

CORRIGIBLE CORPORATIONS & UNRULY LAW

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Edited by
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1985

Trinity University Press
San Antonio

CHAPTER 6

**EFFICIENT CORPORATE HARM: A
CHICAGO METAPHYSIC**

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Introduction

With the emergence of the large business organization as a dominant institution in contemporary society, the traditional focus of economics and criminal law on the individual has been challenged. Efforts to adapt criminal law to reflect the realities of a pervasive corporate order have met with only mixed success. Indeed, one writer suggests that the application of criminal law to issues of corporate harm has resulted in such a "weak and undeveloped" idea of corporate criminal liability as to endanger the very notion.¹ Similarly, numerous problems have accompanied recent efforts in the field of economics to apply the conventional theory of the firm to complex organizations, especially the large corporation.

The mutual state of underdevelopment manifested in criminal law and economics' handling of corporations underscores the need for a coherent interdisciplinary theory of the area. An approach that is drawing increasing attention and interest is what is commonly referred to as the Chicago School approach to the economic analysis of law. Developed by lawyers and economists including Coase, Stigler, Becker, Posner and Elzinga and Breit, this framework seeks to direct the insights of economic theory to the task of revising corporate criminal law. This chapter focuses on the economic approach as a possible remedy to one problem in corporate criminal law, namely, the appropriate corporate sanction.

Elzinga and Breit² will be relied upon to illustrate both the specific policy attitude and the general normative orientation of the economic framework. This work provides in our view one of the most cogent expositions of the concepts, logic, and norms involved in the economic analysis of law and is additionally attractive for its practical tone, which keeps the volume largely free of the excess and zeal not infrequently exhibited by writings in this field. By focusing on their arguments, we hope that our own concerns with and objections to the economic approach are more clearly defined.

We begin with a review of basic concepts in the economic analysis of law and then summarize the major contributions made by Elzinga and Breit. A critical analysis ensues which concentrates on the building

blocks of the economic framework: the rational actor model which these writers extend to explain corporate decisionmaking generally and criminal choice in particular; and the expectational calculus which they employ as a calibrator for corporate actions under conditions of uncertainty. We challenge the realism of these analytic constructs and argue that the defense mounted by Elzinga and Breit and others in favor of their use betrays an antagonism to the complexities involved in analyzing the corporate world. This antagonism results from a self-sealing quality in the economic analysis of law that disposes it to serve less as a theory of corporate criminal law than as some sort of guide to life. We conclude that the problem of devising criminal sanctions against corporations cannot be usefully addressed, much less resolved, within the economic framework as presently constituted. The need for an interdisciplinary theory remains.

The Coasian Framework: The Harm in Preventing Harm

To understand the debate over the problem of corporate criminal sanction, and in particular its recent focus on the economic dimensions of punishment, it is useful to begin with a review of the arguments credited by nearly all of the participants as having laid the foundations for the economic analysis of law. These arguments are contained in a paper by Ronald Coase which demarcated the concern of an economic analysis as the "actions of business firms which have harmful effects on others."¹

In the article, Coase characterizes conventional legal analysis as follows: "The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A?"² But, according to Coase, this approach fails to recognize the *reciprocal* nature of harm, a key concept in the economic analysis: "to avoid the harm to B would inflict harm on A." Recognition of this apparently obvious relation has a nonobvious consequence: "The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."³

Armed with this insight, Coase challenges the traditional legal approach to the problem of business-induced harm on two grounds. First, he reasons that it is likely to ignore the consequences of legal arrangements of rights that may make efficient market transactions too costly. Second, even where the cost of scaling the legal wall is not prohibitive, a legal approach needlessly requires economic actors to divert resources away from productive activities and into the unproductive activity of making the law efficient in spite of itself.⁴ The remedy lies in a new approach to law. Coase seeks to address the problem

of harmful effects of business enterprise in a framework that renders rights as factors of production, understands the law as the codification of rights to employ factors of production to various ends, and evaluates law according to the opportunity costs created by the exercise of legal rights. By this measure, a legal system has as its aims the encouragement of maximum output and the reduction or elimination of the costs of engaging in economic exchange (i.e., what are termed transaction costs). Interestingly, Coase shows that a legal system would not be necessary, or at least would be economically harmless, if there were no transaction costs. In such a case, economic actors would settle on the allocation of rights that in each instance maximizes output. While his argument invokes a fanciful history of law, it may also be understood as Coase's effort to assure the reader that the economic analysis will not forsake law entirely.

What distinguishes this approach, among other things, is that the meaning of rights and their relation to law is no longer to be found in what Coase regards as a one-sided consideration of harm (or benefit, as the case may be). Rather, law and rights are to emerge from the reciprocal give-and-take of rational agents seeking to maximize utility (wealth); a reflection of the logic of mutually beneficial exchange. In Coase's vision of society, the consequence of preventing harm is necessarily to cause harm. The aim of law must be to prevent harm only when it would not cause greater harm. The harm that results from the economic give-and-take is offensive and should be redressed *only* when total output might suffer and *then* only when preventing the harm would not reduce total output by a greater amount than allowing the harm to remain. The matter has been summarized nicely: "The real issue is: what party to the transaction is the most efficient in preventing the misallocation resulting from monopoly [that is, the harm]?"⁵

For economists, the Coasian framework brilliantly represents the communal belief: economic forces cannot be denied and legal arrangements will inherently be shaped by economic imperatives. For Coase, that the creation and enforcement of laws should be guided by this truth is obvious.

The Economics of Corporate Criminality

Elzinga and Breit⁶ present a Coasian approach to the problem of anti-trust violation. This work is widely referenced in the law and economics literature as an exemplar of both the economic approach to the design of sanctions against corporations and its value as a guide to policy in this area. From the vantage point of the economist, Elzinga and Breit's chosen focus on antitrust law is ideal since the explicit purpose

of that body of law is to redress the ultimate economic crime of monopoly; what better place to argue the economist's case? A review of their analysis of the economics of antitrust sanctions is presented below. The review will proceed in two stages: the underlying decision-making model relied upon in the analysis is examined first; then their approach to punishment of antitrust violators is considered.

Corporate Criminal Decisionmaking

Elzinga and Breit predicate their analysis on the cardinal Coasian notion of the reciprocal nature of harm. In the antitrust context, this means recognizing that while the monopolist may harm the consumer (e.g., in the form of artificially high prices or unnecessary delays in bringing a product to market), efforts to restrict monopolistic behavior harms the monopolist (e.g., forcing the monopolist to surrender scale economies through reorganization).

If liability is imposed on the consumer, a monopolist causes damage to the consumer of his product in the form of consumer's surplus lost. But if the liability is imposed on the monopolist through some form of antitrust law, the customer of the monopolist, in insisting through the law that the monopolistic behavior end, imposes a cost on the monopolist, the cost of lost monopoly returns. The question of "fault" is largely irrelevant in such a setting.¹⁰

Elzinga and Breit identify the central issue as the determination of the relative costs of the antitrust violation and the costs of enforcement of antitrust law, each weighed against the levels of corresponding benefits. It is this economic calculus rather than any pre-economic legal consideration of responsibility that is the focal point of the analysis.

The corporate sanction analysis developed by Elzinga and Breit depends upon a rational actor model to represent corporate decision-making as antitrust violations are contemplated.¹¹ The model relies on assumptions typically found in economic analyses of corporate behavior. First, the corporation is assumed to be a rational entity engaged in choosing among alternative actions in pursuit of maximum profit. Second, the corporation is regarded as unitary, speaking with one voice and acting linearly to fulfill basic goals. Third, while modes of organization may vary within the corporate world (differing degrees of centralization and hierarchy may be found, for instance), such variance is not expected to significantly alter corporate implementation of the maximizing algorithm. That is, the calculation of marginal costs and benefits is independent of the manner in which the corporation is

organized. Finally, Elzinga and Breit employ a less common assumption that a particular risk distribution adheres in the corporate community, with risk averse behavior being preferred. These views of the corporation are commonly associated with the work of Richard Posner and the Chicago School generally.

With these assumptions in hand, Elzinga and Breit are able to delineate the primary factors affecting corporate involvement in criminal activity. They include: the risk of detection and conviction, the predictability of punishment, the severity of the expected punishment, and the benefits of criminal violation. The risk of detection and conviction is conceived as a probability scale based on the corporate actor's perception of the effectiveness of corporate criminal law enforcement. The predictability of punishment affects the corporation's responsiveness to sanction systems. While all sanctions are convertible to monetary equivalents by rational actors,¹² it is essential that prospective corporate violators can ascertain the punishment, or range of punishments, they risk in criminal indulgence. Coffee has underscored the importance of predictable punishment to the logical operation of the rational actor model: if the punishment is not known, the decision calculus embodied in the model is prevented and the deterrent effect mooted.¹³

Whereas the first two factors involve the expectations of corporate actors about the future consequences of their acts, the remaining factors concern the economic quantities at stake in the criminal gambles, that is, the amounts to be won or lost. Severity of punishment represents the cost to the corporate violator if convicted (and if the expected sentence is imposed). This cost represents the potential loss to the corporation when deciding upon criminal activity and can be divided into two types: the direct costs of the imposed sanction (again, always expressible in money terms) and the indirect costs of litigation incurred in the corporation's unsuccessful defense of its behavior. Weighed against the cost of criminal activity are the potential gains, which include the direct profit from the illegal acts and the long-term benefit of reduced competition. The profit from illegal activity cannot alone justify its commission unless the rate of return associated with it is higher than that to be gained from the equivalent investment in legal activity. In other words, the opportunity cost of the illegal activity—the legal gains foregone—must be exceeded by the illegal profit plus the gains over time of being a monopolist.

