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CONTRACT BREACHES AND THE CRIMINAL/CIVIL DIVIDE: AN *INTER*-COMMON LAW ANALYSIS

Monu Bedi*

Scholars have long debated why certain common law breaches in American jurisprudence receive criminal punishment (imprisonment) while others only receive civil sanctions (monetary damages). Scholars like Richard Posner and Guido Calabresi/A. Douglas Melamed have used economic-based models and the notion of efficiency to explain why tort breaches only receive civil sanctions but crimes receive criminal punishment. Others, like John Coffee and Paul Robinson, have questioned the explanatory power of these models. Instead, they have focused on the moral difference between torts and crimes. Simply put, a crime's intentional nature makes it morally worse than the carelessness typified by tortious activity. Interestingly, scholars on both sides of the debate have largely neglected to include contract breaches—a significant part of common law—into their models. Like torts, these breaches also only receive civil sanctions. What explains the similar treatment?

This Article makes an original contribution to the literature by systematically introducing contract breaches into the broader criminal/civil debate. It employs the aforementioned economic and moral-based models in an effort to understand the treatment of contract breaches. The economic model, and its focus on efficiency, predictably explains why these breaches only receive civil sanctions. The moral-based model stumbles here. Its focus on intent suggests that a contract breach—as intentional conduct—also deserves moral blame and thus criminal punishment. What is missing from this

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model is recognizing the unique nature of the underlying responsibility in a contract breach, and specifically, the difference between a "voluntary obligation" and a "non-voluntary obligation." This Article takes the innovative step of introducing this distinction into the larger criminal/civil debate and using it to conclude that the moral-based and economic approaches can be integrated into a unified model.

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INTRODUCTION

Scholars have long debated why certain common law breaches in American jurisprudence receive criminal punishment (imprisonment) while others only receive civil sanctions (monetary damages).[1] These scholars, however, have focused only on torts and crimes and have largely left out contract breaches—a significant part of common law doctrine. Like its tort counterpart, this breach also only receives civil liability. What explains the similar treatment? This Article makes an original contribution to the literature by systematically introducing contract breaches into this debate on the criminal/civil divide.

It is important to say something about harms. Any meaningful comparison of these three common law breaches requires equalizing the harms involved. Otherwise, the analogy will break down. For example, murdering someone is obviously worse than negligently destroying property or failing to contractually deliver a good or service. Explaining why only murder gets criminal punishment in this case does not seem particularly difficult. The harms involved are very different. Homicide is qualitatively worse than any damage to property or loss of particular service. This assumption about harm is important. This Article seeks to understand why, everything else being equal, crimes alone receive criminal punishment, while both tort and contract breaches only trigger monetary sanctions.

This Article works out this *ceteris paribus* claim by appealing to laws that safeguard property. A person may not steal your property (a crime); she cannot treat your property negligently (a tort); and she may not breach a contract by failing to compensate you for your property (a contract breach). Take the following three cases:

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1. Criminal sanctions can include fines, *see* MODEL PENAL CODE § 302.1 (1985), as well as restitution awarded to a victim. *See* Jeffrey A. Parness, Laura Lee, Edmund Lee, *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819 (2010) (noting that some states allow restitution as part of defendant's sentence); Heidi M. Grogan, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079 (2005) (noting that the Victim and Witness Protection Act permits federal judges to award criminal victims restitution during sentencing); Randy Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 159-60 (1996) (noting that restitution is part of the punishment imposed on a defendant). Civil sanctions include both compensatory and punitive damages. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 355 (1981).

Scenario (1): You are sitting in a coffee shop[2] writing an essay on your recently purchased laptop that costs $1,000. You leave to go to the bathroom. In your absence, someone quickly steals your computer[3] (a crime).

Scenario (2): As you are typing your essay on your recently purchased laptop that cost $1,000, someone negligently knocks it over. You had taken reasonable care to place it squarely on the table so it would not fall.[4] It breaks completely and is now worth nothing (tort breach).

Scenario (3): Wanting to sell your laptop, you contract with an individual to sell it for $1,000. You give the computer to this person and await delivery of the money at the coffee shop (per the contract terms). To your dismay, this individual breaches the contract by failing to bring the money. The person intentionally decided not to honor the terms of the contract. At the time the contract was made, this person fully intended to pay you $1,000 and said as much. The individual simply changed her mind, even though she had the ability to satisfy the terms of the contract (contract breach).[5]

In all three cases (collectively, the "Scenarios"), you lose the value of the computer. That is, in all Scenarios, you suffer the same monetary harm—a loss of $1,000.[6] Nevertheless, only in Scenario (1), the criminal act, could the perpetrator suffer possible imprisonment at the discretion of the state. The perpetrators in Scenarios (2) and (3) (the tort and contract breach, respectively)

2. These scenarios are set up in a coffee shop to make them as similar as possible.

3. This act of taking the computer would constitute larceny under common law as the perpetrator permanently intended to deprive the victim of the computer. *See, e.g.*, United States v. Maloney, 607 F.2d 222, 227 (9th Cir. 1979); Edmonds v. State 70 Ala. 8, 9 (1881) (citing Roscoe's Cr. Ev. 622); MODEL PENAL CODE § 223.1 note (consolidating larceny and other acquisitive crimes such as embezzlement and false pretenses into the general category of theft) (1962); MODEL PENAL CODE § 223.2 (1962); 3 SUBST. CRIM. L. § 19.8 (2d ed. 2010) (same). For the purpose of this paper, the terms "theft" and "larceny" are used interchangeably.

4. In other words, there is no issue of contributory negligence, an affirmative defense in tort cases. *See* RESTATEMENT (THIRD) OF TORTS § 3 (2010).

5. The point here is that the breach was not accidental or unavoidable. The perpetrator simply decided not to fulfill the terms of the contract. Perhaps, it was not in the person's economic interests or the person was too lazy to deliver the computer.

6. I assume that all computers have the same software and files, making sure their values are equal.

would only be subject to monetary damages.[7] They will not suffer any imprisonment, even though these individuals have caused the same harm to you as the criminal in Scenario (1). While this distinction may be familiar to us, what explains it?

The major theories used to account for the varying treatment of these breaches can be grouped roughly into two camps: the economic-based and moral-based models.[8] The economic model relies on deterrence and efficiency to explain why torts receive monetary damages but crimes receive criminal punishment.[9] According to these scholars, society has a greater economic incentive to deter criminal activity than tortious activity. The common phrase used here is that "criminal law punishes while tort law prices."[10] The moral-based camp has questioned the explanatory power of the economic-based arguments. These scholars have argued, instead, that the real distinction between crimes and torts lies in the moral condemnation of the former but not the latter.[11] Crimes generally

7. The perpetrator in Scenario (1) would also be subject to a civil suit for damages, probably for the tort of conversion. *See infra* note 45.

8. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972); Henry Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) (criminal punishment, unlike civil sanctions, represents "the judgment of community condemnation which accompanies and justifies its imposition"); Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1194–95 (1985) (economic model); L. Song Richardson, *When Human Experimentation Is Criminal*, 99 J. CRIM. L. & CRIMINOLOGY 89, 112–14 (2009) (finding that punishment, unlike civil liability, expresses moral condemnation); Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 201–02 (1996) (moral-based model). Admittedly, this somewhat oversimplifies the scholarship**.** *See generally* Kenneth Simmons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 909–10 (2001) (noting that the economic approach can be seen as a variation of a utilitarian or consequentialists model, whereas as the moral-based approach can be seen as a version of a deontological model). Other scholars have put forth more nuanced models. *See generally* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990); George Fletcher, *A Transaction Theory of a Crime?*, 85 COLUM. L. REV. 921 (1985); Alvin Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905 (1985). Still, these two models represent the dominant themes in the literature. *See* Kenneth Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719 (2008) (noting that the moral-based and economic models are the dominant approaches to explaining the tort/crime distinction).

9. *See* Calabresi and Melamed, *supra* note 8; Posner, *supra* note 8.

10. *See* John Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194–95 (1991); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523–24 (1984).

11. *See* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 756–60

constitute purposeful conduct, making them morally worse than the carelessness typified by tortious activity.[12]

Yet, scholars on both sides of the debate have neglected to apply their theories to contract breaches. Perhaps, the thinking is that because contract law involves voluntary behavior, it is readily understandable why such breaches are not criminally punished and nothing more needs to be said. At a conceptual level, it is not clear how merely invoking voluntariness, without more, automatically vitiates the need for criminal punishment. The victim of a contract breach certainly has not consented to the deprivation of her property without compensation. Additional explanation seems necessary, particularly when economic or moral principles underlie the general explanation for the criminal/civil divide.

To be clear, many scholars have used economics and moral principles to analyze contract law. The notion of efficient breach has generated significant discussion and holds that breaking a contract is sometimes the economically preferable course of action.[13] Perhaps, less well known is the notion that a contract corresponds to a moral obligation to uphold this promise.[14] But all of these discussions—whether economic or moral—center on the internal mechanics of contract law (i.e. the analysis occurs *intra*-contract law). These

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(1943); Robinson, *supra* note 8.

12. It is important to distinguish these two models from similar economic and moral-based approaches that seek only to analyze and explain the internal mechanics of torts or crimes. For a discussion on tort law, see generally Shawn Bayern, *The Limits of Formal Economics in Tort Law*, 75 BROOK. L. REV. 707 (2010); Heidi Hurd, *The Deontological of Negligence*, 76 B.U. L. REV. 249 (1996); Kenneth Simmons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901 (2001). For a discussion on criminal law, *see generally* Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007); Hamish Stewart, *Legality and Morality in H. L. A. Hart's Theory of Criminal Law*, 52 SMU L. REV. 201 (1999).

13. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 4.10 (7th ed. 2007); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284–85 (1969); Gil Lahav, *A Principle of Justified Promise-Breaking and Its Application to Contract Law*, 57 N.Y.U. ANN. SURV. AM. L. 163, 163–64 (2000); Craig Warkol, *Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 CARDOZO L. REV. 321, 321–22 (1998) (efficient breaches benefit society as a whole).

14. *See generally* RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW (1994); CHARLES FRIED, CONTRACT AS PROMISE (1981); Jody Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009); Daniel Markovitz, *Making and Keeping Contracts*, 92 VA. L. REV. 1325, 1328–29 (2006).

scholars have not engaged in the broader discussion of why contract breaches—like their tort counterparts—only receive civil liability. Here, the scholarship has been restricted to the tort/crime dichotomy.[15]

Thus, this Article makes an original contribution by applying the aforementioned economic and moral-based theories to all three types of breaches and explains why crimes alone receive criminal punishment. The aim of the Article is not to recommend specific normative changes. Perhaps, certain contract breaches should be criminalized or some crimes not punished. This Article simply seeks to understand *what explains why* we criminalize one but not the others.

The economic model predictably explains why contract breaches are treated like tort breaches. Contracts and torts share an underlying efficiency that is in sharp contrast to crimes. The moral-based position, however, is not as straightforward and cannot readily account for the difference. A contract breach—as intentional-based conduct—would also seem to elicit the same moral condemnation as a crime and thus warrant criminal punishment.[16] This is particularly true if one includes contract breaches based on fraudulent inducement as to an intended obligation; these instances of deception or trickery also typically do not receive criminal punishment.[17] What is missing from the moral-based model is recognizing the unique nature of the underlying responsibility in a contract breach. For this, this Article distinguishes between a "non-voluntary obligation" and a "voluntary obligation."[18] The former automatically applies to all

15. In one respect, this is not surprising. Torts and crimes share a common history. *See* David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law,* 76 B.U. L. Rev. 59, 59–60 (1996) (noting that in early common law, tort and crime both constituted a breach against the king's peace); *see also* Bruce Benson, *The Lost Victim and Other Failures of the Public Law Experiment*, 9 HARV. J.L. & PUB. POL'Y 399, 411 (1986); Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 250 (2005).

16. *See, e.g.*, Grant Lamond, *What Is a Crime?*, 27 OXFORD J. LEGAL STUD., 609 619–20 (2007) (noting that the intentional nature of a contract breach suggests that, at least conceptually, it too could receive criminal punishment).

17. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 162, 164 (1981). Particularly egregious instances of fraudulent inducement may receive punitive damages, a type of civil sanction. RESTATEMENT (SECOND) OF TORTS § 525 (1977). For a discussion of these breaches, see *infra* Part II.C.

18. *Cf.* Kraus, *supra* note 14. Kraus uses similar terminology, but his discussion focuses on the

members of society, and thus, corresponds to tort and criminal legal duties. On the other hand, a voluntary obligation must be affirmatively undertaken, much like contractual responsibilities. Recognizing this fundamental difference can save the moral-based model. Understood in this way, the moral-based and economic-based theories can actually be integrated into a unified model.

There are limitations to this analysis. It does not attempt to explain the law's varying treatment of *all* crimes versus *all* torts or contract breaches. Instead, its focus is on the prototypical common law breach.[19] There are various indeterminacies within these bodies of law that prevent any analysis from being true in all circumstances. For instance, most jurisdictions today rely on a statutory criminal framework in lieu of common law.[20] This framework includes a host of various violations, many of which are considered regulatory in nature.[21] This Article seeks to explain the treatment of those familiar common law origin crimes against property or person that require criminal intent.[22]

The Article is divided into five parts. Part I lays out the parameters of each respective common law breach, as well as three related scenarios involving the safeguarding of property. Part II focuses on the economic model and how it handily explains the respective sanctions all three common law breaches receive. Parts III and IV analyze the moral-based approach and its shortcomings when it comes to contract breaches. Finally, Part V explores the distinction

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unique underlying moral nature of contractual responsibilities. *See infra* note 264.

19. This excludes many types of breaches, including strict liability crimes and intentional torts. *See infra* Part I.A.

20. 1 SUBST. CRIM. L. § 2.1 (2d ed. 2010); Chad Flanders, *The One-State Solution to Teaching Criminal Law, or, Leaving the Common Law and the PPC Behind*, 8 OHIO ST. J. CRIM. L. 167, 177 (2010).

21. This framework is most apparent with the distinction between *malum in se* and *malum prohibitum* crimes. *Malum in se* crimes have a stigma of immorality and include acts like murder and rape. *Malum prohibitum* crimes, on the other hand, are "criminal simply because [they are] prohibited by statutes; [they are] not necessarily immoral in [their] own right." Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 728 (2010).

22. *See generally* 1 SUBST. CRIM. L. § 1.6 (2d ed. 2010); Combs, *supra* note 15, at 253 (noting that common law crimes required a "bad mind" and, at least with *malum in se* crimes, generally arose from notions of natural law). In fact, one scholar notes that a *malum prohibitum* crime is "basically a non-criminal tort that is prosecuted by society at large." Dau-Schmidt, *supra* note 8, at 36 n.189.

between voluntary and non-voluntary obligations, in an effort to rehabilitate the moral-based model and explain the treatment of contract breaches.

