OVERENFORCEMENT

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ABSTRACT: Overenforcement of the law is widespread, but underinvestigated. Overenforcement occurs when the total sanction suffered by the violator of a legal rule exceeds the amount optimal for deterrence. Overenforcement sometimes generates overdeterrence that cannot be remedied through the adjustment of substantive liability standards or penalties *ex ante*. When that happens, the legal system can counteract the effects of overenforcement by adjusting evidentiary or procedural rules to make liability less likely. This framework, which we call the overenforcement paradigm, illuminates previously unnoticed features of various evidential and procedural arrangements. It also provides a powerful analytical and prescriptive tool for creating optimal incentives on the ground in cases in which overenforcement is present.

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Overenforcement of the law is widespread, but underinvestigated. Overenforcement occurs when a violator of a legal rule suffers excessive harm – or more harm than was necessary for the optimal deterrence of that violator – from the actual implementation of that rule. Some instances of overenforcement involve situations in which the legal system acts imprudently by inflicting this harm: it can avoid the overenforcement, but fails to do so. The most obvious example of this occurs when the legal system erroneously sets the penalty for the violation of a rule at a level higher than is necessary, such as imposing a $5,000 fine on all drivers who exceed a speed limit of 55 miles per hour.

Some instances of overenforcement, however, involve situations in which the legal system is entirely prudent in inflicting the harm in question: it simply cannot avoid overenforcement. For example, a rule that deems driving in excess of 55 miles per hour dangerous and, consequently, punishable certainly harms some safe drivers for whom deterrence is not necessary. But the legal system cannot avoid this problem. The definitions of many legal rules need to be overbroad in order to secure the rules' efficient implementation; any such rules inflict harm upon individuals who do not deserve it under the rules' substantive rationales. Another paradigmatic example of overenforcement is a corporation that violates a rule that is neither too broad nor too narrow and receives a balanced penalty. The liability imposed on the corporation, however, triggers a dramatic depreciation of its stock value and severe financial difficulties. Definitional spillovers thus are not the only cause of overenforcement. Overenforcement may also result from the extralegal consequences of legal liability (market spillovers).[1]

This Essay examines overenforcement that the law deems necessary and, consequently, justifiable. Justifiable overenforcement is still socially deleterious to the extent that it creates excessive deterrence. Our goal here is to identify this problem and to offer a framework for addressing it. Until now, the concept of overenforcement has gone largely unnoticed and unanalyzed in the academic literature, which generally has conflated overenforcement, as we use that term, with overdeterrence.[2] Overenforcement and overdeterrence are

[1] See *infra* Section I.A.

[2] Academic literature frequently describes as "overenforcement" indiscriminate

(continued...)

mutually related, but not identical. We use the term "overenforcement" as a term of art to describe a certain kind of factual setup that unfolds after the application of the relevant liability rule. Whenever the facts are such that the person found liable suffers a total sanction that exceeds the net harm that his violation produced, overenforcement exists in our terminology. That is true whether the total sanction comes solely from legal penalties, solely from market penalties, or from some combination of both. Overenforcement is concerned only with the total sanction actually suffered. Overdeterrence, by contrast, is concerned with the incentives that the total sanction creates. One might thus say that overenforcement is situated in the domain of *ex post*, and overdeterrence in the domain of *ex ante*.[3]

This separation implies that overenforcement does not automatically translate into overdeterrence. Overdeterrence depends on the probability that an individual will attach to a *future scenario* in which he could sustain harm as a result of overenforcement.[4]

[2](...continued)
or otherwise excessive enforcement actions by government agencies that inflict social costs without producing offsetting benefits. *See, e.g.,* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1279-80 (2004) (equating overenforcement with excessive enforcement actions by the government); Matthew P. Harrington, *Health Care Crimes: Avoiding Overenforcement*, 26 RUTGERS L.J. 111 (1994) (same); Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 304-6 (2004) (same); Michael J. Pyle, Policy Comment, *A "Flip" Look at Predatory Lending: Will the Fed's Revised Regulation Z End Abusive Refinancing Practices?*, 112 YALE L.J. 1919, 1925 (2003) (same); *see also* Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 782-86 (1991) (arguing that under an originalist approach to statutory interpretation, judicial extension of a statute beyond its original meaning qualifies as overenforcement). What these commentators call "overenforcement" is simply imprudent, unauthorized, or wasteful enforcement. It does not involve individuals who suffer excessively from the *proper* level of governmental enforcement of the relevant legal rule.

[3]Overenforcement, in our lexicon, is thus unconcerned with the frequency of governmental enforcement actions (although these can impact deterrence). It is also unconcerned with the distribution of penalties among liable defendants.

[4]In discussing overdeterrence, we, like the rest of the literature, treat deterrence in the classic narrow sense as strictly cost-benefit analysis by rational, self-interested individuals: potential offenders compare the expected penalty from committing a crime against the expected benefit, and refrain from wrongdoing if the former outweighs the latter. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 & n.1 (Clarendon Press 1907) (1823); (continued...)

Overenforcement thus translates into overdeterrence only to the extent that individuals take it into account *ex ante*. When that happens, overenforcement causes social loss. A perspicacious legal system will recognize this fact and will reduce the number of overenforcement cases in order to bring the *ex ante* probability of overenforcement (and, hence, overdeterrence) down. In the simplest case – the case in which the overenforcement stems from a penalty that is set inappropriately high – the legal system can do this merely by adjusting the penalty downward to the optimal level.

But not all cases are that simple. Operational and expressive constraints on the legal system sometimes prevent tinkering with definitions or sanctions to remedy spillovers *ex ante*. Quick fixes to eliminate overenforcement thus will not always work.[5] Does this mean that overdeterrence is inevitable in such cases? No. The legal system can still ameliorate the effects of this problem by adjusting the requirements for a finding of liability – say, for example, by heightening evidentiary standards – in cases that involve overenforcement. These measures will not erase the problem of overenforcement – a person found liable still will suffer penalties that exceed the net harm that his violation produced – but they will reduce its probability. The consequent reduction in the probability of overenforcement would reduce the expected harm *ex ante* for individuals. This would mitigate the resulting overdeterrence, or even eliminate it altogether.

To the extent that overenforcement is necessary, then, the legal system may maintain it without creating too much overdeterrence on the ground. This is the principal insight of this Essay. While a wide body of literature has examined the ways in which the legal system can counteract underenforcement of the law by manipulating penalty levels to maintain optimal deterrence,[6] this literature has largely ignored the

[4](...continued)
Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 POL. ECON. 169, 180 (1968). We do not here consider how the idea of overenforcement impacts deterrence in its broader, "new path" sense. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (articulating a social influence theory of deterrence that focuses on the criminal law's power to influence values and the formation of preferences).

[5] *Cf.* Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEG. STUD. 401 (2001) (arguing for a setoff system under which courts deduct nonlegal sanctions from legal penalties).

[6]*See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An* (continued...)

role that parallel procedural and evidentiary measures might play to counteract problems of overenforcement. As we explain in this Essay, these special legal measures combine with substantive liability rules into a second-best system of law enforcement.[7] The legal system needs to tolerate some overenforcement, but it need not put up with the full amount of overdeterrence that overenforcement of the law threatens to engender. The system thus does good when it minimizes potential overdeterrence through evidential and procedural mechanisms that reduce the *ex ante* probability of overenforcement for prospective transgressors. Jeremy Bentham remarkably neglected this important point in his overarching critique of evidence law,[8] and contemporary evidence scholarship also tends to neglect it.

The remainder of this Essay proceeds in four Parts. Part I develops the general overenforcement paradigm. It clarifies the idea of overenforcement and demonstrates that some instances of overenforcement are unavoidable in light of operational and

[6](...continued)
Economic Analysis, 111 HARV. L. REV. 870, 897 (1998) (courts should take the probability of escaping liability into account when calculating punitive damages); *see also* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 192, 193-94 (Peter Newman ed., 1998); Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEG. STUD. 463, 466 (1996); *infra* notes 50-52 and accompanying text.

[7]*See generally* Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956-57) (laying out the general economic theory of second best); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189 (1998) (discussing applications of the second-best theory in law); John J. Donohue III, *Some Thoughts on Law and Economics and the Theory of Second Best*, 73 CHI.-KENT L. REV. 257 (1998) (same).

[8]In his famous critique of the privilege against self-incrimination, Bentham denounced the rationalization of evidence rules as mitigating the effects of harsh laws:

> By the effect of this impunity-giving rule undue suffering has probably in some instances been prevented. Prevented? but to what extent? To the extent of that part of the field of penal law which is occupied by bad laws . . . . Applying with equal force and efficiency to all penal laws without distinction — to the worst as well as to the best, it at the same time diminishes the efficiency of such as are good.

7 THE WORKS OF JEREMY BENTHAM 454 (Bowring ed. 1843). Bentham thus overlooked the scenarios that we identify here, in which harsh laws are an operational necessity for the legal system. This explains his failure to consider the way in which evidential mechanisms could minimize overdeterrence by reducing an individual's *ex ante* probability of suffering from such laws.

(particularly in the area of criminal law) expressive constraints on the legal system. It then goes to on to illustrate ways in which evidential and procedural mechanisms might be used to mitigate the problem thus identified – what we call the overenforcement paradigm.

Part II substantiates this theoretical claim. It points to legal rules through which positive law actually minimizes overdeterrence on the ground by reducing the ultimate probability of enforcement in cases in which the prospect of overenforcement is real. Examples of such rules include the "clear and convincing" proof requirement that applies in civil fraud actions,[9] the heightened procedural standards that apply in securities class actions involving allegations of fraud and misrepresentation,[10] and the special corroboration requirement that common law attaches to its overbroad prohibition of perjury.[11]

Part III applies the overenforcement paradigm to highlight the plurality of ways in which the law's evidential and procedural mechanisms integrate with its substantive liability rules and the practical realities that accompany them. It focuses on the example of corporate criminal liability. In its current form, corporate criminal liability generates unique problems of overenforcement. Part III shows that stronger evidentiary protections for corporations could ameliorate those problems by working to counteract the definitional and market spillovers that current doctrine generates.

Part IV considers objections.

I.

Overenforcement of the law is sometimes avoidable and sometimes not. Avoidable overenforcement is theoretically uninteresting. When a legal system can avoid overenforcement of the law without compromising its objectives, it should simply do so. If the right sanction for violating a rule is $1,000, but the rule says that violators should pay $2,000, the legal system should reduce the sanction

[9] *See* 2 MCCORMICK ON EVIDENCE 443 (4th ed. 1992).

[10] *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 78u-4(b).

[11] *See* Weiler v. United States, 323 U.S. 606 (1945) (upholding the common law corroboration requirement for cases in which a single prosecution witness accuses the defendant of perjury); Section 13 of the Perjury Act, 1911 (England); sources cited *infra* note 98.

by $1,000. If a legal prohibition is broad when it should be narrow, the legal system should narrow it down.

But what about overenforcement that, for good reasons, is not open to such straightforward corrections? As this Part makes clear, this type of overenforcement is justifiable and unavoidable. Unavoidable overenforcement of the law splits into two different scenarios. In the first, adjudicators properly impose liability and the appropriate legal sanction on the defendant. By doing so, they also worsen the defendant's position in the relevant market for goods, services or reputation. Consequently, in addition to bearing the harm of the legal sanction, the defendant sustains further financial or other loss.[12] We call this scenario a "market spillover." In the second scenario, adjudicators find the defendant liable under an overbroad liability rule that they correctly apply. By "overbroad," we mean simply a liability rule that captures some cases that are not justified by its underlying social purpose, such as a strict 55 mile per hour speed limit that targets dangerous driving. The defendant's particular case falls under the rule's formal definition, but outside the scope of the rule's purpose. We tag this scenario a "definitional spillover."