Combining these four factors, Elzinga and Breit project the extent of corporate criminal behavior as a function of: (1) expected gain of antitrust violations, figured as the probability of successful violation¹⁴ mul-

tiplied by the net benefits of criminal violation; and {2} the expected loss, figured as the money equivalent of the sanction (including litigation costs) multiplied by the probability of detection and conviction. Coffee's point discussed above may now be more readily seen: this corporate calculus requires certainty about the nature of the punishment to be formulated at all. The essential deduction of this model is given by Easterbrook, Landes, and Posner: "A firm will choose to comply with or violate the antitrust laws depending on whether its anticipated gain from the violation is greater or less than its expected liability."¹⁵

The Search for Efficient Corporate Punishment

Knowing how corporations will evaluate criminality,¹⁶ the analysis then turns to the question of the most appropriate and effective legal sanction. Elzinga and Breit return to the Coasian framework to establish the proper criterion for assessing alternative penalties. They argue that because of the inherently reciprocal nature of harm, the key issue is whether the sanction as an allocation of harm produces, on net, more good than ill. Figured in this way, an optimal sanction is one which maximizes the value of total output.¹⁷ Because output is at its maximum only when society has applied its resources towards their most valued ends, this criterion is another way of expressing the basic economic principle of efficiency: greatest output for a given input. The output is recognized as including both private and public goods; the optimal sanction is "determined by the intersection of the marginal social benefit and marginal social cost curves."¹⁸ This intersection will correspond to "an antitrust approach that will maximize economic welfare and be consistent with the goal of approximating the benefits of perfect competition."¹⁹ In other words, Elzinga and Breit are in search of an antitrust penalty that will deter inefficient monopoly—those instances where monopoly does not approximate the benefits of competition²⁰—on the one hand and inefficient law enforcement on the other.

Their search begins with a survey of three traditional antitrust penalties: incarceration, structural relief (internal reorganization), and treble damages suits.

Incarceration

Employing the rational actor model, Elzinga and Breit find incarceration economically wasteful on at least two grounds. Because incarceration requires identification of individuals responsible for the antitrust violation, resources allocated to investigation necessarily must be sub-

stantial with often little likelihood of detecting the culprit. Elzinga and Breit suggest that, based on a review of antitrust cases, judges and juries are "understandably reluctant" to impose this form of punishment on a "well-dressed, wealthy, articulate pillar of the community" unless they can be certain that they are dealing with the business equivalent of the "common mugger or bank robber."²¹ Thus, incarceration as a corporate criminal penalty suffers in the first instance from an excessive demand on legal resources relative to the level of punishment output obtained.

The second failing of incarceration is that it can only create costs for the legal system; it has conventionally no capacity to produce revenues for the system. This characteristic would not count against the sanction except that as Elzinga and Breit point out, there are sanction alternatives that encumber no resources while at the same time actually generating revenues, most notably, fines. Translated, this means that incarceration is inefficient in deterring corporate crime: "Whenever any penalty can give the same amount of deterrence at less cost, or additional deterrence for the same cost, that option is economically superior."²² In other words, incarceration is bad business.

Structural Relief

A second form of sanction considered by Elzinga and Breit is structural relief, by which is meant some form of internal reorganization of the corporation, including dissolution, divorcement, and divestiture.²³ This sanction is predicated on the notion that anticompetitive conditions stem from inordinate market power of individual firms. But this definition of monopoly is the cause of this sanction's major problems. If market power is the measure of monopoly, then presumably any one or more of the conventional criteria for defining market power would be adequate.²⁴ Elzinga and Breit, however, demonstrate the practical difficulty of applying these definitions. More importantly they argue that market power is only a symptom of monopoly; it is a necessary but not sufficient condition.

According to them, the proper measure of monopoly is the failure of a firm or industry to provide output at the least cost, or more precisely, to shift to the lowest available cost curve that competitive conditions would warrant.²⁵ Monopolists are able to resist pressures to minimize costs because of their "power over price" which they can manipulate through changes in quantity sold.²⁶ The difference between monopoly as a cost condition and as a circumstance of market power is basic. If a legal system uses the structuralist emphasis on market power, then large organizations become the target of antitrust prosecution. But

Elzinga and Breit argue that large organizations may in fact represent the most efficient means of production in certain markets. Citing Coase's theory of the nature of the firm,⁴⁷ they relate organizational scale to the cost of contracting, arguing that central planning brought about by increasing organization may more efficiently extend production than a series of smaller firms competing for market shares. Indeed, it is suggested that the existence of large organizations may be interpreted as evidence of the workings of competitive rather than monopoly markets: "Some entrepreneurs (or managers) will be less likely to make mistakes and can therefore efficiently organize a larger bundle of inputs (thus making for a larger firm) than other entrepreneurs."⁴⁸ Posner concurs in the view that fewer firms in some instances is preferable to numerous competitors.⁴⁹

Thus, structural relief poses not only problems of wasteful use of law enforcement resources but may promulgate both directly through its application and indirectly through its deterrent effect an inefficient scale of business organization. The authors concede that the whole matter is somewhat iffy empirically, but urge that the legal system forego experimentation and instead observe the limits set by objective economic analysis for understanding monopoly.⁵⁰

Private Action Penalty

There remains to be considered the most well-developed and extensive antitrust sanction in the American system, namely, the private action penalty of treble damages. Given the assumptions of the rational actor model and its tendency to revere the efficiency of the market, one would think that leaving the matter in the hands of private actors to deter monopoly would be the preferred action. Yet, Elzinga and Breit reject the private action penalty. They do so, however, not because of any detected inefficiency in this sanction's method of deterring antitrust behavior; rather the flaw is identified as its excessive efficiency in deterring crime. Briefly stated, the problem is that the private bar will tend to "overprosecute" and thereby deter monopoly beyond the point justified by economic efficiency.

It will do so according to Elzinga and Breit for three reasons. First, the private bar, in being a successful prosecutor, will discourage victims from taking corrective actions which are justified by their costs as weighed against the harm imposed upon them through monopoly. Or, what amounts to the same thing, victims will seek greater levels of victimization in order to increase the level of the treble damage award. Elzinga and Breit term this the "perverse incentives" effect. A second source of inefficiency is what they term the "misinformation effect." In

this instance, the private bar increases the supply of damage allegations through nuisance suits beyond what is economically justified. They are able to do so because of the supposed risk aversiveness of corporations (an assumption strongly advocated but never empirically supported by Elzinga and Breit). This risk attitude makes them "tantalizingly vulnerable" to prosecution;⁵¹ apparently, business does not learn from its collective experience. Faced with the highly complex and difficult calculation involving the certain costs of out-of-court settlement versus "the unpredictable payment of a relatively large (even if improbable) loss," many captains of industry submit to the private bar — this calculation is just too tough.⁵² It should be noted that Elzinga and Breit must at least implicitly distinguish between the difficulty of this calculation and what the layman might mistakenly regard as the formally similar calculation of whether to engage in criminal acts. We leave it to the reader to discern the difference.

Finally, even when the perverse incentive and misinformation effects are small or absent, a private action approach exceeds the efficient level of sanction because it necessarily requires compensation of the private bar. As Elzinga and Breit observe, with this sanction "real resources are utilized not only in the conviction of violators but in the determination of damages . . . scarce resources that could be put to better uses."⁵³ This cost cannot be avoided because by the very nature of treble damage actions lawyers must be able to expect compensation for their efforts. Indeed, these legal entrepreneurs are entitled to profits in the same sense as any entrepreneur in a market. The court system being what it is, the result is that the private bar is able to produce more deterrence outputs per input of legal effort than other sanctions (such as incarceration and structural relief). Unfortunately, this level of individual production is beyond what market forces justify in terms of an overall level of economic efficiency. Thus Elzinga and Breit find the market an unreliable force for efficiency *within* the current legal architecture. But, they conclude that this problem can be easily overcome by altering the architecture.

The Optimal Solution—Fines

Based on the economic analysis of corporate legal sanctions, Elzinga and Breit reject conventional penalties because they either over- or underproduce deterrence relative to what would be called for in competitive markets *with* efficient legal arrangements. Their remedy is to devise a structure of fines administered through public enforcement which meets the Coasian requirement of efficiently allocating both corporate and judicial harms (i.e., the harms of monopoly vs. the

harms of antitrust enforcement).

The economic advantages of fines are several. Because corporations are economic entities, economic punishments will be the most effective in influencing their behavior. Fines are also the least-cost economic punishment; according to Elzinga and Breit, "in terms of additional scarce resources, the cost of such a fine (once a violation has been detected and convicted) is in fact zero."⁴⁴ Second, a system of fines can costlessly bring the expected gain and loss functions into equality by simply varying the proportion of public antitrust enforcement resources devoted to detection and conviction. This is a significant advantage over private enforcement, which tends to drive the expected loss above the expected gain. Third, fines leave undisturbed the scale efficiencies achieved through time by increased organization, while simultaneously ensuring that corporate calculations of the net benefits of criminal activity take into consideration the relevant social costs (in the form of higher prices and misallocated resources of monopoly). This advantage of a fine system flows from the Elzinga-Breit rule that fines be set at a level equal to the marginal social cost of monopoly. Firms are then free to seek that level of organization which maximizes the "social benefits deriving from economies of scale."⁴⁵

Thus, Elzinga and Breit are able to show that a fine system can be designed to precisely affect each factor in the corporate calculus—probability of detection and conviction, the cost of criminal activity, and its net benefits. Moreover, such a system is optimal because each factor in the model can be influenced according to the relative elasticity of the typical firm's calculus with respect to the factor. In this way, expected social gains are made to equal expected social losses, the equilibrium point of corporate crime. In the new legal architecture, corporations are free to invest in legal and criminal activity up to the point of this social equilibrium. Efficient monopolies are preserved and inefficient ones are penalized. At the same time, public enforcement of antitrust laws is constrained to a level which neither under- nor overproduces deterrence. The search for efficient corporate punishment is now concluded.

