L. & Soc. Change 497 (1994).

<sup>229</sup> See *supra* note 94 and accompanying text.

<sup>230</sup> Obviously, such power is a significant part of our legal system. For an overview, see David G. Epstein, *Bankruptcy and Other Debtor-Creditor Laws in a Nutshell* (5th ed. 1995). In the case of liability rules, there are often special mechanisms for securing payment of the price for exercise of the taker's option. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) (enjoining polluting activity until payment of permanent damages). If title or possession has passed before default in payments, the most likely result is the court-ordered return of title or possession if such restitution is possible. See, e.g., *Sackman & Van Brunt*, *supra* note 29, § 8.10[1] (summarizing cases holding that land taken by eminent domain must be returned if the awarded compensation is not paid).

Professors Coleman and Kraus seem to believe that such problems present an unavoidable need for recourse to the criminal law "or some institutional arrangement very much like it." Coleman & Kraus, *supra* note 8, at 1366. They reason that criminal or quasi-criminal sanctions would be necessary to enforce judgments that pre-

Of course, there will be cases in which the harm done to individuals by the failure of the recalcitrant to pay in accordance with such obligations is too small to justify the expenditure of the victims' resources in litigation, and this is true even if litigation expenses are potentially recoverable by the successful litigant. If corrective justice is to be achieved, such problems will need to be solved by resorting to some sort of public enforcement or a class action device, whether privately or publicly initiated. In the latter case, for particularly diffuse and widespread harm, the state might act as proxy in the collection of compensatory damages. Some civil fines imposed under current law might be explained and justified in this manner.<sup>231</sup> Whether such public enforcement is necessary depends upon the litigative economies of scale available to the state and whether such economies can be achieved in the private sphere. It might be, of course, that private institutions will emerge to fill the void if the state does not act. But do we have confidence in that possibility? If we do not, is our lack of confidence warranted? For example, before its large-scale use, would we have had confidence in the emergence of the contingent fee as a means of financing lawsuits by relatively poor plaintiffs suffering significant harm?<sup>232</sup>

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scribe the payment of debts or damages. See *id.* (Although presented as a hypothetical interpretation of an argument that the criminal law backs transaction structures, the authors clarify in a footnote that they endorse that form of the argument. See *id.* at 1367 n.35.) But as indicated in the text, in many cases it may not be necessary or even desirable to invoke the criminal sanction in such contexts. Property can be seized and sold without doing so, and in fact this is the usual practice. (Physical resistance by the debtor, a rare phenomenon, might invoke the criminal law, but because of the resistance to lawful authority rather than the failure to pay the debt itself.) Only if there is available property from which to satisfy the judgment but which is not readily accessible without the debtor's cooperation does debt enforcement against the recalcitrant potentially drive one to something "very much like" the criminal law, namely "civil contempt" incarceration. See, e.g., *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988) (addressing the use of incarceration for contempt of court in ignoring court orders to pay available money in discharge of child support duty). Nonetheless, this qualification only strengthens the ultimate point Coleman and Kraus were making, that the criminal law's relation to transaction structures is more indirect than some law and economics practitioners have assumed.

<sup>231</sup> But see Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 *B.U. L. Rev.* 1, 7-10 (1996) (lamenting the tendency of public enforcement to expand from civil fines that might be explainable in this fashion to criminal fines and imprisonment).

<sup>232</sup> On contingent fees, see Richard A. Posner, *Economic Analysis of Law* § 21.9, at 567-74 (4th ed. 1992).

Such a civil compensatory enforcement scheme, even if augmented by publicly initiated enforcement when needed, will likely be insufficient in two important ways.<sup>233</sup> First, as C&M argued, a stronger response is necessary in order to prevent recalcitrants from converting property rules and inalienability rules into de facto liability rules, that is, rules that function like liability rules except that the involuntary taking is not socially condoned.<sup>234</sup> These further measures will be necessary to offset the uncertainty of enforcement of the compensatory remedies,<sup>235</sup> to avoid undermining incentives for investment under property entitlements,<sup>236</sup> and to reassert the wrongfulness of the recalcitrant's cost-benefit analysis itself.<sup>237</sup>

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<sup>233</sup> A third inadequacy that may be noted is that on rare occasions both the harm and the perpetrator can be predicted with reasonable certainty, in which case preventive relief is feasible and desirable, in the form of an injunction backed by the potential of coercive measures, or even preventive detention. See generally Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. Rev. 113 (1996).

<sup>234</sup> See C&M, *supra* note 4, at 1124-27 (noting also that the circumvention of established property rules will hamper the effectiveness of the market in achieving static Pareto efficiency); see also Murphy & Coleman, *supra* note 27, at 114-16 (describing the public interest in suppressing conduct that undermines the prescriptive rule structure, a kind of revolutionary activity). The prevention of injuries that are not plausibly compensable, such as loss of life or limb, is often suggested as a reason to impose a regime of deterrence. See *id.* at 112-13 (developing a similar suggestion by the philosopher Robert Nozick). But as the problem of automobile accidents illustrates, this reasoning by itself does not explain our existing institutions, which frequently and rightly provide only compensatory remedies for such injuries.