[12]The Ford Explorer's rollover problems with Bridgestone tires, for instance, caused Ford reputation damage (from perceived bad behavior): Explorer sales collapsed by 21% in the first half of 2001 (even though, in 2001, it was not clear that Ford was at fault). *See* Joann Muller, *Ford: Why It's Worse Than You Think*, BUSINESS WEEK, June 25, 2001, at 80-89. On February 12, 2002, after reviewing extensive accident data, the National Highway and Traffic Safety Administration declined to launch an official investigation into the Explorer's safety, although legal claims are still pending against the company. *See* Monica Roman, ed., *Exonerating the Explorer*, BUSINESS WEEK, February 25, 2002, at 50. *See also, e.g.*, Faye Rice, *Denny's Changes Its Spots*, FORTUNE, May 13, 1996, at 133, 134 (highlighting a 30% decline in 1993 operating income and a 4% drop in customer traffic for Denny's, after the restaurant chain was accused of racial discrimination following a widely-reported incident involving a Maryland Denny's that denied service to a group of black Secret Service agents en route to an assignment guarding President Clinton); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249, 1271-1280 (2003) (describing financial fallout for Texaco, Home Depot, and Denny's from class-action discrimination suits); *infra* notes 119-124 and accompanying text (citing additional examples).

As some of these examples illustrate, there is by no means a perfect causal or temporal relationship between imposition of the legal sanction and the market spillover harms suffered by a defendant. For our theory to hold, there doesn't need to be: the confluence of events, whatever its cause, still results in overenforcement on the ground.

Under both scenarios, the deleterious consequence that the defendant suffers from the imposition of liability is excessive from the defendant's perspective. This consequence may not necessarily be unjust, but the prospect of suffering it certainly produces overdeterrence. Consider a situation in which the optimal sanction for deterrence equals x; the average spillover addition to that sanction equals y; and a rational individual is contemplating a course of action that falls under one of the above scenarios. This individual will take the contemplated action if its expected benefit to him or her (b) is greater than $x+y$. From a classic social utility perspective, the individual should take the action whenever $b>x$: in any such case, the aggregate social welfare would be greater than it was before.[13] The individual, however, will not take the action when $x<b<x+y$, which implies that y — the spillover addition to the optimal sanction — is detrimental to society.[14]

Does this mean that, in any such overenforcement scenario, adjudicators should deduct the spillover amount from the sanction that they would otherwise impose on the defendant? Not at all. Both scenarios implicate independent constraints on the ability of lawmakers to adjust sanctions downward in order to compensate for any

[13] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10-16 (6th ed. 2003) (expounding this basic notion of efficiency).

[14] We do not mean to suggest, though, that there is some optimal level of crime — a perspective that treats a potential burglar's decision to refrain from burglarizing a house as decreasing social welfare. Under our approach, the spillover addition to the optimal sanction would only be detrimental to society when it chills socially beneficial conduct. This chilling effect will be of particular concern in the context of many business and regulatory crimes, where the distinction between lawful and unlawful activity is often both difficult to discern and a matter of degree, and the conduct surrounding the crime often has great social value. *See* Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 506-07, 513 (2004) (discussing difficulty of distinguishing criminal from non-criminal behavior, and the often high social value of the legitimate conduct surrounding the latter, in the white collar context). By contrast, murder, rape, and other core criminal offenses produce very little social utility and very great social harm. Overenforcement by definition will almost never exist for such crimes, the ideal rate of which is zero. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 194 (1991) ("[O]nce it is recognized that society generally intends to prohibit behavior through the criminal law, it follows that there cannot be an 'optimal' rate of crime."); Ackerman v. Schwartz, 947 F.2d 841, 847 (7th Cir. 1991) (Easterbrook, J.) ("The optimal amount of fraud is zero."). Where it would exist, criminal law has crafted special doctrines to accommodate it. *See* MODEL PENAL CODE § 3.02 (articulating "choice of evils" defense).

overdeterrence that might flow from overenforcement. To show why, we will take each scenario in turn. Section A looks at market spillovers. Section B addresses definitional spillovers. Section C explains how, under our overenforcement paradigm, the law can ameliorate the effects of these spillovers through resort to evidential and procedural mechanisms that reduce overdeterrence without running afoul of the limitations discussed in Sections A and B.

A. *Market Spillovers*

Take the market spillover scenario first. Although a market spillover sanction is triggered in part by a court's decision, the sanction is still *extralegal*. Deducting it from the legal sanction would therefore be deeply problematic, for a number of reasons.

The first reason turns on the relationship between law and social meaning. Academics, particularly in the area of criminal law, have recently begun to acknowledge how background social norms and conventions against which legal sanctioning regimes operate can impose independent constraints on the ability of adjudicators to manipulate the rules within those regimes. Criminal punishment "is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation" and repudiates the false valuations embodied in criminal wrongdoing.[15] The social meaning of punishment imposes expressive constraints on authorities' abilities to manipulate criminal sanctions in the single-minded pursuit of efficiency.[16] In some circumstances, these constraints rule out the use of alternative sanctions even in cases in which such sanctions might otherwise inflict an optimal amount of disutility on an offender.[17] Merely fining a wealthy

[15]Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996); *see also* Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970) ("Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.");.

[16]*See, e.g.*, Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 131 (1988) (arguing that "we would be accomplices in the crime if we failed to punish its perpetrator, because we would be condoning the evidence it gave us of the relative worth of victim and offender"); *see also* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618-19 (1998) (discussing the "expressive rationality" of punishment).

[17]*See* Kahan, *supra* note 15, at 619 (noting that, theoretically, fines can inflict

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offender as a penalty for his crime, for instance, sends the message that the rich are free to commit offenses, so long as they are willing to pay for the privilege of doing it.[18] Likewise, sentencing a convict to community service instead of prison "devalues community service, denigrates the virtue of those who perform it, and shows contempt for the interests of those whom it is supposed to benefit."[19] Such penalties fail as publicly acceptable sanctioning methods because they are expressively irrational: they do not convey what conviction and punishment are supposed to convey, but instead undercut and contradict the condemnatory message of the criminal law.

Mere announcement of criminal liability without any accompanying punishment, be it a fine or otherwise, also undercuts that message.[20] The way for society to convey to offenders, victims, and the community that it takes a crime seriously is to back up its words with some real-world penalty.[21] In criminal cases involving market spillovers, then, it might not be possible to adjust the sanction downward *ex ante* to compensate for the *ex post* overenforcement that the market spillover will create on the ground. Indeed, doing so not only would dilute the expressive force of the criminal sanction in the particular case, but it also could work to undermine the criminal law's more general moralizing, educative, and norm-building function in the long term.[22]

[17](...continued)
the optimal amount of disutility on offenders at a cheaper cost than other alternatives).

[18]*See id.* at 621-23; *see also* Kahan, *supra* note ?, at 616.

[19]Kahan, *supra* note 15, at 627.

[20]*See* Jean Hampton, *The Retributive Idea*, *in* MURPHY & HAMPTON, *supra* note 16, at 131 (maintaining that a failure to punish amounts to "acquiescing in the message [that the crime] sent about the victim's inferiority"); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. ___ (forthcoming 2004), manuscript at 139 ("Offenders, victims, and society interpret the failure to punish to mean that the crime is not really wrong and that the offender is free to keep doing it.").

[21]*See* Kahan, *supra* note 15, at 600-01.

[22]*See, e.g.*, Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477-88 (1997) (explaining that the criminal law's power to nurture and communicate societal norms is intimately connected to its moral credibility); John Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101 YALE L.J. 1875, 1881 (1992) (arguing that "reflexive criminalization" in response to new social problems potentially ensnares a large portion of the population and has a detrimental effect on the perceived degree of freedom enjoyed by the public). We note that, by the same token, applying the criminal law too
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Consider the following illustration. Suppose that prosecutors obtain a conviction of a corporation for criminal fraud, an offense punishable under the controlling statute by a $1,000,000 fine. As is often the case in such situations, suppose further that, by the day after the conviction but before sentencing, the corporation has suffered a substantial decline in its stock value as a result of the events surrounding the criminal investigation and ultimate conviction – say, $950,000.[23] This decrease could be based on any number of factors, from the stock market's general loss of confidence in the corporation's financial stability and future performance to the effect of the fraud and the conviction on relationships with government agencies or with customers, suppliers, or private parties.[24] Should the adjudicators allow this extralegal loss to offset the statutory fine by setting the corporation's ultimate penalty at $50,000? Probably not. This setoff would trivialize the normative message that the criminal prohibition against fraud needs to project and thereby undermine the expressive function (and the corresponding expressive utility) of the criminal law. The message would shift from, "Fraud is wrong, hurts innocent victims, and warrants a severe sanction," to, "Fraud can impact business, and that is punishment enough for those who engage in it."

Of course, not all cases will implicate significant expressive constraints. But even when a setoff is expressively allowable, it very likely will be practically unworkable. The unsure relationship between extralegal sanctions and legal penalties complicates any setoff system to the point of infeasibility. Market spillovers occur when the imposition of a legal penalty combines with extralegal sanctions to bring a defendant's negative payoff above the level optimal for deterrence.

[22](...continued)
broadly to organizational and other crimes that are more appropriately viewed as the subject of civil or administrative regulation might give rise to similar long-term dilution concerns, an issue we do not address in this Essay. *See, e.g.*, Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996).

[23]*See* Jonathan M. Karpoff and John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 758 (1993) (presenting evidence that "the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud").

[24]*See, e.g.*, Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 493 (1999) (noting decreases in share value due to loss of goodwill towards companies following instances of product tampering); Karpoff & Lott, *supra* note 23, at 772 ("The difference between a firm's wealth loss and the amount of loss attributable to legal penalties is an estimate of the loss imposed by the market.").

Setoffs in such cases would be problematic because courts could never be sure that, if they lowered the penalty, the defendant would actually suffer the full extralegal loss. If, for example, a court decided to fine a corporation only $50,000, the relative lightness of that fine might bolster the market's confidence and significantly reduce the extralegal fallout or even rectify it at some later point in time. Any such development, over which the court has no control, will frustrate the calculation that led them it the $50,000 figure and upset optimal deterrence.[25]

Another reason for discarding the setoff system springs from the path-dependence of trial and pre-trial procedures, which would frustrate setoffs even more.[26] The fact-finding procedures that courts routinely apply center around legal liabilities, entitlements, and formal sanctions. An elaborate system of evidence rules to which judges and attorneys habitually resort has developed in light of this orientation. The existing framework of procedure and evidence trims the information that courts receive in a way that sharply separates the legal issues of a lawsuit or prosecution from its extralegal consequences. The principle of relevancy, which applies both at pretrial discovery[27] and with respect to evidence that courts ultimately admit and consider at trial,[28] is the most obvious example of this separation. Rules against hearsay[29] and opinion,[30] the right to cross-examine adverse witnesses,[31] and the

[25]Economists describe this effect as "crowding out." *See, e.g.*, Oren Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEG. STUD. 485, 492-93 (2001) (noting that increase in the frequency of crimes may induce changes in their social perception by eroding the stigma that society attaches to crimes); AMIHAI GLAZER & LAWRENCE S. ROTHENBERG, WHY GOVERNMENT SUCCEEDS AND WHY IT FAILS 139-40 (2001).

[26]*See generally* Stephen E. Margolis & Stan J. Liebowitz, *Path Dependence*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, *supra* note 6, at 17.

[27]*See* FED. R. CIV. P. 26 (prescribing that only information relevant to the litigation is subject to discovery).

[28]*See* FED. R. EVID. 401 and 402; 1 MCCORMICK, *supra* note 9, at 773-74 (only evidence that has potential legal consequences is relevant and admissible).

[29]*See* FED. R. EVID. 801 and 802; 2 MCCORMICK, *supra* note 9, at 93-96 (hearsay evidence is inadmissible subject to exceptions).

[30]*See* FED. R. EVID. 701; 1 MCCORMICK, *supra* note 9, at 41-47 (lay opinions are generally inadmissible).

[31]*See* 1 MCCORMICK, *supra* note 9, at 78 (expounding the right to cross-

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limitations on expert testimony,[32] just to name a few, have a similar trimming effect.

