

ARTICLES

Overenforcement

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ABSTRACT

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

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INTRODUCTION

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

Other instances of overenforcement, however, involve situations in which the legal system is entirely prudent in inflicting the harm in question: it simply cannot avoid the overenforcement. For example, a rule that deems driving in excess of fifty-five miles per hour dangerous and punishable, certainly harms some safe drivers for whom deterrence is not necessary. But the legal system cannot avoid this problem. The definitions of many legal rules need to be overbroad in order to secure their efficient implementation. Such rules inflict harm upon individuals who do not fall within the rules' substantive rationales. Unavoidable overenforcement can also accompany even precisely drawn rules and carefully balanced legal penalties. Imposing a formal legal penalty on a firm, for instance, might trigger a dramatic decline in its stock value and severe financial difficulties, effectively resulting in a substantial additional sanction. Definitional spillovers thus are not the only cause of overenforcement. Overenforcement can also result from the extralegal consequences of legal liability, or market spillovers.¹

This Article examines overenforcement that is unavoidable and, consequently, justifiable. Justifiable overenforcement is still socially harmful to the extent that it creates excessive deterrence. Our goal is to identify this problem and to offer a framework for addressing it. Until now, the concept of overenforcement has gone largely unnoticed and unanalyzed in the academic literature. That literature generally has conflated overenforcement, as we use that term, with overdeterrence.² Overenforcement and overdeterrence are closely related, but

1. See *infra* Section I.A.

2. The literature frequently describes as “overenforcement” indiscriminate or otherwise extreme enforcement actions by government agencies that inflict social costs without producing offsetting benefits. See, e.g., Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 *LOY. CONSUMER L. REV.* 303, 304–06 (2004) (equating overenforcement with excessive enforcement actions by the government); Matthew P. Harrington, *Health Care Crimes: Avoiding Overenforcement*, 26 *RUTGERS L.J.* 111 (1994) (same); Michael J. Pyle, Policy Comment, A “Flip” Look at Predatory Lending: Will the Fed’s Revised Regulation Z End

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

This separation implies that overenforcement does not automatically translate into overdeterrence. Overdeterrence depends on the probability that an individual attaches to a *future scenario* in which he suffers harm from overenforcement.⁴ Overenforcement accordingly translates into overdeterrence only to the extent that individuals take it into account *ex ante*. When that happens, overenforcement causes social loss. A perspicacious legal system will recognize this fact and reduce the number of overenforcement cases in order to bring the *ex ante* probability of overenforcement (and, hence, overdeterrence) down. In the simplest case—the case in which the overenforcement stems from a legal penalty that is set inappropriately high—the legal system can do this merely by adjusting the penalty downward to the appropriate level. In a case in which the legal penalty is properly calibrated, the system might still ensure an optimal total sanction by deducting the extralegal penalty from the legal one.⁵

Abusive Refinancing Practices?, 112 YALE L.J. 1919, 1925 (2003) (same); see also Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 782–86 (1991) (arguing that under an originalist approach to statutory interpretation, judicial extension of a statute beyond its original meaning qualifies as overenforcement). What these commentators call “overenforcement” is simply imprudent, unauthorized, or wasteful enforcement. It does not involve individuals who suffer excessively from the *proper* level of governmental enforcement of the relevant legal rule.

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

4. In discussing overdeterrence, we treat deterrence in the traditional narrow sense, strictly as cost-benefit analysis by rational, self-interested individuals: potential offenders compare the expected penalty with the expected benefit and refrain from wrongdoing when the former outweighs the latter. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 & n.1 (Clarendon Press 1907) (1823) (laying out the traditional theory of deterrence); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968) (developing classic economic model of deterrence). We do not here consider how overenforcement affects deterrence in its broader, “new path” sense. See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (articulating a social meaning theory of deterrence that focuses on the criminal law’s power to influence values and the formation of preferences).

5. See Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401 (2001) (arguing for a setoff system under which courts deduct nonlegal sanctions from legal penalties); Richard H. McAdams & Eric B. Rasmusen, *Norms and the Law*, in HANDBOOK OF LAW & ECONOMICS (A.M. Polinsky & S. Shavell eds.) (forthcoming Dec. 2005) (manuscript at 27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=580843) (suggesting same).

But not all cases are susceptible to such tidy solutions. Operational and expressive constraints on the legal system sometimes prevent tinkering with substantive rules or sanctions to remedy spillovers. Quick fixes to eliminate overenforcement thus will not always work. Does this mean that overdeterrence is inevitable in such cases? No. The legal system can still ameliorate it by adjusting the requirements for a finding of liability—say, by heightening evidentiary standards—in cases likely to involve systemic overenforcement. These measures will not eliminate the overenforcement—a person found liable still will suffer penalties exceeding the net harm his violation produced—but they will reduce its probability. The consequent reduction in the probability of overenforcement would reduce the expected harm for individuals. This would mitigate overdeterrence, or even eliminate it altogether.

To the extent overenforcement is necessary, then, the legal system can accommodate it without creating excessive deterrence on the ground. This is the principal insight of this Article. While a wide body of literature has examined the ways in which the legal system can counteract underenforcement of the law by manipulating penalties and their probabilities,⁶ this literature has largely ignored the role that procedural and evidentiary measures play in counteracting overenforcement. As we explain in this Article, where systemic and unavoidable overenforcement is present, these measures can combine with substantive liability rules to create a second-best system of law enforcement.⁷ Given operational and expressive considerations, the legal system must tolerate some overenforcement. But it need not put up with the full amount of overdeterrence that overenforcement threatens to engender. The system thus does well when it minimizes overdeterrence through evidentiary and procedural mechanisms that reduce the probability of overenforcement for potential transgressors. Jeremy Bentham remarkably neglected this point in his overarching critique of evidence law,⁸ and contemporary legal scholarship also tends to neglect it.

6. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 897 (1998) (arguing that courts should take the probability of escaping liability into account when calculating punitive damages); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 192, 193–94 (Peter Newman ed., 1998) [hereinafter Polinsky & Shavell, *Punitive Damages*]; Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463, 466 (1996); *infra* notes 57–59 and accompanying text.

7. See generally Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956–57) (laying out the general economic theory of second best); Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3, 3 (1998) (noting that “Second-Best Theory has startling implications for law-and-economics analysis”); John J. Donohue III, *Some Thoughts on Law and Economics and the Theory of Second Best*, 73 CHI.-KENT L. REV. 257 (1998) (discussing applications of the second-best theory in law); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189 (1998) (same).

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

[B]y the effect of this impunity-giving rule, undue suffering has probably in some instances been prevented. Prevented? but to what extent? To the extent of that part of the field of penal

The remainder of this Article proceeds in four Parts. Part I develops the general overenforcement framework. It clarifies the idea of overenforcement and demonstrates that some instances of overenforcement are unavoidable in light of operational and (particularly in the area of criminal law) expressive constraints on the legal system. Part I then goes on to illustrate ways in which evidentiary and procedural mechanisms might be used to mitigate this problem—what we call the overenforcement paradigm.

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

Part III applies our paradigm to the area of corporate criminal liability. In its current form, the doctrine of corporate criminal liability creates unique problems of overenforcement. Part III shows how evidentiary and procedural protections for corporations could ameliorate those problems by working to counteract the definitional and market spillovers that current doctrine generates.

Part IV considers objections.

I. THE MODEL

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

But what about overenforcement that, for good reasons, is not open to such straightforward corrections? As this Part makes clear, this type of overenforce-

law which is occupied by bad laws Applying with equal force and efficiency to all penal laws without distinction—to the worst as well as to the best, it at the same time diminishes the efficiency of such as are good.