I. THE BASIC COMMON LAW BREACHES AND SAFEGUARDING PROPERTY

A. Contract Breaches, Torts, and Crimes

The basic common law doctrines of a contract breach, tort, and crime are readily known. A contract constitutes a promise for which the law gives a remedy in case of breach.[23] Formation requires mutual assent and consideration.[24] Courts use an objective test. It does not matter what the parties subjectively believed during the contract's formation, as long as they manifested the appropriate intent.[25] A breach occurs when one party does not perform under the contract.[26] This is a strict liability standard.[27] If a party contravenes the terms of the contract, the party is in breach, regardless of her motivations or state of mind.[28] While accidental breaches are possible, it stands to reason that most breaches will be intentional.[29] A breach entitles a person to bring suit for any money damages resulting from the nonperformance of the contract; however, the state does not seek non-monetary sanctions, such as imprisonment, for such breaches.[30] Usually, the damages consist of what the victim

23. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

24. *Id.* ch. 3.

25. *See* Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954); RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. B (1981) ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention *as distinguished from undisclosed intention*.") (emphasis added); *id.* § 21; Lawrence M. Solan, *Contract As Agreement*, 83 NOTRE DAME L. REV. 353, 354–55 (2007).

26. 23 WILLISTON ON CONTRACTS § 63:1 (4th ed. 2010).

27. RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (1981).

28. *Id.*

29. In fact, the efficient breach hypothesis finds that a person should breach a contract if doing so would be more economically desirable than performing under the contract. *See* Richard Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568 (2006); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); *infra* Part II.B.

30. *See* 23 WILLISTON, *supra* note 26, § 64:1.

would have received from the contract or any loss she suffered as a result of making the contract.[31]

Tort law also only allows for a private right of action.[32] It is commonly understood as a mechanism for individuals to seek redress for wrongs against them.[33] Typically, a tort breach requires a failure to exercise a reasonable duty of a care where the conduct proximately causes some identifiable harm[34] to the victim.[35] A defendant only needs to be negligent in exercising this duty of care to be liable for any resulting damage to the victim.[36]

Crimes stand apart from both torts and contracts. The state can prosecute these acts and seek sanctions including imprisonment.[37] A crime typically requires a wrongful deed or act, an *actus reus*, combined with a guilty state of mind, a *mens rea*.[38] The defendant does not need to be successful in completing the prohibited act. As long the person intended to cause the harm and takes some affirmative action, this person can be punished.[39]

The aforementioned types of torts and crimes are just the typical cases. For instance, there are intentional torts and strict liability crimes; but these are outliers and are not the focus of this Article.[40]

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31. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. a (1981) ("The purpose[] of awarding contract damages is to compensate the injured party. . . . For this reason, courts in contract cases do not award damages to punish the party in breach or to serve as an example to others unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); *id.* §§ 347, 356. Relief may also consist of specific performance, depending on the terms of the contract. *See id.* § 357.

32. *See* 1 DAN B. DOBBS, THE LAW OF TORTS § 2, at 4 (2001) (the "purpose of tort liability" is "primarily to vindicate the individual victim and the victim's rights").

33. *See* Combs, *supra* note 15, at 251.

34. Harm includes bodily harm, real property damage, or tangible personal property damage. RESTATEMENT (THIRD) OF TORTS § 4 (2010).

35. *See id.* § 6.

36. *Id.*

37. The state can also pursue fines as applicable. *See* MODEL PENAL CODE § 302.1 (1985).

38. *See* 1 SUBST. CRIM. L. § 5.1 (2d ed. 2010) (One may be criminally liable based on purposefulness, recklessness, gross negligence, or even strict liability.); MODEL PENAL CODE § 2.02 (1985) (Most crimes, including statutory crimes, require some kind of ill motive or bad intention.); *see also* United States v. Bailey, 444 U.S. 394, 402 (1980).

39. 2 SUBST. CRIM. L. § 11.2 (2d ed. 2010).

40. For a discussion of intentional torts, see RESTATEMENT (THIRD) OF TORTS § 5 (2010). There are also certain strict liability torts, but these are extremely narrow in scope. *See generally id.* ch. 20. For a discussion of strict liability crimes, see 1 SUBST. CRIM. L. §§ 5.1, 5.5 (2d ed. 2010). These crimes are considered the exception, even amongst statutory crimes, to the general rule requiring an "evil-meaning mind." *Bailey*, 444 U.S. at 404 n.4. It is not uncommon for scholars to put aside intentional torts and

Moreover, the main goal is to understand why, everything else being equal, crimes receive criminal punishment, but tort and contract breaches only receive civil liability. This requires equalizing the harms. An intentional tort, like defamation or infliction of emotional distress, does not have a criminal equivalent.[41] We do not normally criminalize defamatory statements or words that merely hurt a person's feelings.[42] So, it makes little sense to use this type of tort because of the difficulty in finding a criminal act that causes the same harm.

Strict liability crimes (e.g., statutory rape) would also not work here. Again, these are outliers. They do not require intent and thus do not originate from the common law.[43] Moreover, using a strict liability crime as the model criminal act would create the same issue of trying to find an equivalent tort or contract breach that causes the same harm.

Certain conduct also creates both tort and criminal liability.[44] For instance, the act of taking someone's property would constitute theft, a crime, and conversion, a tort breach.[45] However, there is no point to compare these two types of acts because the underlying conduct could receive both civil and criminal sanctions. This Article's focus centers on conduct that causes the same kind of harm as a criminal act, but nevertheless, does not receive criminal punishment. That is, assuming equal harm, why do certain torts and contract breaches *only*

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strict liability crimes when analyzing the distinctive treatment of torts and crimes. *See, e.g.*, Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335, 345–46 (1996); Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 486–87 (2004).

41. *Compare* RESTATEMENT (SECOND) OF TORTS § 46 (1965), *with* 2 SUBST. CRIM. L. (2d ed. 2010).

42. Some jurisdictions do criminalize defamation by statute. *See, e.g.*, Thomas v. City of Baxter Springs, 369 F. Supp. 2d 1291, 1293 (D. Kan. 2005) (Kansas statute); I.M.L. v. State, 61 P.3d 1038, 1040–41 (Utah 2002) (Utah Statute). This comparison still would not have been useful since the underlying conduct would receive both criminal and civil sanctions.

43. *Bailey*, 444 U.S. at 404 n.4; 1 SUBST. CRIM. L. §§ 5.1, 5.5, 17.4 (2d ed. 2010).

44. *See* Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 250 (2005).

45. *See* 1 SUBST. CRIM. L. § 1.3 (2d ed. 2010). The elements of conversion, RESTATEMENT (SECOND) OF TORTS § 222A (1965), are similar to the elements of larceny, 3 SUBST. CRIM. L. § 19.2 (2d ed. 2010). James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 36 (1996); *see* 4 WILLIAM BLACKSTONE, COMMENTARIES *5 (finding that particular conduct can constitute both a crime and tort); Thomas Colby, *Clearing the Smoke From* Phillip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L. J. 392, 424 (2008).

receive monetary damages while the equivalent crime, causing the same harm, receives criminal punishment? This requires identifying a harm that results equally from all three types of acts as well as isolating those tort and contract breaches that only receive civil sanctions.

B. Equalizing Harms: The Safeguarding of Property

As stated earlier, this Article looks to three primary ways in which the law safeguards property: someone may not steal your property, Scenario (1); she may not treat your property negligently, Scenario (2); and she may not breach a contract by failing to compensate you for your property, Scenario (3). In all three Scenarios, you lose the value of the computer, but only in Scenario (1) could the perpetrator suffer possible imprisonment at the discretion of the state.[46]

You could very well decide not to sue the perpetrator in Scenarios (2) and (3) for the value of the computer. Or, maybe the perpetrator in both Scenarios (2) and (3) decides to give you $1,000 the next day. In either of these two situations, the individual, for all practical purposes, would be "off the hook" and suffer no further sanctions. On the other hand, even if the perpetrator in Scenario (1) gives you $1,000 the next day or you choose not to sue, the state can still prosecute the individual with the threat of imprisonment.[47]

In short, stealing is treated differently than both contractually failing to deliver property and negligently destroying it. Only with stealing does one suffer criminal punishment and the possible loss of liberty. This difference may be familiar, but what explains it? Someone not familiar with our legal system may think that all three acts should receive criminal punishment because they caused the same harm. Or perhaps, this person would say that all acts, including the crime, should receive only monetary sanctions. As stated earlier, scholars have attempted to explain why torts and crimes receive

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46. You may also decide to sue the perpetrator in Scenario (1) for the value of the computer based on the tort of conversion. *See supra* note 45.

47. As long as the perpetrator intended to deprive you of the computer when she took it, she can be guilty of larceny, even if she later decides to compensate you for the loss. *See* People v. Pond, 284 P.2d 793, 799 (Cal. 1955); 3 SUBST. CRIM. L. § 19.5 (2d ed. 2010).

different sanctions. They rely on the concepts of efficiency and culpability. But what is missing from their analysis is explaining the contract breach.

The obvious difference between Scenario (3) and the others is the voluntary or consensual nature of entering into a contract. One might argue that this fact alone explains why the contract breach only receives civil sanctions. But the discussion cannot end there. For one thing, consent is not the operative principle used to distinguish torts and crimes. These models rely on economic and moral-based principles to explain this distinction. As this Article will show, voluntariness plays an integral role in explaining the treatment of these breaches, but more explanation is necessary as to how this concept informs the economic and moral-based models (*see infra* Sections II and V).

For now, it is enough to say that if consent or voluntariness is important, in what way does it, alone, explain the treatment of these breaches? Take the perspective of the perpetrator. The fact that this individual voluntarily entered into the contract does not suggest impunity. In fact, the contract breacher had the option not to enter into a contract and not take on the responsibility of paying money for the computer. It is not clear why this person receives the benefit—unlike the perpetrator in Scenario (1)—of being exempt from criminal punishment. From the victim's perspective, consent also does not suggest impunity. You did not consent to having the contract breached. Quite the contrary, you voluntarily entered into a contract, expecting that the person would pay you the money for your computer.

Simply invoking the terms "consent" or "voluntariness," without more analysis, becomes even less compelling when talking about a contract breach based on a fraudulent inducement. In such a case, an individual makes a false representation regarding an intended obligation that induces the other party to enter into the contract.[48] For

48. *See* RESTATEMENT (SECOND) OF CONTRACTS § 171 (1981) (discussing fraudulent inducement where the promisor falsely expresses an intention to perform); RESTATEMENT (FIRST) OF CONTRACTS § 474 (1932); *see also* RESTATEMENT (SECOND) OF TORTS § 525 (1977).

example, take the permutation of Scenario (3) where the perpetrator, at the time of making the contract, manifested an intent to pay you the money but never really had any intention of following through on the contractual obligation (e.g., she did not have the money). In short, the person deceived you by making a fraudulent promise. This is different from Scenario (3), as articulated above, where the perpetrator fully intended to pay the money and manifested as much, but later changed her mind.[49] But, even in the case of fraudulent inducement, the perpetrator will typically not be subject criminal punishment for failing to pay the money owed.[50] At most, if the conduct were particularly egregious, the perpetrator may be subject to punitive damages, a type of heightened civil liability.[51]

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49. *See* Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998) (distinguishing fraudulent inducement from a normal contract breach). It is important to distinguish fraudulent inducement—a false representation of a future action or promise—from the crime of taking property by false pretenses, which typically involve a false representation of a past or present fact. *See* 3 SUBST. CRIM. L. § 19.7 (2d ed. 2010).

50. Some jurisdictions criminalize this type of fraudulent inducement. *See* MODEL PENAL CODE § 223.3; Ellen Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 752 (1999) (explaining the evolution of federal fraud statues, such as mail fraud that criminalize false promises); Michael A. DiSabatino, Annotation, *Modern Status of Rule That Crime of False Pretenses Cannot Be Predicated upon Present Intention Not to Comply with Promise or Statement as to Future Act*, 19 A.L.R. 4th 959 (1983) (collecting cases showing that a growing number of jurisdictions criminalize this behavior, while others have continued to treat this act as a civil violation). The fear in criminalizing this type of behavior is that a jurisdiction "blur[s] the boundary between acceptable and criminal conduct." John Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 8 (2010); Helen Gunnarsson, *Fraudulent Misrepresentation Tort Limited to Business*, 96 ILL. B.J. 282 (2008) (noting that in Illinois, the tort of fraudulent misrepresentation has been traditionally limited to the business setting, whereas the same type of fraudulent misrepresentation may constitute criminal conduct in a non-business setting). In fact, under common law, this type of false promise was never considered criminal, and even the Model Penal Code cautions that commercial transactions involving false promises may not merit criminal punishment. 3 SUBST. CRIM. L. § 19.7 (2d ed. 2010) (noting that the traditional view was that fraudulent promises were not criminalized but that the modern view has moved in the direction of criminalizing these acts); Diamond, *supra*, at 7–8; Arthur Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 967–68 (1953) (noting that American courts generally have not criminalized the taking of property by false promises). These concerns do not exist with larceny as articulated in Scenario (1), which is universally classified as a crime without reservation. *See, e.g.*, MODEL PENAL CODE § 223.2; 3 SUBST. CRIM. L. § 19.2 (2d ed. 2010). Given this state of affairs, this Article is useful in explaining why these two acts (larceny vs. fraudulent inducement) trigger such different reactions and treatment. That said, this Article focuses on comparing why certain conduct that causes the same harm as a crime would only receive civil sanctions. This limitation would exclude fraudulent inducement if it receives criminal punishment. *See infra* Part II.C. So, this Article makes the reasonable assumption that such conduct would not receive criminal punishment.

51. *See, e.g.*, Great W. Sav. Bank v. George Easley Co., 778 P.2d 569, 580 (Alaska 1989); RESTATEMENT (SECOND) OF TORTS § 908 (1979).

While fraudulent inducement may be classified as a distinct intentional tort,[52] it is better understood as arising from a contractual relationship.[53] By definition, it requires voluntary action by both parties—the person must make a false representation and the other party must rely on it to her detriment.[54] Most cases of fraudulent inducement arise in contract-type settings, such as buying or selling goods.[55] This type of reliance is not present in the normal negligence tort, such as Scenario (2). Here, the perpetrator simply failed to use the appropriate duty of care.

Scenario (3') will constitute the same set of facts and resulting breach as Scenario (3) articulated above. Only this time, the perpetrator falsely represented an intention to pay the money during the formation of the contract. The victim has the option to bring a civil suit against this person. But this remedy—applicable to Scenarios (3) and (3')—begs the same question. Why do both of these types of common law breaches only receive civil liability? Again, the harm—loss of the computer—remains the same as in the criminal act. And just like the criminal, the perpetrators in Scenarios (3) and (3') intentionally deprived the victim of this property. With fraudulent inducement, the perpetrator actually deceived you to give her your computer without ever intending to pay the money.

C. The Public/Private Distinction

The simplest and probably most widely known explanation for the criminal/civil divide—though the literature focuses only on torts and

52. *See Formosa Plastics Corp. USA*, 960 S.W.2d at 47 (noting that fraudulent inducement is distinct from the contract itself); RESTATEMENT (SECOND) OF TORTS § 525 (1977).

53. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981); RESTATEMENT (SECOND) OF TORTS § 525 (1977) (citing contract-type cases where fraudulent inducement may apply); Frank Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 84 (1997) (recognizing the relationship between tort and contract in cases of fraudulent misrepresentation and noting a "tort would arise out of the contractual setting when an act of inducing or breaching the contractual agreement gives rise to a separate and independent cause of action in tort").