Adducing evidence of the extralegal consequences brought about by the civil or criminal liability is very difficult to do under this framework. Such evidence normally will not lie within the first-hand knowledge of ordinary witnesses (except in the most general way).[33] Even if it did, to the extent that testimony ascribes a dollar value to damage to a defendant's reputation or the like, it cannot be made by an ordinary, as opposed to expert, witness.[34] More often than not, however, an expert witness testifying about such matters would face disqualification. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[35] the assessments that an expert would make frequently would be too speculative to qualify as admissible expert evidence.[36] Economic experts estimating the impact of a firm's civil or criminal liability on its stock would usually surpass the admissibility threshold. If carried out properly, their event studies would furnish evidence upon which courts could rely.[37] But even these experts usually would be unable to resolve the

[31](...continued)
examine adverse witnesses as a fundamental requirement that promotes accuracy in fact-finding).

[32]The Supreme Court articulated these limitations in its *Daubert Trilogy*. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S.136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[33]Testimony about general reactions to a particular liability ruling would often rely on out-of-court statements that the rule against hearsay renders inadmissible. *See* FED. R. EVID. 801(a-c); 2 MCCORMICK, *supra* note 9, at 98 (any out-of-court assertion offered to prove the truth of the matter asserted qualifies as hearsay).

[34]The rule against opinion contains an explicit provision to this effect, which both judges and attorneys habitually apply. *See* FED. R. EVID. 701; 1 MCCORMICK, *supra* note 9, at 41-47 (non-expert opinions are generally inadmissible).

[35]509 U.S. 579 (1993).

[36]*See* Janet Cooper Alexander, *The Value of Bad News in Securities Class Actions*, 41 UCLA L. REV. 1421, 1438 (1994) (uncovering the problems with such assessments and demonstrating that many of them are biased in favor of plaintiffs because they sweep in elements of the market's reaction to bad news that are not within the legal definition of damages); In re Executive Telecard, Ltd. Securities Litigation, 979 F.Supp. 1021, 1023-27 (1997) (excluding an economic expert's testimony on *Daubert* grounds for its failure adequately to distinguish between different repercussions on the relevant stock prices).

[37]*See generally* Richard A. Posner, *The Law and Economics of the Economic*
(continued...)

problem of indeterminate causation. In particular, they would be unable to differentiate between stock depreciation that reflects a firm's business performance and the market's negative reaction to a liability ruling as such. This differentiation is crucial to the setoff system: it is the impact of the liability ruling *per se* — not the firm's poor market performance — that courts can plausibly consider as a sanction-reducing factor.[38]

And those are the easy cases. In the hard ones, an expert may have no solid basis at all for attempting to estimate the extralegal sanctions suffered by a defendant. How, for example, might an expert witness quantify a criminal defendant's sincere remorse or pangs of conscience? If extralegal sanctions are to be considered in some sort of setoff calculus, presumably these sanctions should count as much as any other.[39]

Even in the most straightforward cases, implementation of the setoff system would require substantial reform of existing trial practice. Specifically, it would require a fact-finding procedure analogous to the Brandeis brief mechanism that courts presently employ in resolving broad constitutional and policy issues.[40] The tradeoff between the costs and the benefits of such a thoroughgoing reform is uncertain at best. It is basic path-dependence theory that a shift from familiar to unfamiliar tasks and practices can generate costs that make the game not worth the candle. A good example of this is the widespread (and non-collusive) rejection of the Dvorak Simplified Keyboard.[41] Good

[37](...continued)
Expert Witness, 13 J. ECON. PERSP. 91 (1999) (explaining the role of economic experts in litigation); *see also* In re Executive Telecard, Ltd. Securities Litigation, 979 F.Supp. 1021, 1026 (1997) (indicating that event studies, if properly carried out, are both admissible and reliable evidence).

[38]*See supra* note 12 and accompanying text.

[39]*See* Robinson & Darley, *supra* note 22, at 469 (discussing various extralegal sanctions that often follow from criminal wrongdoing, including "the loss of valued relationships with others" and harm to one's "ability to command trust from others").

[40]*See generally* John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993) (highlighting the importance of legislative facts in precedent-setting cases addressing constitutional or public policy issues); *see also* Logiodice v. Trustees of Maine Cent. Institute, 296 F.3d 22, 30 (1st Cir. 2002) (distinguishing between "Brandeis brief facts and courtroom proof").

[41]The Dvorak Simplified Keyboard was proven to be more ergonomic than is the traditional QWERTY keyboard. Dvorak was patented in 1936, but never caught (continued...)

ergonomics always ought to consider the cost of modifying existing habits, and the same holds true for the ergonomics of trial.

B. *Definitional Spillovers*

The second overenforcement scenario involves definitional spillovers. Unlike market spillovers, definitional spillovers do not increase the overall sanction for liable defendants. Rather, in cases of definitional spillovers, defendants divide into two distinct categories. The first category consists of defendants who are liable under the relevant legal rule both formally and as a matter of the rule's substance. Their liability, in other words, aligns not only with the language of the overbroad liability rule, but also with its underlying rationale. The second category consists of defendants whose liability is merely formal because it only aligns with the language of the liability rule. Defendants falling into the first category can make no valid complaints about overenforcement and excessive deterrence. By imposing its sanction on these defendants, the liability rule treats them exactly right. These defendants do not pay any of the extra costs that the definitional spillover generates.

This is not the case with the second category of defendants. Defendants belonging to that category internalize the costs of the definitional spillover in their entirety. The overbroad liability rule treats these defendants exactly wrong. It is easy to see this if we return to our example involving the 55 mile per hour speed limit. Suppose that the underlying rationale for the speed limit is to prevent dangerous driving, and that the rule is effected by a misdemeanor criminal prohibition.[42]

[41] (...continued)
on, despite marketing efforts, because QWERTY locked in. Path-dependency appears to be the most plausible explanation for this. *See* PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS 221-44 (1994); Paul David, *CLIO and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985). For criticism of this thesis, *see* Stan J. Liebowitz & Stephen E. Margolis, *Policy and Path Dependence: From QWERTY to Windows 95*, 18 (3) REGULATION 35 (1995); Stan J. Liebowitz, & Stephen E. Margolis, *The Fable of the Keys*, 33 J. LAW & ECON. 1 (1990).

[42] Classification of traffic violations varies by jurisdiction: some jurisdictions treat garden-variety speeding as a criminal offense, with no right to a jury trial, while other jurisdictions treat it as a civil offense. For example, in Alaska, a speeding violation is called an infraction and is not considered a criminal offense, *see* AK. ST. § 28.40.050(c) & (d) (2003), whereas Texas treats speeding violations as criminal (continued...)

Drivers who exceeded this limit fall into two distinct categories: some drove their cars dangerously at that speed, and some did not. But the rule's prohibition treats all of the drivers indiscriminately by holding each one liable. In doing so, it generates social costs that are far from negligible by excessively deterring safe drivers. Many safe drivers will slow down — and each will slow down the business to which he or she belongs — without producing any offsetting benefits on the road.[43]

One might try to solve this problem by crafting a more flexible definition that captures only the dangerous drivers while letting the safe ones go, but a number of good reasons exist to reject that fix. Strict rules that lay down unambiguous precepts coordinate traffic much better than do flexible standards.[44] They also save a good deal of adjudication expenses and other enforcement costs.[45] And, by providing a bright-line rule for police as well as motorists, they also help to constrain potential abuses by law-enforcement personnel – such as racial profiling – that might be easier to engage in under a vague discretionary standard.[46] Operational constraints, in short, prevent

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[42](...continued)
misdemeanors, *see* TX. TRANSP. § 542.301 & 750.002(b) (1999).

[43]*See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433 (1990) ("[S]peed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers … can operate much more safely, even at prohibited speeds, than the average citizen.").

We note that the 55 mile per hour speed limit also contemplates a third category of drivers: those who drive dangerously even at a speed of 55 miles per hour or less. The rule does nothing to deter these drivers. This results in a species of underenforcement that is the opposite of overenforcement. In theory, some rules might be crafted to strike the optimal balance between underenforcement and overenforcement. Those cases do not fall under the overenforcement paradigm developed in this Essay.

[44]*See* FREDERICK SCHAUER, PLAYING BY THE RULES 32-34, 125 (1991) (noting that strict rules, such as "Speed Limit 55", enhance certainty and promote people's coordination).

[45]*See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 563-64 (1992) (noting that strict rules, such as well-specified traffic regulations, substantially reduce adjudication expenses and other enforcement costs whenever adjudication and enforcement are frequent).

[46]*See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 61 (1999) (making this point in course of holding unconstitutional city ordinance that gave police officers "absolute discretion" to determine what activities constituted loitering within the meaning of the statute).

tinkering the rule's definition to eliminate the overenforcement that flows from the defintional spillover.

C. *The Overenforcement Paradigm*

The overenforcement of the law upon which we focus is systematic and justifiable, rather than occasional and unjustifiable. For this reason, we separated it at the outset from the avoidable overenforcement that excessive legal sanctions sometimes produce. For the same reason, we also set aside the occasional overenforcement of the law that results from erroneous, wasteful or otherwise imprudent enforcement decisions. For the purposes of what follows, we will assume that, in both market and definitional spillover scenarios, courts and law-enforcing agencies do not deviate in their decisions from the appropriate (and socially unavoidable) error rate.[47] More broadly, we will assume that courts ascribe liability and impose legal sanctions on proper grounds, and that agencies do not overstep their authority or expend resources wastefully or imprudently.[48] We will also assume that individual actors are basically rational and reasonably informed about the workings of the law.[49]

Overenforcement that is systematic, justifiable and, consequently, unavoidable still creates excessive deterrence on the ground. This chills many worthwhile activities. Ideally, then, the legal system should not simply put up with overenforcement. Whenever appropriate, it should counterbalance overenforcement by corrective measures that reduce excessive deterrence. These measures need to reduce excessive deterrence within the expressive and operational constraints we identified earlier and without seriously compromising the objectives that the substantive law strives to attain. This condition is crucial. In light of it, overenforcement can only be mitigated by procedural and evidential mechanisms that reduce the level of

[47]For courts, that rate is set by the controlling proof standards. *See* 2 MCCORMICK, *supra* note 9, at 437-49. We assume that courts comply with these standards.

[48]*See* POSNER, *supra* note 13, at 17-21, 542-44, 643-45 (discussing the plausibility of this assumption).

[49]This standard assumption does not presuppose omniscience, nor does it ascribe other superhuman capacities to individual actions. It only means that individual actors upon which this Essay focuses are willing and able "to use instrumental reasoning to get on in life." *See* POSNER, *supra* note 13, at 17.

overdeterrence. These mechanisms must not dilute the substantive liability rule that produces the overenforcement. We call this framework the overenforcement paradigm.

To better understand this paradigm, contrast overenforcement with underenforcement of the law and the measures that the legal system can use to counteract it. Take a jurisdiction that suffers from serious drawbacks in law-enforcement on account of scarcity of resources. One way to achieve optimal deterrence would be simply to spend more on law-enforcement. But that is not the only way. To be sure, if the money is not there, the legal system cannot eliminate underenforcement *per se*. But it still does not have to put up with the consequent dilution of deterrence that underenforcement generates. Instead of attempting to mobilize additional resources, the legal system can boost the relevant sanction in a way that cancels out the underenforcement's diluting effect.

As is well-recognized in the literature, the simplest way to do this is to divide the theoretically optimal sanction by the existing probability of enforcement.[50] For example, if the ideal penalty is $100,000 and the probability of enforcement is 1/3 (which means that the law is enforced in only one out of three cases), the actual penalty should be set at $300,000. This would bring the expected penalty for each prospective wrongdoer into line with the optimal penalty of $100,000 (1/3@$300,000). Absent this adjustment, of course, the expected penalty would equal only $33,333 (1/3@$100,000). In that case, under a classic model of deterrence, prospective wrongdoers would be significantly underdeterred.[51] The best way to deal with this problem may not be to cut back on other valuable programs or to raise additional revenue to fund more enforcement resources. Instead, assuming good information, the lawmaker can simply increase the relevant sanction, and can do so cheaply and easily.[52]

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[50]*See* Becker, *supra* note 4; Polinsky & Shavell, *supra* note 6; Craswell, *supra* note 6.

[51]In these circumstances, any rational, self-interested offender would be willing to violate the law if his benefit from doing it equaled $34,000. Taking the $100,000 sanction as corresponding to the net harm that the average wrongdoing inflicts, it is apparent that the wrongdoer is not internalizing the full social costs of his wrongdoing.