<sup>235</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968) (applying economic analysis to suggest an "optimal level" of enforcement); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff between the Probability and Magnitude of Fines*, 69 Am. Econ. Rev. 880 (1979) (same). One must, of course, adjust for the Holmesian assumptions that appear in such articles.

<sup>236</sup> See David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Cal. L. Rev. 1 (1990) (arguing that extraordinary remedies such as punitive damages are needed to prevent opportunistic takings that capture the potential gains from trade and thereby discourage investment by the initial entitlement holders). This otherwise illuminating article is a good example of the continuing legacy of conceptual confusion about rule typology. The problem mentioned in the text, that resort only to compensatory protection of property rules can undermine incentives, is described by these authors as a problem that "liability rules may be strategically abused." *Id.* at 13. But what they should have referred to is the strategic abuse of property rules enforced only by compensatory remedies. This can be seen most easily by noting that, if entitlements are correctly allocated as between property and liability rules, then it is difficult to

Second, there is the distinct problem of recalcitrants who try to convert inalienability rules into de facto property rules.<sup>238</sup> If the directly affected persons actually agree to the sale of a nominally inalienable entitlement there may be particularly difficult problems associated with detection, since mutual consent makes the existence of a complaining party unlikely. Thus, publicly initiated punishment may be necessary for "victimless" crimes, crimes for which a victim, if there is one, is unlikely to complain by way of a civil suit because she is a willing party to the transfer, or for illegal alienations in which the numerous victims are each too minimally affected to warrant expenditures necessary for litigation.<sup>239</sup> Such publicly initiated punishment is, in general, criminal punishment.<sup>240</sup>

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make sense of the idea of a liability rule being "abused" by the taker's paying only compensation: That is exactly what the law contemplates, for whatever good reasons that may be. Abuse of liability rules must be attributed not so much to strategic opportunism by takers, but rather to the law's error in allocating the entitlement to a liability rule structure rather than a property rule structure. Of course, Haddock et al. were precluded from articulating the matter in the way suggested here because, like most people working in law and economics, they were unable to distinguish a property rule that is enforced by a compensatory remedy from a liability rule however enforced.

<sup>237</sup> See generally Jean Hampton, *The Retributive Idea*, in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 111 (1988). Although deterrence and retribution are often viewed as incompatible ideas, the one forward-looking and the other backward-looking, Hampton rightly emphasizes their compatibility. See *id.* at 138, 143; see also B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 *Law & Phil.* 151 (1989) (arguing that the usual emphasis on retribution in Kant's theory of punishment neglects the deterrent element of the threat of punishment also evident in Kant's theory).

<sup>238</sup> See Alvin K. Klevorick, *On the Economic Theory of Crime*, in *Criminal Justice: Nomos XXVII* 289, 302-03 (J. Roland Pennock & John W. Chapman eds., 1985).

<sup>239</sup> Indeed, the law would also have to decide which party to a consensual transaction is the "victim." The law could achieve some deterrence by picking one or the other party to the transaction, the identity of whom might or might not be known in advance of the transaction, and endowing that person with civil remedies. But in many cases the profit to be derived from the suit would not be worth the consequential losses to the "victim" in foregone future transactions.

<sup>240</sup> To be sure, under existing law there are proceedings that are publicly initiated and entail the imposition of punitive sanctions but that are not considered criminal, perhaps because only monetary sanctions are available. These aberrations, created in part to avoid constitutional restrictions on criminal prosecution, are criminal proceedings by any reasonable conception, and should be examined in that light. See, e.g., Carole B. Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 *Duke L.J.* 960 (arguing that the nature and severity of sanctions under the Act render it quasi-criminal).

The same is not necessarily true of the first class of cases, unconsented takings, since there will generally be an aggrieved party who would be willing to take legal action. In other words, it is important to assess to what extent arguments presented for sanctions that are more severe than compensation lead to the need for punishment *simpliciter* and to what extent they support specifically criminal punishment, meaning public prosecution.<sup>241</sup> One can put the question this way: Given the institutions of punitive and restitutionary civil awards, why have criminal punishment at all, other than to suppress consensual transfers of nominally inalienable rights? As presently constituted the critical characteristic of criminal punishment, aside from the fact that prosecution is done by the state at public expense, is that certain kinds of penalties, mainly incarceration or death, are available only in such a context. Given this feature, there are several things to say about the necessity of criminal punishment.

Civil remedies, at least as presently configured, give a cause of action only to a plaintiff who has been injured, whereas one might well want to be able to punish some outrageous actions that only expose people to unacceptable *risks* of injury. This is a problem for the civil law, though it may not be insuperable. That is, the civil law could be configured to allow punitive damages without proof of actual injury.<sup>242</sup> Although it would require greater institutional changes, tort law could also be restructured to allow compensatory damages for risk exposure, whether or not predicated on injury to all compensated persons.<sup>243</sup>

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<sup>241</sup> C&M barely mention the subject of punitive civil awards. See C&M, *supra* note 4, at 1126 n.71.