54. *See Formosa Plastics Corp. USA*, 960 S.W.2d at 47 (describing elements of fraudulent inducement); RESTATEMENT OF CONTRACTS (SECOND) chs. 3–4 (1981); RESTATEMENT (SECOND) OF TORTS § 525 (1977).

55. *See* RESTATEMENT (SECOND) OF TORTS §§ 525, 549 (1977).

crimes—relies on the distinction between an injury to society and an injury to the individual.[56] This private/public distinction dates back to at least Blackstone, who defines a tort as a "private wrong[] . . . of the civil rights which belong to individuals, considered merely as individuals," whereas a crime represents a "public wrong[] or . . . a breach and violation of the public rights and duties, due to the whole community . . . in it's [sic] social aggregate capacity."[57] Scholars have elaborated on this rudimentary distinction in an effort to distinguish these two types of breaches and explain why only crimes trigger criminal punishment.[58] But, it is not clear how merely appealing to the terms "private wrong" and "public wrong" does the trick. More is required.[59] Scholars have pointed out that public harms are usually just private wrongs writ large.[60] For example, a person's "private interest in the enforcement of a contract can also be described as the collective, public interest in the security of transactions."[61] Another scholar highlights the same problem by arguing that society cares not just about preventing crimes; it also cares about the fulfillment of contracts and the avoidance of traffic accidents.[62]

Merely relying on the terms "public wrong" and "private wrong" would be especially unpersuasive with the Scenarios articulated above. Here, the harm is equal. In what way does Scenario (1) alone involve a public wrong, thus warranting criminal punishment? In all three Scenarios, the victim is wronged in the same way—the loss of

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56. *See generally* 1 SUBST. CRIM. L. § 19.5 (2d ed. 2010).

57. 4 BLACKSTONE, *supra* note 45, at *5; Coffee, *supra* note 10, at 221.

58. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 60 (1974) (explaining the difference by appealing to the notion that crimes create public fear in a way that torts do not). S*ee generally* George Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347 (1996) (focusing on notion of dominance in explaining the difference between the public wrong of a criminal act and the private wrong of a tort); Lamond, *supra* note 16, at 619–20 (using the public/private divide to suggest that what distinguishes crimes from torts or contract breaches is the fact that only crimes are prosecuted by the state).

59. *See* Coffee, *supra* note 10, at 221; 3 ROSCOE POUND, JURISPRUDENCE 23–24, 328–30 (1959). For a critique of this position, see Robert W. Drane & David J. Neal, *On Moral Justification for the Tort/Crime Distinction*, 68 CALIF. L. REV. 398, 402–03 (1980).

60. *See* Coffee, *supra* note 10, at 221; Pound, *supra* note 59, at 23–24, 328–30.

61. Coffee, *supra* note 10, at 221.

62. *See id.*; Hart, *supra* note 8, at 403.

the value of the computer. It is not clear what makes the crime a "public" offense and the tort and contract breach "private" offenses. It will not do to simply say that only crimes are prosecuted by the state, and thus, are public in nature. This is almost tautological. More importantly, we still need an explanation as to why crimes receive criminal punishment, whereas contract and tort breaches only receive monetary damages. This Article focuses on two models used to explain this criminal/civil divide—the economic and moral-based models.[63]

II. THE ECONOMIC MODEL AND THE EFFICIENCY-DETERRENCE RELATIONSHIP

The economic-based model for distinguishing between civil and criminal liability has a long and developed history.[64] This Article focuses on three representative theories from Richard Posner, Guido Calabresi/A. Douglas Melamed, and Steven Shavell.

Richard Posner provides one of the earlier and more famous economic models.[65] He essentially relies on the efficiency of voluntary transactions over involuntary transactions to explain the distinction between criminal punishment and civil or monetary sanctions.[66] His argument is based on two propositions: First, the

63. These theories are not the only ones. *See, e.g.*, Dau-Schmidt, *supra* note 8; Fletcher, *supra* note 8; Gruber, *supra* note 40; Klevorick, *supra* note 8.

64. Gary Becker probably provides one of the earliest comprehensive accounts of an economic explanation for criminal punishment. *See* Gary Becker, *Crime and Punishment*: *An Economic Approach*, 76 J. POL. ECON. 169 (1968). His basic argument is that a breach is classified as a crime because it is harder to catch criminals and not all criminals will be caught; so, the penalty imposed will have to exceed actual damages (i.e., compensatory damages). *Id.* at 191–92. He argues that imprisonment is used because not all individuals would be able to effectively compensate victims if the punishment were monetary damages alone. *Id.* at 196. Other scholars have further developed this economic approach to explaining the criminal/civil distinction. *See* Calabresi & Melamed, *supra* note 8; Dau-Schmidt, *supra* note 8; Klevorick, *supra* note 8; Posner, *supra* note 8; Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

65. Posner, *supra* note 8.

66. Posner also applies economic principles to explain the varying kinds of criminal punishment. *Id.* at 1214–25. Why, for instance, does first-degree murder receive greater punishment than second-degree murder or manslaughter? Posner's explanation focuses on the probability of apprehension in each respective case. *Id.* at 1222–23. Posner, in fact, provides intra-economic based analyses for all three common law breaches, as well as other legal breaches. *See generally* POSNER, *supra* note 13.

major function of criminal punishment is to prevent individuals "from bypassing the system of voluntary, compensated exchange"—the marketplace—for the less efficient "forced exchange" exemplified by the criminal act;[67] second, tort law with its privately enforced suits for monetary damages cannot effectively deter this kind of bypassing.[68]

As to the first proposition, Posner argues that crimes generally consist of inefficient, forced transfers intended to bypass the voluntary market of exchange.[69] He uses the example of coveting a neighbor's car.[70] He contends that it is more efficient to negotiate with the neighbor for the car than simply taking it.[71] Stealing the car cannot improve the allocation of resources.[72] It cannot "move resources from a less to a more valuable employment" because the person taking the car is not willing to pay an agreed upon price.[73] Moreover, if the perpetrator is allowed to take the car, she will

67. Posner, *supra* note 8, at 1195.

68. *Id.*

69. Posner, *supra* note 8, at 1196. Posner finds "acquisitive crimes—such as burglary, robbery, fraud (false pretenses), embezzlement, extortion (by threat of violence), most kidnapping, some murder, some assault and some rape" as clear examples of forced exchanges. *Id.* He recognizes that some crimes might be considered "crimes of passion," and so they do not have—at least ostensibly—anything to do with bypassing the marketplace. *Id.* at 1198. He cites the example of killing someone because you hate them, instead of because you want their money, or someone raping an individual because this person takes pleasure in this activity. *Id.* at 1197–98. Posner contends that these perpetrators can be seen as bypassing the "implicit market" of friendship, love, or consensual sex. *Id.* at 1197, 1199; *see also* GARY BECKER, A TREATISE ON THE FAMILY (1981) (discussing the economics of familial relationships). *But see* Gil Lahav, *A Principle of Justified Promise-Breaking and Its Application to Contract Law*, 57 N.Y.U. ANN. SURV. AM. L. 163, 183–86 (discussing how some scholars consider certain instances of theft to constitute efficient behavior).

70. Posner, *supra* note 8, at 1196.

71. *Id.*

72. *Id.*

73. *Id.* at 1195. It is important to note that this notion of efficiency is not a simple utilitarian calculation. *See* Markovitz, *supra* note 14, at 1332 n.13 (noting that the efficiency calculus works differently than a straightforward utilitarian calculus); POSNER, *supra* note 13, § 1.2. Posner, in fact, recognizes that stealing the car may "confer more utility (pleasure, satisfaction)" on the perpetrator than the victim. Posner, *supra* note 8, at 1196 n.9. But, what matters is the economic value, which is "measured by willingness to pay for what is not yours already, or willingness to accept payment for what is yours." *Id.*; *see also* Fred McChesney, *Desperately Shunning Science*, 71 B.U. L. REV. 281, 283–85 (1991) (explaining that under the economic model, crime has no net social usefulness and eradication is desirable); Stephen Marks, *Utility and Community, Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 215–16 (1996) (noting that some scholars include the benefit to the criminal when assessing overall utility, while others do not take this benefit into account, and positing a theory that accounts for both variations).

expend resources to do so, which will increase the victim's incentive to expend resources to prevent the car from being taken.[74] This activity will increase net expenditures, with no social benefit.[75] So, stealing is inefficient, and it is in society's interest to deter it.[76]

But, if the point of criminal law is to discourage this inefficient behavior, Posner rightly asks why tort law is not enough of a deterrent.[77] His answer focuses on the *in*effectiveness of pricing crimes. He explains that while affluent members of society may be kept in line with only monetary sanctions, non-affluent members of society will not be sufficiently deterred.[78] They typically will not have the money to pay. This is particularly true for crimes of violence such as murder and rape, which would be priced very high.[79] Criminal punishment, and specifically imprisonment, would be the optimal type of sanction.[80]

Posner goes on to say that efficiency considerations militate against imposing criminal sanctions for the typical tort.[81] Posner finds that if we criminalize torts, this would needlessly deter economically valuable or efficient behavior.[82] He uses the case of carelessly injuring someone in an automobile accident.[83] If the penalty were imprisonment, people would drive too slowly or not

74. Posner, *supra* note 8, at 1196.

75. *Id.*

76. *Id.* at 1196. Posner applies the same efficiency explanation to strict liability crimes, such as statutory rape. *Id.* at 1221–22. He seems to claim that this conduct also represents an attempt to bypass the voluntary market of exchange—in this case, voluntary sexual acts with adults. *Id.* at 1199. Strict liability works here because society is not concerned about curtailing lawful activity on the border—intercourse with young, but age appropriate, individuals. *Id.* at 1222. Posner's model also strives to explain inchoate crimes. *Id.* at 1217–20. Punishing criminal attempts not only deters the individual who was unsuccessful from trying again, but also other individuals who may be considering bypassing the voluntary market of exchange. *Id.* at 1217–18.

77. *Id.* at 1201.

78. *Id.* at 1204–05.

79. *Id.* at 1202 (recognizing that setting the monetary amount for such crimes would not be easy).

80. Posner concedes that this notion suggests "criminal law is designed primarily for the nonaffluent; the affluent are kept in line, for the most part, by tort law." Posner, *supra* note 8, at 1204–05. He finds nothing problematic with this conclusion given that efficiency may dictate differing sanctions depending on one's wealth. *Id.* Posner also recognizes that criminal punishment may include fines, which can also deter bypassing the market of voluntary transaction. *Id.* at 1206–07.

81. *Id.* at 1204–05.

82. *Id.* at 1206.

83. *Id.*

all.[84] Because driving is an economically valuable activity, we do not want to discourage this conduct.[85] Compensation, instead of criminal punishment, represents the optimal sanction.[86]

Guido Calabresi and Douglas Melamed present a different economic-based model.[87] They begin by articulating the concept of an "entitlement," which represents something of value, such as a good or service.[88] Society uses various rules to protect or otherwise compensate for such entitlements.[89] For Calabresi and Melamed, the distinction between criminal sanctions and tort sanctions rests on the distinction between property and liability rules.[90] A property rule protects an entitlement so that someone who wishes to acquire that entitlement must buy it from the owner in a voluntary transaction.[91] For example, if someone wants to buy another person's car, the car being the entitlement, she must negotiate with the buyer for the price to be paid. This generally represents the most efficient mechanism for the transfer of goods.[92] It improves the allocation of resources without making anyone worse off.[93] Calabresi and Melamed contend that criminal sanctions are used to deter individuals from undermining an entitlement protected by such a property rule.[94]

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84. *Id.*

85. This idea also generally explains the case of intentional torts where the underlying conduct is not subject to any criminal sanctions. Like negligent behavior, this conduct would have some economic value. Take the case of defamation. The underlying conduct—writing and talking about individuals—may serve some economic value, so we would not want to criminalize cases of defamation. Individuals would be afraid to speak their mind. The optimal deterrence would be monetary damages, which may include punitive damages, depending on the nature of the tort violation. Posner, *supra* note 8, at 1204.

86. *Id.* Posner relies on the famous Hand Formula to determine what constitutes negligence or a violation of the standard duty of care. *Id.*

87. *See generally* Calabresi & Melamed, *supra* note 8.

88. *Id.* at 1090.

89. Naturally, society must initially determine to whom the entitlement belongs. It must seek to decide how this entitlement will be protected or whether the individual can sell or trade that entitlement. *Id.* at 1090, 1092.

90. Calabresi and Melamed also explain that certain entitlements are inalienable, e.g., your freedom to be sold into slavery, meaning that they cannot be transferred or otherwise bargained away. *Id.* at 1092–93, 1112.

91. *Id.* at 1092.

92. *Id.* at 1093–94, 1110.

93. *See* Calabresi & Melamed, *supra* note 8, at 1095. Calabresi and Melamed explicitly rely on Pareto efficiency to describe this type of behavior. This type of transaction improves the condition of one person without making another worse off. *Id.*

94. *Id.* at 1124–25.