Failures of Realism

Elzinga and Breit represent their proposal for an optimal fine solution as grounded in realism, asserting that "it is the real world that concerns us."⁴⁶ This claim, as far as we can discern, means no more than they recognize that bargaining and negotiation are costly (transaction costs are positive). When one pushes past this concession to reality, however, there is little in the analysis that is grounded in the practical-

ities of either corporate decisionmaking or corporate criminality. The assumptions underlying the rational actor model and its application to the problem of corporate legal sanctions are far from realistic. Interestingly, a wealth of empirical evidence and conceptual challenges have already been formulated which cast doubt on both the assumptions and the general model itself. Yet this evidence is seldom considered in economic analyses of the law; indeed, Elzinga and Breit fail to reference this body of work.

In our view, the problem is not simply the lack of realism in such an approach, but an antagonism in the analysis generally toward the complexity and changeableness of reality. Elzinga and Breit's framework is indifferent and resistant to problems presented by contrary empirical findings and conceptual challenges that suggest that decisionmaking in large organizations is both a more complicated and less precise affair than they allow. As a result, their work offers little that would improve our understanding of corporate criminal decisionmaking. Indeed, it is easily shown that this analysis frequently leads us away from clear thinking about corporate criminal decisions. Yet, the framework contains nothing in its design which would force reconciliation of self-generated errors. In many instances, there can be no reconciliation because the arguments rest on data that cannot be collected or validated. As Coffee has argued, "it is a theory whose validity depends on data that cannot as a practical matter be gathered to verify or disconfirm it."⁴⁷

Our discussion of the analytic properties of the economic analysis of law is divided into two parts. First, the representation of corporate decisionmaking by a rational actor model is examined. Discussion is then focused on the assumptions and implications of the expectational calculus used to describe corporate choice to violate antitrust statutes.

19th-Century Assumptions and 20th-Century Reality

The theory of the firm that underlies the rational actor model was written in all its essentials in the late nineteenth-century by William Stanley Jevons.⁴⁸ His theory bequeathed to contemporary economics the quintessential "economic man" who tirelessly calculates the effects of tiny increments of change in his commodity bundle to satisfy pleasure-pain preferences. Depending upon whether one is an objectivist or subjectivist, the refinement of von Neumann and Morgenstern's game theory⁴⁹ or Friedman and Savage's application of subjective probability to economic affairs,⁵⁰ to allow for the orderly assessment of uncertainty via an expectational calculus, completes the rational actor model used by Elzinga and Breit.

The most apparent difficulty in using this modified nineteenth-century model to describe contemporary corporate criminal decision-making is that it was constructed to stand for the thought patterns and behavior of an individual, not the twentieth-century corporation composed of many individuals, many products, many decisions, many values, and many goals. Economists for the most part, however, have been unconvinced that this obvious disjuncture between theory and reality requires significant repair of their ideas about firm decision-making. As Finkelstein and Thimm have observed, marginalist economics has always assumed the analysis of the firm could be extended "from a single-product to a multi-product firm as two- and three-dimensional Euclidian geometry would be extended to n dimensions. If the behavior of a single-product firm can be analyzed in two dimensions, and n product-firm could be considered to lie in $n + 1$ space and to have n independent variables in its profit function."⁴¹ As with the existence of multiple products, the fact of many individuals, many goals, and so on has been regarded merely as a complication requiring extension but not reconstitution.

In the marginalist tradition, the firm is a "black box"; the process by which decisions are made may be eccentric, convoluted, and irrational without significantly affecting the character of the decision. The only relevant characteristic is that the decision process be directed finally toward the maximization of firm profit. Neither the number of individuals nor the layers of organization involved are expected to play a critical role in the decision process. But Berle and Means⁴² demonstrated long ago (1932) that large organization influences both the nature of decisionmaking and its outcomes. With the rise of the stockholder corporation, the unitary decisionmaker gave way to a technocratic and managerial order which decided business strategy "on behalf of" the owners. This elite transformed the corporation into a multifaceted business and redirected the focus of business strategy away from profit maximization and toward expansion of sales, market influence through advertising, and the search for monopoly power within an otherwise competitive landscape.⁴³

The rise of the managerial and technical elite had consequences far beyond the compromise of profit maximization. For example, it had the further effect of creating a tension between the economic objectives of the elite and the corporation's owners. Williamson's analysis of the modern corporation suggests that managers control profits and in fact lower them in order to improve their own economic circumstances; in other words, managers maximize their own interests and not the interests of the firm (although some limit must be observed,

lest new owners and new managers result).⁴⁴ Leibenstein has extended the argument regarding the conflict between "firm owners" and "firm members."⁴⁵ While agreeing that profit maximization is inadequate as an objective function for large organization, he likewise questions the value of a managerial discretion model in which managers maximize a composite utility function of profits, sales, the firm's growth rate, and managerial perquisites. Efforts to achieve a maximum for this utility function are impeded by the size of the management group, the lack of individual manager control of the group decision environment, and the nonaggregative character of the individual objectives. As a result, "groups involve potential conflict, which puts into question certain basic concepts that are applicable to individuals" such as the existence of a single, unique utility function and the internal consistency of maximization strategies.⁴⁶

The increased scale and complexity of organization has also been linked to the pursuit of nonpecuniary values in business. Fisse has noted that "[i]n bureaucratic practice, if not in economic theory, corporations are agencies having nonmonetary as well as monetary goals."⁴⁷ A host of nonmonetary goals have been found to influence decisions in large organizations, including power, security, community involvement, and X-efficiency.⁴⁸ These values are not easily accommodated in a model such as that used by Elzinga and Breit since they greatly cloud the issue of what counts as a gain or loss (and therefore what a fine on antitrust behavior would deter).

Even the idea that corporations are maximizers – without defining what they are maximizing or for whom – has been disputed in recent organizational studies. The work of what is now called the Carnegie School – Herbert Simon, Richard Cyert, and James March – portrays decisionmaking in organizational society as sub-optimizing.⁴⁹ Individuals face a reality in the age of organization where there are significant costs to learn, decide, and transact. These costs constrain the search to optimize and impel decisionmakers to seek satisfactory pleasure/profits only. The answer to complexity in this world is "weakening the requirements for solution – by requiring solutions only to approximate the optimum, or by replacing an optimality criterion by a satisficing criterion."⁵⁰ For the firm, this means that:

so long as profits are at a satisfactory level, management [may] devote the bulk of its energy and resources to the expansion of sales. Such a goal may, perhaps, be explained by the businessman's desire to maintain his competitive position, which is partly dependent on the sheer size of his

enterprise, or it may be a matter of the interests of management (as distinguished from shareholders), since management's salaries may be related more closely to the size of the firm's operations than to its profits, or it may simply be a matter of prestige.³¹

In sum, the empirical and conceptual analysis of organizations in this century suggests that growing organizational scale and complexity have affected the decision process of business in a way which precludes treatment of corporations as extensions of nineteenth-century "economic man." The importance of profit as a maximand has been diluted; the focus of internal organizational decisionmaking has shifted to discretionary actors and groups (in particular, managers); nonmonetary values have grown in importance in the development of business strategies; and the rationality of maximization has been undermined.

This would seem to leave the marginalist theory of the firm without much empirical or analytic value to the problem of explicating corporate criminal decisionmaking. Its decisionmaker, the isolated individual, is an inappropriate surrogate for the modern corporation. Further, its method of decisionmaking, maximization, is unavailable or irrelevant in many cases. And its decision goal, profit, faces stiff competition from other organizational goals. Why and how corporations commit crimes is suddenly no longer straightforward. These difficulties naturally pose serious problems as to the efficacy of Elzinga and Breit's proposed system of fines. Insofar as the deterrent impact of fines is predicated on their influence on a unitary corporate profit maximization function, the existence of multiple maximands within large organizations confounds and may actually block the deterrence message. In the absence of an unambiguous deterrence circuit, the capacity of fines to establish an equilibrium price for corporate crime which clears the market at a social optimum is suspect. As a result, antitrust violations can vary independently of the efficiency point envisaged by a fine system with no clear damper on their growth. Finally, if fines cannot be counted on to change firm behavior, victims remain victims. The only certain effect of fines would be their eventual absorption by the weakest link in the offending corporation's market sphere—the shareholders, workers (as a result of plant closings, for example), or consumers. In this respect, law will constitute a sort of Darwinian instrument for toughening the victim population.