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

9. See 2 MCCORMICK ON EVIDENCE 443 (John William Strong ed., 4th ed. 1992).

10. See Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 78u-4(b) (1998).

11. See *Weiler v. United States*, 323 U.S. 606 (1945) (upholding the common law corroboration requirement for cases in which a single prosecution witness accuses the defendant of perjury); Perjury Act, 1911, c.6, §13 (Eng.); sources cited *infra* note 106.

ment is unavoidable and justifiable. Instances of unavoidable overenforcement split roughly into two scenarios. In the first, adjudicators properly impose liability and the appropriate legal sanction on a defendant. By doing so, they also help to worsen the defendant's position in the market for goods, services, or reputation. Consequently, in addition to bearing the harm of the legal sanction, the defendant sustains further financial or other loss.¹² We call this scenario a "market spillover." In the second scenario, adjudicators find the defendant liable under an overbroad liability rule that they correctly apply. By overbroad, we mean a liability rule that captures some cases that are not justified by its underlying social purpose, such as a strict fifty-five mile per hour speed limit that targets dangerous driving. The defendant's particular case falls within the rule's formal prohibition but outside the scope of the rule's purpose. We call this scenario a "definitional spillover."

Under both scenarios, the total harm the defendant suffers from the imposition of liability is excessive relative to the social cost of his conduct. This consequence may not necessarily be unjust, and in isolated cases it will not matter. But where the prospect of suffering it is realistic and recurring, overdeterrence results. Consider a situation in which the optimal sanction for deterring a certain type of conduct (representing the total harm that society wants to avoid) equals x , the average spillover addition to the sanction for such conduct equals y , and a rational individual is contemplating a course of action that falls within the sphere of conduct at issue. This individual will take the contemplated action if its expected benefit to him or her (b) is greater than $x + y$. From a classic social utility standpoint, the individual should take the action whenever $b > x$. In any such case, the aggregate social welfare would be greater than it was before.¹³ The individual, however, will not take the action when $x < b < x + y$,

12. The Ford Explorer's rollover problems with Bridgestone tires, for example, caused Ford significant reputational damage. Explorer sales collapsed by 21% in the first half of 2001 (even though, in 2001, it was not clear that Ford was at fault). See Joann Muller, *Ford: Why It's Worse Than You Think*, BUS. WK., June 25, 2001, at 80–89. On February 12, 2002, after reviewing extensive accident data, the National Highway and Traffic Safety Administration declined to launch an official investigation into the Explorer's safety, although legal claims are still pending against the company. See Monica Roman, ed., *Exonerating the Explorer*, BUS. WK., Feb. 25, 2002, at 50. For further examples, see Faye Rice, *Denny's Changes Its Spots*, FORTUNE, May 13, 1996, at 133, 142 (highlighting a 30% decline in 1993 operating income and a 4% drop in customer traffic for Denny's after the restaurant chain was accused of racial discrimination after a widely-reported incident involving a Maryland Denny's that denied service to a group of black Secret Service agents); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249, 1268–97 (2003) (describing financial fallout for Texaco, Home Depot, and Denny's from class-action discrimination suits); *infra* notes 129–134 and accompanying text (citing additional examples).

As some of these examples illustrate, there is by no means a perfect causal or temporal relationship between imposition of the legal sanction and the market spillover harms that a defendant suffers. For our theory to hold, there doesn't need to be. The combined harms, triggered by the same events, still result in overenforcement on the ground.

13. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10–16 (6th ed. 2003) (expounding this basic approach to sanction-setting).

which implies that y —the spillover addition to the optimal sanction—is generally detrimental to society.¹⁴

Does this mean that, in any overenforcement scenario, adjudicators should deduct the spillover amount from the sanction that they would otherwise impose on the defendant? Not necessarily. Each scenario can implicate independent constraints on the ability of lawmakers to adjust sanctions downward in order to offset any overdeterrence that might flow from overenforcement. To show why, we will take each scenario in turn. Section A looks at market spillovers. Section B addresses definitional spillovers. Section C explains how, under our overenforcement paradigm, the law can ameliorate the effects of these spillovers through evidentiary and procedural mechanisms that reduce overdeterrence without running afoul of the limitations discussed in Sections A and B.

A. MARKET SPILLOVERS

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

The first reason turns on the relationship between law and social meaning. Academics, particularly in the area of criminal law, have recently begun to explore how background social norms and conventions against which legal sanctioning regimes operate limit the ability of adjudicators to manipulate sanctions within those regimes. Criminal punishment “is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation”¹⁵ and repudiates the false valuations embodied in criminal wrongdoing. This accepted social meaning of punishment imposes expressive limitations on

14. Importantly, we do not mean this analysis to suggest that there is some optimal level of *crime*—a perspective that would treat a potential burglar's decision to refrain from burglarizing a house as decreasing social welfare. Under our approach, the spillover addition to the optimal sanction is detrimental to society only when it chills socially beneficial conduct. This chilling effect will be of particular concern in the context of many business and regulatory crimes, where the distinction between lawful and unlawful activity is often both difficult to discern and a matter of degree, and the lawful conduct surrounding the crime often has great social value. See Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 506–07, 513 (2004) (discussing the difficulty of distinguishing criminal from noncriminal behavior and the often high social value of the legitimate conduct surrounding white collar crimes). By contrast, murder, rape, and other core criminal offenses produce little or no social utility and great social harm. Overdeterrence will rarely exist for such crimes, the ideal rate of which is zero. See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991) (“[O]nce it is recognized that society generally intends to prohibit behavior through the criminal law, it follows that there cannot be an ‘optimal’ rate of crime . . .”); Ackerman v. Schwartz, 947 F.2d 841, 847 (7th Cir. 1991) (“The optimal amount of fraud is zero. . .”). Where it could exist, criminal law has crafted special doctrines to deal with it. See MODEL PENAL CODE § 3.02 (1962) (articulating “choice of evils” defense).

15. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996); see also R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 72 (2001) (arguing that “to understand crimes as ‘public’ wrongs is to understand them as wrongs to which the community should respond,” because “to mean what we say in condemning some conduct as wrong is to be committed to censuring those who engage in it”); Joel Feinberg, *The Expressive Function of Punishment*, in READINGS IN THE

authorities' ability to adjust criminal sanctions in the single-minded pursuit of efficiency.¹⁶ In some circumstances, these constraints rule out the use of alternative sanctions even in cases in which such sanctions might otherwise inflict an optimal amount of disutility on an offender.¹⁷ Merely fining a wealthy offender as a penalty for his crime, for instance, sends the wrong message that the rich are free to commit offenses so long as they are willing to pay for the privilege of doing it.¹⁸ Likewise, sentencing a convict to community service instead of prison "devalues community service, denigrates the virtue of those who perform it, and shows contempt for the interests of those whom it is supposed to benefit."¹⁹ Such penalties fail as publicly acceptable sanctioning methods because they are expressively irrational. They do not convey what conviction and punishment are supposed to convey but instead undercut and contradict the condemnatory message of the criminal law.²⁰

Mere announcement of criminal liability without any accompanying punishment, be it a fine or otherwise, also undercuts that message.²¹ The way for society to convey to offenders, victims, and the community that it takes a crime seriously is to back up its words with some real-world penalty.²² In criminal and quasi-criminal cases involving market spillovers, then, it might not be possible to adjust a sanction downward to compensate for the overenforcement that the market spillover creates. Indeed, doing so not only would dilute the expressive force of the criminal sanction in the particular case, but it also would work to undermine the criminal law's more general moralizing, educative, and norm-building function in the long term.²³

PHILOSOPHY OF LAW 467, 470 (Jules L. Coleman ed., 1999) ("Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.").