On the other hand, an entitlement is protected by a liability rule when someone destroys or takes an entitlement and then must pay for it after the fact based on some objectively determined value.[95] Take the case of an individual who negligently causes a car accident in which a victim suffers physical harm. According to Calabresi and Melamed, the most efficient way to deal with this tort would be to assess monetary damages after the fact, i.e. employ a liability rule.[96] Using a property rule instead would not be an efficient means to deal with this kind of negligent injury. If victims were given a property entitlement to being accidentally injured, we would have to require all who engage in such activities that may cause injury, e.g., driving, to negotiate before the accident.[97] Under what terms would a person negotiate the right not to negligently injure another? How much would the right to accidentally "knock off an arm or a leg" cost?[98] These kinds of pre-accident negotiations "would be . . . expensive [and] often prohibitively so."[99] Therefore, it is more cost effective to use a liability rule when it comes to these kinds of torts.[100]

The case of crimes is different. Take again the example of a person stealing someone's car. One might rightly ask, is it not more efficient to simply charge the thief for the value of the car? In other words, why not use a liability rule here similar to the case of a negligent tort?[101] Here the efficiency considerations militate against liability rules and in favor of property rules. Calabresi and Melamed cite two problems with using liability rules.[102] First, there is the expense

95. *Id.* at 1092.
96. *Id.* at 1108–09.
97. *Id.* at 1094.
98. Calabresi & Melamed, *supra* note 8, at 1108.
99. *Id.* at 1108–09.
100. Calabresi and Melamed also argue that for certain intentional torts such as nuisance, a liability rule—as opposed to a property rule—may be the more efficient rule for protecting the relevant entitlement. In short, it may be harder to determine *ex ante* which party is the cheapest cost avoider, and so imposing a rule that compensates after the fact—based on an objective valuation—provides the most efficient way to deal with this kind of tort. *Id.* at 1119. Calabresi and Melamed also explain why punitive damages may be used for intentional torts. They argue that this additional compensation—over and above compensatory damages—represents the tortfeasor's knowledge, contrasted with the case of negligence, of the harm caused. *Id.* at 1126 n.71.
101. *Id.* at 1124.
102. *Id.* at 1125.

involved in arriving at a collectively objective valuation of the car.[103] More importantly, any such valuation would merely be an approximate value determined *after the fact*, not something negotiated by the owner and the perpetrator beforehand.[104] So, there is no guarantee that this kind of transfer—via liability rule—would be an efficient transfer, i.e. improve the allocation of resources without making someone worse off. The thief may value the car more than the damages she must pay.[105] This twofold argument is even stronger with bodily integrity. For example, Calabresi and Melamed explain that society cannot presume to collectively and objectively value the cost of a rape to the victim compared to the benefit of the rapist.[106]

This consequently explains the reason for criminal punishment. Some "kicker," e.g., imprisonment, must be added to prevent future attempts at undermining property rules, which represent the most efficient way of protecting the relevant entitlements.[107]

Steven Shavell presents an economic model that relies on five factors to explain why crimes receive nonmonetary punishment, like imprisonment, but torts only receive monetary sanctions.[108] He begins with the relatively uncontroversial assumption that nonmonetary sanctions are overall more costly than monetary sanctions.[109] Based on the additional cost, the former should be employed only where monetary sanctions cannot adequately deter the conduct.[110]

He then turns to the five factors used to calculate the appropriate level of deterrence.[111] The first three factors generally bear on a

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103. *Id.*
104. Calabresi & Melamed, *supra* note 8, at 1125.
105. *Id.*
106. *Id.*
107. *Id.* at 1126. This explanation would apply to both completed and attempted criminal acts.
108. Shavell, *supra* note 64, at 1236–37.
109. *Id.* at 1235. Shavell contends that with monetary sanctions, the disutility the party must pay is roughly balanced by the utility to the party who receives the payment. This balance nets little social costs. However, with nonmonetary sanctions, the disutility to the punished party is not balanced in any automatic way by some utility to another party. Moreover, nonmonetary sanctions require additional social costs related to apprehending individuals and operating prisons. *Id.* at 1235–36.
110. *Id.* at 1236.
111. *Id.* at 1236–37.

party's ability to pay.[112] They include the size of a party's assets, the probability that a party will escape sanctions, and the benefits a party will enjoy from the act.[113] The other two factors include "the probability that an act will cause harm and the magnitude of the harm."[114]

Shavell explains that with most crimes, these five factors suggest that monetary sanctions would be inadequate to deter the behavior.[115] Similar to Posner, he finds that criminal sanctions work best with the nonaffluent. As to the first factor, Shavell argues that because "criminals as a class seem to have relatively little wealth,"[116] it is unlikely that monetary sanctions would sufficiently deter their criminal behavior.[117] Given the fact that many crimes are not always punished and the defendant is not always caught, Shavell finds that the second factor also militates in favor of nonmonetary sanctions.[118] Specifically, a potential criminal—who probably does not have a large number of his own assets—would gain a lot from his crime, suggesting a monetary sanction would not adequately deter the perpetrator. Because a criminal purposefully commits a crime, the probability of success is high, or at least higher, than if she did not intend the harm.[119] For the same reason, Shavell suggests that the magnitude of the harm caused would also generally be high.[120] In total, these five factors suggest that "something more than monetary sanctions must be employed to achieve an adequate degree of deterrence in the core area of crimes."[121]

Shavell goes on to explain why these same five factors favor using the cheaper method of monetary sanctions for the typical tort breach

112. *Id.*
113. *Id.* at 1236–37.
114. Shavell, *supra* note 64, at 1237.
115. *Id.* at 1237–38.
116. Shavell explains that "a primary motivation for some crimes, particularly theft, robbery, and burglary, is presumably that the [criminals] have little money of their own." *Id.* at 1238.
117. Shavell recognizes that wealthier individuals may also commit crimes, and his argument is based on general tendencies. *Id.* at 1238 n.25.
118. *Id.* at 1238.
119. *Id.* at 1239.
120. He cites to murder, rape, and theft as examples of crimes that create a high amount of harm. Shavell, *supra* note 64, at 1239.
121. *Id.*

in which someone negligently causes harm.[122] As to the first factor, he argues that it is more likely that the assets of the average tortfeasor are higher than the average criminal;[123] so, monetary sanctions can work as an effective deterrent.[124] As to the second, a tortfeasor is less likely to escape sanctions. Since she did not intend the harm, she is less likely to avoid or to try to avoid identification.[125] Third, the benefits derived from a tort breach seem to be lower than a crime. The tortfeasor did not intend to commit the crime, so the only benefit gained would be the costs avoided in taking the appropriate safety measures.[126] Finally, while the quantity of harm may be large (e.g., negligently causing someone's death by car accident), the likelihood of occurrence is low.[127] Again, this is because the person does not plan to commit the tort, so the likelihood of success would be less than if the person intended to cause the harm, as with the typical crime.[128]

A. Efficiency/Deterrence: Crime vs. Tort Breach

Working from the above theories, the economic model can be reduced to two interconnected principles: deterrence and efficiency. The former is self-explanatory. Deterrence means preventing or limiting certain kinds of behavior. Criminal punishment would be more severe, or serve a greater deterrent role, than monetary sanctions.[129] Efficient behavior represents economically valuable

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122. *Id.*

123. He specifically notes the large assets of corporate entities. *Id.*

124. *Id.* at 1240. Posner makes a similar point by arguing that "the affluent are kept in line, for the most part, by tort law." Posner, *supra* note 8, at 1205.

125. Shavell explains that if the tortfeasor tries "to avoid identification (as when a driver who strikes a pedestrian leaves the scene of the accident), his act may be converted into a crime." Shavell, *supra* note 64, at 1239.

126. *Id.* at 1239–40.

127. *Id.* at 1240.

128. Shavell similarly finds that intentional torts, like defamation, are best deterred by monetary sanctions because the magnitude of the harm is much lower. *Id.*

129. Calabresi and Melamed say that criminal punishment, in lieu of monetary sanctions, serves as the "kicker" to prevent future attempts at converting property rules. Calabresi & Melamed, *supra* note 8, at 1126. The implication here is that criminal punishment is a greater deterrent. Posner takes a similar position in acknowledging that criminal punishment, instead of monetary sanctions, would deter too much if used for tortious behavior. *See generally* Posner, *supra* note 8. Posner also talks about the stigma associated with criminal liability that is not present with tort damages. *Id.* at 1205. Again, the

behavior. It is behavior that improves the allocation of resources without making another person worse off.[130]

Under the economic model, nonmonetary sanctions, such as imprisonment, are considered the optimal deterrence for crimes, whereas monetary damages are optimal for tort breaches. These respective sanctions suggest a different level of efficiency for torts and crimes. The underlying activity in a tort breach is more efficient, so it requires less deterrence. In contrast, the activity underlying a crime is less efficient, so it requires greater deterrence.

Posner focuses on over-deterrence.[131] For him, saddling tort violations with nonmonetary sanctions would curtail valuable economic activity. The calculus works the other way for crimes. Posner finds that crimes do not improve the allocation of resources. Therefore, it is important that this inefficient behavior is curtailed by more severe sanctions, such as criminal punishment, especially because most offenders will not be able to pay.

Calabresi/Melamed and Shavell do not explicitly discuss the varying efficiencies of torts and crimes. Still, their respective conclusions on optimal deterrence suggest that torts represent less inefficient, or more efficient, behavior than crimes. Calabresi and Melamed explain that merely pricing criminal behavior after the fact would lead to greater inefficiency; more severe deterrence is necessary.[132] This makes sense, since a crime, according to Calabresi and Melamed, constitutes an attempt to undermine a property rule or an efficient market transaction. On the other hand, liability rules that price the conduct after the fact can handle tort breaches without any

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implication is that imprisonment is a more severe form of sanction than monetary damages, and thus, serves as a greater deterrent. Shavell does not rely on deterrence but focuses instead on the greater costs associated with imposing criminal punishment over civil sanctions. But, the implication here is that criminal punishment is the more severe sanction. *See* Shavell, *supra* note 64, at 1235.

130. *See* Calabresi & Melamed, *supra* note 8, at 1094. Calabresi and Melamed say, "[m]ost versions of Pareto optimality are based on the premise that individuals know best what is best for them." *Id.* at 1094 n.10. Posner seems to adopt a similar definition by focusing on a market transaction as the epitome of an efficient transaction where an individual can negotiate an acceptable price for a particular good or service. *See* Posner, *supra* note 8, at 1195. Shavell does not focus on efficiency and, instead, relies on principles of utility in reaching his conclusions. *See* Shavell, *supra* note 64, at 1236–37. Still, one can infer this economic principle from his arguments.

131. *See generally* Posner, *supra* note 8.

132. Calabresi & Melamed, *supra* note 8, at 1125–26.

need for some additional "kicker" as in the criminal context. The inference here is that criminal conduct involves less efficient or economically valuable behavior than tortious conduct. Shavell reasons that the tort breaches are less likely to result in harm, confer less utility to the perpetrator, and are less likely to result in flight than are crimes.[133] These factors lead him to conclude that cheaper monetary sanctions are sufficient for torts, and costly nonmonetary sanctions must be used for crimes.[134] The inference here is that tortious behavior overall creates less disutility—thus, constitutes less inefficient conduct—than criminal behavior.

This efficiency/deterrence relationship is best understood using Scenarios (1) and (2). The underlying behavior in Scenario (2) is economically good for society. We want to encourage individuals to frequent coffee shops and buy coffee. This type of consumer activity improves the allocation of resources—transfer of goods and money—without making another worse off—both parties voluntarily transacted. If Scenario (2) were punished by nonmonetary sanctions, such as imprisonment, fewer individuals would engage in this behavior. People would be afraid that they might negligently knock over a computer when entering the shop. They may also take additional precautions that would be considered inefficient (e.g., only frequenting a coffee shop if no one inside has a computer).[135]

The same economic-based argument applies to other negligent tort breaches. For instance, if we punish negligent automobile accidents with imprisonment, this would curtail driving—an activity that also has positive economic value. It generally facilitates the allocation of resources without harming others. Imposing criminal punishment may also prompt drivers to take additional inefficient precautions

133. Shavell, *supra* note 64, at 1239–40.

134. *Id.* at 1240. In all fairness, this Article's discussion of efficiency and deterrence more closely tracks Posner's model than either Calabresi/Melamed's or Shavell's models. That said, to the extent Calabresi and Shavell would not endorse this Article's efficiency/deterrence analysis, their models would still conclude that the optimal sanction for contract breaches would be monetary damages. For Calabresi, contract formation stands as the quintessential property rule. Shavell's focus on the size a party's assets and her ability to escape sanction would suggest that a contract breacher would be sufficiently deterred by monetary sanctions.

135. *See* Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 59 (2005) (punishing torts may encourage inefficient additional precautions).

(e.g., driving very slowly). The net effect here is the increase of inefficient activity.

Some kind of sanction is still needed. Without any, individuals may be more likely to carelessly destroy computers or cause automobile accidents—i.e., there would be an increase in economically inefficient behavior.[136] So, the optimal deterrence for Scenario (2) would be monetary damages. This sanction will make sure customers and drivers use the appropriate standard of care, without chilling economically valuable behavior or encouraging additional inefficient precautions.

Scenario (1) works differently. This act of stealing a computer is inefficient and has no underlying economic value.[137] It involuntarily denies a person their property and cannot improve the allocation of resources without making someone else worse off. This suggests a need for greater deterrence than what is required for Scenario (2). If we simply priced this type of criminal behavior, potential criminals—who generally are not affluent—would not be discouraged from taking computers knowing that they would simply have to compensate the victim for the loss. Furthermore, putative victims would spend greater resources trying to protect their computers. So, the overall economic cost of pricing crimes would be high. More severe deterrence is necessary. Thus, criminal punishment serves as the optimal deterrence. This type of sanction discourages individuals from stealing computers. Over-deterrence or chilling efficient behavior is not a consideration—unlike with tort breaches—since this activity has no economic value.

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136. It is important to distinguish carelessly driving a car from driving a car. Only the latter would be economically valuable or efficient.

137. *See infra* Part II and accompanying notes. This notion of "economic value" or "efficiency" is not a simple utilitarian calculus, and thus, does not include the potentially beneficial consequences of a particular breach. It may turn out, for instance, that by stealing the computer, the perpetrator in Scenario (1) is able to create a computer program that revolutionizes the transfer of assets in a way that cuts costs dramatically. One might argue that this crime creates more good than harm. This overall utilitarian calculus is not relevant. The economic model is concerned with the nature of the breach itself and whether it involves efficient behavior. This instance of stealing would still constitute inefficient behavior, because the perpetrator took the computer without permission. To the extent a utilitarian calculus should be used here, it would not matter because this project seeks to understand these Scenarios with all else being equal. So, any positive result would equally apply to all Scenarios, and thus, would not serve as a distinguishing factor.

While the criminal must be in the coffee shop to steal the computer, this is not essential to the criminal act in the same way as negligently destroying the computer. The tortfeasor did not intend to destroy the computer when the individual frequented the coffee shop. So, it is hard to separate the tort—negligently destroying the computer—from the economically valuable activity—frequenting the coffee shop. Because the criminal knew what she was doing, she could have been in the coffee shop and not taken the computer (i.e. there is no problem with separating the crime from the economically valuable activity). The economic model thus seeks to prevent *all* instances of stealing a computer.

Diagram A captures the inverse relationship between optimal deterrence and underlying efficiency.

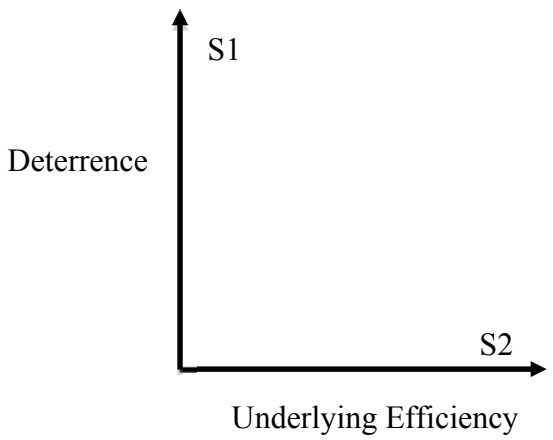

Diagram A

The X-axis represents increasing underlying efficiency. As one moves left to right, the efficiency or economic value of the activity increases. The Y-axis represents increasing deterrence. Monetary sanctions would be considered low deterrence, whereas nonmonetary sanctions, such as imprisonment, would be considered high deterrence. The term "S1" represents Scenario (1), or the crime, and falls on the upper left. The term "S2" represents Scenario (2), or the tort breach, and falls on the lower right.

Deterrence and underlying efficiency are inversely related. The lower the efficiency—and the lower the economic value of the activity—the more deterrence is required. This makes sense from an economic point of view, where the goal is to increase overall efficiency. Because stealing the computer (S1) has low underlying efficiency, a greater level of deterrence is desired. This would decrease future crimes. Conversely, because negligently destroying the computer (S2) has higher underlying efficiency, lower deterrence is desired to ensure that the underlying activity is not completely curtailed.