The Wonderland of Economic Expectation

Efforts to operationalize the expectational calculus (expected gains

reduced by expected losses) supposed in the rational actor model meet with similar problems of realism. That calculus employs probabilities to stand for the perceived risks of criminal activities by corporations. As a method of risk measurement, probability lends to the rational actor model the aura of precision required to make credible its promise of a decision pattern which will optimally allocate business and law enforcement resources. Indeed, the capacity for precision is vital to the proposed fine policy: if this sanction approach is to influence firm behavior *efficiently*, the future must be accurately anticipated in order that corporations can choose the socially optimal organizational scale and level of criminal participation. It should be noted, therefore, that in the rational actor model probability cannot stand for the layman's inexact sense of the "chance" that an event will occur. It must observe the mathematical properties of a probability distribution in order to yield a logically coherent and predictable image of expectation. Similarly, expected utility, as used by Elzinga and Breit, must correspond to the mean value of a frequency distribution; not just any approximate idea of future benefit or cost will do when it is their effect at the margin that is all-important. This does not rule out the possibility that probability might be subjectively based. But even subjective probabilities must conform with the basic mathematical axioms of probability generally.

The use of probability to transform uncertainty into a well-ordered function of economic risk has been debated in economic circles throughout this century. Specification of how uncertainty affects and is incorporated into market activity is obviously essential. But despite the elegance, rigor, and conciseness of the probability approach, questions regarding its adequacy remain. The challenges to this approach are wide-ranging and cannot be fully explored here. We have limited our discussion to two basic problems: the first concerns the technical requirements of probability specification; and the second revolves around the joint probability or collective expectation of several actors.

Formally, the model put forth by Elzinga and Breit requires corporate actors to estimate four probabilities: the probability of being detected and convicted for an antitrust violation, the probability of being assigned a particular fine,³² the probability of success (increased wealth) and loss (decreased wealth) scenarios flowing from the criminal activity, and the probability distribution of different "foregone opportunities" scenarios (i.e., the probable outcomes of legal actions not undertaken as a result of the decision to engage in antitrust violations). The base of information which would support their estimation is certainly enormous. Minimally, corporations would need to antici-

pate the economic results of a long list of their own conceivable actions, the actions of other economic agents which might bear upon the outcome(s) of the corporation's criminal act(s), and the future market for their own goods and close substitutes. With this information base, firms could form the latter three probabilities. In addition, violators would have to engage in an expectational speculation of the activities of regulatory and judicial agencies which might lead to their detection and conviction.

The data collection requirements alone would seem to prevent precise probability estimations by corporations. It would appear more reasonable to assume that even large business organizations would respond to such complexity in the manner described by Simon and others,⁵⁵ namely, that they would "satisfice" by limiting their search for information in the hope of reducing the requirements for successful action. But satisficing in this case could threaten the efficiency of the Elzinga-Breit fine system. The behavioral influence attributed by them to fines is predicated on their incorporation in an expectational calculus of ill-gotten gains against the imposed costs of the court. If corporations fail to attempt such a calculus, then the efficiency effect of a fine system is short-circuited. The likely result in the event of detection is that corporations will seek to plea bargain, in which case fines lose their avowed superiority at least over the private action penalty. They will overproduce deterrence in the same way that treble damage nuisance suits do and for the same reason—by failing to perform the calculus (because it is too difficult) sub-optimal harm allocation results.⁵⁶ Thus, the fine system proposal, to be credible, *requires* that potentially offending corporations engage in probability estimation, even if done sloppily. And so we are forced to accept another level of unrealism to rescue the model.

Things become murkier as one inquires further into the matter. In addition to the data collection requirements, corporations are confronted with a second technical task—applying probability rules to the mass of information gathered. These include: (1) the "completed list" rule—that all alternatives are known and accounted for in the probability specification;⁵⁷ (2) the distributive rule—as the number of alternatives considered increases, the probability of at least some alternatives must decline and vice versa (in other words, the probabilities sum to one); and (3) the frequency rule—the probability of an event varies with the frequency of its occurrence. It should be noted that these rules apply regardless of the data that support the probability estimation; whether firms are supposed to calculate the probabilities from impressions, "insider" information, business statistics, or

whatever, compliance with all of these rules is necessary.

The analytic value of these rules to theorizing about economic decisions under uncertainty, however, has been challenged. Perhaps the strongest critic is G. L. S. Shackle who has presented his arguments against the probability approach in comprehensive detail over the last three decades.⁵⁸ We do not presume to summarize this effort here, but only to indicate some relevant highlights.

Regarding the "completed list" rule, Shackle has pointed out that this is tantamount to assuming certainty as the essential background of economic decisionmaking: "probability, in all its treatments despite their diversity, engages itself to distribute *certainty*, that the truth will be found amongst the members of some given list of answers, or classes of answers."⁵⁹ If all alternatives are known, then an economic actor is not "surprised" by the future; the future cannot be "disbelieved."⁶⁰ While time may pose an obstacle to knowing the particulars of what will actually occur, the future is nonetheless fully anticipated. In this sense, probability as an epistemic system delivers time still-born. This would seem a particularly ill-suited notion for Elzinga and Breit's probability of detection *and* conviction, because it means that corporate actors are presumed to know all possible legal consequences of their illegal activities, including whether and how they might be prosecuted. Since prosecutors, by definition, would not even be in possession of evidence of a violation when this probability is calculated, the presence of this term in the expectational calculus gives a truly other-worldly quality to the analysis.

The distributive and frequency rules also imply odd things about the decision process. For example, in the case of the distributive rule, the arrival of a new possibility, however remote, must affect the distribution of probabilities. The effect, of course, may be small. The problem is not with the magnitude of the distributive effect, but instead with the logic imposed by this rule on the formation of expectations.

[T]he numerical assessments of different answers to a given question [i.e., probabilities] are required, essentially, to be proper fractions summing to unity, that is, together representing the certainty that, between them, the answers include all possibilities. This logically necessary feature of a *distributive* expression . . . has one implication which seems to be generally overlooked and ignored. It implies that one of the chief disabilities of some proposed answer, regarding its power to influence action-decisions, lies simply in the *number of its rivals*. To increase the number of rival answers

is to reduce . . . the probability which can be assigned to particular answers.⁵⁹

In other words, a business manager's expectation about a particular future event A—high payoff for an antitrust violation—must vary according to the number of other future events he can imagine, regardless of his judgment about the certainty of A's occurrence. Such a procedure concentrates attention on the fickle—the rise and demise of alternatives with the “news” of the moment—which may be nothing more than an expression of social fashion, idiosyncrasy, neurosis, etc. This is hardly the sort of decision process that is conjured by claims of efficient deterrence.

Probability theory does include a corrective to overemphasis upon the fickle. The frequency rule causes events considered in a probability distribution to be weighed according to their numerousness. Application of this rule to expectations, however, simply substitutes one problem for another. Now the manager's expectations about event A and other conceivable outcomes are to be weighted by business trends. Probability is a frequency distribution and represents what is known about the historical occurrence of events under consideration; that is, probability is a summary of historical knowledge: “[Probability] is knowledge about a particular, identified set of circumstances in an identified, ‘proper-named’ historical context, a set of observations made on some occasion which can be located on the calendar and on the map and on a list of persons who made them.”⁶⁰ While such weighting provides some antidote to the myopia of short-term thinking, it does so by grounding forecasts of the future on knowledge of the past. But as Shackle has observed, the future by its nature is beyond knowledge and therefore “expectation is origination, not reason . . . it cannot be understood by the principles of logic alone.”⁶¹ This has implications for the possibility of probable inference: “When the materials of certainty are incomplete, no manipulation of those that are present will change ignorance into knowledge.”⁶² A procedure which encases expectation in what is known, indeed varies expectations predictably according to what is known, strains its association with rationality.

Shackle argues that probability rules are entirely sensible treatments of outcomes which are repetitive and regular in nature, and which have their standing in a definable continuity of events. But their application to human decision under uncertainty distorts our understanding of the conditions involved. The essence of human decisions about the future is their nonrepetitive character involving choice among “rival hypotheses”—outcomes that cannot mutually occur—

which nonetheless coexist for the chooser; that is, “choice is amongst things which do not yet exist except in thought.”⁶³

To accurately portray economic decisionmaking under uncertainty, a nondistributional concept of expectation is needed. Shackle has developed a method called “focus-values” which proposes to accomplish this. Whether one is persuaded by Shackle's proposal is not the issue here. Rather, what is at stake in the acceptance of any nondistributional method is the recasting of expectation against a background of “irremediable uncertainty,”⁶⁴ with the consequence that the economic world can no longer be rendered self-contained or self-determined. But it is precisely these consequences of a nondistributional method which make it an unsuitable tool with which to rehabilitate the expectational calculus in Elzinga and Breit's model. The effect of fines, as conceived by Elzinga and Breit, is fully internalized by all corporate actors *because* of the probability rules. Although these rules distort our understanding of corporate expectation, they at least ensure that the net benefits of all alternatives are compared. It is the inherent property of a distributional scale that a complete comparison is made. In contrast, a nondistributional scale does not promise a full accounting of all possibilities. A fundamental disadvantage, therefore, accompanies a more realistic treatment of corporate expectation: it cannot promise that the actions of corporations will always be efficient. If a repair of Elzinga and Breit's model were to be guided by Shackle's criticisms, it would no longer be possible to presume a corporate mind and to fully determine the thoughts of corporate decisionmakers. As a result one could not claim to know the responses of corporations independent of the circumstances that shape these responses. Only a hermetic economic world can deliver with certainty the optimality ordained by Elzinga and Breit for fines.

If there are drawbacks to the use of probability in conceiving individual expectation, its applicability to collective expectation is more problematic. In the case of collective expectation, it is necessary that either a consensus exists among individuals about the future or that the risk attitudes of individuals conform. The condition of consensus almost certainly cannot be met. Consensus implies that individual probabilities can be aggregated somehow to yield a single number for the collective. Insofar as individual probabilities are derived from subjective judgments, such aggregation is precluded because there is no common scalar for performing the summary operation. This leaves the possibility that orientations toward risk agree.