<sup>242</sup> There has long been controversy in the courts over whether a punitive award must bear some relationship, some proportionality, to the injury suffered. See Keeton et al., *supra* note 30, § 2, at 14-15. In recent decisions, the Supreme Court has endorsed the idea that *potential* as well as actual damages may constitutionally be considered in determining appropriate punitive awards. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-1602 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

<sup>243</sup> Interestingly, Professor (now Judge) Calabresi was one of the first to explore such possibilities. See Calabresi, *supra* note 53, at 306. For a recent exchange on the subject, see Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. Rev.* 439 (1990); Simons, *supra* note 57 (commenting on Schroeder); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 *UCLA L. Rev.* 143 (1990).



Then, too, there will be some plaintiffs who, although seriously harmed, do not pursue a civil remedy, such as persons who are killed or incapacitated by a recalcitrant or children (or other family members) who suffer from abuse but are unable or unwilling to sue or for whom the recovery of money would be of little practical significance. These problems may be solvable: Estates may sue by way of a guardian *ad litem*, which could be the state itself as a last resort; children can also be so represented. But the more important relief in the family context would be prospective, that is injunctive, and then the problem of the ignored injunction must be anticipated. And if the injured persons are unwilling to take action, it might be necessary for the public to do so. Once again, criminal penalties will be necessary at some point.<sup>244</sup>

However, the problem that many tend to identify most readily (if my students are at all indicative) is that monetary awards, no matter how high, will not adequately deter certain conduct. This is true in some situations, but one must sort it out carefully. First, one must segregate examples where even the harshest *criminal* punishment would not deter, such as where the actor does not even take into account the punitive consequences of her action. Such cases may still call for punishment on retributivist grounds, but it is unclear whether that necessarily means criminal punishment. Perhaps in some cases retribution requires something like "an eye for an eye," so that only the impairments of life and liberty possible under criminal law will suffice.<sup>245</sup>

One can also point to the very rich person, for whom paying punitive damages might seem to be just a "cost of doing evil business" even if she does attend to the consequences of her getting caught. This example also seems misdirected, but for a

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<sup>244</sup> Exactly at what point criminal law has a valuable role here is controversial, and alternative remedies—such as terminating the parental rights of an abusing parent—might be superior in many cases. See Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 9.4, at 358-60 (2d ed. 1988).

<sup>245</sup> This is closely related to the idea that punishment involves an "expressive dimension" that cannot be duplicated by monetary penalties. Even here, however, it is not clear that incarceration is the only way to achieve such public expression of condemnation. See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591 (1996) (arguing that shaming punishments can express society's disapproval of crimes).

different reason: It underestimates the extent to which rich people value their wealth.<sup>246</sup> To say that rich people will not be deterred by punitive damages—in some way that criminal punishment *would* deter them—is really to say that our judges and juries will fail to set the punitive award high enough. Why should we assume this to be true? Maybe there are some acts that would be appropriately deterred by the threat of incarceration but would not be so deterred by the threat of taking all or nearly all of a rich person's present (or future) wealth, but it seems unlikely.<sup>247</sup> A potentially more serious problem, one that could necessitate criminal sanctions operating on the person of the wrongdoer, is that a monetary sanction will be ineffective to the extent that the wrongdoer can immunize her wealth and income against prevailing methods of debt collection.<sup>248</sup>

For the time being, however, the more serious version of this argument concerns those at the other extreme of our society: Monetary penalties will not deter someone who has no wealth to lose, especially if he suspects that he will never have much wealth or that his wealth, either transient or illegally obtained, will never be seized. This is a serious problem with civil punitive damages and suggests that one of the most important reasons for the institution of criminal law is to control willful wrongdoing by the poor.<sup>249</sup> Of course, there may also be offenses that are

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<sup>246</sup> Indeed, punitive civil remedies may well be *essential* for disciplining economically powerful entities that are largely immune from significant criminal punishment. See Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1440-45 (1993).

<sup>247</sup> Cf. Richard A. Posner, Optimal Sentences for White-Collar Criminals, 17 Am. Crim. L. Rev. 409 (1980) (arguing that, in the context of white-collar crime, large fines provide deterrence as effective as that provided by imprisonment). At one point, however, Posner concedes without explanation that "some . . . crimes, such as murder, are so serious that even the affluent cannot pay adequate fines." *Id.* at 417.

<sup>248</sup> Under the current regime, some scholars believe that this is a serious and increasing problem as to unsecured judgment debts such as those that result from tort recoveries. See, e.g., Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1 (1996).

<sup>249</sup> See Epstein, *supra* note 231, at 15 ("Although a person might have 'plenty of nothing,' he always fears losing at least two assets: his liberty and his life. Take these away and deterrence against aggression can proceed apace even if compensation is utterly unavailable to the injured party."); Galanter & Luban, *supra* note 246, at 1426 ("Increasing reliance on civil punishment therefore fosters a two-tier system with organizations, the affluent, and those with modest but stable economic positions controlled by civil remedies, while the economically marginal are controlled by the

so heinous that, even if committed by a rich person, warrant punishment more severe than monetary penalties, regardless of deterrence. Moreover, if we use the criminal sanction against the poor recalcitrant, some will believe that it must be extended to the rich out of a notion of equal treatment, even if it is not needed for adequate deterrence or the exaction of appropriate retribution.<sup>250</sup>