B. The Efficiency/Deterrence of a Contract Breach

Proponents of the economic model do not explicitly discuss contract breaches when analyzing the criminal/civil divide.[138] However, there is a wealth of scholarship on how economics explain the making and keeping of contracts, most of which is not relevant here.[139] These scholars basically argue that contract making and a regime to enforce these agreements promotes overall efficiency.[140] This camp also finds that, sometimes, it is economically desirable to breach a contract.[141] The doctrine of "efficient breach" encourages a person to breach a contract if she can compensate the other party and be better off than if she did not fully perform.[142] This analysis, by and large, centers on the internal mechanics of contract law.[143] This

138. Calabresi and Melamed make references to contracts as part of their discussion of property rules but do not elaborate further on why these breaches receive civil sanctions. *See* Calabresi & Melamed, *supra* note 8, at 1106.

139. *See, e.g.*, Alan Schwartz & Robert Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003).

140. *See* Schwartz, *supra* note 139, at 556; POSNER, *supra* note 13, § 4.10; Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 291 (1970). ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1 (1979) (noting that law and economics "may be able to tell us why people make contracts and how contract law can facilitate the operation of markets").

141. RICHARD POSNER, *supra* note 13, § 4.10.

142. *See supra* note 13; *see also* Kraus, *supra* note 14, at 1649 n.6 (citing scholars who support the efficient breach principle).

143. There are certainly critiques of this economic analysis; they typically focus on the moral aspect of keeping promises. *See, e.g.*, Markovits, *supra* note 14. S*ee generally* Frank Menetrez, *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, 47 UCLA L. REV. 859 (2000).

Article's focus, however, remains comparative.[144] Still, this basic principle of efficiency that also underlies the economic model can explain why contract breaches are treated like tort breaches and only receive civil sanctions.

Compare Scenarios (1) and (3). The underlying efficiencies of the two breaches are quite different. The forced transaction of Scenario (1) has no overall economic value, so society seeks to deter it completely. On the other hand, the underlying conduct in Scenario (3) was the formation of a contract, which has a high degree of economic value. A number of things typically go into this kind of transaction. Parties weigh their options and research potential buyers or sellers. Because both parties negotiate the terms of the deal and arrive at a mutually acceptable price, this transaction improves the allocation of resources without making another worse off.

This free market transaction stands as the epitome of efficient market behavior. Indeed, this kind of contract formation typifies Posner's idea of market transaction and Calabresi and Melamed's property rule. Posner defines "market" as the system of "voluntary, compensated exchange."[145] Calabresi and Melamed's concept of a "property rule" entails the sale of an entitlement "at the price at which [the seller] subjectively values the property."[146] These definitions are just another way of describing the exchange of goods or services via contract.

The high level of efficiency in contract formation requires low deterrence when sanctioning a contract breach.[147] The economic model seeks to encourage this kind of behavior just like the underlying conduct in a tort.[148] Saddling contract breaches with criminal sanctions would chill economically valuable behavior.[149]

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144. Implicit in the notion of advocating for "efficient breaches" is that such breaches do not receive criminal punishment. Otherwise, it would not make sense to call them efficient. However, this notion accepts—without explaining why—such breaches, compared with their criminal counterparts, do not receive criminal punishment.

145. *See* Posner, *supra* note 8, at 1195.

146. *See* Calabresi & Melamed, *supra* note 8, at 1105.

147. *See* Fellmeth, *supra* note 135, at 58–59.

148. *See id.* at 54.

149. *See id.* at 55.

Individuals would be discouraged from making contracts in fear that any resulting breach would land them in jail.[150] The number of efficient market transactions would naturally decrease. This may explain why contract breaches also generally do not receive punitive damages.[151] Like criminal punishment, this kind of heightened civil sanction could deter individuals from engaging in contract formation. This result is not economically desirable. Diagram B captures the efficiency/deterrence relationship of contract breaches relative to the other common law breaches.

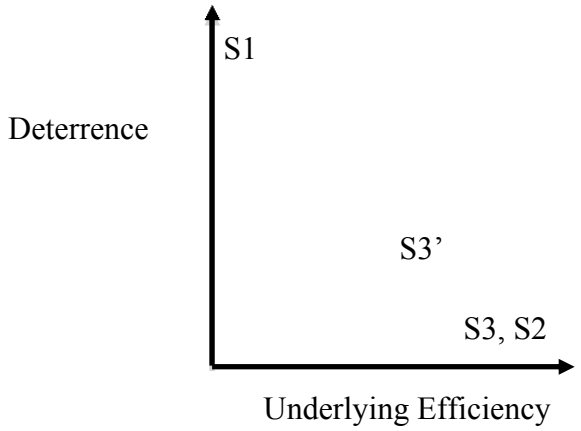

Diagram B

Diagram B incorporates Diagram A with the addition of the contract breaches. Again, the X-axis represents increasing underlying efficiency, and the Y-axis represents increasing deterrence—from monetary sanctions on the low end to criminal punishment on the high end. The term "S3" represents Scenario (3), or the contract breach, and "S3'" represents Scenario (3'), or the case of fraudulent

150. *Id.*

151. *See id.* 58–59 (explaining that contract breaches generally do not receive punitive damages because of the economic interest in not deterring efficient breaches); *infra* note 272. *But see* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999) (arguing that courts should impose punitive damages for all contract breaches, including efficient breaches).

inducement. S3 and S2 fall in the same location.[152] Both of these breaches represent efficient underlying behavior that requires low deterrence.

It may seem odd that these breaches (S2 and S3) receive the same treatment even though one is intentional-based conduct. This concept of intent certainly affects the analysis under the moral-based model (*see infra* Part IV). But the economic model relies on efficiency as the governing principle. Motives or intent do not directly play a role.[153] What matters is to what extent the underlying conduct is considered efficient. Here, the underlying behavior in a contract breach or tort is more efficient than the underlying behavior in a crime, which explains why only crimes receive criminal punishment.

C. The Efficiency/Deterrence of Fraudulent Inducement

Diagram B places Scenario (3') to the left of Scenario (3). The former represents behavior that can be considered less efficient than a regular contract breach (S3), but still more efficient than a crime (S1). Breaches based on fraudulent inducement, like regular contract breaches, generally receive compensatory damages. Only an egregious instance of this type of fraud may trigger punitive damages, something ordinary contract breaches do not receive.[154] Punitive damages are defined as "damages, other than compensatory damages or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[155] The economic model can

152. This Article does not make a conclusion as to which underlying activity, tort or contract, is more efficient, which is beyond the scope of the Article. It is enough to say that both represent more efficient behavior than their criminal counterpart.

153. Intent is relevant, but only to the extent it impacts the economic calculus. For Posner, the concept of "intent" can, among other things, help identify the forced transfer that bypass the marketplace. *See* Posner, *supra* note 8, at 1221. But, it is not intent *qua* intent that is doing the work; rather, it is the fact that the individual is purposely bypassing the market, and thus, engaging in inefficient behavior. Similarly, Shavell argues that intentional conduct is more likely to cause harm than unintentional conduct. *See* Shavell, *supra* note 64, at 1239. Again, the focus is on how the intentional conduct impacts the calculus, not the mere fact that the conduct was intentional.

154. RESTATEMENT (SECOND) OF TORTS § 908 (1979).

155. *See id.*

explain this heightened civil sanction. Here too, the issue remains deterrence and underlying efficiency.[156]

The underling activity in Scenarios (3) and (3') is similar. Both involved the voluntary formation of a contract, where the parties came to a mutually acceptable price. In short, both actions represent market transactions. Thus, it is fair to say that the underlying conduct in Scenario (3') involves somewhat efficient behavior.

However, there is a crucial difference between these two breaches. The buyer in Scenario (3') made a false promise regarding the payment of $1,000. This dishonesty means that there was no true meeting of the minds. The victim was relying on an inaccurate representation when agreeing to sell the computer. At least with Scenario (3), the perpetrator initially intended to deliver the money. Therefore, it is hard to argue that Scenario (3') represents a genuine market negotiation. Because one party was not fully aware of the defendant's true intention, this transaction is less likely to allocate resources without making the other party worse off. This key difference explains why S3' is not as efficient as S3 and falls to the left of S3 in Diagram B.

Scenario (S3') still represents conduct that remains much *more* efficient than S1, where the perpetrator just took the computer.[157] The theft involved no negotiations whatsoever. There was no attempt at a meeting of the minds. For the economic model, this type of action would be the least efficient method for the transfer of goods and services. The fraudulent inducement was still part of a negotiation where the parties formed a contract. Even here, there remains some indicia of a voluntary transaction (and thus some indicia of efficiency), something that is completely absent in the criminal act.

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156. The analysis would be different if fraudulent inducement were considered a crime. *See supra* note 50. To explain why this type of action gets criminal punishment, the economic model would conclude that this conduct does not entail efficient behavior of any kind. In this way, it is very similar to the crime of larceny.

157. One might disagree with where S3' is placed relative to S3 and S1. It could be argued that S3' is not as close in efficiency to S3, so it should be placed more in the middle of Diagram B. Where along the efficiency/deterrence relationship this Scenario falls is not a concern of this Article. It is enough to say that conduct is not as efficient as S3 but more efficient than S1. That said, because only egregious instances of fraudulent inducement receive punitive damages, it makes sense that the conduct would fall closer to a regular contract breach.

The efficiency level of Scenario (3'), and its placement to the left of S3 but far to the right of S1 in Diagram B, explains the potential need for heightened deterrence in the form of punitive damages. These types of damages constitute something more than compensatory damages (reserved for regular contract breaches), but still within the confines of civil sanctions, and well below criminal punishment (reserved for crimes).[158] This is consistent with the goals of the economic model. The economic model seeks to encourage the formation of contracts but discourage inducements based on fraud. Criminalizing breaches based on fraudulent inducement may deter too much. For instance, individuals who act in good faith may still not want to enter into certain contracts for fear that they might be criminally prosecuted for fraudulent inducement should they fail to satisfy their obligation under the agreement. But mere compensation may not always be enough. It may encourage lying and deceit in contractual promises. Thus, the economic model explains why society might impose punitive damages in select egregious instances.

III. THE MORAL-BASED MODEL AND THE ROLE OF CULPABILITY

The moral-based approach takes different forms and, like the economic model, has a long history.[159] This Article focuses on three representative theories by Jerome Hall, Paul Robinson, and John Coffee.[160]

Jerome Hall provides one of the earlier moral-based accounts of the distinction between criminal and civil liability.[161] The crux of Hall's argument is that criminal behavior—in contrast to tortious

158. *Cf.* Kenneth Mann, *Punitive Civil Sanctions, The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1803–04 (1992) (noting that punitive damages stand somewhere between compensatory damages and criminal punishment).

159. The moral-based understanding of criminal law traces its roots to Medieval and Greek scholars. *See* Hall, supra note 11, at 756–60 (cataloguing the history of the various ways scholars have distinguished criminal law based on moral principles).

160. *See generally* Coffee, *supra* note 10; Hall *supra* note 11; Jerome Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967 (1943); Robinson, *supra* note 8.

161. *See generally* Hall, *supra* note 11. While Hall's analysis predates Posner and Calabresi/Melamed, it can still be seen as a critique of the economic-based approach, which focuses on deterrence.

conduct—constitutes immoral or culpable behavior.[162] He finds incomplete the arguments that simply focus on the varying utility of the sanctions imposed.[163] What is missing, according to Hall, is understanding the reason for the respective sanctions, which requires focusing on the actual behavior and its moral status.[164] This reasoning readily explains why only crimes receive criminal punishment.

Hall begins by stating that every tort and crime constitutes a "harm" and that this harm is made up of two elements: "culpable conduct" and its "effects."[165] These elements together explain why torts receive civil sanctions and only crimes receive criminal punishment. Hall argues that, by and large, crimes, but not torts, involve culpable conduct.[166] For Hall, "moral culpability" means a "value judgment" formulated in terms of "personal responsibility."[167] Simply put, society finds crimes to be morally wrong.[168] Hall relies on the notion of volitional conduct to explain this distinction.[169] A criminal perpetrator intends to cause harm, a central feature of any crime.[170] A tortfeasor, on the other hand, is merely negligent with no "intention" of causing harm.[171]

Next, Hall turns to the second element of a breach, the "effects."[172] This term simply refers to the resulting harm caused by the perpetrator's conduct. Effects work differently for crimes and torts. Actual damages are necessary for the latter but are not essential to the

162. *Id.* at 775–79.

163. *See id.* at 760–75. Hall spends a significant portion of his paper discussing the utilitarian model for explaining criminal punishment (based on deterrence) and its shortcomings. Hall, *supra* note 160, at 999.

164. Hall, *supra* note 160, at 999.

165. Hall, *supra* note 11, at 760.

166. *Id.* at 775–79.

167. *Id.* at 775.

168. Hall, *supra* note 160, at 968.

169. Hall, *supra* note 11, at 777.

170. With regard to strict liability crimes, Hall ultimately concludes that "moral culpability should remain the essence of criminal liability," and these strict liability violations should be re-evaluated. Hall, *supra* note 160, at 995–96.

171. Hall, *supra* note 11, at 778. Hall includes recklessness in his conception of "volitional conduct." *Id.* What matters is that the perpetrator had knowledge that the conduct would cause harm. *Id.* at 778–79.

172. Hall, *supra* note 160, at 967.

former.[173] A tort, in fact, can produce more damage or harm than a crime.[174] This is not problematic under Hall's model. Regardless of the quantity of harm, the fact remains that the defendant's conduct is not culpable (i.e. not intentional), thus explaining why she would not receive punishment.[175]

Hall finds that a crime also produces harm, but calls it "social harm."[176] Unlike individual damages, a crime's effect is not quantifiable, so it cannot be measured in money.[177] It represents an overall harm to society, not an individual slight.[178] Hall appeals to Blackstone's original public/private dichotomy as a starting point.[179] He notes that a tort represents a private injury that is immaterial to the public.[180] Crimes are different. They "strike at the very being of society" and represent public wrongs.[181]

Hall spends a significant amount of time explaining the contours of "social harm," the bulk of which is not relevant here.[182] The important take-away is that social harm and culpability are both integral to Hall's notion of a crime in a way that they are not with a tort breach.[183] This analysis also explains why attempts to commit crimes receive criminal punishment. Even though they do not create any individual harm, these acts still represent culpable conduct that is an affront to society, i.e., the conduct causes social harm.[184]

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173. *Id.* at 969. Richard Epstein makes a similar point by noting that an "intention to harm" plays a central role in crimes, whereas actual damages plays a central role in the case of torts. Richard Epstein, *Crime and Tort: Old Wine in Old Bottles*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 242 (John Hagel & Randy E. Barnett eds., 1977).

174. Hall, *supra* note 160, at 972.

175. *Id.* at 974.

176. *Id.* at 969.

177. *Id.* at 971.

178. *Id.*

179. Hall, *supra* note 11, at 757–58.

180. This notion explains why torts are prosecuted by individuals and not the state. *Id*

181. This difference explains why crimes are only prosecuted by the state at its discretion. *Id.*

182. Hall, *supra* note 160, at 967–79.

183. This combination of "culpability" and "social harm" also explains why intentional torts do not receive punishment. *Id.* While this conduct can be considered culpable, unlike crimes, intentional torts do not cause social harm; they only cause individual harm. *Id.* at 974–75.

184. *Id.* at 975.