Is there reason to believe that managers and other decisionmakers in corporations share a common attitude toward risk? And specifically, is

there reason to believe that an aversive attitude as assumed by Elzinga and Breit prevails? One might argue that "the market" imposes a discipline on organizational actors forcing them to recognize a mutual reality of costs and competition, to seek an accommodation of their differences, and to internalize a common attitude toward risk. A variant of this argument has been offered by Posner⁶⁵ to discount the possibility that managers might reduce corporate profits in pursuit of personal gain. But in the case of attitudes toward risk, at least, the discipline exercised by the market may actually lead managers to adopt riskier dispositions than their superiors. As Coffee⁶⁶ has suggested, pressure on middle managers to show a profit for their sphere of organizational responsibility, coupled with the insecurity of their positions, may actually encourage them to take greater risks, including those involved in illegal acts, in order to protect or enhance their place in the corporate hierarchy. At any rate, because of their place in the hierarchy, they will experience different pressures from those of their superiors and as a result will recognize and act upon different risks. Furthermore, Coffee has noted that psychological and other studies of risk behavior suggest that individuals are likely to be risk preferrers rather than averters when in the shelter of a group; this is the so-called "risky shift phenomenon."⁶⁷ If anything, this work points to the possibility that market discipline and the nature of corporate decisionmaking attenuate conditions needed to establish a consistent attitude of risk, especially an attitude of risk aversion, among corporate members. Certainly, the *ipse dixit* (as Coffee characterizes them)⁶⁸ which are cataloged by Elzinga and Breit in support of their presumption of corporate risk aversiveness cannot resolve the question.

This is not to deny the possibility that policies and procedures can be formulated which purport to express a corporate sense of risk. But it is far from evident that corporate actors will carry forward this uniform expectation in their decisions. Indeed, the segmented nature of large organizations documented in the research on organizational behavior militates against the achievement of a collectively observed approach to expectation. Therefore, without a rational basis for believing that either condition necessary to the formation of a collective expectation can be met, there is little to recommend it as an analytic construct. And, correspondingly, there is even less to recommend a single prevalent substantive disposition such as risk aversiveness.

Admitting as much, however, would be fatal to Elzinga and Breit's analysis. The abandonment of the assumption of risk aversion loosens, if not unravels, the relationship between fines and deterrence. Elzinga and Breit's own graphs concede that risk-neutral or risk-preferring

actors will be affected more by the certainty of punishment than by its severity.⁶⁹ If the risky shift phenomenon is prevalent in large organizations, or if managers find that risking corporate assets as opposed to their own is less risky for them, the deterrence claim for fines dissolves.

Not only is risk aversion crucial to realizing the projected outcome for fines, it is also what prevents the specific fine system championed by Elzinga and Breit from inducing its own perverse incentives. Losses under Elzinga and Breit's proposed single fine of 25 percent of pre-tax profits are capped; but, obviously, potential benefits are not. Fines levied against violators, therefore, will never liquidate their holdings. In addition, fines are to be exacted from all profits during the "period of anticompetitive activity" (an interesting question of fact unto itself). Thus the 25 percent amount may or may not be equivalent to the harm value capitalized by the monopolist over the anticompetitive period. Elzinga and Breit are quite clear on the point: "The 25 percent figure is not to be taken as either an estimate of the firm's profits attributable to its antitrust violation or an estimate of the misallocative damage done to society by the firm's anticompetitive activity."⁷⁰ Modesty prevents them from designing a fine equal to the harm—"the present state of economic knowledge does not enable these estimations to be made with confidence." Anyway, "rather than being concerned with compensation, our proposal is directed toward deterrence."⁷¹ However, once corporations are freed from the conservatism of risk aversion, a rational response to this sanction approach would seem to be: Gamble on monopoly when the stakes exceed 25 percent of "normal" profits. In other words, decisionmakers are encouraged to acquire a taste for risk, an orientation patently inconsistent with the goal of deterrence.

A second perverse incentive is set in motion when antitrust enforcement agencies vary the level of detection and conviction activity to optimize deterrence. While Elzinga and Breit recognize that either the level of enforcement activity or the level of the fine can be adjusted for this purpose, they seem to suggest that the former is the more practical and perhaps efficient approach.⁷² In any event, altering the fine is limited by the possibility that a firm will be bankrupted, an eventuality clearly proscribed by Elzinga and Breit as jeopardizing the root goal of maximization of output.⁷³ If we now assume that a deterrence equilibrium exists and that prosecution efforts score a number of successes in a brief period of time, antitrust officers pledged to the efficient solution must worry that the deterrence signals sent out could discourage not only inefficient monopoly but efficient ones as well. In other words, an oversupply of deterrence is imminent. Given the expectational acumen of corporations assumed by the model, certainly they

would have little problem discerning the implication and would launch monopoly efforts during the anticipated lull in prosecution. Even if they were caught (presumably because of some oversight in their calculations), firms could amortize their fines as downpayments on investments in future more lucrative violations resulting from an eventual decline in the supply of deterrence. This would appear to be what Lee has argued more abstractly to result from trading off fine and detection-conviction levels.⁷⁴

The expectational calculus of the Elzinga-Breit framework, then, presents the reader with several hurdles to be overcome by the imagination. While the amount of information required to construe the future is sizable, the corporation is to be deemed equal to the task; indeed, it can be counted upon to pursue and organize the data efficiently. Creative faculties are then summoned to discipline the data via probability rules so that a well-ordered vision of the future is achieved. This vision transcends the chaos of the organization's parts – the disagreeing, conflicting individuals who would otherwise muddle the corporate sense of risk. Appropriately, the elementary materials for this imaginative exercise are the thoughts and images of the future possessed by corporate members. It is well that the corporate body can pull together these materials and realize the necessary imperative: Be Risk Averse. For without this realization, the efficient solution is denied.

Those not able to imagine the corporation in possession of these powers, it would seem, lack the special metaphysical sense necessary to enter the wonderland of economic expectation.

Self-Sealing Analysis

The rational actor model and the expectational calculus together portray an organizational decision process which bears little resemblance to what researchers of the subject have found. Ordinarily, distortions of the magnitude associated with the application of these analytic constructs to organizational contexts would be sufficient to force at least some reformulation. Nonetheless, we can expect the economic analysis of law generally and specifically to avoid addressing the problems that have been raised.

Why is this so? In part, change will be resisted out of self-interest. Repairs of Elzinga and Breit's analysis, for example, would almost certainly threaten the proposition that fines are the optimal solution. But there is a more fundamental reason.

The rational actor model and the expectational calculus on which the economic analysis of law entirely depends are built on conjectures

about mental states and processes. As such, there can be little hope of measuring and evaluating data relative to these models. In other words, these models can neither be expected to repair nor recalibrate themselves with the arrival of new information. This in itself is not untoward; the study of society and social institutions such as law necessarily requires conjecture on matters for which there is no hope of measurement. But the economic approach to this problem is distinctive. It can be summarized in two steps. First, there is the postulate that human thought, decision, and action collectively emerge from a black box; that is, they cannot be analyzed by attention to (research on) the internal workings of actual human beings because they are essentially mysterious. Instead, we know about mental states and processes solely and conclusively by the *results*. Thus, although preferences rule, there is no way of studying them – there is no accounting for tastes.⁷⁵ All that we can do is allow the results of preferences to stand for the processes by which they are created and acted upon; in the economist's shorthand, this is the utility notion of value. A second postulate is that although the whys or hows of thought, decision, and action cannot be known, the method by which each is weighed (measured) and ordered (evaluated) can logically be represented as rational. That is, while the black box nature of mental states and processes precludes direct access to the data, how the data are organized, filtered, and manipulated can be expressed in terms of a pure logic of choice as an analog of human reason. Specifically, this analog is directed toward maximization of values assigned to the data (utilities).

These two postulates need to be juxtaposed to understand their implications. On the one hand, we are told that the workings of the social world are predicated on mysterious elements – the incomprehensible mental states and processes of human beings. On the other hand, we are assured as to precisely what is transpiring at any moment in this world – the mysterious elements are being evaluated and the maximal values being determined. Said another way, the first postulate announces that *direct* measurement of the objects of analysis – thoughts, decisions, and actions – is beyond analytic possibility; the second tells us that there exists a surrogate for the measurement of mental states and processes that precisely specifies what will be the results. Indeed, the surrogate – utility maximization – is logically unassailable. Thus, what the rational actor model and expectational calculus present is a closed system of thought that is fully determined and self-fulfilling. Analysis of the central objects of study is precluded, while the surrogate measurement of the unmeasurable informs us of what the answer would be were we able to study the

objects.