16. See, e.g., DUFF, *supra* note 15, at 28 (observing that when persons engage in conduct that society has labeled criminal, "[t]o remain silent in the face of their crimes would be to undermine . . . [the] declaration that such conduct is wrong"); Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111, 131 (1988) (arguing that "we would be accomplices in the crime if we failed to punish its perpetrator, because we would be condoning the evidence it gave us of the relative worth of victim and offender").

17. See Kahan, *supra* note 15, at 619 (noting that, theoretically, fines can inflict the optimal amount of disutility on offenders at a cheaper cost than other alternatives).

18. See *id.* at 621–23.

19. *Id.* at 627.

20. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 32–38 (1993) (discussing the "expressive rationality" of punishment).

21. See Hampton, *supra* note 16, at 131 (maintaining that a failure to punish amounts to "acquiescing in the message . . . sent about the victim's inferiority"); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 123 (2004) ("Offenders, victims, and society interpret the failure to punish to mean that the crime is not really wrong and that the offender is free to keep doing it.").

22. See Bibas & Bierschbach, *supra* note 21, at 122–23; Kahan, *supra* note 15, at 600–01.

23. See Yuval Feldman & Janice Nadler, *Expressive Law and File Sharing Norms* 35–39 (Northwestern U. Sch. of Law Pub. Law & Legal Theory, Research Paper No. 05-18 & Bar-Ilan U., Faculty of Law, Interdisc. Program for Law, Rationality, Ethics & Soc. Just., Working Paper No. 12-05, 2005) (finding in an empirical study that laws accompanied by formal sanctions influence perceptions of sharing digital files of copyrighted materials, while laws unaccompanied by sanctions do not), *available*

Consider the following illustration. Suppose that prosecutors obtain a conviction of a corporation for criminal fraud, an offense punishable under the controlling statute by a \$1,000,000 fine (which we will assume to be optimal for deterrence). As is often the case in such situations, suppose further that, prior to sentencing, the corporation suffers a substantial *additional* decline in its total stock value as a result of the events surrounding the criminal investigation and ultimate conviction—say, \$950,000.²⁴ This decrease could be based on any number of factors, from the stock market's general loss of confidence in the corporation's financial stability and future performance to the effect of the fraud and the conviction on relationships with government agencies or with customers, suppliers, or other private parties.²⁵ Should the adjudicators allow this extralegal sanction to offset the statutory fine by setting the corporation's ultimate penalty at \$50,000?²⁶ Probably not. This setoff would trivialize the normative message that the criminal prohibition against fraud aims to project and thereby undermine its expressive function. The message would shift from, "Fraud is wrong, hurts innocent victims, and warrants a severe sanction," to, "Findings of fraud can impact business, and that is punishment enough for those who engage in it."

Of course, not all cases will implicate significant expressive constraints. The

at <http://ssrn.com/abstract=799364>; Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399, 1407–31 (2005) (discussing original experimental evidence showing that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); see also John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1877 & n.7 (1992) (discussing the criminal law's "socializing role"); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477–88 (1997) (explaining that the criminal law's power to nurture and communicate societal norms is intimately connected to its moral credibility). We note that, by the same token, applying the criminal law too broadly to conduct that is more appropriately viewed as the subject of civil or administrative regulation might give rise to similar long-term dilution concerns, an issue we do not address in this Article. See, e.g., Coffee, *supra*, at 1877 (arguing that "overuse" of the criminal law in response to new social problems "will impair the criminal law's nondeterrent functions . . . because society's capacity to focus censure and blame is among its scarcest resources"); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996) (describing the functions of civil liability in circumstances where "moral blameworthiness" is insufficient to merit criminal sanctions).

24. See Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 758 (1993) (presenting evidence that "the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud"). In our example, the \$950,000 decrease in the corporation's stock value adds to the \$1,000,000 decrease that would result from the impending fine. The total stock-value diminution brought about by the corporation's conviction thus equals \$1,950,000.

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

26. If the corporation were to receive a \$950,000 credit toward the fine and pay the government only \$50,000, the total stock-value diminution of \$1,000,000 would be optimal for deterrence. This assumes, as noted, that the legislative deterrence calculus has not already anticipated the \$950,000 market sanction in setting the statutory fine at the optimal level. For further discussion of that assumption, see *infra* notes 177–78 and accompanying text.

less the public views an act as wrong, the less expressive fallout from a setoff there will be.²⁷ But even when a setoff is expressively allowable, it very likely will be practically unworkable. The unsure relationship between extralegal sanctions and legal penalties complicates any setoff system to the point of infeasibility. Market spillovers occur when the invocation of the legal process and the ultimate imposition of a legal penalty combine with extralegal sanctions to bring the total harm to a defendant above the amount optimal for deterrence. Setoffs in these cases would be problematic because courts could never be sure that, if they lowered the penalty, the defendant would still suffer the full extralegal loss. If, for example, a court decided to fine a corporation only \$50,000, the relative lightness of that fine might bolster the market's confidence and significantly reduce the extralegal fallout or even eliminate it at some later point in time.²⁸ Any such development, over which the court has no control, would frustrate the calculation that led it to the \$50,000 figure and upset optimal deterrence.

Another reason for discarding a setoff system springs from the path-dependence of trial and pre-trial procedures, which would frustrate setoffs even more.²⁹ The factfinding procedures that courts routinely apply center around legal liabilities, entitlements, and formal sanctions. An elaborate system of evidence rules has developed in light of this orientation. The existing framework of procedure and evidence trims the information that courts receive in a way that sharply separates the legal issues of a lawsuit or prosecution from its extralegal consequences.³⁰ The principle of relevancy, which applies both dur-

27. See, e.g., McAdams & Rasmusen, *supra* note 5, at 27–28 (explaining different relationship of social norms to *malum in se* and *malum prohibitum* crimes); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1556–63 (1997) (discussing public perceptions of *malum prohibitum* and *malum in se* crimes and noting criticisms of using criminal law to regulate “petty offenses” that the public does not perceive as sufficiently wrongful or harmful). *But see id.* at 1565 (describing certain regulatory offenses that are perceived by the public as being just as serious as traditional nonregulatory crimes).

28. Economists describe this effect as “crowding out.” See, e.g., Oren Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485, 492–93 (2001) (noting that an increase in the frequency of crimes may induce changes in their social perception by eroding the stigma that society attaches to them); AMIHAI GLAZER & LAWRENCE S. ROTHENBERG, WHY GOVERNMENT SUCCEEDS AND WHY IT FAILS 139–40 (2001) (discussing “crowding out” effect); see also Doron Teichman, *Sex, Shame and the Law: An Economic Perspective on Megan's Law* 4 (University of Texas School of Law, Law and Economics Working Paper No. 047, April 2005), available at <http://ssrn.com/abstract=705162> (demonstrating that “policymakers cannot substitute legal sanctions with nonlegal ones and still hold the level of nonlegal sanctions constant, since the level of each of these is expected to affect the other”).

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

30. Some exceptions to this separation, of course, do exist. For instance, many courts allow convicted defendants in white-collar criminal cases to point to the extralegal consequences that their own prison time might have for employees and other stakeholders in arguing against incarceration at sentencing. See, e.g., *United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995) (affirming downward sentence departure granted to defendant because of the hardship his sentence would cause his employees); *United States v. Somerstein*, 20 F. Supp. 2d 454, 460–62 (E.D.N.Y. 1998) (granting defendant a downward sentence departure for same reason); *United States v. Reilly*, 33 F.3d 1396, 1424

ing pretrial discovery³¹ and with respect to evidence that courts ultimately admit and consider at trial,³² is the most obvious example of this separation. Rules against hearsay³³ and opinion,³⁴ the right to cross-examine adverse witnesses,³⁵ and the limitations on expert testimony,³⁶ just to name a few, have a similar trimming effect.