Paul Robinson also presents a model based on moral considerations.[185] He does not think that the efficiency based arguments of scholars like Posner and Shavell adequately explain the distinction between tort and criminal sanctions.[186] Their focus on optimal deterrence, according to Robinson, does not capture the basic thrust of the two types of sanctions.[187] They try to rationalize a system that is fundamentally based on emotion, not necessarily intellect.[188] Robinson relies on the intuitive difference between these two sanctions to make his case. Simply put, criminal liability signals blameworthiness, whereas civil liability does not.[189]

According to Robinson, the language used to describe these sanctions reflects this view.[190] In the criminal context, we "speak of a 'crime' rather than a 'violation' or a 'breach,' and of 'punishment' rather than of 'remedy' or 'damages.'"[191] These criminal-related terms carry the stamp of moral condemnation, whereas as the civil terms do not.[192] For Robinson, this also explains why "consent generally is a defense in tort but not a defense to most crimes."[193] A plaintiff can vitiate their own right to recover damages, but a crime constitutes a wrong to society.[194] So, individual consent cannot remove criminal liability. This also explains why fines are paid to the state and not the victim.[195]

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185. Robinson, *supra* note 8, at 206.
186. *Id.* at 204–05.
187. *Id.*
188. *Id.* at 209–10. Robinson appears to suggest that a cost-benefit analysis could be used but that it would have to carefully take into account society's desire for moral condemnation. *Id.* at 212.
189. Robinson seems to imply that intentional torts, like their negligent counterparts, do not have the imprimatur of moral condemnation, and thus, only receive civil liability. *Id.* at 210 n.38. He suggests that punitive damages are most likely imposed in these cases where the harm caused is actually greater than that in a typical negligent breach. *Id.*
190. *Id.* at 205–06.
191. Robinson, *supra* note 8, at 206.
192. *Id.* Robinson cites the dictionary, which defines "criminal" as something "disgraceful" and "punishment" as retributive suffering. *Id.*
193. *Id.* at 207.
194. He distinguishes the case of a plaintiff, who may consent to discharge his right to recover damages, from the case of a suffering patient, who cannot remove criminal liability by consenting to allow her spouse to kill her. *Id.*
195. *Id.*

Robinson uses the case of a *de minimis* violation in the criminal context to bolster his point.[196] A minor violation of criminal statutory law may avoid criminal liability but is no escape for civil liability.[197] Robinson cites to the relevant part of the Model Penal Code, which states, a "court shall dismiss a prosecution if . . . it finds that the defendant's conduct . . . cause[d] or threaten[ed] the harm or evil sought . . . only to an extent too trivial to merit condemnation or conviction."[198] Robinson's point is well taken. We do not punish every violation of the criminal code. Only those acts that violate some societal norm deserve punishment.[199] However, all tort breaches can be prosecuted as long as the victim suffers some damage.[200]

Robinson then asks why we need two systems at all.[201] Would it not be more efficient to have one system that doles out punishment or damages, depending on the nature of the breach? In fact, given the great diversity of society and legal regimes, he thinks one would expect to see at least some structures that use a single criminal-civil system.[202] The lack of such unified systems is meaningful to Robinson. He speculates that the human desire to make moral judgments is universal, and "there is practical value in giving formal legal expression to this human desire."[203] A distinct criminal system serves as the best way to express this sentiment. It provides a clear and simple mechanism for communicating moral condemnation.[204]

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196. *Id.* at 206.

197. Robinson, *supra* note 8, at 206.

198. *Id.* at 206 (citing MODEL PENAL CODE § 2.12(2) (1985)).

199. Robinson makes clear that not "every norm violation gives rise to criminal liability." Yet, "criminal liability cannot exist in the absence of a violation of a norm." *Id.*

200. *Id.* Other scholars have also focused on the notion of deserving punishment. Jules Coleman argues that a tort simply requires a "state [to have] sufficient grounds for shifting a loss from" one party to the other. Jules Coleman, *Crimes, Kickers, and Transaction Structures*, *in* NOMOS XXVII: CRIMINAL JUSTICE 313, 326 (J. Pennock & J. Chapman eds., 1985). Criminal punishment, on the other hand, means loss of liberty, so society must be sure that this person deserves such sanction. This requires "an inquiry not only into what a person does, but his responsibility and guilt in having done it." *Id.*

201. Robinson, *supra* note 8, at 207–08.

202. *Id.*

203. *Id.* at 207.

204. Specifically,

> [b]y creating a special criminal label and widely disseminating the notion that this label has a different, condemnatory meaning, the system enhances its ability to communicate a

John Coffee also endorses the concept of blameworthiness or moral condemnation as the distinctive quality of crimes compared to their tort counterparts.[205] He begins with the premise that criminal sanctions serve a socializing force.[206] Their purpose is to morally educate citizens.[207] This purpose is distinct from tort sanctions, which are merely private sanctions that serve to price behavior. Civil sanctions "do nothing to reinforce a communitarian ethic or promote social bonding."[208]

Coffee explains that the stark contrast between the purpose of civil sanctions and criminal punishment turns on the existence or non-existence of criminal intent.[209] He finds that punishment is only appropriate where the individual knows that their behavior could be harmful to others.[210] Without this *mens rea*, or state of mind, an individual does not require moral socialization, so the imposition of monetary sanctions is sufficient.

Coffee recognizes that certain crimes are premised on strict liability or negligence.[211] He finds that society may be better off by pricing this misbehavior, much like torts do.[212] Coffee, in fact, is troubled by the expansion of the realm of criminal law: "behavior that was once considered merely tortious or a regulatory violation is now prosecuted as a crime."[213] He cites securities fraud and worker safety remedies as examples.[214] Coffee believes that this blurring between tort and criminal law weakens the overall effectiveness of criminal law as a social control.[215] He advocates for a greater role of

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> clear condemnatory message. Without a distinct criminal system, it would be more difficult to convey the message that some cases signal condemnation yet others do not.

Id. at 208.

205. Coffee, *supra* note 10, at 235.
206. *Id.* at 223.
207. *Id.*
208. *Id.* at 225.
209. He recognizes that criminal behavior operates on a continuum, ranging from "the trivial to the egregious." Still, the distinguishing factor between all of these crimes and any tort rests on the notion of criminal intent. *Id.* at 239.
210. *Id.* Coffee cites to case law to illustrate this level of intent. *Id.*
211. Coffee, *supra* note 10, at 228.
212. *Id.*
213. *Id.* at 238.
214. *Id.*
215. *Id.*

intent to separate those actions that truly deserve criminal punishment from those that should merely receive monetary compensation.[216]

A. Culpability: Crime vs. Tort Breach

The moral-based model relies on the notion of culpability or blameworthiness to explain the differing treatment of crimes and torts. The concept of blameworthiness is tied up with intentional conduct. If a person intends to cause harm, the resulting act merits condemnation and thus criminal punishment. On the other hand, if the person was merely careless, these actions do not suggest ill motive, so they do not have the imprimatur of moral condemnation. Thus, it makes little sense to criminally punish this conduct, even if it causes the same or greater harm.

Hall focuses on the intentional nature of criminal behavior and its resulting culpability.[217] Robinson relies on the intuitive moral condemnation associated with a criminal violation.[218] While he does not explicitly state a criminal violation requires intentional conduct, this seems to be the inference and would explain why society associates terms like "violation" or "punishment" with criminal acts but "damages" or "remedy" with tort breaches. Coffee also relies on the intentional nature of criminal behavior as the distinctive quality that explains why such breaches receive criminal punishment.[219]

The moral-based approach adequately explains the differing treatment of Scenarios (1) and (2). Scenario (1) is criminally punished because the perpetrator intended to take the computer. Scenario (2), however, does not receive such sanctions because the person was merely careless in destroying the computer, and thus, had no intention of destroying the property. Diagram C graphically represents this relationship.

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216. *Id.* at 193. He finds that the best way to implement these changes is at the sentencing stage. *Id.* at 24–45.
217. Hall, *supra* note 11, at 775–79.
218. Robinson, *supra* note 8, at 205–06.
219. Coffee, *supra* note 10, at 235.

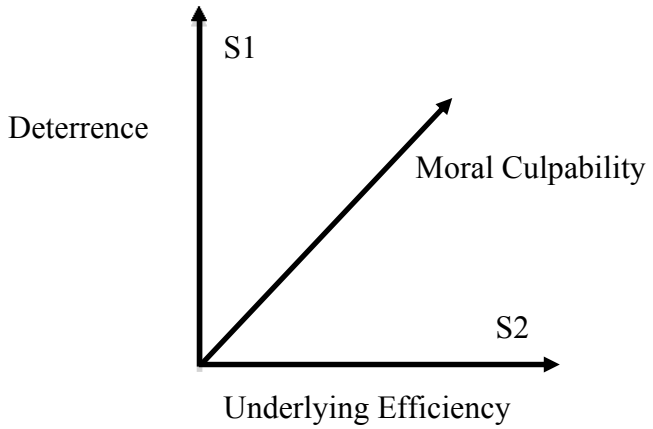

Diagram C

Diagram C incorporates Diagram A with the addition of a Z-axis, representing an increasing level of moral culpability. As the level of "intent" increases, so does the culpability.[220] The tort and crime stand as polar opposites. The tort breach (S2) falls on the lower end of the continuum, suggesting no culpability, because the perpetrator did not intend to destroy the computer. The crime (S1) falls on the upper end, suggesting a high degree of culpability, because the perpetrator purposefully took the computer.

Extrapolating from this relationship, one could imagine that a breach based on "recklessness" would represent a level of culpability somewhere between these two extremes. Here, the perpetrator would have exhibited a "conscious disregard of, or indifference to, [the] risk [of harm]."[221] We can imagine a defendant who is severely intoxicated and enters the coffee shop and knocks down the

220. Here, "intent" means the state of mind of the perpetrator in a common law breach. Intent or purpose is considered the most serious mental state, followed in descending order by knowledge, recklessness, and negligence. *See* 1 SUBST. CRIM. L. § 5.1 (2d ed. 2010); Kenneth Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

221. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965); *see also* RESTATEMENT (THIRD) OF TORTS § 2 (2010) (focusing on the knowledge of the defendant and finding that recklessness entails that "the [defendant] knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation.").

computer. This breach is still treated as a tort, but such action may trigger punitive damages.[222] The moral-based theory can explain this result. Recklessly destroying the computer is morally worse than negligently destroying it. The reckless actor was aware of what could happen in a way that the negligent defendant was not. This heightened awareness suggests a greater culpability.[223] Still, the reckless defendant remains less culpable than the defendant who intentionally took the computer. Graphically, the former act would fall somewhere between S1 and S2 on the culpability continuum. This placement explains why this kind of action would receive punitive damages, which are greater than compensatory damages but less than criminal punishment. Under the moral-based model, punitive damages can be seen as a device for expressing moral condemnation, just not as strong as the condemnation associated with criminal punishment.[224]

Diagram C combines both the economic and moral-based models. In this way, the crime (S1) stands as the morally blameworthy action and also the one that is least efficient, requiring the greatest deterrence. Conversely, the tort breach (S2) triggers no moral condemnation. Its underlying conduct is also efficient and requires the least deterrence. Diagram C does not make any causal claims. For instance, the crime does not receive the highest deterrence because of its moral blameworthiness or vice versa (this analysis is beyond the scope of the Article). Still, these correlations make some sense. It stands to reason that the most culpable conduct would also merit the most deterrence. On the other hand, conduct with no stamp of moral culpability would merit the least deterrence.

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222. *See* RESTATEMENT (THIRD) OF TORTS § 2 (2010) ("While a showing of negligence generally suffices for compensatory damages, the standard for awarding punitive damages commonly refers to the defendant's reckless conduct—or reckless indifference to risk, or reckless disregard for risk.").

223. Hall makes a similar point in the criminal context, when explaining that recklessness may constitute volitional conduct worthy of moral condemnation. *See* Hall, *supra* note 160, at 982.

224. Under the moral-based position, punitive damages can be seen as a device for expressing moral condemnation, just not as strong as the condemnation associated with criminal punishment. *See, e.g.*, Richardson, *supra* note 8, at 114 ("Punitive damages are a conventional device for expressing condemnation. However, the relative strength of that condemnation is weak compared to the condemnation expressed by the criminal sanction. Punitive damages carry neither the possibility of imprisonment nor the collateral consequences of criminal punishment.").

A similar correlation exists with the reckless breach described earlier. As slightly more culpable than the negligent breach, it stands to reason that it would also constitute slightly less efficient behavior. The reckless perpetrator had heightened knowledge that her actions could destroy the computer. So, imposing punitive damages could be the appropriate deterrence. This would not chill valuable economic activity (frequenting coffee shops) because the perpetrator—unlike his negligent counterpart—was aware of the risks. This larger monetary sanction would simply deter this individual from getting drunk when frequenting coffee shops, not from frequenting coffee shops. Still, because this behavior would not be as inefficient as intentionally taking the computer, criminal punishment would be inappropriate and constitute too great a deterrence.

The economic and moral-based scholars seem to recognize the interplay between the two approaches. Posner, for instance, states that the moral-based approach may have some "normative merit[]," but the fact remains that economics provides the superior theory for understanding criminal punishment.[225] Calabresi and Melamed also seem to suggest that some entitlements can be explained by moral principles but that efficiency considerations provide the more persuasive explanation.[226] These statements at least suggest that the two approaches can be viewed together in a consistent matter. The same recognition holds true for the advocates of the moral-based model. Hall, for instance, focuses on origins of the punishment but recognizes that the type of punishment flows from this original determination of culpability.[227] Robinson too suggests that the two models positively correlate. He simply finds that the economic approach does not recognize the "fundamental differences in [the] purposes and goals" of criminal and civil sanctions.[228]

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225. Posner, *supra* note 8, at 1230–31 ("Although judges and legislators do not often speak the language of economics, this Article suggests that they often do reason implicitly in economic terms and that economic analysis is, therefore, helpful in explaining the basic structure of law, including criminal law.").

226. Calabresi & Melamed, *supra* note 8, at 1105.

227. Hall, *supra* note 160, at 1000.

228. Robinson, *supra* note 8, at 205.

B. Integrating the Economic and Moral-Based Models

Some scholars go further and explicitly argue that both approaches must be used in order to persuasively explain the distinction between criminal and civil sanctions.[229]

Alvin Klevorick uses Posner's and Calabresi/Melamed's economic models as starting points.[230] However, he finds that these theorists must first posit a political and moral foundation of society before engaging in a law and economic analysis of civil and criminal liability.[231] For Klevorick, any discussion of efficient behavior and market forces presupposes something he coins a "transaction structure."[232] Society has created this structure, which "sets out the terms or conditions under which particular transactions or exchanges are to take place."[233] This structure embodies a particular society's values, including a description of its actual moral, political, and legal commitments.[234] He goes on to say that the sanctions we place on certain acts—e.g., criminal punishment or monetary damages—reflect efforts to enforce this structure.[235] He gives special attention to the moral aspect of society's transaction structure, citing Hall's emphasis on culpability and moral condemnation.[236] Klevorick concludes that this type of moral judgment informs any subsequent economic analysis. If we morally condemn an act such as a crime this will alter how we perform any cost-benefit analysis resulting from such behavior.[237]

Similarly, Dau-Schmidt focuses on both economic and moral principles to explain the existence of criminal sanctions.[238] He begins by positing a model that focuses on shaping the preferences of individuals when they deviate from established norms.[239] This

229. *See, e.g.*, Dau-Schmidt, *supra* note 8; Klevorick, *supra* note 8.
230. Klevorick, *supra* note 8, at 907–08.
231. *Id.* at 909.
232. *Id*. at 908.
233. *Id.*
234. *Id.*
235. *Id*.
236. Klevorick, *supra* note 8, at 917.
237. *Id*. at 918.
238. Dau-Schmidt, *supra* note 8, at 3.
239. *Id.* at 26.