Fundamentally, this confers upon economic arguments derived from the rational actor-expectational calculus construct the status of assured truth. Investigation within this framework becomes an exploration into the thoughts available within the closed system. Liebhafsky in his review of the law and economics literature characterizes the analysis as just that: "[it] consists of a discovery of the meaning of the assumption originally made."⁷⁶ The truths found by this mode of economic analysis cannot be disturbed by reality. From the first postulate, it is clear that no empirical evidence can be assembled to defeat these truths. The second postulate, moreover, indicates in any event that all the empirical evidence ever needed for this mode of analysis has already been collected, analyzed, and summarized in the truth of maximization. As Leff concludes:

"[S]ince people are rationally self-interested, what they do shows what they value, and their willingness to pay for what they value is proof of their rational self-interest. Nothing merely empirical could get in the way of such a structure because it is definitional. That is why the assumptions can predict how people behave: in *these* terms there is no other way they can behave."⁷⁷

Understood in this way, Elzinga and Breit's search for the optimal corporate punishment constitutes a coherent rendering of the deductions available on this matter from the standpoint of the rational actor-expectational calculus construct. The lack of realism found in their description of corporate decisionmaking, and the lack of any detailed attention to the realities of antitrust detection, apprehension, and conviction, are understandable since the enterprise was never intended to engage these areas. Their work faithfully sticks to its subject and even eschews potential demands that it infer beyond its "data" which, as they frequently remind us, is "the present state of economic knowledge."

For just this reason, Elzinga and Breit admonish against conceiving the efficient fine as equal to the extent of the harm.⁷⁸ While they are confident that individuals can accurately and comprehensively identify costs to them (and even to others if given the proper incentives), the authors recognize that the extent of economic knowledge to date is such as to foreclose the possibility of an objective account of costs, particularly those of monopoly.⁷⁹ The point should not be lost as technical detail of the argument. The economic analysis is not prepared to vouch for estimates of an essential economic quantity—cost—in any specific empirical context (at least this is true if one does not regard

perfect competition as empirically possible). Yet, it is fully prepared to assure us that this economic quantity is accurately known and completely accounted for in the (inaccessible) mental states and processes of human beings. This is one example of Elzinga and Breit staying within the limits of their "data": the economic analysis of law "presented in such a way that while it is in form empirical, it is almost wholly nonfalsifiable by anything so crude as fact."⁸⁰

Elzinga and Breit outline a new antitrust sanction policy which directly follows from their investigation of a closed system of thought. They know what corporations will think and how they will act in response to a fine of 25 percent of pre-tax profits and, therefore, empirical or other inquiry into either the corporate world or law enforcement is not needed. This approach—moving directly from a deductive exercise to policy—is by no means unusual. Indeed, the Chicago version of economic analysis of law is replete with examples of such leaps of faith. Thus, Becker is prepared to reorganize criminal law in light of formal equations that can never be empirically tested yet which prove that crime is most efficiently deterred by punishments directed to lower criminal wealth;⁸¹ Becker and Stigler propose to prevent malfeasance in law enforcement by the efficient use of (what else) income bribes;⁸² Rubin stands ready to counsel us on how to restructure appeals so that the inherent efficiency of economic forces is allowed fully to work on judge-made law;⁸³ and Posner is eager to rewrite constitutions that would ensure efficiency in the allocation of rights.⁸⁴ An especially daring example of this kind is Ehrlich's analysis of the deterrent effects expectable from capital punishment in which he manufactures the necessary data ("synthetic data" as it is called) to describe mental states and processes of potential murderers in order to establish the efficacy of the death penalty.⁸⁵ Not surprisingly, the data confirm the model's inferences.

Self-sealing analysis of the kind found in law and economics can only confirm the validity and value of its assumptions. There can be no other conclusion.⁸⁶ In this sense, such analysis presents the reader with stories about what has always been, always is, and always will be—the inevitable, unassailable forces of economic order. The economic analysis of law resembles less a theory in an analytic sense than a guide to life.

Economic Analysis of Law as a Guide to Life

Some members of the law and economics community appear to recognize that indeed what they have to offer is akin to a guide to life. For them, the essential truth of economic order is everywhere evident.

Priest observes:

[T]he tendency of the set of all legal rules to become dominated by rules achieving efficient as opposed to inefficient allocative effects is substantially more pervasive than might be thought. It will be shown that efficient rules will be more likely to endure as controlling precedents regardless of the attitudes of individual judges toward efficiency, the ability of judges to distinguish efficient from inefficient outcomes, or the interest or uninterest of litigants in the allocative effects of the rules. Furthermore, it will be shown that this tendency toward efficiency is a characteristic of the common law process so that the content not only of the common law itself, but also of the legal interpretation of statutes or of the Constitution, is subject to forces pressing toward efficiency.⁸⁷

He needs only the disarmingly simple assumption "that transaction costs in the real world are positive" to arrive at this observation; that and the closed system of thought embodied in the rational actor-expectational calculus construct.

Another practitioner of the art avers that efficiency is inescapable because it is the motive of an evolutionary process which eternally shapes law.

We have thus shown that if rules are inefficient, parties will use the courts until the rules are changed; conversely, if rules are efficient, the courts will not be used and the efficient rule will remain in force. An outside observer coming upon this legal rule would observe that the rule is efficient; but this efficiency occurs because of an evolutionary process, not because of any particular wisdom on the part of judges. If judges decide independently of efficiency, we would still find efficient rules. Intelligent judges may speed up the process of attaining efficiency; they do not drive the process.⁸⁸

To demonstrate this point, Rubin requires but three formal equations into which facts can never intrude.

Understanding the basic forces at work throughout society and history, it is possible via the economic analysis of law to discover "an alternative moral system" that is self-contained and complete. Posner offers that "rights can be derived from [the economic theory of law] itself; they do not have to be postulated."⁸⁹ This lends to the economic

analysis of law a special power: it is able to deduce moral guidance directly from the eternal truth of efficiency, without the discomfit of complex reality interfering. Coase has recently urged economists and social analysts in general to take heed of the "decisive advantage" associated with "the treatment of man as a rational, utility-maximizer" and extend the successes enjoyed in the field of law to other branches and disciplines of knowledge.⁹⁰ Presumably, this would include the handling of moral issues that surround and confuse those areas as well.

The depth of enthusiasm for spreading economic analysis to other fields is genuinely felt. These men honestly believe that efficiency is good, all other things being equal, and do not understand why the message would be resisted. What, then, are the norms which guide the efficient life found so irresistible by these writers? In particular, what are these norms with respect to law? While Elzinga and Breit seek to tackle only a part of the problem, many of the normative implications to be drawn from this mode of analysis are made clear in their discussion of antitrust penalties.

They perceive the guide to life offered by the economic approach in practical terms. The force of economic realities, including the inherent costs of law (i.e., the reciprocal harm theorem), compel the search for an efficient solution to the problem of devising sanctions against corporate offenders. In this sense, efficiency is a practical ideal and its moral direction also practical. From this humble ground, Elzinga and Breit describe practical norms for addressing the historic legal concerns with redress (compensation), the moral standing of the victim under law, the rehabilitation of offenders, and the need for law to express principles of fairness and equity.

They observe that the optimal fine will function as forecast only if corporations can be certain that this punishment, and not the treble damages of private suits, awaits them. Otherwise, corporations are forced to engage in a calculus characterized by a high degree of uncertainty and, being risk averse, will continue to undertake a strategy of minimizing maximum losses through out-of-court settlements. Therefore, Elzinga and Breit advocate a system of fines without victim compensation: "A severe monetary exaction paid to the state by violators should be the sole instrument of antitrust enforcement."⁹¹ They do not seek to deny victims any form of redress, but instead limit redress to simple injunctive relief without damages.⁹² This is consistent with the Coasian analysis which denies moral or other priority to victims. In the Coasian framework, harm is always reciprocal, with victim and criminal regarded simply as legal categories, continuously subject to redefinition to meet the objective of efficiently allocating harm; they are not

moral types. If nothing else, the Elzinga-Breit position is symmetrical in this regard: as there is no perpetrator to kick or soul to damn where corporate violation is concerned,⁹¹ so there is no corresponding victim to protect or compensate. Indeed, the very notion of victim is suggested to be irrelevant to social concerns about monopoly.⁹²

Without a victim, and therefore the need for victim compensation, a potential problem arises for this approach, namely, the detection of an antitrust violation. As Elzinga and Breit point out, the traditional source of information regarding violation has been the victim(s). They claim, however, that eliminating victim compensation will not significantly diminish the historic role of the victim-informant. The reasons given are interesting, to say the least:

[t]he costs of providing such information are so low and the gains (even without compensation) so adequate that such information will continue to flow into the enforcement agencies At only minimal costs, without even the services of legal counsel, [the victim] can write an enforcement agency about its belief. The payoffs in doing so, even in the absence of treble damages, are still very real. If the anti-trust agency successfully prosecutes . . . the informer may benefit through lower prices. In fact, the incentives for an informer . . . may actually be increased in the absence of treble damages because of the concomitant elimination of moral hazard counterincentives [i.e., malfeasance in private antitrust actions].⁹³

At one level the argument appears bizarre. It is difficult to believe that lower prices will actually occur and accrue to the informant, or that such a circumstance will be seen as adequate incentive to report violations. Moreover, the faith expressed by these two economists in the relative virtue of government officers is not only incredulous but extravagant: even theories which entertain the possibility of rational governments do not advise confidence in official virtue. But we believe that this reading of the argument misses the most important point. What Elzinga and Breit are after, in our view, is the notion that antitrust enforcement should not be a function of the extent of victimization. An optimal fine system implies, instead, that enforcement ought to be varied according to the extent and size of the inequality between corporate expected gains and losses from antitrust activities. Thus, the efficient solution decouples enforcement from victimization. Neither the existence nor number of victims is to be of legal concern; only the efficiency of the violation. In this respect, law is

accorded no role of rehabilitation of offenders. So long as the reciprocal harms are the most efficient, victims and offenders may prosper.