Adducing evidence of the extralegal consequences brought about by civil or criminal liability is difficult to do under this framework. Such evidence normally will not lie within the first-hand knowledge of ordinary witnesses (except in the most general way).³⁷ Even if it did, to the extent that testimony ascribes a dollar value to damage to a defendant's reputation or the like, it cannot be made by an ordinary, as opposed to expert, witness.³⁸ More often than not, however, an expert witness testifying about these matters would face disqualification. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁹ the general assessments that an expert would make often would be too speculative to qualify as admissible expert evidence.⁴⁰ Economic experts narrowly estimating the impact of a firm's civil or criminal liability on its stock price would usually pass the admissibility threshold. If carried out properly, their event studies would furnish evidence upon which courts could rely.⁴¹ But even these experts usually would

(3d Cir. 1994) (denying downward departure requested by defendant who asserted hardship to his business resulting from conviction).

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

32. See FED. R. EVID. 401 and 402; 1 McCORMICK, *supra* note 9, at 773–74 (only evidence that has potential legal consequences is relevant and admissible).

33. See FED. R. EVID. 801 and 802; 2 McCORMICK, *supra* note 9, at 93–96 (hearsay evidence is inadmissible subject to exceptions).

34. See FED. R. EVID. 701; 1 McCORMICK, *supra* note 9, at 41–47 (lay opinions are generally inadmissible).

35. See 1 McCORMICK, *supra* note 9, at 78 (describing the right to cross-examine adverse witnesses as a fundamental requirement that promotes accuracy in factfinding).

36. The Supreme Court articulated these limitations in its *Daubert* trilogy. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

37. Testimony about general reactions to a particular liability ruling would often rely on out-of-court statements that the rule against hearsay renders inadmissible. See FED. R. EVID. 801(a)–(c) and 802; 2 McCORMICK, *supra* note 9, at 98 (any out-of-court assertion offered to prove the truth of the matter asserted qualifies as hearsay).

38. The rule against opinion contains an explicit provision to this effect. See FED. R. EVID. 701; 1 McCORMICK, *supra* note 9, at 41–47.

39. 509 U.S. 579 (1993).

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

41. See generally Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. ECON. PERSP. 91 (1999) (explaining the role of economic experts in litigation); see also *In re Executive Telecard*, 979 F. Supp. at 1026 (indicating that event studies, if properly carried out, are both admissible and reliable evidence).

be unable to resolve the problem of indeterminate causation. In particular, they would find it hard to differentiate between stock depreciation that reflects a firm's business performance and the market's negative reaction to a liability ruling as such. This differentiation is crucial to the setoff system. It is the impact of the liability ruling *per se*—not the firm's poor business performance—that courts can plausibly consider as a sanction-reducing factor.⁴²

And those are the easy cases. In the hard ones, an expert may have no solid basis at all for attempting to estimate the extralegal sanctions suffered by a defendant. How, for example, might an expert witness quantify a criminal defendant's sincere remorse and pangs of conscience, or his discreditation with those around him, or his loss of future business and job opportunities? If extralegal sanctions are to be considered in some sort of setoff calculus, presumably these and similar sanctions should count as much as any other.⁴³

Even in the most straightforward cases, principled implementation of a setoff system would require substantial reform of existing trial practice. Specifically, it would require a factfinding procedure analogous to the Brandeis brief mechanism that courts presently employ in resolving broad constitutional and policy issues.⁴⁴ The tradeoff between the costs and the benefits of such a thoroughgoing reform is uncertain at best. Basic path-dependence theory holds that a shift from familiar to unfamiliar tasks and practices can generate costs that make the game not worth the candle.⁴⁵ A good example of this is the widespread (and non-collusive) rejection of the Dvorak Simplified Keyboard.⁴⁶ Good ergonomics always ought to consider the cost of modifying existing habits, and the same holds true for the ergonomics of trial.

B. DEFINITIONAL SPILLOVERS

The second overenforcement scenario involves definitional spillovers. Unlike

42. See *supra* note 12 and accompanying text.

43. See Robinson & Darley, *supra* note 23, at 469–70 (discussing various extralegal sanctions that often follow from criminal conviction).

44. See generally John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993) (highlighting the importance of legislative facts in precedent-setting cases addressing constitutional or public policy issues); see also Logiodice v. Tr. of Maine Cent. Inst., 296 F.3d 22, 30 (1st Cir. 2002) (distinguishing between “Brandeis brief facts and courtroom proof”). The Brandeis brief has been frequently criticized as anecdotal and unscientific. See, e.g., Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993) (discussing problems with and proposing alternatives to Brandeis-brief approach).

45. See Margolis & Liebowitz, *supra* note 29, at 18.

46. Studies proved the Dvorak Simplified Keyboard to be more ergonomic than the traditional QWERTY keyboard. Dvorak was patented in 1936 but never caught on, despite marketing efforts, because QWERTY locked in. Path-dependency appears to be the most plausible explanation for this. See PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS 221–44 (1994); Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985). For criticism of this thesis, see Stan Liebowitz & Stephen E. Margolis, *Policy and Path Dependence: From QWERTY to Windows 95*, 18 REG. 35 (1995); S. J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J. LAW & ECON. 1 (1990).

market spillovers, definitional spillovers do not increase the overall sanction for liable defendants. Rather, in cases of definitional spillovers, defendants divide into two distinct categories. The first category consists of defendants who are liable under the controlling legal rule both formally and as a matter of the rule's substantive goal. Their liability, in other words, aligns not only with the language of the overbroad liability rule, but also with its underlying rationale. The second category consists of defendants whose liability is merely formal because it aligns only with the language of the liability rule.⁴⁷ Defendants falling into the first category can make no valid complaints about overenforcement and excessive deterrence. By imposing its sanction on these defendants, the liability rule treats them exactly right. These defendants do not pay any of the extra costs that the definitional spillover generates.

This is not the case with the second category of defendants. Defendants belonging to that category internalize the costs of the definitional spillover in their entirety. The overbroad liability rule treats these defendants exactly wrong. We can see this by returning to our example involving the fifty-five mile-per-hour speed limit. Suppose that the underlying rationale for the speed limit is to prevent dangerous driving and that the rule is effected by a misdemeanor criminal prohibition.⁴⁸ Drivers who exceed the limit fall into two categories: some drive their cars dangerously at that speed, and some do not. The rule's prohibition, however, treats all drivers indiscriminately by holding each one liable. In doing so, it generates social costs by excessively deterring safe drivers. Many safe drivers will slow down—and each will slow down the business to which he or she belongs—without producing any offsetting benefits on the road.⁴⁹

One might try to solve this problem by crafting a more flexible definition that captures only the dangerous drivers while letting the safe ones go. But a number of reasons exist to reject that solution. Strict rules that lay down unambiguous

47. *See, e.g.*, FREDERICK SCHAUER, *PLAYING BY THE RULES* 32 (1991) (observing that the generalizations of most rules “encompass states of affairs that might in particular instances not produce the consequence representing the rule’s justification”).

48. Classification of traffic violations varies by jurisdiction. Some jurisdictions treat garden-variety speeding as a criminal offense, with no right to a jury trial, while other jurisdictions treat it as a civil offense. For example, in Alaska, a speeding violation is called an infraction and is not considered a criminal offense, *see* ALASKA STAT. § 28.40.050(c)–(d) (2003), whereas Texas treats speeding violations as criminal misdemeanors, *see* TEX. TRANSP. CODE ANN. § 542.301 & 750.002(b) (2004).