"preference-shaping theory" serves to promote adherence to these norms through criminal punishment. It targets individuals whose "actions indicate that [they] intended or desired to bring about the proscribed harm."[240] Accordingly, it makes no sense to punish those individuals that are negligent, because their actions do not indicate deviant preferences—they did not intend to contravene social norms.[241]

What sets Dau-Schmidt's theory apart from the traditional economic model is how criminal punishment shapes preferences. While he notes the straightforward economic value of deterrence, Dau-Schmidt goes one step further.[242] He finds that this punishment also represents "an expression of society's condemnation of the criminal act."[243] This moral dimension is crucial to understanding the purpose of criminal law.

Revisiting Diagram C, Klevorick and Dau-Schmidt would probably say that it is no coincidence that the crime places high on the moral condemnation line and low on the efficiency continuum. Criminal punishment represents an expression of both these economic and moral opinions. Similarly, both of these principles inform society's decision to impose only civil sanctions for tort breaches. So, it makes sense that these breaches are low on the moral condemnation line and high on the efficiency scale.

Again, this Article's aim is not to argue for any specific causal relationship. Does the moral condemnation suggest the lower economic efficiency, and thus, the greater deterrence? Or, is it the other way around? The point here is that these two approaches *can* be seen as part of a single integrated system expressing society's social structure and related mores.

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240. *Id.*

241. Dau-Schmidt argues that an "opportunity shaping" model provides the better mechanism for tortfeasors. *Id.* at 23. By imposing only monetary sanctions at the discretion of individual members, this policy simultaneously creates incentives for good behavior and provides a means to compensate victims. *Id.* at 22–23.

242. *Id.* at 36–37.

243. *Id.* at 37.

IV. CONTRACT BREACHES AND THE ROLE OF CULPABILITY

Contract breaches are generally not part of the greater discussion on moral judgments and the criminal/civil divide. Hall briefly discusses contract making and distinguishes it from torts and crimes.[244] He explains that torts and crimes just forbid certain actions, whereas contractual duties arise only after certain affirmative conduct.[245] The discussion ends there. He then moves on to explaining the tort/crime distinction without further reference to contracts.[246]

Robinson also makes a brief reference to contracts when discussing the notion of culpability.[247] He argues "[b]reaking a contract . . . may be conduct that we seek to discourage and may . . . justify compensation of an injured party, but such conduct does not necessarily carry the moral blameworthiness . . . implicit in [a] criminal conviction."[248] Interestingly, he does not elaborate further. Why do contract breaches not share the moral condemnation of crimes? A contract breach appears to mimic the contours of a criminal act. Both are intentional and purposeful behavior that can cause the same harm.

Many scholars, in fact, have incorporated the notion of moral obligation into their understanding of contract formation. Immanuel Kant's famous categorical imperative appeals to promise-making as a paradigmatic example of following the moral law.[249] Scholars like Charles Fried have gone on to argue that a contract represents a moral responsibility to fulfill the terms of the contract.[250] Fried argues that that a contract corresponds to an underlying moral promise and that contract law serves as society's enforcement

244. *See generally* Hall, *supra* note 11.
245. *Id.* at 755.
246. *Id.* at 756–60.
247. Robinson, *supra* note 8, at 206.
248. *Id.* at 206.
249. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39–40 (Lewis Beck trans.) (1959). Kant maintains that if a single person's act of not fulfilling a promise were made into a universal law (everyone made promises only to break them) contracting would be impossible. *Id.*
250. Fried, *supra* note 14; Kraus, *supra* note 14, at 1604 (discussing the correspondence account of contract making).

mechanism of this promise.[251] More recent scholars have argued that contract law should recognize this underlying moral obligation or promise.[252] This stands in sharp opposition to the economic scholars—and their notion of efficient breach—who argue that sometimes breaching a contract is the economically right thing to do.[253] But again, the discussion centers on the internal mechanics of contract law.[254] The purpose of this Article is to explain why contract breaches receive the same treatment as tort breaches. That said, it would seem that understanding contracts as moral obligations bolsters the conclusion that under the moral-based model, a contract breach—much like a crime—constitutes culpable conduct worthy of moral blame.

A. The Culpability of a Contract Breach

It is hard to see how the moral-based model can differentiate between Scenario (3) and Scenario (1) in terms of culpability. In both cases, the perpetrator intentionally caused the same type of harm, namely the loss of a computer. Neither was mistaken or careless. This behavior stands in stark contrast to Scenario (2) where the perpetrator did not intend to destroy the computer. This suggests that the contract breach also deserves moral blame, and thus, criminal punishment.

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251. Fried, *supra* note 14, at 1 ("The promise principle, which in this book I argue is the moral basis of contract law, is that principle by which persons may impose on themselves obligations where none existed before.").

252. *See generally* Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007) (discussing the divergence between the legal requirements/consequences of a contract breach and the moral requirements/consequences of a breaking a promise); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARD A LIBERAL THEORY OF CONTRACT 89–115 (2003). *But see* Michael Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801 (2008) (arguing that contracts do not constitute promises); *see also* Kraus, *supra* note 14, at 1648 n.3 (citing scholars).

253. *See* Kraus, *supra* note 14, at 1649 n.6 (citing scholars supporting efficient breach principle); *supra* Part II.B. and accompanying notes.

254. Shiffrin does suggest (albeit briefly) that the moral nature of the respective breaches explains why torts and crimes "levy penalties" but contract breaches do not. Shiffrin, *supra* note 252, at 737. Contract breaches involve a breach of trust, while torts/crimes involve a breach of physical security. *Id.* at 738–39. It is not clear what "penalties" mean here, as only crimes receive criminal punishment. Moreover, Shiffrin seems to assume that a tort or crime causes a different type of harm than a contract breach. It is unclear what this means or how this distinction helps here, particularly where the Scenarios articulated above all cause the same harm.

The voluntariness of this transaction does not readily seem to alter this analysis. Recognizing that the perpetrator could have avoided entering into the contract does not, in any way, mitigate the resulting breach. If anything, the moral-based model suggests this person is more culpable because she intentionally broke a promise that she chose to undertake and could fulfill. On the other side, it is not the victim's fault that the contract was breached. It is counterintuitive to suggest that the victim was somehow responsible for entering into the contract, and this fact now vitiates the need for criminal punishment. Indeed, in the criminal context, a victim's conduct does not generally play a part in determining whether criminal punishment should be imposed. In Scenario (1), it may have been unadvisable for the victim to go to the bathroom, but no one would suggest that this act absolves the perpetrator of criminal liability.[255] Any argument based on voluntariness needs more explanation (see *infra* Part V).

Perhaps, the focus should be on the role that intent plays in a crime as compared to a tort or contract breach. Under the moral-based model, culpability is central to a crime in a way that it is not with a tort breach. Hall explains that "the immorality of the actor's conduct is essential" to a crime, whereas "moral culpability is of secondary importance in tort law."[256]

Understood in this way, a contract breach would be more akin to a tort breach. Neither requires intentional conduct. A person is liable if she fails to take the appropriate duty of care or fails to fulfill her

255. The case of provocation or heat of passion defense bolsters this point. Here, the defendant argues that the victim somehow provoked the conduct, usually in the context of a homicide. Lizama v. United States Parole Comm'n, 245 F.3d 503, 506 (5th Cir. 2001); United States v. Scafe, 822 F.2d 928, 932 (10th Cir. 1987); MODEL PENAL CODE § 210.3(1)(b) (1985) (describing manslaughter as "a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse"). While this may lessen the defendant's punishment, it will not absolve the defendant of all potential criminal liability. Appealing to the notion of consent also does not provide a persuasive answer. First, it seems counterintuitive to argue that the victim of a contract breach consented in some way to the resulting breach. She entered the contract expecting satisfication of the contractual terms. Moreover, in the criminal context, while a person may consent to activity that may otherwise be unlawful (e.g. fighting in a boxing match), this individual also absolves the perpetrator of any civil liability. Thus, relying on consent in the contract breach to explain the lack of criminal punishment would lead to the unintended conclusion that the breacher should also not be liabile for civil damages.

256. Hall, *supra* note 160, at 971.

obligations under a contract. In fact, a contract breach does not require a reasonable duty of care. The legal standard is strict liability. With Scenario (3), it is irrelevant that the perpetrator intentionally breached the contract. The only thing that counts is that she did not pay the money (i.e. she did not perform under the contract). So, while this breach constitutes culpable behavior, this fact is of secondary importance to the actual harm caused.

This argument does not have much persuasive appeal. The fact remains that both perpetrators in Scenarios (1) and (3) intended to deprive the victim of the value of the computer. Thus, it seems somewhat facile to say that the perpetrator in Scenario (3) is not culpable, or otherwise not deserving of criminal punishment, simply because intent is not a legal element of a contract breach. Indeed, the purpose of the moral-based account is to explain the legal regime, not the other way around. This view means morally judging the actual conduct, not the formal requirements. The varying legal standards—strict liability versus intent—seem to follow from the criminal/civil divide, not explain it. Society legally requires intent with crimes because this conduct is criminally punished. On the other hand, because contract breaches only receive civil sanctions, intent is not as important.

Focusing on intent makes sense when comparing criminal and tort breaches. In Scenario (2), the negligent tortfeasor *cannot* intentionally cause the destruction of the computer. The crux of this tort is its non-intentional nature. This explains why this individual cannot be culpable and why society does not impose criminal punishment. But the perpetrator in Scenario (3) purposefully withholds the money even though she has the ability to pay. Regardless of the legal requirements, this person's behavior would seem to trigger the same moral judgment as the criminal counterpart, suggesting the imposition of criminal sanctions.

B. The Culpability of Fraudulent Inducement

Relying on intent to distinguish crimes from contract breaches becomes more problematic when examining Scenario (3'). Intent is

equally relevant here as with a crime. Fraudulent inducement *legally* requires a defendant to *intentionally* make a false representation as to a future act on which the other party relies.[257] So, if the criminal act is morally blameworthy, it is hard to see why the fraudulent inducement would not also be so.[258]

Maybe, the emphasis should be on individual damages. Damages play an important role in a fraudulent inducement claim, much like in a tort or normal contract breach.[259] Hall makes a similar point when discussing the difference between "social harm" and "individual damages."[260] With both Scenarios (3) and (3'), if the perpetrator returned the money, for all practical purposes there would be no cause of action. This is different from Scenario (1). Even if the computer were returned to the victim, the defendant would still be criminally liable and subject to punishment. But, this emphasis on damages does not explain why only crimes trigger criminal punishment. In other words, does society criminalize Scenario (1) *because* damages are not necessary to make out a criminal act? The corollary would be that society does not criminalize the other Scenarios because damages are integral to making out a breach. This approach does not have significant persuasive appeal. The moral-based theory still needs to explain how the requirement of individual harm or damages provides the key to understanding the civil/criminal divide. [261] In fact, it seems the causal relationship works the other way around. The requirement of damages follows from society's decision not to criminalize torts and contracts rather than explaining it. It is precisely because society finds crimes morally worse than torts that damages are integral to the latter but not the former. Where

257. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981).

258. Perhaps, this partly explains why some jurisdictions have criminalized this type of fraud. But this criminalization is certainly not universal a practice, so an explanation is still necessary as to why such behavior is not criminal in certain jurisdictions where larceny remains a crime.

259. *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977); 23 WILLISTON ON CONTRACTS § 64:1 (4th ed. 2010).

260. *See supra* Part III and accompanying notes.

261. Hall's distinction between social harm and individual damages is also not particularly helpful. The moral-based account must still explain why the harm involved in the crime constitutes social harm, while the harm involved in the tort or contract breach constitutes individual damages. In the three Scenarios, in fact, the harm appears to be the same, namely the loss of the value of the computer.

does that leave contract breaches? On the one hand, individual damages are integral for civil liability, suggesting a similarity with torts. But this behavior is also intentional and purposeful, much like a crime.

C. Contract Breaches and the Moral-Based/Economic Models

The moral-based approach has merit. However, a more nuanced analysis is required. A good start would be to understand how the economic and moral models work, or do not work, together when examining contract breaches.

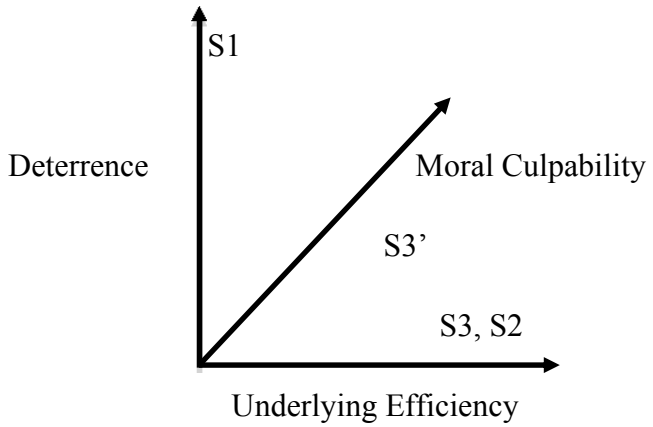

Diagram D

Diagram D incorporates Diagram B with the addition of the Z-axis, representing the increasing moral culpability of the individual breach. Again, Scenario (2) falls on the low end of this line because the breach does not involve intentional conduct, whereas Scenario (1) falls on the upper end because the breach was intentional. These locations correlate with the economic principles of efficiency and deterrence.

Scenarios (3) and (3') do not fit in the same way. The economic model places both of these breaches in the lower right quadrant, indicating relatively efficient behavior that requires low deterrence.

S3' falls to the left and above of S3 (indicating less efficient behavior) but still a significant distance from S1. These locations imply that both types of contract breaches are relatively low on the culpability continuum and do not constitute conduct worthy of moral condemnation.[262] Yet, the moral-based approach suggests the contrary, namely that these breaches are on par with crimes.[263] Likewise, they constitute intentional-based conduct that merits equal blame. But, if these breaches are placed on the upper end of the culpability continuum with S1, this suggests that these acts have a low efficiency and require high deterrence. So, it seems that the moral-based and economic models do not positively correlate when explaining contract breaches.

The logical conclusion is that one of the models is not accurately classifying these breaches. The problem rests with the moral-based approach, at least as it stands. Something more is required to explain the unique nature of contract breaches. What is missing is distinguishing the concept of a non-voluntary obligation from a voluntary obligation.

V. THE UNIQUE NATURE OF CONTRACTS: VOLUNTARY OBLIGATIONS VS. NON-VOLUNTARY OBLIGATIONS

The underlying responsibility in a contract breach has a profoundly different structure than the underlying responsibility in a tort or a crime. The Article distinguishes here between a "voluntary obligation" and a "non-voluntary obligation."[264] Non-voluntary

262. While the economic model finds that S3' is less efficient than S3, this model still finds that S3' is far more efficient than S1, suggesting that S3' constitutes conduct that is far less culpable than S1.