Despite these various arguments for the use of punitive sanctions of some sort and of civil or criminal punishment in particular contexts, a scheme of compensatory civil enforcement should be optimal for an enormous number of situations. In particular, our working theoretical contrast between the law-abiding citizen and the recalcitrant will not accurately describe the majority of real persons. The ordinary person will be largely law-abiding, subject to temptations to disobey the law's directives when strong personal interests are at stake. Even after a knowing or negligent violation of some prescriptive entitlement, the ordinary citizen may be brought back to the fold at the re-

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criminal process."); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1204-05 (1985) ("[T]he criminal law is designed primarily for the nonaffluent; the affluent are kept in line, for the most part, by tort law."). Of course, the problem of the judgment-proof perpetrator explains the recourse to non-monetary punishments; it does not explain why the action to impose those punishments should be prosecuted by the state. To the extent that the practice is justifiable, it must be because of the government's economies of scale in the detection and prosecution of serious wrongdoing and the inability or unwillingness of victims to finance prosecutions that do not hold out any prospect of monetary return out of which to pay even their litigation expenses.

<sup>250</sup> These last two arguments, especially the equal treatment argument, seem rather weak, but a full consideration of the issue would unduly extend this Article. For some helpful thoughts on the equal treatment issue, see Posner, *supra* note 247, at 414-15. Professors Robinson and Darley have recently argued that the moral force of the criminal law depends upon the public perception that the severity of criminal punishments is in accordance with the community's perceptions of just desert. See Robinson & Darley, *supra* note 46 at 477-88. From this one might construct an argument that criminal punishment of rich malefactors is necessary to preserve public confidence, perhaps because civil punishment is not as visible to the public as criminal punishment or because the public does not appreciate the deterrent force of punitive civil awards. Compare *id.* at 480 (arguing that the law "cannot have moral credibility outside of a system with a clear criminal-civil distinction"), with *id.* at 491 (noting that "non-incarcerative [criminal] sentences frequently can be used to inflict the punishment deserved, even for many non-minor offenses").

medial stage of a dispute.<sup>251</sup> And in situations where the legal standard that separates prohibited from permissible conduct is unavoidably vague, as in the case of negligence law, concern for the difficulties in accurately knowing and applying the standard to particular acts argues in favor of the modesty of compensatory responses.<sup>252</sup> Thus, it is plausible to believe that civil enforcement, indeed purely compensatory remedies, will be enough in a great many situations.

Obviously, these are only the barest bones of a theory of enforcement rules. Much of the preceding simply reworks ideas developed by others without any systematic attention to the guidance/enforcement dichotomy. Yet even at this level, several things should be clear. The present analysis benefits from a richer set of assumptions about citizen response to authoritative norms than one generally encounters in the literature spawned by C&M's article. This helps to explain features of our existing law, such as the often perplexing mixture of civil and criminal sanction schemes.<sup>253</sup> And it provides a useful framework from which

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<sup>251</sup> This claim is at least not inconsistent with the moderate deterrent effects that tort law seems to provide. See Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 *UCLA L. Rev.* 377 (1994) (reviewing evidence and suggesting that tort law has a moderate deterrent effect).

<sup>252</sup> Cf. Marks, *supra* note 205, at 239 (suggesting the reduction of errors by limiting penalties "to continuous (categorical) prohibitions or to the extreme range of discontinuous prohibitions").

<sup>253</sup> It also helps open these schemes to criticism. For example, it is one thing to establish in what respect punishment, or criminal punishment in particular, is a necessary adjunct of compensatory schemes. It is another to craft the institutional relationship between the two or more systems in a coherent way. For example, one should question the rationalizations of the multiple punishment that results from the simultaneous availability of civil and criminal forms of punishment. See, e.g., *Tuttle v. Raymond*, 494 A.2d 1353, 1358-60 (Me. 1985) (articulating various rationales for the use of punitive damage awards even in cases where a criminal punishment can be imposed for the same act). The only sound basis for such multiple punishment is that the criminal court was *unable* to impose a harsher penalty than the one it did, where that inability is not attributable to the authoritative policy of proper lawmaking or law-applying authorities. (Such an inability might be reflected in the criminal court's imposing the maximum penalty under a statute that did not contemplate the kind of offense, or the kind of offender, involved in the particular case.) Cf. Galanter & Luban, *supra* note 246, at 1443 (commenting on the low level of criminal fines imposed on corporate offenders without addressing whether this is a function of unintended imperfections in the system or of explicit moral judgments by the judges and juries in such cases).

to consider the claim, made by others, that the criminal sanction is overused, at least in its current form.<sup>254</sup>

Most importantly, however, the present analysis gives greater definition to the distinguishable problems of formulating guidance rules on the one hand, and formulating enforcement rules on the other. This analytical precision allows one to focus on the possibility that the former problems—determining the appropriate guidance rules—pose important issues of distributive and commutative justice, while the latter—formulating enforcement rules—arise entirely in the domain of corrective justice.<sup>255</sup> In particular, the problems of specifying the existence and content of liability rules, as technically defined here, fall in the former category; the problems of choosing between compensation and other remedies fall in the latter. Conventional economic analysis of law has great difficulty even contemplating this difference.