[52]Just as expressive considerations can constrain the ability of lawmakers to adjust a sanction downward, they also can constrain lawmakers' ability to adjust a

(continued...)

Overenforcement rectified by counterbalancing procedural devices is the mathematical equivalent of underenforcement mitigated by a soaring legal sanction. For example, if the sanction that overenforcement produces amounts to $300,000 instead of $100,000, and—for reasons already given[53]—the lawmaker cannot bring this sanction down to $100,000, it can still eliminate the overdeterrence by reducing the general probability of enforcement from 1 to 1/3. The expected sanction for potential wrongdoers would consequently equal $100,000 (1/3@$300,000) – the right penalty for optimal deterrence. To bring this about, lawmakers can set up special procedural or evidentiary barriers to enforcement, such as heightening standards of proof or placing other evidential burdens on prosecutors or claimants.

This paradigm for attacking the problem of overenforcement instantiates the general theory of second best.[54] Under this theory, observing an economic distortion (an evidential requirement that impedes fact-finding) is not yet a good reason for eliminating it. The observed distortion may be counterbalancing another distortion (overenforcement) that the relevant social institution, such as law, needs to put up with due to its operational and expressive constraints. This possibility calls for a comprehensive evaluation of the problem of overenforcement and the framework we have articulated for approaching it. At the same time, like second-best solutions generally, it does not call for perfectionism. In our theory, the legal system does its second-best by integrating unavoidable overenforcement with heightened evidential or procedural requirements that minimize overdeterrence. But this theory offers no prescriptions for accurate integration with a counterbalancing effect that would do exactly right. In practical affairs, such prescriptions are unavailable. Consequently,

[52](...continued)
sanction upward. In fact, "when increasing the penalty on a particular law is out of step with the norms in a community, [doing so] may reduce deterrence instead of promoting it." Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1186 (2004). Overly severe penalties "create what may be termed an inverse sentencing effect" because, "[a]s penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught." *Id.* at 1185; *see also id.* at 1185 n.42 (citing studies documenting this effect).

[53]*See supra* Sections I.A & I.B.

[54]*See supra* note 7.

the legal system must do its practical best without satisfying the perfectionist's test for accuracy.[55]

To see what we mean by this, consider the following example. Say a jurisdiction contemplates legislation that will determine the conditions under which people can and cannot drive cars following the consumption of alcoholic beverages. Two legislative possibilities — a rule and a standard — are on the table. The lawmakers can set a flexible standard providing that "any person driving a motor vehicle under the influence of alcohol that substantially impairs his or her ability to control and operate the vehicle shall be guilty of misdemeanor." Alternatively, they can lay down a rigid rule specifying the permissible level of alcohol in blood for car drivers (L) and stating that "any driver with an alcohol level above L shall be guilty of a misdemeanor."

Under both regimes, police will be authorized to use breathalysers for determining L. The standard-based regime, under which courts will examine each driver's condition individually, promises relatively accurate enforcement of the law, but at a relatively high cost.[56] The rule-based regime substantially reduces this cost, and it does even that cheaply. The level of L weakening the average driver's control over his or her car is already scientifically established, and lawmakers can use it for free. By making a straightforward statement that "any driver with an alcohol level above L shall be guilty of a misdemeanor," the rule-based regime takes advantage of this economy of scale.[57] It thus dramatically minimizes the total sum of the relevant promulgation and enforcement expenses, which provides a prima facie reason for preferring it over the standard-based regime.[58]

The lawmakers, however, also need to consider the impact of each regime on the rate of enforcement and the corresponding level of deterrence. On that score, the rule-based regime would not produce

[55]Arthur James Balfour (a celebrated practitioner of public administration and, less famously, a philosopher) must have had a similar idea in mind when he wrote, "If we have to find our way over difficult seas and under murky skies without compass or chronometer, we need not on that account allow the ship to drive at random." ARTHUR J. BALFOUR, A DEFENCE OF PHILOSOPHIC DOUBT, BEING AN ESSAY ON THE FOUNDATIONS OF BELIEF 234 (1879).

[56]*See* Kaplow, *supra* note 45, at 572-73.

[57]*Id.*, at 563-64.

[58]*Id.*, at 568-77.

liability rulings as accurate as would the standard-based regime. This forces lawmakers to weigh the appropriate tradeoff between accuracy on the one hand and future enforcement costs on the other. Say the lawmakers find the standard-based regime too expensive, so they opt for the rule-based regime. Now they need to decide upon an appropriate figure for L, which turns out to be an uneasy task. If L were to represent the point at which the influence of alcohol impedes the average driver's control over his or her car, the rule would fail to deter drivers who suffer loss of control by drinking less alcohol than the average. The lawmakers are particularly interested in deterring this vulnerable category of drivers, and so they choose the L threshold much lower than the average. This will generate overenforcement of the definitional spillover type. Under this regime, individuals with average and above-average resistance to alcohol will often have to choose between drinking and driving when, for them, both activities are socially innocuous or beneficial. The result is excessive deterrence from the chilling of the non-dangerous driving of cars and social life at once. The lawmakers might want to consider introduction of corrective measures that would mitigate this effect.

From the lawmakers' viewpoint, reduction of the penalty for driving under the influence of alcohol (DUI) is altogether inappropriate. This measure would be overcorrective because it would equally benefit all alcohol-consuming drivers, both safe and unsafe. Safe drivers might be deterred adequately (or still excessively, depending on how far the penalty reduction goes), but unsafe drivers would be deterred insufficiently. Reducing the penalty also would chip away at the educational impact of the DUI prohibition and would vitiate the clear expressive significance of that sanction.[59]

The best corrective measure, therefore, is to reduce the probability of a DUI conviction for safe drivers. The lawmakers might, for instance, require two independent breathalyser tests in order to convict a person of DUI; they might also stipulate that each test must independently establish the person's alcohol level beyond all reasonable doubt. They might then qualify this evidentiary safeguard by providing that it will not extend to a driver who committed a separate traffic offense when his or her alcohol level was above the statutory threshold. This crucial qualification would capture safe drivers within the safeguard while excluding unsafe drivers from its protection. Under this

[59] *See supra* notes 15-22 and accompanying text.

regime, drivers with average and above-average resistance to alcohol would estimate their expected sanction by multiplying the statutory penalty by their reduced probability of conviction. The resulting figure (admittedly, not as neat as in our stylized example) would yield more or less optimal level of deterrence. Although some offenders escape conviction and punishment *ex post*, the law adequately deters every prospective offender *ex ante*.

An identical example can easily be constructed for market-spillover cases, too. Assume that, in the relevant market for professional car drivers, drivers with a DUI record make fifty percent less than do clean-sheet drivers. This is so because the insurance costs for drivers with DUI records are high, and these costs are high because—under the chosen DUI threshold—unsafe drivers who consume alcohol pool with safe drivers who do the same. This prospect of a reduced salary deters the average driver above and beyond what is optimal. The resulting chilling effects and their economic repercussions are obvious.[60] Under these circumstances, lawmakers should adopt the same corrective measures as in the previous example. In evidence law, such measures commonly appear as corroboration requirements.[61]

Corroboration requirements, of course, are not the only corrective measures available. Lawmakers may resort to other procedural and evidential mechanisms that counterbalance overenforcement of the law. These mechanisms merit a detailed analysis. We therefore close our theoretical discussion and turn to positive law. Specifically, we turn to three real-world examples of the overenforcement paradigm in action: the "clear and convincing" proof requirement for civil fraud actions; the heightened procedural standards applicable in securities class actions involving allegations of fraud and misrepresentation; and the common law's special corroboration requirement for perjury prosecutions.

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[60] *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 177-99 (2004) (demonstrating that excessive liability rules chill socially beneficial activities, such as driving of vehicles, without producing offsetting benefits).

[61] *See, e.g.*, Road Traffic Regulation Act, 1984, § 89(2) (Eng.) ("A person prosecuted for [speeding not involving an accident] shall not be liable to be convicted solely on the evidence of one witness to the effect that, in the opinion of the witness, the person prosecuted was driving the vehicle at a speed exceeding the specified limit.").

II.

Some claims and contentions adjudicated in civil cases require proof by "clear and convincing evidence." This standard is more demanding than "preponderance of the evidence," the general proof standard that applies in civil litigation.[62] The preponderance standard is both fair and efficient. By allowing the party with the better proof to prevail, it treats the plaintiff and the defendant as equals. That makes it fair.[63] By allowing the party with the better proof to prevail, this standard also minimizes the number of erroneous decisions: any other proof standard would produce more erroneous decisions than this one.[64] That makes it efficient. Any other proof standard, such as "clear and convincing evidence", therefore needs to be justified on special grounds.

The overenforcement paradigm highlights these grounds in cases involving allegations of fraud. Claims and contentions that require proof by clear and convincing evidence include allegations of fraud.[65] A finding that a person committed fraud exposes that person to two sanctions rather than one. The first sanction is legal: the liable party pays damages and any other applicable court-ordered penalties and fees.

[62]*See* 2 MCCORMICK, *supra* note 9, at 441-45.

[63]*See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (holding that "the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants"); *see also* Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J. L. & JURISP. 279, 333-42 (1996) (demonstrating that the preponderance-of-the-evidence standard along with the general burden-of-proof doctrine place equal risks of error on the plaintiff and the defendant and thereby promote fairness).

[64]*See* David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. BAR FOUND. RES. J. 487 (the preponderance standard is optimal because it generates the lowest possible number of fact-finding errors); David Kaye, Book Review, *Naked Statistical Evidence*, 89 YALE L.J. 601, 605n.19 (1980) (same); *see also* A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 60-62 (2000) (subject to special concerns, such as protection of innocents from erroneous convictions, evidence law would promote efficiency by reducing both false positives and false negatives).

[65]*See* 2 MCCORMICK, *supra* note 9, at 443. *But see* Grogan v. Garner, 498 U.S. 279, 288-90 (1991) (in actions for fraud under federal statutes, Congress generally intended preponderance-of-the-evidence to be the controlling proof standard). Under our theory, the preponderance standard would only be appropriate when overenforcement is not present. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983) (observing that the need to protect defrauded investors in anti-fraud actions under the Securities Exchange Act 1934 suggests that courts should prefer the preponderance standard over that of clear and convincing evidence, despite the defendant's "risk of opprobrium that may result from a finding of fraudulent conduct").

The second sanction is nonlegal and social, what we categorize as a "market spillover." Following his identification by the legal system as fraudulent, the liable party might also very well suffer a reputation loss in his community.[66] This compounds the reduction in his welfare (for example, he suffers emotional distress and loses business and social opportunities). Economists thus sometimes suggest that courts should deduct this nonlegal sanction from the legal penalty in order to avoid excessive deterrence.[67] As we explained earlier, however, expressive and operational constrains often prevent such deductions.[68] This leads to overenforcement and, quite likely, overdeterrence. The clear and convincing evidence standard avoids or substantially reduces this danger of overdeterrence by raising the applicable proof threshold and thereby reducing people's *ex ante* probability of being adjudicated fraudulent – a prime example of the overenforcement paradigm.

Our second example comes from securities class actions. Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), any class action containing allegations of material untrue statements or omissions relating to securities must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed."[69] Furthermore, when the action claims that the defendant acted with fraudulent intent or a similar state of mind, commonly called scienter,[70] "the complaint shall, with respect to each act or omission ... state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[71] Failure to meet any of these pleading

[66]*See infra* notes 119-124 and accompanying text.

[67]*See* Cooter & Porat, *supra* note 5, at 405-10; *see also supra* notes 13-14 (explaining how classic social utility theory would demand this).

[68]*See supra* Section I.A.

[69]15 U.S.C.A. § 78u-4(b)(1).

[70]*See* In re Cable & Wireless, PLC, Securities Litigation, 321 F. Supp. 2d 749, 760 (E.D. Va. 2004) ("In a securities fraud action, the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud.") (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n. 12 (1976)).