263. Because S3' involves deceit, the moral-based model would probably find that this conduct is more culpable than S3 or the regular contract breach.

264. These terms and their respective definitions generally track Jody Kraus' recent distinction between "moral duty" and "moral obligation." *See* Kraus, *supra* note 14, at 1613–15; *see also* Michael Pratt, *Promises, Contracts and Voluntary Obligations*, 26 LAW & PHIL. 531, 533 (2007). Kraus' focus, however, is on the normative, moral nature of contract breaches. He follows scholars like Fried who are interested in exploring the underling moral responsibilities of contract formation. Kraus uses this distinction for the purposes of exploring the notion of personal sovereignty in making promises (none of which is relevant here). *See* Kraus, *supra* note 14, at 1606–09. This Article is not particularly interested in the debate about the relationship between moral obligations and legal responsibilities. *See, e.g.*, Patricia White, *Law and Moral Obligation*, 49 U. CHI. L. REV. 249 (1982) (discussing the difference

obligations are responsibilities that are already in place, and as a member of society, each person is automatically subject to them.[265] They exist independent of any individual action, and thus, are not self-imposed. A non-voluntary obligation represents the underlying responsibility in a tort or crime. With a voluntary obligation, on the other hand, a person chooses to take on this obligation with another person. Unlike non-voluntary obligations, without taking some affirmative action with another individual, a person is not subject to these voluntary obligations.[266] A voluntary obligation represents the underlying responsibility in a contract breach.

A. The Elements of a Contract Breach and Criminal/Tort Breach

The basic elements of a crime and tort point to a non-voluntary obligation, whereas the elements of a contract breach suggest a voluntary obligation. A *prima facie* tort requires a breach of a duty of care. An individual must fail to exercise a reasonable level of care as defined by the circumstances.[267] This duty is not triggered by any voluntary action. All members of society are bound by it.[268] In this way, the perpetrator in Scenario (2) was responsible for using the appropriate level of care when the individual frequented the coffee shop. This duty did not arise from voluntary action or agreement. By this person's very presence in the coffee shop, she had a duty not to negligently destroy the computer.[269]

The same notion of non-voluntary obligation is perhaps more obvious in a crime. Most people think of criminal laws simply as

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between natural law scholars, such as Thomas Aquinas, who find a relationship between legal duties and moral duties and positivist scholars, such as John Austin, who deny any such essential relationship). This Article's focus is on the unique nature of the actual legal responsibility arising from contract law compared with the legal responsibility arising from tort or criminal law.

265. *See* Kraus, *supra* note 14, at 1614.

266. *See id.* at 1616.

267. RESTATEMENT (THIRD) OF TORTS §§ 3, 7 (2010).

268. A perpetrator may cite to the contributory negligence of the plaintiff to avoid liability, but this is an affirmative defense where the defendant has technically already breached the level of care. *See id.* § 3 cmt. b.

269. One might argue that this duty arose voluntarily, in so far as the perpetrator entered the coffee shop willingly. This is certainly true but misses the point. There is no doubt the nature of the duty will depend on the circumstances (e.g. driving, entering a coffee shop). Short of the specific environment, however, the individual has no choice in the matter on whether to take on the duty.

rules that we all must follow. These duties are automatic; they are not assumed voluntarily. Take again Scenario (1). The perpetrator had a legal duty not to take the computer. Like its tort counterpart, this duty does not arise because this person did or did not do something. The perpetrator, as a member of society, is simply bound by this duty.

While both breaches signify non-voluntary obligations, this does not mean that these obligations are made the same. A crime receives punishment whereas a tort breach receives civil sanctions. This conclusion is not problematic. There is no reason to think all non-voluntary obligations must be treated the same. One would not expect this to be the case. Society can decide that some actions are worse than others. In fact, this is exactly what the moral-based model does with torts and crimes. It is worse to intentionally take a computer, violating a criminal non-voluntary obligation, than to negligently destroy it, violating a tort non-voluntary obligation. This explains the differing treatment of these breaches.

A contract breach works differently. Here both parties must agree to the terms. Simply put, there is no contract if the individuals do not voluntarily undertake their respective responsibilities with the other person.[270] The underlying obligation is self-imposed. The contract breacher in Scenario (3) was not automatically obligated to deliver the money. She chose to buy a computer and to take on the corresponding voluntary obligation of paying for it. The victim, too, had to agree to the terms of the contract. For instance, the victim in Scenario (3) could have refused to sell the computer to the perpetrator. No contract would have been formed and there would have been no corresponding voluntary obligation.

Scenario (3') works the same way. Again, the legal responsibility of delivering the money is voluntarily undertaken with another person. A breach, based on fraudulent inducement, requires the perpetrator to make a representation regarding her end of the deal, albeit a false representation, and the victim to agree to it. Without these voluntary actions, there is no legal responsibility or obligation to fulfill the terms of the contract.

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270. *See generally supra* Part I.A.

B. The Moral-Based Model: A Redux

With this distinction, this Article revisits the moral-based approach. As explained earlier, this approach focuses on the culpability of the act—its intentional nature—to explain why only crimes receive criminal punishment. The problem, though, is explaining contract breaches, particularly breaches based on fraudulent inducement, both of which also appear to involve culpable conduct.

The voluntary/non-voluntary obligation distinction can help here. Contract breaches may constitute culpable conduct, but the underlying responsibility is different from the underlying responsibility in a tort or a crime. Contractual obligations constitute voluntary conduct where both parties agree to the terms of the bargain.[271] On the other hand, a non-voluntary obligation to obey a criminal or tort law is always in place. Society is the source of this obligation. No individual action is required. The qualitatively different nature of these two responsibilities explains the varying treatment of their corresponding legal breaches.[272]

Society does not have as great of an interest in policing a voluntary obligation compared to its non-voluntary obligation counterpart. A non-voluntary obligation can be viewed as a direct affront to society's established precepts. It is a duty owed directly to society, making any violation particularly significant.[273] On the other hand, a voluntary obligation—because it does not flow from society itself—does not carry the same importance. It is better understood as a responsibility directly owed to the individual with whom the obligation was undertaken. This voluntary/non-voluntary obligation

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271. This notion of both parties voluntarily acting to create a voluntary obligation can help explain the theory behind why a contractual legal responsibility requires more than just a promise by one person. *See, e.g.*, Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) (arguing that consent of other the party creates the necessary legal obligation).

272. Kraus makes a similar point when explaining why contract breaches do not receive punitive damages. *See* Kraus, *supra* note 14, at 1641. He finds that because these contract breaches correlate with what he calls "moral obligations," not "moral duties," it is not surprising that society does not generally impose punitive damages. *Id.*

273. This idea does not mean, of course, that society would punish all non-voluntary obligations. As explained above, society may weigh certain violations (intentional conduct) as morally worse than others (negligent conduct).

distinction better captures the public/private distinction discussed above.[274] Because a non-voluntary obligation is owed to society directly, the resulting tort or crime can be viewed as a public injury. Because a voluntary obligation is an obligation owed to a person, the resulting contract breach can be viewed as a private injury.

Put another way, society does not regulate the substance of voluntary obligations. It is only interested in *how* these obligations are created and subsequently breached, not *what* these obligations happen to be.[275] In this way, contract law involves rules that dictate the manner by which these responsibilities are created and the consequences of their breach. Contracts require mutual assent and consideration. A breach occurs when the obligation is not fulfilled. None of these rules regulates the substance of the terms of the contract. These rules do not prescribe or require specific obligations. For instance, the law does not require that a contract must involve a reasonable price, a specific time for delivery, or a certain type of exchange.[276] Individuals are generally free to create contracts about whatever they choose.[277] In other words, they bargain or negotiate the substance of the voluntary obligation that they undertake. In both Scenarios (3) and (3'), for instance, the perpetrator and victim agreed upon the terms, which included paying a certain amount for the computer. The law only regulates the manner by which these responsibilities become enforceable.[278]

Non-voluntary obligations, on the other hand, involve substantive rules that relate to content. In promulgating these rules, society cares about *what* behavior is deemed permissible or impermissible. This is

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274. *See supra* Part I.B.

275. This is similar to Hart's analysis that contract law embodies secondary rules. *See* H.L.A. Hart, *The Concept of Law*, (Oxford 1994), Chapter V. However, Hart discusses these rules for the purpose of providing a typology of a robust legal system, not explaning the treatment of a resulting breach of these rules.

276. The requirement that the consideration be more than just a pretense is not inconsistent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981). This requirement is not substantive; it simply mandates that the two parties actually bargain in good faith for a price. *See id.*

277. There are some limited exceptions. *See id.* § 178 (contract not enforceable on grounds of public policy); *id.* § 266 (contract not enforceable because of practical impossibility).

278. The legal rules surrounding fraudulent inducement are also non-substantive in that they regulate how one makes promises (i.e., one cannot misrepresent her intentions), not what the content of the promises must be. *Id.* § 167.

most easily understood in the criminal context, which prohibits specific conduct. For instance, one cannot hurt someone else or take someone's property without permission. Here, society has determined what the appropriate conduct should be and requires individuals to follow these mandates. In Scenario (1), for instance, the perpetrator was under a non-voluntary obligation not to permanently deprive you of your property without permission. As a member of society she was not free to disregard this duty. Tort law also regulates substantive conduct. An individual must use a particular level of care when performing an activity. Like a criminal duty, this obligation is imposed on all individuals by their status as members of society. In Scenario (2), for instance, the perpetrator was required to use a reasonable level of care instead of voluntarily choosing the standard she believed most appropriate.[279]

By design, the rules governing the creation of voluntary obligations do not regulate the substance of the duty. So, it stands to reason that society would not have a great interest in criminalizing any resulting violation of duties arising from these rules. The contract breacher merely violates a mutually agreed upon duty. An intentional violation, therefore, represents a private wrong in which an individual has failed to satisfy her obligation to another individual rather than an obligation owed directly to society. This stands in contrast to non-voluntary obligations, which prohibit behavior that society has determined to be unacceptable. An intentional violation of such a duty thus stands as a public-wrong where an individual has violated a duty owed to society. Accordingly, it stands to reason that society would seek to heavily sanction any violation by imposing criminal punishment.

This notion does not mean that society has no interest in trying to regulate voluntary obligations. These acts affect individuals; naturally, society would have some vested interest. Indeed, as obligations owed directly to individuals, it makes sense that society

279. This Article is not suggesting that individuals cannot contract around tort or certain criminal duties. But the fact remains that without such agreements, these obligations are automatically in place and must be followed.

creates rules that allow individuals themselves to bring civil sanctions for breaches of these obligations. Society may even determine that certain egregious violations of voluntary obligations, e.g., fraudulent inducement breaches, should receive punitive damages. Nevertheless, these voluntary obligations do not rise to the same level of importance as non-voluntary obligations.

To be clear, this Article is not presenting a new account of why only crimes receive punishment. Culpability remains the operative principle to explain criminal liability. Even though torts represent non-voluntary obligations, they do not constitute culpable conduct, and thus, do not merit criminal punishment. Crimes and contract breaches, however, are both worthy of condemnation. It is just how we conceive of this culpability that changes. The individual who commits a crime violates a *non-voluntary obligation*, one that was already in place and was not agreed upon with another. Society, not mutual agreement, imposed this duty on this individual, which explains why this breach alone receives criminal punishment. The contract breach constitutes a different type of responsibility. Because this person intentionally violated a *voluntary obligation* that she chose to undertake with another person, the resulting breach does not carry criminal punishment.

This voluntary/non-voluntary obligation distinction also explains why the moral-based and economic positions do not correlate in the same way when it comes to contract breaches, but they do when it comes to crimes and torts.[280] The Z-axis showing culpability is best understood as charting the blameworthiness of the various non-voluntary obligations society imposes on its members, not voluntary obligations agreed upon by individuals. This interpretation makes sense, especially when considering the economic and moral-based approaches as representing an integrated overall societal structure. Klevorick focuses on society's "transaction structure," and Dau-Schmidt discusses how society shapes individual preferences. Both emphasize *society's* social, moral, and economic values, and how

280. *Compare* Diagram C, *with* Diagram D.

collectively, these factors influence the treatment of common law breaches.

So, it is not surprising that when it comes to torts and crimes, the economic and moral-based approaches correlate positively. Both criminal and tort breaches correspond to underlying non-voluntary obligations that are part of societal structure in a way that voluntary obligations are not. This fact allows us to chart their respective culpability on the same continuum. However, a contract breach—because it represents a voluntary obligation—would not necessarily fall on the same continuum. It is a created obligation that does not exist until after an individual enters into a contract. Therefore, it cannot be graphically represented on the same line with torts or crimes.

The unique nature of a contractual responsibility does not have any impact on how the economic model deals with this breach. The efficiency/deterrence relationship applies in the same way to contract breaches as it does to crimes and torts. This is not surprising. The economic analysis does not seek to evaluate the nature of the respective responsibilities. By design, this model only focuses on the behavior itself and to what extent it constitutes efficient conduct. It is irrelevant then whether the obligation was created by individuals or already in place. The distinction between a non-voluntary and voluntary obligation also provides an explanation as to why scholars have focused only on torts and crimes when discussing the distinction between civil and criminal liability. As non-voluntary obligations, they stand as natural comparisons. Contracts are something different. They represent voluntary transactions where the responsibility was voluntarily created.

CONCLUSION

One might wonder whether this exercise has any use beyond mere intellectual curiosity. Here, this Article submits that this analysis sheds light on how society values contractual responsibilities. The above conclusions point to a system that finds intentional-based legal

breaches arising out of voluntary transactions to be economically valuable or fundamental to society and thus not to warrant criminal punishment. This system suggests a society that values the ability of its citizens to freely engage in market transactions—and create agreed upon obligations—without the threat of criminal punishment. Society may deem a contract breacher a "bad person" and go so far as to permit heightened civil sanctions against her. Still, this person's intentional unlawful conduct does not put her in the same category as a criminal. Only with a crime has the person violated a non-voluntary obligation owed directly to society.

But the discussion cannot end there. With at least one type of contract breach—namely fraudulent inducement—society seems to have changed, at least partly, its perspective. For the purposes of this paper, the reasonable assumption was made that Scenario (3') would only receive civil sanctions. However, a growing number of jurisdictions now criminalize this type of fraudulent behavior.[281] For instance, federal wire and mail fraud statutes criminalize the taking of property by fraudulent promises.[282] This seems to suggest a change in how society, or at least some jurisdictions, views these types of contractual breaches and accordingly a change in how to apply the economic and moral-based models. What does this change mean for the economic and moral-based models? How exactly did the efficiency calculus change when comparing the common law regime—where fraudulent promises were not criminally punished—with the current federal statutory scheme? Is the shift better explained through society's change in mores and culture, corresponding to a shift in how society values certain voluntary obligations? These questions remain to be answered. For now, it is enough to say that employing the economic and moral-based models can help one understand how society views or values contract responsibilities.

281. *See supra* note 50.
282. *See* 18 U.S.C. §§ 1341, 1343 (2006).