This in turn helps to explain another feature of the relationship between substantive and remedial law that is obscured when the two are collapsed. Entitlements tend to be structured as rules, what I have called guidance rules, much more so than the remedies that are used to protect them. That is, substantive legal norms tend to be more rule-like and prospective in operation, providing more information to the potential nonofficial actors, whereas remedial norms tend to be more retrospective in operation, allowing the judge to tailor a response after the fact to suit the situation, pursuant to looser standards of application.<sup>256</sup>

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<sup>254</sup> See generally Charles F. Abel & Frank H. Marsh, *Punishment and Restitution: A Restitutory Approach to Crime and the Criminal* (1984) (arguing that a restitutionary model of criminal law would better serve the combined goals of deterrence, retribution, and rehabilitation); Randy E. Barnett, *The Justice of Restitution*, 25 *Am. J. Juris.* 117 (1980) (arguing that a rights-based theory of justice is incompatible with retribution- and deterrence-based theories of punishment); Herbert L. Packer, *Two Models of the Criminal Process*, 113 *U. Pa. L. Rev.* 1, 66-68 (1964) (arguing that a solution to the rising costs of providing due process is narrowing the scope of actions subject to criminal sanction). See also Lois G. Forer, *A Rage to Punish: The Unintended Consequences of Mandatory Sentencing* (1994) (arguing that imprisonment should be the least favored response to crime); Robert Sommer, *The End of Imprisonment* (1976) (advocating the end of long-term imprisonment).

<sup>255</sup> The notion of “commutative justice” is intended to capture elements of justice in interactions between people that are not appropriately called “corrective” but also do not involve any “distributive” dimension. See Finnis, *supra* note 64, at 177-84.

<sup>256</sup> See Emily Sherwin, *Introduction: Property Rules as Remedies*, 106 *Yale L.J.* 2083, 2084-89 (1997).

Of course, from the perspective I have articulated, it is entirely understandable that things would be structured this way. The key role of guiding nonofficial conduct is *supposed* to be provided by what I have called guidance rules. If the substantive and remedial norms are reasonably well constructed, only recalcitrants will look to the remedy in deciding how to act, and the law might not want to provide very precise information to assist them in this regard. Because of risk aversion, the very uncertainty of the remedy that will be applied will often serve to discourage a cost-benefit calculation about whether to violate someone's entitlement. In an extreme case, the government might be satisfied with people's knowing virtually nothing about remedial law, although this is not without its difficulties.<sup>257</sup>

This does not mean that efficiency concerns have no place at the enforcement level. Certainly the creation of incentives for efficient or inefficient behavior is one factor to be considered in choosing among remedial options, if only as a tie-breaker between options that are equally just. There is also the inevitable question of how much direct and indirect cost is worth incurring in our efforts to enforce guidance rules. But this obviously is not *only* a question of efficiency, because economic cost is weighed against more intangible social goals reflected in the guidance rules, goals that can be reduced to monetary terms or even to collective preference satisfaction terms only in a tautological but obfuscating decision-theoretic sense. At the same time, considerations of distributive justice are pushed into the background, applying only to such decisions as whether to adopt a particular scheme of privately financed civil enforcement or to adopt a publicly financed scheme of criminal enforcement. Indeed, the principal relevance of both efficiency and distributive justice is that the scheme of enforcement rules is designed in part to protect the collection of efficiency goals and judgments of distributive justice that have been adopted by the polity in its guidance rules.<sup>258</sup>

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<sup>257</sup> See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984) (suggesting that such "selective transmission" might prevent some crimes).

<sup>258</sup> This does not mean that enforcement practices are justified entirely by the need to effectuate the particular judgments and choices about efficiency and distribution

## CONCLUSION

As a set of guidance rules, we might call C&M's scheme an  $n$  dimensional view of the cathedral.<sup>259</sup> Additional dimensions can be constructed by taking account of the extent of recalcitrance among the parties to the entitlement structure. An assumption of significant recalcitrance gives rise to the need for remedial rules that are unnecessary in the  $n$ -space of a law-abiding citizenry. These rules can be articulated as adding a set of  $m$  variables, corresponding to the number of possible remedies that can be employed, either singly or in combination. This  $n+m$  dimensionality gives us not only a different picture but a richer picture than the one C&M provided. We can, if we wish, make the Holmesian assumption about the citizenry, thus projecting onto an  $m$ -space in which only the coercive remedies matter. For limited purposes this may be useful, provided it is done in a consistent manner. But generally more valuable is the projection onto  $n$ -space made possible by assuming a law-abiding citizenry. By comparing these two views, we obtain valuable information about the important roles of guidance and enforcement rules in the real world.

But C&M's pervasive assumption of a "flat" Holmesian world blinds them to the difference between guidance and enforcement. Although their analysis is more coherent when understood as a rudimentary framework of guidance rules, it is nonetheless motivated in the language of enforcement rules and a concern for recalcitrance that is assumed to be ubiquitous. The resulting ambivalence is associated with several related mistakes.