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

The fifty-five mile-per-hour speed limit does nothing to deter a third category of drivers: those who drive dangerously even at a speed of fifty-five miles-per-hour or less. This yields a species of underenforcement that is the opposite of overenforcement. Theoretically, a legal rule might be crafted to strike the perfect balance between underenforcement and overenforcement. *See* SCHAUER, *supra* note 47, at 32–34 (discussing the over- and under-inclusiveness of rules). Rules of that sort do not fall under the framework developed in this Article.

precepts coordinate traffic much better than do flexible standards.⁵⁰ They also save a good deal of adjudication expenses and other enforcement costs.⁵¹ And, by providing a bright-line rule for police as well as motorists, they also help to constrain potential abuses by law-enforcement personnel—such as racial profiling—that might be easier to engage in under a vague, discretionary standard.⁵² In sum, operational constraints—the same constraints that led to choosing the rule in the first place—prevent altering the definition to eliminate the overenforcement that flows from the definitional spillover.

C. THE OVERENFORCEMENT PARADIGM

The overenforcement upon which we focus is systemic and justifiable, rather than occasional and unjustifiable. For this reason, we separated it at the outset from the avoidable overenforcement that extreme legal sanctions sometimes produce. For the same reason, we also set aside the occasional overenforcement that results from erroneous, wasteful, or otherwise flawed enforcement decisions. For the purposes of what follows, this Article assumes that in both market and definitional spillover scenarios courts and law-enforcing agencies do not deviate in their decisions from the appropriate (and socially unavoidable) error rate.⁵³ More broadly, we assume that courts ascribe liability and impose legal sanctions on proper grounds, and that agencies do not overstep their authority or expend resources wastefully or imprudently.⁵⁴ We also assume that individual and organizational actors are basically rational and reasonably informed about the workings of the law.⁵⁵

Overenforcement that is systemic, unavoidable, and justifiable still creates excessive deterrence on the ground. This chills many worthwhile activities. Ideally then, the legal system should not simply put up with overenforcement. Whenever appropriate, it should counterbalance overenforcement through corrective measures that reduce excessive deterrence. These measures must reduce excessive deterrence within the expressive and operational constraints we identified earlier and without seriously compromising the objectives that the substantive law strives to attain. This latter condition is crucial. In light of it,

50. See SCHAUER, *supra* note 47, at 32–34, 125 (noting that strict rules, such as “Speed Limit 55,” enhance certainty and promote coordination).

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

52. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 61–62 (1999) (making this point in the course of holding unconstitutional a city ordinance that gave police officers “absolute discretion” to determine what activities constituted loitering within the meaning of the statute).

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

54. See POSNER, *supra* note 13, at 17–21, 542–45, 643–45 (discussing the plausibility of this assumption).

55. This standard assumption does not presuppose omniscience, nor does it ascribe other superhuman capacities to individual actors. It only means that the actors upon which this Article focuses are willing and able “to use instrumental reasoning to get on in life.” *Id.* at 17.

overenforcement can be counterbalanced only by procedural and evidentiary mechanisms that reduce the overdeterrence. These mechanisms must not dilute the substantive liability rule that produces the overenforcement. We call this framework the overenforcement paradigm.⁵⁶

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

As is well-recognized in the literature, the simplest way to do this is to divide the theoretically optimal sanction by the existing probability of enforcement.⁵⁷ If the ideal penalty is \$100,000, and the probability of enforcement is one-third, the actual penalty should be set at \$300,000. This would bring the expected penalty for each prospective wrongdoer into line with the optimal penalty of \$100,000 ($1/3 \times \$300,000$). Absent this adjustment, the expected penalty would equal only \$33,333 ($1/3 \times \$100,000$) and prospective wrongdoers would be significantly underdeterred.⁵⁸ The best way to deal with that problem may not be to cut back on other valuable programs or to raise additional revenue to fund more enforcement resources and initiatives. Instead, assuming good information is available, the jurisdiction can increase the sanction, and can do so cheaply and easily.⁵⁹

56. In an influential article, Meir Dan-Cohen developed an analogous approach based on "decision rules" (directed at officials to guide decisions) and "conduct rules" (directed at the public to guide conduct). See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Using his approach, one might say that our framework calls for special procedural and evidentiary decision rules that counteract overenforcement without undermining the values embodied in the corresponding substantive conduct rules. But unlike Dan-Cohen's model of acoustic separation, the decision rules in our framework are not walled off from the general public. To the contrary, for those rules to reduce excessive deterrence, the public must know both that the rules exist and how they apply. It need not know, however, of the policies underlying those rules. See *infra* notes 171–75 and accompanying text (distinguishing between rules that minimize the appearance of overt trade-offs between competing goals and values and those that do not).

57. See Becker, *supra* note 4; Craswell, *supra* note 6; Polinsky & Shavell, *Punitive Damages*, *supra* note 6.

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

59. Just as expressive considerations can constrain lawmakers' ability to adjust a sanction downward, they can also constrain lawmakers' ability to adjust a sanction upward. In fact, "when increasing the penalty on a particular law is out of step with norms in a community, [doing so] may reduce deterrence instead of promoting it." Tracey L. Meares et al., *Updating the Study of Punishment*, 56

Overenforcement accompanied by counterbalancing procedural devices is the mathematical equivalent of underenforcement rectified by soaring legal sanctions. If the sanction that overenforcement produces amounts to \$300,000 instead of \$100,000, and—for reasons already given⁶⁰—lawmakers cannot bring this sanction down to \$100,000, they can still eliminate the overdeterrence by reducing the general probability of enforcement from one to one-third. The expected sanction for potential wrongdoers would consequently equal \$100,000 ($1/3 \times \$300,000$)—the right penalty for optimal deterrence. Lawmakers can do this by setting up special procedural or evidentiary barriers to enforcement, such as heightened standards of proof or other burdens placed upon prosecutors or claimants.

This paradigm for attacking the problem of overenforcement instantiates the general theory of second-best.⁶¹ Under that theory, observing an economic distortion (such as a procedural requirement that impedes factfinding) is not by itself a good reason for eliminating it. The observed distortion may be counterbalancing another distortion (overenforcement) that the relevant social institution, such as the law, needs to put up with due to other constraints (operational and expressive). This possibility calls for a comprehensive evaluation of the problem of overenforcement and the framework we have articulated for addressing it. At the same time, like second-best solutions generally, it does not call for perfection. In our theory, the legal system does its second-best by mitigating unavoidable overenforcement with heightened evidentiary or procedural requirements that minimize overdeterrence. But our theory offers no concrete prescriptions for a perfectly tailored counterbalancing approach that would do exactly right on a case-by-case basis. As a practical matter, this is unattainable. The legal system must do its practical best without satisfying the perfectionist's test for accuracy.⁶²

As an illustration of how our paradigm might work, consider the following example. Say a jurisdiction contemplates legislation that will determine the conditions under which people may drive cars following the consumption of alcoholic beverages. Two legislative possibilities—a rule and a standard—are on the table. The lawmakers can set a flexible standard providing that “any person driving a motor vehicle under the influence of alcohol that substantially impairs his or her ability to control and operate the vehicle shall be guilty of a misdemeanor.” Alternatively, they can lay down a rigid rule specifying the permissible level of alcohol in the blood for car drivers (L) and stating that “any

STAN. L. REV. 1171, 1186 (2004). Overly severe penalties “create what may be termed an inverse sentencing effect” because, “[a]s penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught.” *Id.* at 1185; *see also id.* at 1210 n.42 (citing studies documenting this effect).

60. *See supra* sections I.A–B.

61. *See sources cited supra* note 7.

62. *See WILLIAM TWING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 96–97* (1990) (rejecting the demand for perfection in legal rules as unrealistic).

driver with a blood-alcohol level above L shall be guilty of a misdemeanor.”