[71]15 U.S.C.A. § 78u-4(b)(2). Absent this reform, general allegations of scienter would suffice. *See* FED. R. CIV. P. 9(b) (stating that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," but that "malice, intent, knowledge, and other condition of mind of a

(continued...)

requirements warrants dismissal of the action.[72] After discovery, if the defendant can show that no evidence substantiates any of the required allegations, the defendant would generally be able to succeed in obtaining a summary judgment in its favor.[73] Courts vigorously enforce these procedural requirements.[74]

As Stephen Choi explains in a recent paper, the upshot of all of this is that these PSLRA requirements effectively shield corporate defendants from securities-fraud class actions unaccompanied by hard evidence of fraud.[75] Choi points out that the PSLRA's procedural barriers have reduced both filing and prosecution of frivolous and other unsubstantiated lawsuits.[76] But, according to Choi, they also have discouraged many meritorious lawsuits that became unprofitable from

[71](...continued)

person may be averred generally"); In re Securities Litigation BMC Software, Inc., 183 F.Supp.2d 860, 868 (S.D. Tex. 2001) (explaining that PSLRA "requires a heightened standard of pleading over that set out in Federal Rule of Civil Procedure 9(b), which allows a state of mind, or scienter, to be averred generally."); Collmer v. U.S. Liquids, Inc., 268 F.Supp.2d 718, 723 (S.D. Tex. 2003) (same); Bruce Cannon Gibney, *The End of the Unbearable Lightness of Pleading: Scienter After Silicon Graphics*, 48 UCLA L. REV. 973 (2001) (analyzing and commending PSLRA's heightened pleading requirements, relative to Federal Rule of Civil Procedure 9(b), but criticizing their ambiguity); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 600-607 (2002) (offering a detailed scholarly account of PSLRA's heightened pleading requirements, relative to Federal Rule of Civil Procedure 9(b)).

[72]15 U.S.C.A. § 78u-4(b)(3)(A).

[73]To escape summary judgment, evidence upon which the plaintiff relies must point to specific facts showing a genuine issue for trial. *See* FED. R. CIV. P. 56(e); Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Conclusional allegations, speculation, improbable inferences, unsubstantiated assertions and legalistic argumentation will not do. *See* Securities & Exch. Comm'n v. Recile, 10 F.3d 1093, 1097 (5th Cir. 1993).

[74]*See, e.g.*, Fla. State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 660 (8th Cir. 2001) (holding that securities fraud claim properly stated only if allegations collectively add up to a strong inference of the required state of mind); Ganino v. Citizens Utils. Co., 228 F.3d 154, 168-9 (2d Cir. 2000) (holding that fraudulent intent can be established either by alleging facts to show that the defendant had both motive and opportunity to commit fraud or by alleging facts that constitute strong circumstantial evidence of conscious misconduct); In re Cable & Wireless, PLC, Securities Litigation, 321 F. Supp. 2d 749 (E.D. Va. 2004) (dismissing action for failure to properly specify the defendant's misconduct and state of mind).

[75]*See* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?,* manuscript at 3-6 (U.C. Berkeley Public Law Research Paper No. 558285, June 2004), *available at* http://ssrn.com/abstract=558285.

[76]*Id.*, at 45-47.

the plaintiffs' attorneys perspective.[77] Normatively, Choi sees this tradeoff as one of dubious merit.[78] Viewing it through the lens of the overenforcement paradigm, we see it as much more complicated.

Securities class-action suits generate a threatening overenforcement potential along a number of dimensions. Chief among these is the action's effect on a firm's stock value and the consequent harm to its business (a market spillover, in our taxonomy). As Janet Cooper Alexander demonstrated in an important empirical study, before the PSLRA's reforms, firms faced with threats of securities class actions routinely experienced steep drops in the value of their shares.[79] This occurred both before and after courts ruled on certification questions and without any showing of potential success on the merits by the plaintiffs.[80] Skyrocketing monetary awards recoverable in securities class actions contribute to this effect.[81] More often than not, these awards are disproportionate to what the defendants earn and can pay: typically, they exceed the firm's working capital, posing a serious threat to its ability to remain in business.[82] Corporate defendants thus

[77] *Id.*

[78] *Id.*

[79] *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 505-21 (1991). The primary focus of Alexander's study was securities class actions involving accusations of fraud, which are particularly likely to trigger market spillovers. *See infra* note 124 and accompanying text.

[80] *See* Alexander, *supra* note 79,at 505-33.

[81] *See id.* at 529-33.

[82] *See id.* at 532, Table 5; *see also* In re Warner Communications Sec. Litig., 618 F. Supp. 735, 746 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986) (quoting attorneys for the Warner Communications company who stated at a settlement hearing in court, "If we lost [at trial] it could very well have meant bankruptcy. That is what the damages could have been if left to a jury.").

face pressure to settle suits regardless of their merits,[83] and the market reflects this fact.[84]

To this threat one should add both the corporate and the individual defendants' prospect of sustaining reputational losses,[85] as well as other factors that generate overenforcement on the ground. These include the plaintiffs' entitlement to implead as many defendants — both corporate and individual — as they deem fit (a definitional spillover, in our taxonomy). Class attorneys take full advantage of this entitlement even in cases in which the risk of not collecting the judgment from the firm is practically non-existent.[86] This works to make individual defendants – who are often both wealthy and reputable – anxious by triggering their risk-aversion to even the slightest possibility of loss of livelihood and social status.[87] These defendants consequently press for settlement within their camp, regardless of the merits.[88] In

[83]To mitigate this predicament for all class actions, rather than just those that fall under the PSLRA, some judges and commentators recommend that courts certify only those class actions that they find meritorious. *See* In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299-1304 (7th Cir. 1995) (Posner, J.) (implementing the merit-inquiry approach to class action certification); Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, manuscript at 74 (N. Y. U. Law & Economics Research Paper No. 04-011, June 21, 2004), available at http://ssrn.com/abstract=554663 (criticizing the Supreme Court's holding in Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177-78 (1974), that Federal Rule of Civil Procedure 23 does not authorize courts to scrutinize the class action's merits prior to its certification and recommending a refined merit-inquiry approach on the grounds of both fairness and economic efficiency).

[84]*See, e.g.*, In re Rhone-Poulenc Rorer, Inc., 51 F.3d at 1300 (acknowledging that corporate defendants in class actions are pressured into settling cases regardless of merits); West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002) (Easterbrook, J.) (same). The amounts at which defendants in Alexander's study settled enabled her to discern the going settlement rate at the time: about one quarter of the potential monetary award. Alexander, *supra* note 79, at 500, 547-48, 566-68.

[85]*See* Alexander, *supra* note 79, at 532.

[86]*See id.* at 529-31.

[87]*See id.* at 531-32.

[88]As Alexander explains,

> In many cases, the individual defendants are still officers and directors of the issuer, and thus are in a position to make litigation decisions for the major entity defendant. These individuals may well apply their individual risk preferences, even if unconsciously, in making decisions for the entity about whether to settle the case or risk a trial. Thus suing the company's directors and officers individually may alter the company's risk preferences, and thereby

(continued...)

short, securities class actions greatly skew the settlement balance in both strong and weak cases, placing upon corporate defendants "inordinate or hydraulic pressure ... to settle"[89] and triggering a clear need to protect defendants from blackmail under the color of law[90] – that is, from overenforcement and its ensuing overdeterrence (such as chilled investment, management, and business ventures).

The extent to which the PSLRA's procedural reforms counteract this effect is the principal social benefit of those reforms. The more narrow, secondary benefit of these reforms is the elimination of frivolous lawsuits. To be sure, the PSLRA also drives away from courts many meritorious lawsuits by making them unprofitable on balance. This weakens deterrence and is undoubtedly undesirable. Our point is not to weigh in on one or the other side of this balance. Ours is the supplemental claim that, in light of the overenforcement paradigm, it is apparent that the tradeoff introduced by the PSLRA's procedural reforms is more complex than Choi and others have appreciated. Rather than simply removing many frivolous but also some meritorious class actions, those reforms also counteract market and definitional spillovers that *both* frivolous and meritorious actions generated previously. The social loss from the frustration of meritorious suits must be measured against the *sum* of PSLRA's benefits, and the resulting tradeoff is unclear.[91]

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[88](...continued)
improve the plaintiffs' bargaining position.

Id. at 532.

[89]Newton v. Merrill Lynch, 259 F.3d 154, 164 (3d Cir. 2001).

[90]*See, e.g.,* West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002) (Easterbrook, J.) (agreeing with the scholarly opinion that "settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions."); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (Posner, J.) (acknowledging, in the class action context, that "the industry is likely to settle — whether or not it really is liable"). For a different view, *see* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1359 (2003) (arguing that the "blackmail charge" leveled against class actions is empirically unsupportable).

[91]Although the exact dollar value of the total spillovers to which we refer is unknown, its conservative estimation points to a multimillion dollar figure. *See* Alexander, *supra* note 79, at 515-21.

Our final example is the special requirement of corroborative evidence that the common law attaches to its overbroad prohibition of perjury.[92] This requirement bars conviction for perjury solely on the testimony of a single witness. Any such testimony must be corroborated by additional testimony or other evidence.[93] In the absence of corroboration, the jury must acquit the defendant.[94] The judge's failure to instruct the jury to this effect constitutes plain and reversible error.[95] This corroboration requirement is special because it is an exception to the general law. Under the general law, "the touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many."[96]

Despite this general rule, the corroboration requirement for perjury prosecutions "is deeply rooted in past centuries."[97] The unmodified common law requirement of corroboration for perjury prosecutions still applies in several jurisdictions across the United

[92]*See* Weiler v. United States, 323 U.S. 606 (1945); Perjury Act, 1911, § 13 (Eng.).

[93]*See Weiler*, 323 U.S. at 608.

[94]*See id.*; United States v. Chaplin, 25 F.3d 1373, 1378 (7th Cir. 1994) (holding that "although criticized by some, the two-witness rule remains viable in perjury prosecutions, at least in those perjury prosecutions brought under a statute in which the rule has not been expressly abrogated").

[95]The Court in *Weiler* explained that allowing a judge to refuse to issue such an instruction

> would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. ... The refusal of the trial judge to instruct the jury as requested was error.

323 U.S. at 610-11; *see also Chaplin*, 25 F.3d at 1376 (holding that, because the corroboration requirement controls evidential sufficiency, the trial judge should give the jury the appropriate instruction even when the defendant does not request it, and that a failure to do so is plain error).

[96]*See Weiler*, 323 U.S. at 608.

[97]*See Weiler*, 323 U.S. at 608-9.

States.[98] The law in these jurisdictions tracks English law.[99] In England, under Section 13 of the Perjury Act of 1911, which codified the common law,[100]

> A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

Courts interpret this provision as a stringent corroboration requirement,[101] while legal scholars criticize it.[102]

Finding a rationale for this requirement in a system that generally allows judges and juries to convict the defendant on the testimony of a single witness cannot be easy. After all, if one witness's testimony that the jury finds credible beyond all reasonable doubt is good enough for convicting the defendant in a murder trial, why should it not be enough in trials for perjury? One commonly offered answer is

[98] *See, e.g.*, *Weiler*, 323 U.S. at 610-11; United States v. Chaplin, 25 F.3d 1373, 1376 (7th Cir. 1994); Hammett v. State, 797 So.2d 258 (Miss. App. 2001); People v. Ellsworth, 15 P.3d 1111 (Colo. App. 2000); Watson v. State, 509 S.E.2d 87 (Ga. App. 1998); Murphy v. U.S., 670 A.2d 1361 (D.C. 1996); State v. Barker, 851 P.2d 394, 396 (Kan. App. 1993) (each jurisdiction requires corroboration for a single witness whose testimony accuses the defendant of perjury).

[99] *See, e.g.,* Marvel v. State, 33 Del. 110, 113 (1925). In 1970, Congress modified this rule significantly for federal cases in Title IV of the Organized Crime Control Act, 18 U.S.C.A. § 1623(e). That provision explicitly provides that the corroboration requirement does not apply in prosecutions for false declarations before a grand jury or a court. *See id.*

[100] *See* Weiler v. United States, 323 U.S. 606, 610 n.4 (1945).