First, there is a tendency to exaggerate the significance of both efficiency and distributional goals in what should be seen as the

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that are made; in part they protect the very authority and capacity to make such institutional judgments and choices. This is one reason that an act of a kind that threatens the system of public judgments and choices cannot always be defended on the ground that, on the particular facts, the act happens to facilitate the effectuation of such judgments and choices. Compare James W. Nickel, *Justice in Compensation*, 18 *Wm. & Mary L. Rev.* 379 (1976) (arguing that corrective action such as a compensation award is just only to the extent that it protects a just distribution), with Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 *Iowa L. Rev.* 515 (1992) (arguing that corrective justice can be validated without reference to distributive justice).

<sup>259</sup> With regard to the numerical value of  $n$ , see *supra* note 211.

context of corrective justice, a tendency that reflects the broader, justice-agnostic components of the pragmatic instrumentalism favored by many law and economics adherents. This tendency leads in turn to exaggerated empirical claims about the prevalence of rules allowing the violation of otherwise valid entitlements for the sake of efficiency or other consequentialist social goals. Closely related is a tendency to exaggerate the importance of the criminal sanction and other supracompensatory remedies in enforcing what are dimly understood as guidance rules. These tendencies, which some law and economics practitioners have struggled to correct, can be largely attributed to the Holmesian view. That view allows one to conflate monetary sanctions, especially compensatory civil remedies, with "prices," thus obscuring the system's capacity to control violations of entitlements by the use of such lesser legal sanctions directed toward relatively law-abiding citizens.<sup>260</sup>

More generally, to adopt the Holmesian view of the citizenry undermines the factual foundation of all theories of justice in law that depend on notions of individual autonomy and responsibility and even those that depend only on the notion of respect for the individual. After all, how can one maintain any such theory when the subjects are assumed to be Holmesian bad men? Such a vision of law in society undermines the legitimacy of the law by assuming away the citizens' general duty of obedience and their recognition thereof.<sup>261</sup> Indeed, to view the nonof-

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<sup>260</sup> To be sure, for C&M this may have been an unintended consequence of an argument that otherwise served an important function at the time:

It is not widely realized that Guido Calabresi's pathbreaking paper with A. Douglas Melamed on the distinction between property rights and liability rules was written in reaction to [Gary] Becker's article [on the economics of crime]. The article had seemed to imply that if the probability of apprehension and conviction for theft was one, the optimal fine for theft would be simply the value of the good taken. But then people would be indifferent between stealing and buying the things they want. The point of property rights, as Calabresi and Melamed explained, is to compel voluntary transacting where transaction costs are low.

Richard A. Posner, Gary Becker's Contributions to Law and Economics, 22 *J. Legal Stud.* 211, 211-12 (1993) (footnote omitted) (referring to Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968)).

<sup>261</sup> See, e.g., Steven J. Burton, *An Introduction to Law and Legal Reasoning* 166 (2d ed. 1995) (arguing that systemic legitimacy "requires that the people generally recog-



ficial citizenry consistently in the legal realist way is conducive to a condescension, latent in ideas of "social engineering," that sees citizens only as pawns to be manipulated in the service of some good defined by a distinct officialdom, with the able assistance of its lawyers and academic advisors. If this is not the picture of society and public policymaking that one endorses, then one should use the Calabresi and Melamed framework only after significant adjustment.

To paraphrase a famous judicial opinion, "Five generations of bad man theorists are enough."<sup>262</sup> Put simply, the time has come to relegate the ubiquitous recalcitrance assumption to those specific contexts in which it has demonstrated plausibility and usefulness.<sup>263</sup> As a general framework for the analysis of ordinary legal entitlements, not only is it unrealistic but it is highly counterproductive. Its rejection allows us to articulate a more sophisticated, more realistic, and, yes, more honorable analysis of legal entitlements.

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nize an obligation to abide by the law, because it is the law"); Dworkin, *supra* note 35, at 190-92 ("A state may have good grounds in some special circumstances for coercing those who have no duty to obey. But no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations.").

<sup>262</sup> See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.).

<sup>263</sup> To be sure, such contexts are not necessarily limited to the problems of dealing with hardened criminals. Analysis based on a Holmesian assumption might be necessary, for example, in a context where lawyers in a position to make crucial decisions have been trained to think like the bad man. See, e.g., Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 *Nw. U. L. Rev.* 1498, 1545-49 (1996) (recommending bad man strategic analysis in contexts like bankruptcy law).

## APPENDIX

The purpose of this Appendix is to indicate the additional complexity of efficiency comparisons of property and liability rules when these rule types are understood in the purely prescriptive manner suggested in Part II of the body of this Article or even in the pragmatic ways suggested in Section IV.B. It considers only the situation in which transfer *transaction costs* attending a consensual trade (TC) are high enough to preclude any possible consensual trade, and the loss *assessment costs* attending a public determination under a liability rule (AC) are low enough that they would not offset any social gain that would result from a transfer of the entitlement. In such situations, the standard modern result in law and economics is that liability rules are more efficient than property rules.<sup>264</sup> This result is shown to entail further assumptions that are necessarily distinct from the definitions of property and liability rules. In what follows, the entitlement E is assumed to reside initially in person A. Proposition 1 considers cases in which the value of the entitlement E to A— $V(A)$ —is more than the value of that entitlement if it were instead granted to B— $V(B)$ . Proposition 2 addresses cases manifesting the opposite relationship,  $V(A) < V(B)$ . Proposition 3 generalizes to cover both possibilities. The concept of efficiency employed can be either wealth maximization or Kaldor-Hicks efficiency relative to subjective utilities; the choice does not affect the results given.<sup>265</sup> For simplicity, in