The costs and benefits of enforcement will differ under each regime. Police in both regimes will be authorized to use breathalyzers for determining L. The standard-based regime, however, also requires police and courts to examine each driver's condition individually, at a relatively high cost.⁶³ The rule-based regime substantially reduces that cost, and it does so cheaply. The effects of various blood-alcohol levels on the average driver's control over his or her car are already scientifically established, and lawmakers can use them for free. By making a straightforward statement that “any driver with a blood-alcohol level above L shall be guilty of a misdemeanor,” the rule-based regime capitalizes on this economy of scale.⁶⁴ It thus dramatically minimizes the sum of promulgation and enforcement expenses, which provides a *prima facie* reason for preferring it over the standard-based regime.⁶⁵ The lawmakers, however, also need to consider the impact of each regime on the efficacy of enforcement and the corresponding level of deterrence. On that score, the standard-based regime produces more accurate liability rulings than does the rule-based regime.

As with any rules-versus-standards question, then, the lawmakers must weigh the tradeoff between accuracy on the one hand and future enforcement costs on the other. Say the lawmakers find the standard-based regime too expensive and opt for the rule-based regime. Now they need to decide upon an appropriate figure for L, which turns out to be a difficult task. If L were to represent the point at which the influence of alcohol impedes the average driver's control over his or her car, the rule would fail to deter drivers who lose control after drinking less alcohol than the average. Assuming the lawmakers are particularly interested in deterring this vulnerable category of drivers, they will choose a lower L threshold. This will generate overenforcement of the definitional spill-over type. Under this regime, drivers with average and above-average resistance to alcohol will often have to choose between consuming alcohol and driving when, for them, both activities are socially innocuous or beneficial. The result is excessive deterrence from chilling safe driving and social life at once.⁶⁶ The lawmakers might want to consider introducing corrective measures that would mitigate this effect.

From the lawmakers' viewpoint, reduction of the penalty for driving under the influence of alcohol (DUI) is not an option. That measure would be overcorrective because it would equally benefit all alcohol-consuming drivers, both safe and unsafe. Safe drivers might be deterred adequately (or still excessively, depending on how far the penalty reduction goes), but unsafe drivers would be deterred insufficiently. Reducing the penalty also would chip

63. See Kaplow, *supra* note 51, at 572–73.

64. *Id.* at 563–64.

65. *Id.* at 568–77.

66. See generally STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 177–99 (2004) (demonstrating how overbroad liability rules chill socially beneficial activities, such as driving, without producing offsetting benefits).

away at the educational impact of the DUI prohibition and would vitiate its expressive significance.⁶⁷

A better corrective measure is to reduce the probability of a DUI conviction predominantly for safe drivers. The lawmakers might, for instance, require two independent breathalyzer tests in order to convict a person of DUI. They might also stipulate that each test must independently establish the person's blood-alcohol level beyond all reasonable doubt.⁶⁸ They might then qualify this evidentiary safeguard by providing that it will not extend to a driver who committed a separate traffic offense. This qualification would capture many safe drivers within the safeguard while excluding many unsafe drivers from its protection. Under this regime, drivers with average and above-average resistance to alcohol would estimate their expected sanction by multiplying the statutory penalty by their reduced probability of detection and conviction. The resulting figure (admittedly not as neat as in our numerical example) would bring deterrence closer to the optimal level. Ex post, some unsafe drivers would still escape conviction and punishment, and some safe drivers would not. The law, however, would do better at adequately deterring every prospective driver ex ante.⁶⁹

An identical example can be constructed for market-spillover cases. Assume that in the market for professional car drivers, drivers with a DUI record make fifty percent less than do clean-sheet drivers. This is so because the insurance costs for drivers with DUI records are high, and those costs are high because, under the chosen threshold for *L*, unsafe drivers who cross that threshold pool with safe drivers who do the same. The prospect of a reduced salary on top of legal sanction for all drivers (safe and unsafe) overdeters the average driver. In these circumstances, the lawmakers should adopt the same corrective measures as in the previous example. Evidence law employs such measures in the form of corroboration requirements.⁷⁰

Corroboration requirements, of course, are not the only corrective measures available. Lawmakers may also resort to other procedural and evidentiary mechanisms to counterbalance overenforcement. Examples of these mechanisms are abundant and merit detailed analysis. We therefore close our theoretic-

67. See *supra* notes 15–23 and accompanying text.

68. For a general discussion of the scientific reliability issues raised by breathalyzers, see DAVID L. FAIGMAN ET AL., *SCIENCE IN THE LAW: FORENSIC SCIENCE ISSUES* § 8-1.2.4, at 397–98 (2002).

69. One might object that the lawmakers could achieve the same result in a more straightforward way by simply creating a new crime of “committing a separate traffic offense while driving under the influence of alcohol.” Unless the lawmakers also eliminate or significantly scale back the penalties for the stand-alone DUI prohibition, however, doing so will not mitigate the spillover costs we have identified. As we have already explained, reducing or eliminating those penalties very likely will not be an option. See *supra* note 67 and accompanying text.

70. See, e.g., Road Traffic Regulation Act, 1984, c.27 § 89(2) (Eng.) (“A person prosecuted for [speeding not involving an accident] shall not be liable to be convicted solely on the evidence of one witness to the effect that, in the opinion of the witness, the person prosecuted was driving the vehicle at a speed exceeding a specified limit.”).

cal discussion and turn to positive law. Specifically, we turn to three real-world examples of the overenforcement paradigm in action: the “clear and convincing” proof requirement for civil fraud actions; the heightened procedural standards applicable in securities class actions involving allegations of fraud and misrepresentation; and the common law’s special corroboration requirement for perjury prosecutions.

II. POSITIVE LAW

Some claims and contentions adjudicated in civil cases require proof by “clear and convincing evidence.” This standard is more demanding than is “preponderance of the evidence,” the general proof standard that applies in civil litigation.⁷¹ The preponderance standard is both fair and efficient. By allowing the party with the better proof to prevail, it treats the plaintiff and the defendant as equals.⁷² That makes it fair. By allowing the party with the better proof to prevail, it also minimizes the number of erroneous decisions. Any other proof standard would produce more erroneous decisions than would the preponderance standard.⁷³ That makes it efficient. Any other proof standard, such as “clear and convincing evidence,” therefore must be justified on special grounds.

The overenforcement paradigm provides those grounds in cases involving allegations of fraud. Claims and contentions involving allegations of fraud generally require proof by clear and convincing evidence.⁷⁴ Under our theory, a primary justification for this heightened proof requirement flows from the consequences of liability for fraud. A finding that a person committed fraud often exposes that person to two sanctions rather than one. The first sanction is legal: the liable party pays damages and any other applicable court-ordered penalties and fees. The second sanction is nonlegal and social, what we catego-

71. See 2 McCORMICK, *supra* note 9, at 441–45.

72. See *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (noting that “the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants”); see also Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J. L. & JURISPRUDENCE 279, 333–42 (1996) (demonstrating that the preponderance standard places equal risks of error on the plaintiff and the defendant).

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

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

alize as a market spillover. Following his identification by the legal system as fraudulent, the liable party might also suffer a reputation loss in his community, the loss of business and social opportunities, shame, guilt, emotional distress, and other substantial nonlegal sanctions.⁷⁵ These harms compound the reduction in his welfare from the legal penalty, resulting in overenforcement and, quite likely, overdeterrence. Robert Cooter and Ariel Porat have suggested that courts should deduct such nonlegal sanctions from the legal penalty in order to counteract this effect.⁷⁶ In cases involving fraud, however, expressive constraints on the manipulation of penalties frequently will prevent this.⁷⁷ In those cases, the clear-and-convincing-evidence standard avoids or substantially reduces the danger of overdeterrence by raising the applicable proof threshold and thereby reducing potential defendants' probability of being adjudicated fraudulent. This is a straightforward application of the overenforcement paradigm.