Then there is the problem of fairness and equity in a system that denies the need for compensation and the relevancy of victimization. Elzinga and Breit suggest that there is a natural inclination in American society to believe that "a standard of equity or justice demand[s] that parties aggrieved by illegal anticompetitive practices" ought to be recognized and compensated.⁹⁴ Unfortunately, the "present state of economic knowledge" precludes the ability to achieve perfect equity.⁹⁵ Once again, the Coasian framework resolves the moral dilemma: "The real question is how much is society willing to give up, in the form of real income, in order to achieve the normative end of perfect equity, that is, full restitution?"⁹⁶ As Elzinga and Breit astutely observe, "Equity, unlike butterflies, is not free."⁹⁷ What this implies, of course, is that equity, like any other public goal, must undergo the test of reciprocal harm before it can be accepted as a design objective of the legal architecture.

The practical ideal, then, is associated with a distinctive normative view of antitrust justice. If implemented, the business of antitrust law will be to define and protect a world of corporate activity where there are no legal victims, there is no need for compensation of aggrieved parties, enforcement seeks not to reduce victimization but to make it efficient, rehabilitation is avoided on the moral ground of efficiency, and equity is resolved according to the principle of reciprocal harm. Justice in this world will be served when monopoly is required to be efficient and "victims" are forced to pay their fair share.

This normative view finds nothing of intrinsic value in the judicial process itself and, therefore, dwelling on issues associated with that process is not regarded as necessary. Elzinga and Breit are not callous about the plight of victims and their demand for redress. But treating these matters within the judicial process is, in their view, ultimately self-defeating. From their perspective, only if incentives are redirected in the first place toward efficient allocation of harm can victimization, equity, and so on be addressed in a lasting sense.

The assumption that results are what matter is logically correct if one assumes that human beings are (mostly) about the maximization of pleasures. Outside the paradigm, however, the logic fails. As Weinrib has pointed out, justice is not solely and, in some instances, not even primarily, concerned with results. Both judicial outcomes *and* the process that creates them involve significant rights and values. Ignoring this fact leaves the process of justice as pure instrumentality. We no longer care how justice occurs; any means will do. As Weinrib

notes, this is equivalent to arguing that dropping a golf ball in a hole eighteen times amounts to having played a round of golf.¹⁰⁰

Attacks on the economic guide to life for normative weaknesses such as these often are rebutted by practitioners who argue that the guide was never intended to deal with such matters and cannot be expected, therefore, to offer coherent advice on them. This is an interesting admission as to the limits of the economic analysis of law. Michelman has characterized the defense nicely: "noneconomic considerations," so the argument goes, are to be "left for others—philosophers, or maybe poets . . . hard-headed lawyers [and economists] cannot fathom that other spongy stuff."¹⁰¹ But at bottom this dodges the issue. When efficiency is held up as the all-purpose norm against which all others are to be gauged, this is not a display of deference on moral concerns, but a poorly disguised assertion of normative priority. Its effect is to shield efficiency from precisely the analysis of its normative foundations that is required. Apparently, it is believed that assuming the role of moral eunuch absolves the analyst of normative responsibility, which is to confuse impotence with discretion.

In the final analysis, however, the economic guide to life is not a modest proposal and cannot be defended by an appeal to practical ideals. Tullock applies economic reason (and, as he repeatedly reminds, "high school algebra") to demonstrate why.

A person who feels that the evidence is such that he has a certain probability of conviction will, if he is rational, confess if he is given a suitable reduction in sentence . . . There is . . . no obvious reason why we should find this undesirable. People would only confess to a crime of which they are innocent if the evidence against them is strong enough so that they feel there is a reasonable probability of conviction. The sentence to be given to them . . . would be appropriately discounted in terms of the evidence against them.¹⁰²

There is nothing formally different in this argument from those typically offered in the economic analysis of law. What is desirable can be discerned without bringing in the spongy stuff once one realizes the truth of efficiency. The solution is obvious:

we . . . work out the most efficient legal system and we, then, enforce it by use of the courts and police forces. But we should also indoctrinate a similar ethical code. Under this system . . . the ethical system becomes subordinated to the law rather than *vice versa*.¹⁰³

Sooner or later, the economic analysis of law comes to moral absolutism. Tullock's "revision"¹⁰⁴ is but one version.

*The Theodicy of Moral Paradox*¹⁰⁵

Some will conclude (and many already have) that The Economic Analysis of Law is ideology masquerading as analysis and will charge that the framework is either unwilling or unable to take responsibility for its normativity. We certainly would not quarrel with this conclusion. But there is an additional, by no means incompatible, interpretation which we would like to offer.

Our interpretation harks back to the following observation of Liebhafsky:

This literature has been produced largely by economists who know no law and a handful of lawyers who have learned their economics from these same economists, all of whom are bound together by their acceptance of eighteenth-century hedonism and a philosophy produced under the influence of two ripe apples—one observed falling by Newton and the other eaten by Adam and Eve.¹⁰⁶

Under the influence of these apples, The Economic Analysis of Law presents but another extension of economic liturgical practice—promise the faithful that through the empowerment of greed the unintended consequence (think of gravity) will be advancement of the public good. Moral intentions need not play a role in the proceedings; anyway, their conscious consideration can only confuse the issue, increase costs, and lead to harm (reciprocal, of course). Economics' defense of the free market in all things is an effort to elevate moral paradox to virtue.

NOTES

1. Brent Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions," *Southern California Law Review* 56 (1983): 1144.
2. Kenneth G. Elzinga and William Breit, *The Antitrust Penalties: A Study in Law and Economics* (New Haven: Yale University Press, 1976).
3. Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1-44, as reprinted in William Breit and Harold M. Hochman, eds., *Readings in Microeconomics*, 2d ed. (New York: Holt, Rinehart and Winston, 1971): 423.
4. *Ibid.*, 424.
5. *Ibid.*

6. One is reminded of the historic distinction in political economy between those who produced and those who appropriated output from the productive classes. Lawmakers, like Ricardo's landowners, would appear in the Coasian framework to make their way in society by acting under the illusion that "what they had transferred . . . they had created": W. Stark, ed., *Jeremy Bentham's Economic Writings*, vol. I (London: Allen and Unwin, 1952), 234.
7. Indeed, Posner suggests that the essential rationale for a legal system is to prevent the emergence of prohibitive transaction costs in the market system, "If the initial assignment of some right—say, to clean air—will not affect the wealth of any assignee appreciably, then regardless to whom the initial assignment is made, either a market system (if transaction costs are not prohibitive) or a legal system designed to simulate the outcomes of such a market (if transaction costs are prohibitive) will ensure the final assignment of the right to whoever derives greater value from having it." Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies* 8 (1979): 108.
8. Elzinga and Breit, *The Antitrust Penalties*, 83.
9. Elzinga and Breit, *The Antitrust Penalties*.
10. *Ibid.*, 83.
11. See Simeon M. Kriesberg, "Decisionmaking Models and the Control of Corporate Crime," *Yale Law Journal* 85 (1976): 1091-1129.
12. E.g., Elzinga and Breit, *The Antitrust Penalties*, 123.
13. John Collins Coffee, Jr., "Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions," *American Criminal Law Review* 17 (1980): 427.
14. Actually, Elzinga and Breit's analysis of corporate criminal decisions is limited to those organizations successful in the economic game. Whether or not an individual corporation behaves in the manner described is irrelevant; those that do will survive and prosper, those that do not will, without government assistance, fail, according to this logic.
15. Frank H. Easterbrook, William M. Landes and Richard A. Posner, "Contribution Among Antitrust Defendants: A Legal and Economic Analysis," *Journal of Law and Economics* 23 (1980): 345.
16. This probability is not the same as the inverse of the probability of detection and conviction. Successful violation involves: (a) enjoying one of the gain scenarios that accompanies violation rather than one of the loss scenarios; and (b) foregoing less profitable legal alternatives that would have transpired had the corporation not chosen to violate the law. Both are probability scales in their own right.
17. See Elzinga and Breit, *The Antitrust Penalties*, 112.
18. *Ibid.*, 13.
19. *Ibid.*, 16.
20. As we shall shortly discuss, not all monopolies are inefficient, according to Elzinga and Breit. See their discussion of scale economies, *ibid.*, 99-106.
21. *Ibid.*, 97, 43.
22. *Ibid.*, 123.
23. See *ibid.*, 43.
24. Elzinga and Breit consider five criteria for measuring monopoly market power: a firm's market share, joint market shares of leading firms, a firm's profit, a firm's absolute size, and a firm's (or industry leaders') price behavior. *Ibid.*, 106.
25. Elzinga and Breit, *The Antitrust Penalties*, 99-106.
26. See Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976), 8.
27. Ronald H. Coase, "The Nature of the Firm," *Economica* (November 1937): 386-405.
28. Elzinga and Breit, *The Antitrust Penalties*, 106.
29. Posner, *Antitrust Law*, 15-18.
30. See Elzinga and Breit, *The Antitrust Penalties*, 107.
31. See *ibid.*, 91.
32. *Ibid.*
33. *Ibid.*, 96.
34. *Ibid.*, 150.
35. *Ibid.*, 100.
36. *Ibid.*, 82.
37. Coffee, "Corporate Crime and Punishment," 442.
38. See William Stanley Jevons, *The Theory of Political Economy* (New York: MacMillan and Company, Ltd., 1871).
39. John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton: Princeton University Press, 1944).
40. Milton Friedman and Leonard J. Savage, "The Utility Analysis of Choices Involving Risk," *Journal of Political Economy* 56 (1948): 279-304.
41. Joseph Finkelstein and Alfred L. Thimm, *Economists and Society: The Development of Economic Thought From Aquinas to Keynes* (Schenectady, N.Y.: Union College Press, 1981), 354.
42. A. Berle and G. Means, *The Modern Corporation and Private Property* (New York: MacMillan and Company, Ltd., 1948; 1st ed. 1932).
43. See generally Joan Robinson, *The Economics of Imperfect Competition* (London: MacMillan and Company, Ltd., 1933); Edward H. Chamberlin, *The Theory of Monopolistic Competition* (Cambridge: Harvard University Press, 1938); John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin, 1967).
44. See Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (New York: Free Press, 1975).
45. See Harvey Leibenstein, "A Branch of Economics is Missing: Micro-Micro Theory," *Journal of Economic Literature* 17 (1979): 477-502.
46. See *ibid.*, 481.
47. Fisse, "Reconstructing Corporate Criminal Law," 1154.
48. *Ibid.*, notes at 1154-55.
49. See James G. March and Herbert Simon, *Organizations* (New York: Wiley and Sons, 1958); Herbert A. Simon, "Theories of Decision Making in Economics and Behavioral Science," *American Economic Review* 49 (1959): 253-83; Richard M. Cyert and James G. March, *A Behavioral Theory of the Firm* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963).
50. Herbert A. Simon, "Rationality as Process and as Product of Thought," *American Economic Review* 68 (May 1978): 12.
51. William J. Baumol, *Economic Theory and Operations Analysis*, 2d ed.