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<sup>264</sup> See Krier & Schwab, *supra* note 26, at 453-57 (criticizing the common assumption that loss assessment costs are negligible and asserting that they are commonly as high as transaction costs). Actually, one might restate the standard result in terms of the relative size of TC and AC; that is, one could assert that liability rules are more efficient whenever  $TC > AC$ , even though TC is not so high as to preclude consensual transfer. Cf. *id.* at 464 (arguing that property rules should be used whenever  $TC < AC$ ). However, even C&M apparently rejected this, at least as a general conclusion, because they believed that allowing the market to effectuate transfers where possible would avoid errors in the estimation of the value of the entitlement to its initial holder. See C&M, *supra* note 4, at 1124-27. Of course, in recent years other strands of economic analysis have emerged claiming wider usefulness of liability rules or, conversely, wider usefulness of property rules. See, e.g., Ayres & Talley, *supra* note 26, at 1036-72 (asserting that certain liability rules and other forms of divided ownership can lead to more efficient bargaining even when transaction costs are low); Kaplow & Shavell, *supra* note 27, at 765-68 (asserting that property rules are superior for "possessory" entitlements even if transaction costs are high). These subtleties, which are affected by the conceptual confusions discussed in the text of this Article, can be ignored for purposes of this Appendix.

<sup>265</sup> Kaldor-Hicks efficiency is the concept employed by C&M in their analysis:

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense

all cases sanctions are assumed to be costlessly enforced. Even more complicated results would obtain if enforcement costs were introduced.

*Proposition 1:*  $V(A) > V(B)$ . That is, A is the more efficient user of E. Property rules can be more efficient than liability rules even in contexts of high consensual transaction costs and low loss assessment costs.

*Assumptions:* A is assigned the initial possessory use of entitlement E.  $V(A)$  is 200;  $V(B)$  is 100. TC is 150; AC is 0. B is perfectly recalcitrant, a Holmesian bad man, capable of taking E without costs other than those specified herein. Whether A is perfectly recalcitrant, perfectly law-abiding, or anywhere in between does not affect the result. It is, however, assumed that A has no desire to suffer a loss on a transaction. Sanctions are enforced with certainty (or, alternatively, the figures stated for sanctions can be taken to be discounted for the probability that B will be detected and the sanction will be imposed).

*Rule L:* A and B may transfer by agreement. B is permitted to take without A's consent, in which case B should compensate A for his loss. If B takes but does not compensate A, the (only) sanction is that B will be fined 50 (payable either to A or the state).<sup>266</sup>

*Result:* If Rule L is in place, B will take and not pay compensation (a net gain of  $100 - 50 = 50$ ). Taking with voluntary payment of compensation would net a loss, since  $100 - 200 = -100$ ; purchasing E will net no more than  $100 - 350 = -250$ , unless A does not demand full compensation or severely underestimates the discounted value of her future income stream.<sup>267</sup>

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that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.

C&M, *supra* note 4, at 1093-94. See Morris, *supra* note 15, at 848 n.62 (explaining C&M's mistake in calling this "Pareto optimality").

<sup>266</sup> Thus, L is a liability rule by either prescriptive or pragmatic conceptions.

<sup>267</sup> A would obviously benefit from being able to bribe B into not taking, but there is no assumption warranting a belief that such a bribe would be successful; B might simply take the bribe as well as the entitlement. Moreover, the ability to enter such an agreement, assuming it were effectively enforceable, would depend upon transaction costs; if TC for such an agreement were as high as for the sale of E itself, then

*Rule P:* A and B may transfer by agreement. B is not permitted to take E without A's consent. If B takes E without A's consent, B will be fined 150 (payable either to A or the state).<sup>268</sup>

*Result:* If Rule P is in place, B will neither purchase E (again, at a probable loss of at least 250) nor take E without A's consent (with a net loss, since  $100 - 150 = -50$ ).<sup>269</sup>

*Conclusion:* Rule P is efficient; Rule L is not.

*Corollary 1.1:* If  $V(A) > V(B)$ , then the claim that liability rules are more efficient if transfer transaction costs are high and loss assessment costs are low holds for a perfectly recalcitrant B *only if*: (1) the disutility of the sanction imposed for violation of the duty to compensate under a liability rule is greater than the subjective valuation that B would place upon E if B had the use of E; and (2) the subjective valuation that B would place upon E if B had the use of E is greater than the disutility of the sanction imposed for violation of the duty (not to take) under the property rule.

*Corollary 1.2:* If one generalizes to consider a B who is *not* perfectly recalcitrant, the necessary conditions indicated in Corollary 1.1 may fail even though the monetary value of the sanction for violating the liability rule is greater than the value of E in B's hands and the latter is greater than the monetary value of the sanction for violating the property rule. This is because the disutility associated with the violation of legal rules must then include not only the monetary value of the sanction, but also some additional factor representing B's regret in violating a legal rule as such. In such a case, condition (2) might fail.