Our second example comes from securities class actions. Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the complaint in any class action involving allegations of material untrue statements or omissions relating to securities must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief," must "state with particularity all facts on which that belief is formed."⁷⁸ When the action claims that the defendant acted with fraudulent intent or a similar state of mind, commonly called *scienter*,⁷⁹ "the complaint shall, with respect to each act or omission . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁸⁰ Failure to meet any of these pleading requirements warrants dismissal of the action.⁸¹ After discovery, if the defendant can show that no evidence substantiates any of the required allegations, the defendant will generally be able to succeed in obtaining sum-

75. See *supra* notes 15–22 and accompanying text.

76. See Cooter & Porat, *supra* note 5, at 405–10; see also *supra* notes 13–14 and accompanying text (explaining how this setoff approach accords with classic social utility theory).

77. See *supra* section I.A.

78. 15 U.S.C.A. § 78u-4(b)(1)(B).

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

80. 15 U.S.C.A. § 78u-4(b)(2). Absent this reform, general allegations of *scienter* would suffice. See *FED. R. CIV. P.* 9(b) (stating that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," but that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally"); *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 868 (S.D. Tex. 2001) (explaining that the PSLRA "requires a heightened standard of pleading over that set out in Federal Rule of Civil Procedure 9(b), which allows a state of mind, or *scienter*, to be averred generally"); *Collmer v. U.S. Liquids, Inc.*, 268 F. Supp. 2d 718, 723 n.5 (S.D. Tex. 2003) (same); Christopher M. Fairman, *Heightened Pleading*, 81 *TEX. L. REV.* 551, 600–07 (2002) (offering a detailed account of the PSLRA's heightened pleading requirements relative to Federal Rule of Civil Procedure 9(b)).

81. 15 U.S.C.A. § 78u-4(b)(3)(A).

mary judgment in its favor.⁸² Courts vigorously enforce these procedural requirements.⁸³

As Stephen Choi explains in a recent paper, the upshot is that these PSLRA requirements effectively shield corporate defendants from securities-fraud class actions unaccompanied by hard evidence of fraud.⁸⁴ Choi points out that the PSLRA's procedural barriers have reduced both filing and prosecution of frivolous and other unsubstantiated lawsuits.⁸⁵ But, according to Choi, they also have discouraged many meritorious lawsuits that became unprofitable from the plaintiffs' attorneys' perspectives.⁸⁶ Normatively, Choi sees this tradeoff as one of dubious merit.⁸⁷ Viewing it through this Article's framework, we see the issue as more complicated.

Securities class action suits generate a threatening overenforcement potential along a number of dimensions. Chief among these is an action's effect on a firm's stock value and the consequent harm to its business (a market spillover, in our taxonomy). As Janet Cooper Alexander demonstrated in an important empirical study, before the PSLRA's reforms, firms faced with threats of securities class actions routinely experienced steep drops in the value of their shares.⁸⁸ This occurred both before and after courts ruled on certification questions and without any showing of potential success on the merits by the

82. To escape summary judgment, the plaintiff must point to evidence raising a genuine issue of material fact for trial. *See* FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Conclusory allegations, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation will not do. *See* *Sec. & Exch. Comm'n v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

83. *See, e.g.*, *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 660 (8th Cir. 2001) (holding that securities fraud claim is properly stated only if allegations collectively add up to a strong inference of the required state of mind); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168–69 (2d Cir. 2000) (holding that fraudulent intent can be established either by alleging facts to show that the defendant had both motive and opportunity to commit fraud or by alleging facts that constitute strong circumstantial evidence of conscious misconduct); *In re Cable & Wireless, PLC, Sec. Litig.*, 321 F. Supp. 2d 749, 775 (E.D. Va. 2004) (dismissing action for failure to properly specify the defendant's misconduct and state of mind in the pleadings).

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

85. *Id.* at 45–47.

86. *Id.*

87. *Id.*

88. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 505–21 (1991). The primary focus of Alexander's study was securities class actions involving accusations of fraud, which are particularly likely to trigger market spillovers. *See infra* note 134 and accompanying text. While it undoubtedly has been very influential, the study is not free from controversy. *See* Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act*, 33 SAN DIEGO L. REV. 959 (1996) (arguing that Alexander's study is fundamentally flawed and criticizing Congress for relying on it in legislating the PSLRA); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2083–84 (1995) (criticizing Alexander's study for failing to account for industry-wide price declines in the examined stocks).

plaintiffs.⁸⁹ Skyrocketing monetary awards recoverable in securities class actions contribute to this effect.⁹⁰ More often than not, these awards are disproportionate to what the defendants earn and can pay. They typically exceed the firm's working capital, posing a serious threat to its ability to remain in business.⁹¹ Corporate defendants thus face pressure to settle suits regardless of their merits,⁹² and the market reflects this fact.

To this threat one should add both the corporate and the individual defendants' prospect of sustaining reputational losses,⁹³ as well as other factors that create overenforcement on the ground, including the plaintiffs' entitlement to implead as many defendants—both corporate and individual—as they deem fit (a definitional spillover, in our taxonomy). Class attorneys take full advantage of this entitlement even in cases in which the risk of not collecting the judgment from the firm is practically nonexistent.⁹⁴ This works to make individual defendants—who are often both wealthy and reputable—nervous by triggering their risk-aversion to even the slightest possibility of loss of livelihood and social status.⁹⁵ These defendants consequently press for settlement within their camp, whatever of the merits.⁹⁶ In short, securities class actions greatly skew the settlement balance in both strong and weak cases, placing upon corporate

89. See Alexander, *supra* note 88, at 505–33.

90. See *id.* at 529–33.

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

92. To mitigate this problem for all class actions, rather than just those that fall under the PSLRA, some judges and commentators recommend that courts certify only those class actions that they find meritorious. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299–304 (7th Cir. 1995) (implementing the merits-inquiry approach to class action certification); Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 52–55 (2004) (criticizing the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974), that Fed. R. Civ. P. 23 does not authorize courts to scrutinize the class action's merits prior to its certification and recommending a refined merits-inquiry approach on the grounds of both fairness and economic efficiency); see, e.g., *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1300 (acknowledging that corporate defendants in class actions are pressured into settling cases regardless of their merits); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (same). The amounts at which defendants in Alexander's study settled enabled her to discern the going settlement rate at the time: about one quarter of the potential monetary award. Alexander, *supra* note 88, at 500.

93. See Alexander, *supra* note 88, at 532.

94. See *id.* at 529.

95. See *id.* at 530.

96. As Alexander explains:

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

Id. at 532.

defendants “inordinate or hydraulic pressure . . . to settle”⁹⁷ and triggering a clear need to protect defendants from what is commonly characterized as blackmail under color of law.⁹⁸

The principal social benefit of the PSLRA’s procedural reforms is the extent to which they counteract this effect and the overdeterrence that flows from it. Their more narrow, secondary benefit is the elimination of frivolous lawsuits. To be sure, the PSLRA also drives from the courts many meritorious lawsuits by making them unprofitable. This is undoubtedly undesirable. Our point is not to weigh in on one or the other side of this balance. Ours is the supplemental claim that, in light of our framework, it is apparent that the tradeoff introduced by the PSLRA’s procedural reforms is more complex than Choi and others have appreciated. Rather than simply removing many frivolous but also some meritorious class actions, those reforms also counteract market and definitional spillovers that both frivolous and meritorious actions generate. The social loss from the frustration of meritorious suits must be measured against the sum of the PSLRA’s benefits, and the resulting tradeoff is unclear.⁹⁹

Our final example in this Part is the special requirement of corroborative evidence that the common law attaches to its overbroad prohibition against perjury.¹⁰⁰ This requirement bars conviction for perjury solely on the testimony of a single witness. Any such testimony must be corroborated by additional testimony or other evidence.¹⁰¹ In the absence of corroboration, the jury must acquit the defendant.¹⁰² The judge’s failure to instruct the jury to this effect constitutes plain and reversible error.¹⁰³ This corroboration requirement is

97. *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001).