- [Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965], 296.
52. Even with the 25 percent pre-tax profits rule (see Elzinga and Breit, *The Antitrust Penalties*, 134-36) the corporation must anticipate what revenues and costs will be counted by the court, something that cannot be known with certainty before the sanction is administered.
 53. See text and references to Note 49 above.
 54. See Elzinga and Breit, *The Antitrust Penalties*, 91.
 55. G. L. S. Shackle, *Epistemics and Economics: A Critique of Economic Doctrines* (Cambridge: Cambridge University Press, 1972), 369-71.
 56. See *ibid.*; and G. L. S. Shackle, *Expectations in Economics* (London: Cambridge University Press, 1949); *Decision, Order and Time in Human Affairs* (London: Cambridge University Press, 1961); *Imagination and the Nature of Choice* (Edinburgh: Edinburgh University Press, 1979).
 57. Shackle, *Epistemics and Economics*, 400.
 58. *Ibid.*, 399-406.
 59. *Ibid.*, 399 [emphasis in original].
 60. *Ibid.*, 403.
 61. *Ibid.*, 444.
 62. *Ibid.*, 392.
 63. *Ibid.*, 365.
 64. *Ibid.*, 407.
 65. Richard A. Posner, *Economic Analysis of Law*, 2d ed. (Boston: Little Brown and Company, 1977), 303-05.
 66. John C. Coffee, Jr., "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment," *Michigan Law Review* 79 (1981): 393-94.
 67. Coffee, "Corporate Crime and Punishment," 465-68.
 68. *Ibid.*, 466.
 69. Elzinga and Breit, *The Antitrust Penalties*, 122-26.
 70. *Ibid.*, 135.
 71. *Ibid.*
 72. *Ibid.*, 115-16, 129-32.
 73. *Ibid.*, 135.
 74. Dwight R. Lee, "On Substituting a Socially Costless Penalty for Costly Detection," *International Review of Law and Economics* 3 (1983): 179-85.
 75. Except, interestingly enough, Stigler and Becker have proved (in the same manner that everything is proved in this mode of analysis—with formal equations manipulating the inaccessible) that "tastes . . . are the same to all men"; George J. Stigler and Gary S. Becker, "De Gustibus Non Est Disputandum," *American Economic Review* 67 (1977): 76.
 76. H. H. Liebhafsky, "Price Theory as Jurisprudence: Law and Economics, Chicago Style," *Journal of Economic Issues* 10 (1976): 27.
 77. Arthur Allen Leff, "Economic Analysis of Law: Some Realism About Nominalism," *Virginia Law Review* 60 (1974): 457 [emphasis in original].
 78. Elzinga and Breit, *The Antitrust Penalties*, 135.
 79. See generally, *ibid.*, 103-04; Milton Friedman, *Price Theory: A Provisional Text* (Chicago: Aldine Publishing Co., 1962); James Buchanan, *Cost and Choice: An Inquiry into Economic Theory* (Chicago: Markham Publishing Co., 1969); James E. Buchanan and G. F. Thirlby, eds., *L. S. E. Essays on Cost* (London: Weidenfeld and Nicolson for the London School of Economics and Political Science, 1973).
 80. Leff, "Economic Analysis of Law," 456.
 81. Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76 (1968): 169-217.
 82. Gary S. Becker and George J. Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers," *Journal of Legal Studies* 3 (1974): 1-8.
 83. Paul H. Rubin, "Why is the Common Law Efficient?" *Journal of Legal Studies* 6 (1977): 51-63.
 84. Posner, "Utilitarianism, Economics and Legal Theory."
 85. I. Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *The American Economic Review* 65 (1975): 397-417.
 86. This closed analytic system was elevated to epistemological status by Friedman in his grounding of "positive" economics on the prediction of reality "as if" it were what economists believe it to be: Milton Friedman, *Essays in Positive Economics* (Chicago: The University of Chicago Press, 1953), 3-43. An interesting defense of this epistemology has been offered by Boland who argues that critics have not let "as if" be "as if"; for, when examined on its own terms, surprisingly enough, it is internally consistent and logical. Thus, "Friedman's essay is an instrumentalist defense of instrumentalism. That may be interpreted to mean that Friedman's methodology is based on an infinite regress, but if it is then at least it is not internally inconsistent or otherwise illogical. The repeated attempts to refute Friedman's methodology have failed, I think, because instrumentation is its own defense and its *only* defense": Lawrence A. Boland, "A Critique of Friedman's Critics," *Journal of Economic Literature* 17 (1979): 522 [emphasis in original].
 87. George L. Priest, "The Common Law Process and the Selection of Efficient Rules," *Journal of Legal Studies* 6 (1977): 65.
 88. Rubin, "Why is the Common Law Efficient?" 55.
 89. Posner, "Utilitarianism, Economics and Legal Theory," 109.
 90. Ronald H. Coase, "Economics and Contiguous Disciplines," *Journal of Legal Studies* 7 (1978): 201-11.
 91. Elzinga and Breit, *The Antitrust Penalties*, 150.
 92. *Ibid.*, 144.
 93. See Coffee, "No Soul to Damn: No Body to Kick."
 94. Elzinga and Breit, *The Antitrust Penalties*, 83.
 95. *Ibid.*, 144.
 96. *Ibid.*
 97. *Ibid.*, 145.
 98. *Ibid.*
 99. *Ibid.*, 146.
 100. Ernest J. Weinrib, "Utilitarianism, Economics and Legal Theory," *University of Toronto Law Journal* 30 (1980): 321-22.
 101. Frank I. Michelman, "Norms and Normativity: The Economic Theory of Law," *Minnesota Law Review* 62 (1978): 1029-30.
 102. Gordon Tullock, *The Logic of the Law* (New York: Basic Books, Inc., 1971), 182-84.
 103. *Ibid.*, 256.
 104. *Ibid.*, 257.
 105. This phrase is borrowed from a brilliant study on moral issues raised by

unfettered capital. We hope the authors appreciate our use of the phrase. See J. Raines, Lenora Berson, and David Gracie, eds., *Community and Capital in Conflict: Plant Closings and Job Loss* (Philadelphia: Temple University Press, 1982).

106. Liebhafsky, "Price Theory as Jurisprudence," 40.

CHAPTER 7

**SANCTIONS AGAINST CORPORATIONS:
THE LIMITATIONS OF FINES AND THE
ENTERPRISE OF CREATING
ALTERNATIVES**

Brent Fisse

Corporate crime is now generally recognized as an important social problem¹ but the search for adequate solutions still continues. One conspicuous task which remains is that of devising effective sanctions against corporations.² The type of sanction now used most extensively—monetary exaction through cash fines or penalties—has been widely criticized, essentially on the ground that its deterrent capacity is usually weak.³ Yet, what alternatives are there? Dissolution, disqualification from government contracts, production bans, and other forms of incapacitation have often been made available⁴ but, whatever the possible attraction of any analogy to imprisonment, these forms of sanction are extreme and, if used, can easily cause worse side effects (e.g., layoffs of workers) than the harm prevented. There are more promising possible alternatives, however, namely stock dilution (equity fines), probation, publicity orders, and community service orders. The aim of this commentary is to outline the nature of these alternatives and to review their potential by exploring the main advantages they might have over fines or monetary penalties.

Three preliminary matters need to be settled. The first is that the scope of discussion does not extend to sanctions against individual persons convicted of offenses committed on corporate behalf, but is confined to sanctions against corporations in those cases where, for reasons of efficacy or justice, it is necessary for proceedings to be issued against a corporate employer in addition to, or instead of, an officer or employee.⁵ Second, although our main focus is upon criminal sanctions against corporations, it should be realized that stock dilution, probation, publicity, and community service can also be used as civil penalties or remedies, depending on the circumstances of their application: Just as exaction of money can take the form of fines, monetary penalties, or damages, these alternative means of regulation can be deployed as criminal sanctions or civil penalties or remedies, depending on the manner and purposes of their use.⁶ Third, it will be assumed that corporations can manifest fault in a genuinely corporate