*Proposition 2:* Suppose now that  $V(A) < V(B)$ , that is, B is the more efficient user of E. A property rule can be more efficient than a liability rule even though transaction costs are high enough to preclude consensual trade, and even though assessment costs are not so high as

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under the assumed  $TC = 150$ , there would be no net surplus of cooperation to be divided.

<sup>268</sup> Thus, P is a property rule by either prescriptive or pragmatic conceptions.

<sup>269</sup> Two points: (1) This result does not obtain if B is perfectly law-abiding. P and L are equally efficient in that case. (As argued in the text, this is one way, perhaps the best way, to construe the standard result that emerges from the law and economics literature.) (2) Whether the result would be stable over time depends on the legal relations between the parties after the taking, which are unspecified here.

to offset the potential gains from a compensated taking under the liability rule.

*Assumptions:* A is assigned initial use of E.  $V(A)$  is 100;  $V(B)$  is 200. TC is 150; AC is 50. B is perfectly recalcitrant. A's attitude toward the law's prescriptions is irrelevant, but he will not willingly suffer a loss. Sanctions are enforced with certainty (or, alternatively, the figures stated for sanctions represent probabilistic discounting).

*Rule L:* A and B may transfer by agreement. B is permitted to take without A's consent, in which case B should compensate A for his loss. If B does not compensate A, the (only) sanction is that B will be fined 200 (payable either to A or the state).<sup>270</sup>

*Result:* If Rule L is in place, B will take and pay compensation (a net private gain of  $200 - 100 = 100$ , and a net social gain of  $100 - 50 = 50$ ). Taking without voluntary payment of compensation would not be profitable, since  $200 - 200 = 0$ ; purchasing E would net a loss, since  $200 - 250 = -50$ , unless A does not demand full compensation or severely underestimates the discounted value of A's future income stream.

*Rule P:* A and B may transfer by agreement. B is not permitted to take E without A's consent. If B takes E without A's consent, B will be fined 130 (payable either to A or the state) regardless of whether B compensates A after the fact.<sup>271</sup>

*Result:* If Rule P is in place, B will not purchase E (again, at a probable loss of at least 50). But B will take E without A's consent, with a net gain of  $200 - 130 = 70$ .

*Conclusion:* Rule P is more efficient than Rule L; the net social gain under P is 70, while the net social gain under L is 50.<sup>272</sup>

*Corollary 2.1:* If  $V(A) < V(B)$ , then the claim that liability rules are more efficient if transfer transaction costs are high and loss assess-

<sup>270</sup> Again, L is a liability rule by either prescriptive or pragmatic conceptions.

<sup>271</sup> Again, P is a property rule by either prescriptive or pragmatic conceptions.

<sup>272</sup> Once again, the result does not obtain if B is assumed perfectly law-abiding. In that case, only L would yield a transfer to the more efficient user, in accordance with the standard claim in law and economics.

ment costs are low holds for a perfectly recalcitrant B *only if*  $V(B)$  is less than the disutility of the sanction imposed for violation of the duty (not to take) under the property rule. Otherwise, under the property rule, B would simply take E without A's consent, thereby effectuating the efficiency gain without incurring either TC or AC.

*Corollary 2.2:* If one generalizes to consider a B who is *not* perfectly recalcitrant, the necessary condition indicated in Corollary 2.1 may be satisfied even though the value of E in B's hands is greater than the (probabilistically discounted) monetary value of the sanction for violating the property rule. This is because the disutility associated with the violation of property rule must then include not only the monetary value of the sanction, but also some additional factor representing B's regret in violating a legal rule as such. In such a case, condition (2) might be satisfied.

*Proposition 3:* Unless the lawmaker can know which of  $V(A)$  and  $V(B)$  is larger, it is necessary to take both potential conditions into account. In such a situation of ignorance, there are numerous complexities. One can at least say, however, that a liability rule *might* be more efficient than a property rule if (a) the liability rule is no less efficient when  $V(A) > V(B)$ , and (b) the same liability rule is more efficient when  $V(A) < V(B)$ . In order to satisfy both these conditions, it must be true that:

- (1) B's disutility associated with violating either the liability rule or the property rule, including but not limited to the probabilistically discounted material sanctions imposed, exceeds  $V(B)$ , and
- (2) When  $V(A) > V(B)$ , then  $V(B) - V(A) > AC$ , i.e., there is a net social gain from a compensated nonconsensual taking, which, by hypothesis, will be greater than the net gain from a consensual transfer because  $TC > AC$ .<sup>273</sup>

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<sup>273</sup> Two points: (i) The reason for the qualified term "might" is that dynamic considerations, such as encouraging parties to find ways to reduce consensual transfer transactions costs, might make property rules more efficient even if the indicated conditions are met. See Krier & Schwab, *supra* note 26, at 462-64. (ii) The reason Proposition 2 is stated in terms of *sufficiency* conditions (a) and (b) is that it is possible that the liability rule could be more efficient in contexts with  $V(A) < V(B)$  yet less efficient in contexts with  $V(A) > V(B)$  and the gains from the former context might exceed the losses from the latter (or vice versa).