[101] *See, e.g.*, Hamid and Hamid (1979) 69 Crim. App. R. 324 (C.A.); *see also* Hammer v. United States, 271 U.S. 620, 626 (1926) ("The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal."); Roche v. State Employees' Retirement Board, 731 A.2d 640, 647 (Pa. Commw. Ct. 1999) (reiterating the Supreme Court's holding in *Hammer*).

[102] *See* IAN H. DENNIS, THE LAW OF EVIDENCE 488 (1999) (arguing that the corroboration requirement "no longer has a plausible justification and could be scrapped without loss"); PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 470 (2004) (writing that "even if section 13 of the 1911 Act might originally have been justified as a bulwark against witness intimidation or manipulation, this rationalization no longer validates the continuing demand for corroboration").

that the corroboration requirement for perjury prosecutions is necessary to avoid chilling prospective witnesses with the prospect of easy prosecution for perjury.[103]

Although courts and commentators have not recognized it as such, this rationale in fact flows from the overenforcement paradigm. Under its common law definition, perjury is any false statement regarding a material matter that a witness makes knowingly and under oath in a judicial proceeding.[104] On its face, this definition contains three mutually related ambiguities. First, what counts as a "statement"? Would it include, for example, a witness's demeanor when the witness uses it deliberately as a form of communication? Second, what classifies as "false"? Would this description attach, for example, to untruthful testimony when the witness hesitantly — but still deliberately — signals the court that his testimony is not to be believed (along the

[103]*See Weiler*, 323 U.S. at 609 ("The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."); ROBERTS & ZUCKERMAN, *supra* note 102, at 470. Roberts and Zuckerman, however, favor other methods of reducing this chilling effect. Conditioning prosecutions for perjury upon the approval of the Director of Public Prosecutions is one such method. *Id.*

[104]Under Section 1 of the Perjury Act of 1911, "If any person lawfully sworn as a witness ... in a judicial proceeding wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to imprisonment for a term not exceeding seven years, or to a fine or to both such imprisonment and fine."

The federal definition of perjury in the United States is similarly broad. Under U.S.C.A. § 1621,

> Whoever —
>
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury ... willfully subscribes as true any material matter which he does not believe to be true ...
>
> is guilty of perjury.

lines of the famous "Liar Paradox"[105])? Would reticent non-acknowledgment of the truth qualify as perjurious deceit?[106] Third, does any of these puzzles impact the defendant's *mens rea*?

These ambiguities in the definition of perjury are important because many witnesses testifying in courts would rather not be there.[107] Participating in litigation even as a mere witness costs time and money and often generates considerable stress in the form of questions about vague, unsavory, or personal events, circumstances, or relationships. Witnesses facing these disincentives have much to lose and little to gain from telling the truth. Many of them nonetheless choose to testify because they fear punishment for contempt (and in some cases, moral reprobation as well).[108] A witness in this category often will deliver evasive testimony that obfuscates the truth without making any affirmative attempts to mislead the court. Indeed, his testimony might openly display reticence that does not induce the court to make a wrong factual finding. It says, in effect, "I am forced to testify against my will, and am very uncomfortable doing so, so please don't place too much weight on what I'm saying." Is this testimony perjury?

A longstanding approach to these questions has been to interpret the definition of perjury broadly by resolving any ambiguities in the prosecution's favor. Thus, *any* part of a witness's material testimony amounts to perjury if it is untrue; falsity cannot be offset by the witness's self-acknowledged reticency or evasiveness or by any other credible signal that induces the court not to believe the

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[105]*See* R.M. SAINSBURY, PARADOXES 111-17 (2d ed. 1995).

[106]Thomas Nagel argues that it would not because it flows from generally known conventions. *See* Thomas Nagel, *Concealment and Exposure,* 27 PHIL. & PUB. AFF. 3 (1998); *see generally* BERNARD A. O. WILLIAMS, TRUTH & TRUTHFULNESS: AN ESSAY IN GENEALOGY 96-100 (2002) (acknowledging the validity of the distinction between lying and being reticent or even misleading).

[107]*See, e.g.,* Bronston v. United States, 409 U.S. 352, 358 (1973) (discussing reasons behind the reluctance of witnesses to testify); Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 Wayne L. Rev. 1755, 1802 (1996) (calling for legislation that will encourage testimony from reluctant witnesses in order to counterbalance the chilling effect of increased perjury prosecutions).

[108]*See, e.g.*, Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 754 (1998) (stating that the "contempt trap" argument advanced by witnesses to avoid testifying has generally not been successful).

witness.[109] Likewise, the witness need not harbor an intent to mislead the court: his awareness of the statement's untruthfulness would satisfy the *mens rea* requirement.[110] In short, witnesses must always tell "the truth, the whole truth, and nothing but the truth," and any deliberate violation of this requirement qualifies as perjury.[111] The reason for this approach is simple. Broadly defining perjury in this way strengthens the incentives of all witnesses to tell the truth[112] and eases the prosecution's burden in cases in which witnesses have in fact lied.

But it also creates a problem: the definition of perjury becomes overbroad in that it condemns and punishes individuals who do not necessarily produce the mischief at which the criminal prohibition against perjury aims. This mischief is an erroneous verdict that false testimony actively induces.[113] Openly evasive testimony does not do

[109]*See, e.g.,* Ostendorf v. State, 128 P. 143, 154 (Okla. Crim. App. 1912) (willful suppression of part of the truth is equivalent to an affirmative statement of falsehood); Flowers v. State, 163 P. 558 (Okla. Crim. App. 1917) (same); Alan Heinrich, Note: *Clinton's Little White Lies: the Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L.A. L. REV. 1303 1311-16 (1999) (demonstrating that courts uniformly interpret the "materiality" condition for perjury in very broad terms).

[110]United States v. Williams, 874 F.2d 968, 980 (5th Cir. 1989) (explaining that for perjury purposes, absence of such a motive to deceive the court does not exonerate a witness who knowingly gives false testimony on one of the material issues); United States v. Lewis, 876 F.Supp. 308, 312 (D. Mass. 1994) ("[P]erjury does not require proof that the defendant had the specific intent to impede justice."); *cf.* 18 U.S.C.S. § 1623(a) (2004) (in order to convict a defendant of making false statements to a grand jury or court, the prosecution only has to show knowledge by the defendant that the statement was false).

A few states reject this broad interpretation. *See* TEX. PENAL CODE ANN. § 37.02(a) (Vernon 2003) ("Perjury. A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning, he makes a false statement under oath ...."); MO. ANN. STAT. § 575.040 (West 1995) ("A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths."); TENN. CODE. ANN. § 39-16-702 (2004) ("Perjury. A person commits an offense who, with intent to deceive ... makes a false statement, under oath ....").

[111]*See, e.g.*, MODEL PENAL CODE § 241.1 ("A person is guilty of perjury...if in any official proceeding he makes a false statement under oath or equivalent affirmation...when the statement is material and he does not believe it to be true."); Jared S. Hosid, *Perjury*, 39 AM. CRIM. L. REV. 895 (2002) (analyzing this definition).

[112]*See* Robert Cooter & Winand Emons, *Truth-Bonding and other Truth-Revealing Mechanisms for Courts*, 17 EUR. J. LAW & ECON. 307 (2004).

[113]*See, e.g.,* Bronston v. United States, 409 U.S. 352, 362 (1973) (holding that (continued...)

this because everyone can see that the witness is passively refusing to assist the court in its pursuit of the truth. At its worst, such testimony amounts to contempt of court[114] — conduct that is certainly reprehensible, but not as pernicious as perjury. Indeed, as many commentators have noted, evasive as opposed to affirmatively misleading testimony raises normatively difficult questions about the extent to which an individual's moral entitlement to privacy and non-exposure should limit her truth-telling obligations to society.[115] From a moral (as opposed to formal legal) point of view, it is one thing actively to bring about an injustice, and it is quite another thing to withdraw one's testimonial assistance from a justice-making proceeding. On this view, only outright liars can properly be identified and condemned as perjurers.[116]

So why not re-interpret the perjury prohibition more narrowly to reflect these nuances? The answer parallels the answer to the similar definitional problem we faced with the safe versus unsafe drivers: operational constraints prevent it. Narrowing down the prohibition to capture only outright liars but not evaders would dramatically increase the difficulty of successful perjury prosecutions. At the same time, it would dramatically decrease the incentives for people who are contemplating lying not to do so. The law's resolution of this difficulty

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[113](...continued)
literally true statements made under oath that are evasive or unresponsive must be resolved under further questioning by counsel, not by prosecution for perjury, and that such statements do not fall within the federal perjury statute, 28 U.S.C.S. § 1621 (2004)); *see also* United States v. Shotts, 145 F.3d 1289, 1299 (11th Cir. 1998) ("[T]he prosecutor's purpose must be to obtain the truth. Perjury, of course, thwarts that proper purpose. It must not be the prosecutor's purpose, however, to *obtain* perjury, thus avoiding more precise questions which might rectify the apparent perjury.")

[114]*See* 28 U.S.C.A. § 1826(a) ("Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.").

[115]*See, e.g.*, WILLIAMS, *supra* note 106, at 96-100.

[116]*See* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 179-180 (2001) (distinguishing on moral grounds between lying and misleading and defending the "literal falsity" approach to perjury); *id.* at 168-73 (arguing that defensive deception is excusable on self-preservation grounds).

generates overenforcement of the definitional spillover variety that pools non-liars with liars and affirmatively chills the affairs of both.

The common-law corroboration requirement counteracts this effect by leavening the overbroad definition of perjury with a special evidential rule through which many evasive — but still not affirmatively misleading — witnesses escape criminal liability. The net effect of this mechanism is to require the prosecution to identify a particular falsity in the defendant's testimony, to demonstrate that this falsity was material to the proceedings in which the defendant appeared as a witness, and to provide additional and independent proof to back up a witness who testifies about this falsity. In general, it will be much harder for the prosecution to discharge this burden in criminal proceedings initiated against evasive as opposed to deliberately misleading witnesses.[117] Thus, while an evasive witness will still run the risk of being identified as a perjurer under the overbroad definition of the crime, he at least would face a decreased risk of being prosecuted and convicted. This tradeoff substantially reduces the chilling effect that the overbroad definition of perjury exerts upon prospective witnesses. It does so, moreover, while partially sorting perjury suspects into evasive witnesses and downright liars by encouraging prosecutors to tend toward charging the latter more than the former. The tradeoff admittedly remains imperfect, but it is better than the alternative.[118]

[117]Some scholars claim that the prosecution's burden is too heavy, to the detriment of society. *See, e.g.*, GLANVILLE WILLIAMS, THE PROOF OF GUILT 68 (3rd ed. 1963) (noting the difficulty of proving the guilty mind as affecting all prosecutions for perjury); Michael Stokes Paulsen, Review, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1488-89 (1997) ("Oaths are taken less seriously today ... fewer people believe in hell, and an oath is no longer thought to be effective because of extratemporal consequences for false swearing. The only real bite behind an oath is the specter of a perjury prosecution, and perjury is notoriously difficult to prove... Indeed, the ethos of today is that perjury is commonplace..."); Harris, *supra* note 106, at 1774 (explaining that proving perjury is difficult because "there is often no physical evidence and the prosecutor must not only prove that the statement was false, but [also] that the witness believed that the statement was false" and "that the false statement was material to the case.").

[118]For another similar example, consider Article III, Section 3(1) of the United States Constitution, which provides , "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in Open Court." U.S. CONST. art. I, § 3, cl. 1. This corroboration requirement offsets a definition of treason that is both overbroad and ambiguous: as stated by the same constitutional provision, "Treason against the United States shall consist ... [inter alia] in adhering to their Enemies, giving them Aid and Comfort". U.S. CONST. art. I, § 3,

(continued...)

III.

The doctrine of corporate criminal liability creates unique problems of overenforcement. Those problems come in two forms. The first is a straightforward market spillover. Investigations and convictions of corporations, like those of individuals, often trigger significant extralegal sanctions for the defendants and their employees. These sanctions include loss of morale,[119] damage to reputation and corporate image,[120] damage to relationships with customers and suppliers,[121] bars to future business,[122] and, consequently, significant drops in share price and market share.[123] The size of these extralegal

[118](...continued)
cl. 1; *see also* 18 U.S.C. § 2381 (2004) ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.").

[119]*See, e.g.*, Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 969 (1999) (noting how the first prosecutions of business leaders under the Racketeering Influenced and Corrupt Organizations Act (RICO) triggered a significant "reputational rub-off effect"); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1864 (2001) (observing that when misbehavior is widely publicized, as in the case of a high-profile firm, substantial reputational penalties result).

[120]*See* Skeel, *supra* note 119, at 1832 (noting the reputational damage to Texaco and Denny's in the wake of their respective racial discrimination suits); Selmi, *supra* note 12, at 1271.

[121]*See* Alexander, *supra* note 24, at 504 (concluding that legal sanctions for fraud may lead to "termination and/or suspension of business relationships with customers as a significant form of real-world reputational sanction").

[122]*See, e.g.*, 41 U.S.C. § 354(a) (2004) (barring corporations convicted of violating the Service Contracts Labor Standards Act from receiving new contract awards for three years); 42 U.S.C. § 7606(a) (2004) (prohibiting federal agencies from entering into any contracts with companies convicted of violating the Clean Air Act until Administrator's certification that the condition has been corrected).

[123]Karpoff & Lott, *supra* note 23, at 773 (concluding that publication of stories in the *Wall Street Journal* of "alleged or actual fraud correspond with statistically significant and economically meaningful losses in equity value"); Alexander, *supra* note 24, at 505-506 (reviewing data suggesting that the average decline in stock price for companies publicly charged with corporate wrongdoing was four times greater than legal penalties ultimately imposed by the court); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 109 (2000) (describing how investor reaction to news of the discriminatory tapes and other evidence contributed to a loss of more
(continued...)

penalties often dwarfs that of the formal legal penalty. In an empirical study involving corporate fraud, for example, Karpoff and Lott concluded that "the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud."[124] Discounting firms' expected legal sanctions by the sum total of these costs, however, would be both practically infeasible and expressively unjustifiable, for it likely would require reduction of the legal sanction to near zero.[125]

The second type of overenforcement that occurs in the corporate crime context is more complicated and flows from the incentives created by the substantive rules governing corporate criminal liability. The scope of corporate criminal liability under American law is very broad. Corporations "may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder."[126] The standards that courts use to attribute liability to corporations also are easily satisfied.[127] Corporate liability is vicarious and, consequently, strict: firms can be criminally liable for crimes committed by their employees acting within the scope of their employment and to benefit the firm.[128] The "firm's benefit" qualifier is much less restrictive than it sounds. So long as the employee was carrying out a job-related activity, firms can be liable,

[123](...continued)
than $1 billion in Texaco's market capitalization).

[124]Karpoff & Lott, *supra* note 23, at 758. Specifically, Karpoff and Lott found that under the sentencing scheme in effect at the time, only 6.5 percent of the share value lost by firms that were investigated for or convicted of fraud was attributable to court-imposed costs, with penalties and criminal fines accounting for only 1.4 percent. *Id.* at 759.

[125]*See supra* Section I.A. Indeed, as Karpoff and Lott themselves noted, despite the substantial extralegal sanctions associated with conviction, at the time of their article, the expected penalty for conviction of fraud "seemed surprisingly low." *See* Karpoff & Lott, *supra* note 23, at 758. Amendments to the organizational sentencing guidelines have now raised the relevant fine substantially, the disparity between the legal penalty and the extralegal sanction is still very substantial, and so the same constraints remain. *See* Alexander, *supra* note 24, at 492-493.

[126]V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1488 (1996).

[127]*See id.* at 1489.

[128]*See* New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494-95 (1909); *Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1229, 1247-49 (1979).

even if they expressly prohibited the wrongdoing and implemented procedures to prevent it.[129]

The basic idea behind this scheme is that vicarious liability for corporations reduces wrongdoing by corporate agents by fostering optimal deterrence of those agents. Vicarious liability, the thinking goes, promotes optimal enforcement on the ground by inducing firms to control their employees in number of ways.[130] It can induce firms to implement preventive measures, such as compliance programs and other measures which decrease the risk of crime *ex ante*.[131] It also can encourage firms to undertake policing measures, or measures that increase the probability that employees who do break the law are apprehended and sanctioned.[132] And, when employees are apprehended, it can reduce sanctioning costs by encouraging the firm, rather than the government, to penalize the employees itself in cases in which the firm is in a better position than the government to do so.[133] The ultimate effect of all of these measures — compliance programs, *ex post* policing, and swift internal sanctioning — is to increase the expected liability for individual wrongdoers. By deterring misconduct on the part of the firm's individual employees, this scheme reduces the likelihood to the firm of being held criminally liable.

This scheme is problematic. On the ground, it can lead to serious overenforcement for the firm. Assuming that the legal sanctions for corporate criminal liability are set high enough so that the firm wants to avoid them, firms will implement some or all of the measures just discussed in an attempt to decrease their liability. But despite their best efforts, firms can never stamp out all misconduct. Some residual offenses will occur. In those cases, the same measures that firms employ to attempt to decrease their own liability will backfire. By increasing

[129] *See id.* at 1249-50 (discussing how courts broadly interpret the "scope of employment" prong to include any job-related activity, even prohibited as opposed to merely unauthorized employee conduct).

[130] *See* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEG. STUD. 319, 324-25, 333-49 (1996) (offering an economic rationale for this doctrine, conditional on the principle that corporations pay no more than the social costs of the crimes perpetrated by their agents; and demonstrating that, in practice, criminal sanctions imposed upon corporations tend to be excessive).

[131] *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 701-05 (1997).

[132] *See id.* at 706-12.

[133] *See id.* at 700-01.

the probability that the government will detect and sanction any residual offenses, the firm will actually increase its own expected liability.[134]

This "liability enhancement effect," as Arlen and Kraakman call it,[135] is a variant of definitional spillover which results from the failure of the substantive liability standard — strict vicarious liability — to distinguish between firms that self-police themselves, and firms that do not. Perversely, the overenforcement flowing from the liability enhancement effect can lead to underdeterrence of corporate misconduct. If by self-monitoring and self-policing, a firm increases the probability of its own conviction under the vicarious liability standard, then firms subject to that standard will have a disincentive to undertake such measures, or at least to undertake them in good-faith.[136] Firms facing a disincentive to self-monitor and self-police *ex post*, moreover, may find it harder credibly to threaten their employees with such measures *ex ante*. The paradoxical result of both of these effects is underdeterrence. Neither raising nor lowering the legal sanction can remedy this problem, because both a weaker and a stronger sanction would result in the same disincentive on the part of the firm to root out misconduct by its employees.

One might attempt to solve this problem by tinkering with the substantive liability rule to eliminate the definitional spillover. For example, the law may specify the preventive and policing measures that the corporation needs to take, both before and after the crime, in order to mitigate criminal liability for itself. Arlen and others have advocated this approach, a variant of which is now embodied in the federal Organizational Sentencing Guidelines.[137] This solution is a good start

[134]*See id.* at 708; *see generally* Jeffrey W. Nunes, Comment, *Organizational Sentencing Guidelines: the Conundrum of Compliance Programs and Self-reporting*, 27 ARIZ. ST. L.J. 1039 (1995).

[135]Arlen & Kraakman, *supra* note 131, at 708 (in a strict liability regime, policing measures cause a rise in a company's expected liability both if the company reports wrongdoing to the government or if the government suspects the wrongdoing itself).

[136]*Cf.* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1407-1409 (1999) ("Survey research...reveals that a majority of employees see ethics codes as an exercise in public relations.").

[137]Arlen & Kraakman, *supra* note 131, at 718-738 (advocating mixed or composite liability standards in place of purely strict or duty-based liability); *see also* V.S. Khanna, *Corporate Liability Standards: When should Corporations be Held Criminally*

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for mitigating the problem of the definitional spillover. But it is far from being perfect. It leaves the market spillover without a remedy. It also creates counterproductive incentives for firms to comply only "cosmetically" with their prevention and policing duties, in order to gain the benefits of a duty-based regime (mitigation) without the costs (discovery and consequent investigation of misconduct, and possible conviction).[138]

Under our paradigm, one way to supplement this approach is to introduce evidential and procedural barriers that encourage the corporation to self-police while reducing its probability of being found guilty of a crime. A broad attorney-client privilege is one such barrier. This privilege allows a corporation to investigate its internal criminal activities confidentially by entrusting the investigation to its attorney. The privilege should attach whenever the attorney is fulfilling this role – that is, whenever she is providing confidential reports and legal advice to the corporation. This in fact corresponds to the form in which the Supreme Court upheld the corporate attorney-client privilege in *Upjohn Co. v. United States*.[139] In this expanded form, the privilege is only available to corporations, as opposed to natural persons.

Even so, a corporation's *Upjohn* privilege is still very limited. Like the garden-variety attorney-client privilege, it only protects from disclosure information that attorneys and clients exchange between themselves in order to facilitate the attorney's legal advice to the client or the client's legal representation by the attorney.[140] Corporate crime cases are document intensive, and such information can include documents that clients, attorneys and others may produce. To receive protection and consequent exemption from disclosure, however, documents must qualify as "work product of the lawyer."[141] The attorney-client privilege by no means exempts from disclosure all information that may incriminate the corporation. Moreover, empirical

[137](...continued)
Liable?, 37 AM. CRIM. L. REV. 1239, 1269 (2000); 18 U.S.C.S. app. § 8B2.1 (2004) (mitigating sentences for convicted companies that, among other things, have *bona fide* compliance programs in place).

[138]*See* Laufer, *supra* note 136.

[139]Upjohn Co. v. United States, 449.U.S. 383 (1981).

[140]*See* 1 MCCORMICK, *supra* note 9, at 322-30.

[141]*See* 1 MCCORMICK, *supra* note 9, at 353-60.

evidence suggests that, even when the privilege would exempt information, corporations often waive it to avoid adverse inferences and other negative implications.[142]

In these circumstances, another evidential barrier that calls for consideration is the Fifth Amendment's privilege against self-incrimination.[143] As the law stands now, this privilege protects only natural persons and not corporations.[144] Nor does it extend to a corporate agent or employee who is required under the color of law to provide documents or other information tending to incriminate the corporation.[145] Moreover, although such an agent or employee can claim the privilege in his or her personal capacity, this entitlement is limited by the "collective entity" rule.[146] Under this rule, a person's assumption of a corporate job entails a duty to produce corporate documents regardless of the self-incriminating consequences.[147] A corporate agent or employee holding corporate documents in his or her representative capacity therefore "has no right to resist a demand for production of those documents ... on the basis of his [or her] Fifth Amendment privilege."[148] This limitation of the agent's personal privilege has a two-fold explanation. Allowing corporate agents and

[142]*See* Practising Law Institute, *Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, 1417 P.L.I./CORP. 381, 384 (2004) ("[M]any corporations choose to go farther in order to demonstrate their commitment to cooperation by voluntarily waiving privileges and forging a much closer relationship with Government investigators in order to uncover wrongdoing.").

[143]U.S. CONST. amend. V.

[144]*See* Hale v. Henkel, 201 U.S. 43, 74-5 (1906) (holding that the self-incrimination privilege does not protect corporations and justifying this holding by the social need to obtain inside corporate information in order to police corporate abuses effectively); United States v. White, 322 U.S. 694 (1944) (holding that the self-incrimination privilege only protects natural persons and does not extend to organizations); Braswell v. United States, 487 U.S. 99, 120 (1988) ("[L]abor unions, corporations, partnerships and other collective entities have no Fifth Amendment self-incrimination privilege.").

[145]*See* Wilson v. United States, 221 U.S. 361, 377-85 (1911); 1 MCCORMICK, *supra* note 9, at 472-73.

[146]*See* Wilson v. United States, 221 U.S. 361, 377-85 (1911) (establishing the "collective entity" rule); Braswell v. United States, 487 U.S. 99, 110-15 (1988) (reaffirming the "collective entity" rule).

[147]*See Braswell*, 487 U.S. at 110.

[148]*See* 1 MCCORMICK, *supra* note 9, at 473-74.

employees to exercise the Fifth Amendment privilege on personal grounds would circumvent the inapplicability of the privilege to corporations (and other organizations).[149] In addition, such a broad privilege would disarm the police and prosecutors in their fight against corporate crime.[150]

These limitations on the privilege against self-incrimination in the corporate context are not without merit. Yet, to ameliorate the overenforcement problem, the law might consider providing corporations at least some protection against compulsory self-incrimination. The best way of doing this would be to grant corporations a removable privilege against self-incrimination. Under this regime, corporations would have the privilege, but police and prosecutors would be able to obtain judicial warrants for its compulsory removal. Judges would issue such warrants upon showing of probable cause. To show probable cause, prosecutors would need to produce their own evidence pointing to the perpetration of a corporate crime. Together with the attorney-client privilege, this evidential barrier would attenuate overdeterrence by reducing the corporation's *ex ante* probability of being convicted while at the same time allowing it safely to self-police (but not to commit misconduct with impunity).[151]

We conclude this part of the Essay by empirical observation. Unlike the examples discussed in Part II, in the case of corporate crime, law-enforcement faces substantial informal barriers and constraints.[152] These constraints effectively mitigate overenforcement on the ground and thereby lessen the need for offsetting evidential and procedural mechanisms. This helps explain the absence of any robust development of privileges for corporations: practical limitations on the government are doing what evidentiary privileges otherwise might.[153]

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[149]*See Braswell*, 487 U.S. at 110.

[150]*See id.* at 115.

[151]More narrowly-tailored, task-specific privileges might also be constructed. The rise of environmental audit privileges in the liability regime context is a good illustration of this. *See* Arlen & Kraakman, *supra* note 131, at 742-744.

[152]*See* Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526-527 (2004) (observing that the complexity of corporate crime and the privacy within which it is committed create barriers to investigation and prosecution).

[153]*Id.* at 529-530 (describing strategies adopted by the executive, legislative, and judicial branches to counter the inherent privacy advantages enjoyed by

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IV.

The overenforcement paradigm gives rise to several objections. The most straightforward of these is that the paradigm is needlessly complicated. A much simpler way to ameliorate overenforcement is to reduce the level of detection and prosecution of transgressors. This would reduce an individual's *ex ante* probability of suffering excessive harm, but would do so without introducing the drafting and application costs that procedural and evidentiary mechanisms carry with them.

This fix is only available in a small category of cases, if at all. Underdetection is not an option in civil litigation between private parties, such as class actions, where the power to file lawsuits is vested in individuals outside the government. A private person's only criterion for filing a lawsuit is the difference between the expected investment and the expected return. She is not concerned about overenforcement and whether her lawsuit would benefit society.[154]

In criminal cases, and in civil cases brought by the government, underdetection is theoretically available but still problematic. Underdetection might be a viable solution for the subset of activities that, while nominally criminal or subject to civil penalties, are not widely considered objectionable. Consider, for example, jaywalking in New York City or "deviant" sex between consenting adults in private. Of course, this fix also would require costly measures to ensure the proper level of underdetection and to protect against abusive law-

[153](...continued)
corporations). Indeed, it was these types of constraints that prompted the Supreme Court not to extend the Fifth Amendment privilege to corporations and its officers (whenever they act in their official capacity) in the first place. *See supra* note 144.

[154]As Steven Shavell points out, there is a fundamental divergence between the private and the socially desirable level of suit. *See* SHAVELL, *supra* note 60, 167, at 391-97 (2004). One might try to get around this problem by increasing the fees required for initiating suit. *Cf.* Securities Act § 11(e), 15 U.S.C. § 77k(e) (2004) (authorizing court to require plaintiff to post a bond for attorney's fees and other costs in order to guard against nuisance suits); Exchange Act § 18(a), 15 U.S.C. § 78r(a) (2004) (authorizing a similar bond requirement for similar reasons). To have any appreciable mitigation effect on overenforcement, these fees would need to be very high, so high that they might in fact lead to underenforcement or might undesirably skew the distribution of lawsuits among potential plaintiffs, rich and poor. Financing of lawsuits (by attorneys working on a contingent-fee basis, or otherwise) could rectify this shortcoming. But to the extent this prospect is real it undercuts the very purpose of the fee-filing mechanism: reduction of the number of lawsuits filed.

enforcement.[155] But for activities that are both criminal and viewed as such – for example, corporate fraud – underdetection is not viable. The expressive considerations that constrain the dilution of penalties in such cases also limit deliberate underdetection and under-prosecution in the first instance.[156]

This answer leads to a second objection. The procedural and evidentiary mechanisms of the overenforcement paradigm result in zero enforcement for some defendants who otherwise would have been found liable and sanctioned under the relevant substantive rule. Arguably, this erodes the expressive function of the law in the same way and just as much as would offsetting penalties or refusing to prosecute at the outset.

To be sure, evidentiary and procedural rules could trigger expressive fallout if the public were to view them as mere "'technicalities' that require courts to let admittedly guilty defendants go free."[157] The exclusionary rule is one example of this.[158] But the rules most fitting to the overenforcement paradigm largely avoid this problem. For instance, a qualified privilege of the sort we propose for

[155]*See, e.g.*, Tobe v. City of Santa Ana, 40 Cal. Rptr. 2d 402, 408 (1995) (discussing city's selective use of jaywalking citations against homeless residents); United States v. Luckett, 484 F.2d 89, 90 (9th Cir. 1973) (holding that police impermissibly issued jaywalking citation in order to detain defendant so that they could perform a warrant check and a search); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (observing that four of the thirteen states with sodomy laws still on the books at the time of the Court's decision only enforced them against homosexuals); *supra* notes 44-46 and accompanying text.

[156]Even in the residual category of cases for which underdetection might theoretically be available, it is not at all clear how it could work in practice. To reduce overenforcement and its concomitant overdeterrence, prosecutors would need to credibly pre-commit to underdetection. But randomized and binding underdetection simply is not feasible. Binding underdetection guidelines that instruct prosecutors how and what to detect and prosecute would be more feasible. But they also would be an instance of a procedural mechanism that falls under the overenforcement paradigm.

[157]Kahan, *supra* note 4, at 390 (footnote omitted).

[158]*See, e.g.*, Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1124-25 (2000) ("[T]he instances of Fourth Amendment violations that seem less than willful to the layperson are the likely origin of the common public perception that the exclusionary rule is a technicality, rather than the important and substantive constitutional remedy that it reflects."); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 77 (1992) (describing the unpopularity of the exclusionary rule with the general public).

corporations, removable upon a showing of probable cause, likely would not raise such concerns because it would not apply to corporate crimes for which the government had its own independent evidence of guilt.[159] The same holds true for other mechanisms that reduce overenforcement while effectively sorting between right and wrong liability decisions.

Moreover, even in cases in which the public does view such mechanisms as mere technicalities, their expressive costs would be less than the costs of the alternatives. As a general matter, people are likely to perceive a failure to convict or an inability to prosecute in the face of an evidential or procedural obstacle as expressively less objectionable than an affirmative decision to forego punishing a criminal whose guilt has already been determined under applicable substantive standards and procedural rules. This is true even when the ultimate end of both the procedural barrier and the setoff or declination decision is to serve greater efficiency goals. The expressive consequences of rules and decisions are matters of social meaning which do not turn solely on the purpose of the rules or the decisionmaker's intent.[160] Facially neutral procedural and evidentiary rules that may make liability more difficult to prove minimize the appearance of overt tradeoffs between efficiency and expressive condemnation in a way that outright setoff or declination decisions for clearly liable defendants do not.[161] And it is these sorts of tradeoffs that the public is likely to see as morally and expressively offensive.[162] That may well be why, for example, juries

[159]*See supra* note 151 and accompanying text.

[160]*See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 149 U. PA. L. REV. 1503, 1513 (2000) (describing the limited role of legislative intent in the public's ascription of meaning to legislative acts).

[161]*See* Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 288 (1997) (stating that "[t]he most viable defense" to public censure for certain types of value trade-offs "is to minimize public awareness of [them] by maximizing the opacity of the decision-making process"); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1738 (2003) (arguing that "nominal adherence to the proposition that life has infinite value," although clearly not true, "serves important social purposes that advocates of risk-utility analysis ignore," particularly where lay perceptions are involved).

[162]*See generally* Fiske & Tetlock, *supra* note 161 (articulating a general theory of "taboo trade-offs"); Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1135-36, 1136 (2003) (arguing that comparing or exchanging money with a "'sacred value'"

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reward higher punitive awards against corporations that explicitly use cost-benefit analysis in their product safety decisions than against those that do not.[163]

A final objection has to do with what we earlier described as the unsure relationship between extralegal sanctions and legal penalties.[164] Theoretically, social norms and sanctions may function as efficient supplements to legal penalties. In such cases, social sanctions create no overdeterrence because legal penalties underdeter. The overenforcement paradigm therefore should not apply. Using procedural and evidentiary mechanisms to decrease the expected legal sanction in such cases actually would create underdeterrence. How, one might object, are adjudicators to know when social norms function as efficient supplements to legal penalties, as opposed to when they create overenforcement?

At bottom, this objection is an empirical one that requires further investigation into the precise relationship between social and legal sanctions on a case-by-case basis. That task is well beyond the scope of this Essay. As things stand now, no readily identifiable means exist by which social sanctions can be coordinated with legal sanctions to achieve efficient outcomes. To the contrary, such coordinated synergies appear highly implausible and extremely rare.[165] Adjudicators therefore cannot generally assume that social penalties work as efficient supplements to legal ones. We claim that, to the extent they do not,

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[162] (...continued)
such as justice will "strike most people as distasteful and morally offensive") (citations omitted).

[163] *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000) (concluding based on survey of 489 mock jurors that jurors are more likely to award punitive damages and to give marginally larger punitive damages awards for corporations that conduct explicit cost-benefit or risk analyses than for those that do not).

[164] *See supra* notes 119-125 and accompanying text.

[165] *See* Cooter & Porat, *supra* note 5 (assuming, without addressing, the implausibility of the synergy scenario); Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 21-22 (2000) (discussing the uncertain relationship of social sanctions to legal punishments); *see generally* ERIC POSNER, LAW AND SOCIAL NORMS (2000) (providing a general account of extralegal social norms); GEOFFREY BRENNAN & PHILIP PETTIT, THE ECONOMY OF ESTEEM 65-77 (2004) (offering a general account in which disesteem functions as an extralegal social sanction).

the overenforcement paradigm is one useful way for righting the balance.

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Ever since Bentham, the traditional economic wisdom has maintained that all procedural and evidential mechanisms are geared to a single objective.[166] Operating in a legal system that has to live with the omnipresent possibility of error and misuse, these mechanisms skew the risk of error in the right direction and thereby effectuate the desirable tradeoff between false positives and false negatives and, correspondingly, between correct and erroneous liability decisions.[167] Burdens, standards of proof, and pleadings are salient examples of these mechanisms.

Our theory introduces a new dimension to this analysis of evidence and procedure. By isolating the phenomenon of overenforcement, we demonstrate that expressive and operational considerations sometimes generate overdeterrence that cannot be easily remedied through the manipulation of penalties or substantive liability standards. In those cases, evidential and procedural mechanisms serve an additional important and substantive goal. They attenuate overenforcement and the consequent overdeterrence that both erroneous *and* correct liability decisions generate on the ground. Descriptively, this overenforcement paradigm helps explain certain features of the evidentiary and procedural landscape in cases involving definitional and market spillovers. Prescriptively, it provides a new analytical tool for courts and lawmakers to generate optimal incentives while respecting important expressive and operational constraints. To be sure, the precise contours of these constraints and of the overenforcement paradigm itself still need to be fleshed out. The

[166] *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 344-47 (1986) (explaining Bentham's utilitarian system of procedure as based upon provisions "for minimizing evil in each individual case" — with "evil" representing the cost of decisional error and the cost of avoiding it).

[167] *See* POSNER, *supra* note 13, at 599 (stating that the objective of a procedural system, viewed economically, is to minimize the sum of two types of cost: the cost of erroneous judicial decisions and the cost of operating the procedural system that reduces the incidence of errors); SHAVELL, *supra* note 60, 167, at 387-418 (2004) (identifying procedural mechanisms that reduce this sum).

introduction of the paradigm in this Essay is an important first step in that direction.