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

99. Although the exact dollar value of the total spillovers to which we refer is unknown, its conservative estimation points to a multimillion dollar figure. *See Alexander, supra* note 88, at 515–20.

100. *See Weiler v. United States*, 323 U.S. 606 (1945); Perjury Act, 1911, c.6, § 13 (Eng.).

101. *See Weiler*, 323 U.S. at 608.

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

103. The Court in *Weiler* explained that allowing a judge to refuse to issue such an instruction

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

323 U.S. at 610–11; *see also id.* at 611 (going on to hold that “[t]he refusal of the trial judge to instruct

unusual because it is an exception to the general law regarding the weight of testimonial evidence. Under the general rule, “[t]he touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our factfinding tribunals are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many.”¹⁰⁴

Despite this general rule, the corroboration requirement for perjury prosecutions “is deeply rooted in past centuries.”¹⁰⁵ The unmodified common law requirement of corroboration for perjury prosecutions still applies in many United States jurisdictions.¹⁰⁶ The law in these jurisdictions tracks English law.¹⁰⁷ In England, Section 13 of the Perjury Act of 1911, which codified the common law,¹⁰⁸ states:

A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.¹⁰⁹

Courts interpret this provision as a stringent corroboration requirement,¹¹⁰ while

the jury as requested was error”); *Chaplin*, 25 F.3d at 1376 n.2 (holding that, because the corroboration requirement controls evidentiary sufficiency, the trial judge should give the jury the appropriate instruction even when the defendant does not request it, and that a failure to do so is plain error).

104. See *Weiler*, 323 U.S. at 608.

105. See *id.* at 608–09.

106. See, for example, *Weiler*, 323 U.S. 606; *Chaplin*, 25 F.3d 1373; *Hammett v. State*, 797 So. 2d 258 (Miss. Ct. App. 2001); *People v. Ellsworth*, 15 P.3d 1111 (Colo. Ct. App. 2000); *Watson v. State*, 509 S.E.2d 87 (Ga. Ct. App. 1998); *Murphy v. United States*, 670 A.2d 1361 (D.C. 1996); and *State v. Barker*, 851 P.2d 394, 396 (Kan. Ct. App. 1993), each of which requires corroboration for a single witness whose testimony accuses the defendant of perjury. See also KY. REV. STAT. ANN. § 523.060 (Banks-Baldwin 2004) (“In any prosecution for perjury or false swearing . . . falsity of a statement may not be established solely through contradiction by the testimony of a single witness.”); CAL. PENAL CODE § 118(b) (West 1999) (“No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant”); N.Y. PENAL LAW § 210.50 (McKinney 1999) (“In any prosecution for perjury . . . or in any prosecution for making an apparently sworn false statement, or making a punishable false written statement, falsity of a statement may not be established by the uncorroborated testimony of a single witness.”).

107. See, e.g., *Weiler*, 323 U.S. at 610 n.4; *Marvel v. State*, 131 A. 317, 318 (Del. 1925). In 1970, Congress modified this rule significantly for federal cases in Title IV of the Organized Crime Control Act. See 18 U.S.C. § 1623(e) (2000). That provision explicitly provides that the corroboration requirement does not apply in federal prosecutions for false declarations before a grand jury or a court. See *id.*

108. See *Weiler*, 323 U.S. at 610 n.4.

109. Perjury Act, 1911, c.6, § 13 (Eng.).

110. See, e.g., *R. v. Hamid*, 69 Cr. App. R. 324 (1979); see also *Hammer v. United States*, 271 U.S. 620, 626 (1926) (“The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal.”); *Roche v.*

legal scholars criticize it as having outlived any of its plausible justifications.¹¹¹

Finding a rationale for this requirement in a system that generally allows judges and juries to convict a defendant on the testimony of a single witness is not easy. After all, if one witness's testimony that the jury finds credible beyond all reasonable doubt is good enough to convict a defendant in a murder trial, why should it not be enough in a trial for perjury? One commonly offered answer is that the corroboration requirement for perjury prosecutions is not really an exception to the general rule regarding testimonial worth in that it does not turn on any judgment regarding the trustworthiness of the evidence. Rather, as the Supreme Court recognized in *Weiler v. United States*, the requirement is a necessary evidentiary barrier with a very different aim: to avoid chilling witnesses with the prospect of easy prosecution for perjury.¹¹²

This rationale, which courts and commentators have done little to unpack, derives from the overenforcement paradigm. The common law definition of perjury is any false statement regarding a material matter that a witness makes knowingly and under oath in a judicial proceeding.¹¹³ On its face, this definition contains three mutually related ambiguities. First, what counts as a "statement"? Would it include, for example, a witness's demeanor when the witness uses it

State Employees' Retirement Bd., 731 A.2d 640, 647 (Pa. Commw. Ct. 1999) (reiterating the Supreme Court's holding in *Hammer*); sources cited *supra* note 106.

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

112. See *Weiler*, 323 U.S. at 609 ("The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."); ROBERTS & ZUCKERMAN, *supra* note 111, at 470. Roberts and Zuckerman, however, favor other methods of reducing this chilling effect. Conditioning prosecutions for perjury upon the approval of a high-ranking prosecutorial official (in England, the Director of Public Prosecutions) is one such method. *Id.*

113. Under Section 1 of the Perjury Act of 1911, "If any person lawfully sworn as a witness . . . in a judicial proceeding willfully makes a statement material in that proceeding which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment . . . for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine." Perjury Act, 1911, c.6, § 1 (Eng.).

The federal definition of perjury in the United States is similarly broad. Under 18 U.S.C. § 1621 (2000):

Whoever —

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

deliberately as a form of communication? Second, what does it mean for testimony to be “false”? Would this description attach to untruthful testimony when the witness indirectly but still deliberately signals to the court that his testimony is not to be believed (along the lines of the famous “Liar Paradox”¹¹⁴)? Would reticent non-acknowledgment of the truth qualify as perjurious deceit?¹¹⁵ Third, how (if at all) should these questions affect our view of the defendant’s mens rea?

These ambiguities in the definition of perjury are important because many witnesses testifying in court would rather not be there.¹¹⁶ Participating in litigation, even as a mere witness, costs time and money and often causes considerable stress through the public examination of vague, unsavory, or personal events, circumstances, or relationships. Witnesses facing these disincentives have much to lose and little to gain from telling the truth. Many of them nonetheless choose to testify because they fear punishment for contempt (and in some cases, moral reprobation as well).¹¹⁷ A witness in this category often will deliver evasive testimony that obfuscates the truth without making any affirmative attempts to mislead the court. Indeed, his testimony might so openly display reticence that it does not induce the court to make any incorrect factual finding. The testimony says, in effect, “I am forced to testify against my will, and am very uncomfortable doing so, so please don’t place too much weight on what I’m saying.” Is this testimony perjury?

A longstanding approach to these issues has been to interpret the definition of perjury broadly by resolving any ambiguities in the prosecution’s favor. Thus, any part of a witness’s material testimony amounts to perjury if it is untrue; falsity cannot be offset by the witness’s apparent reticence or evasiveness or by any other credible signal that induces the court not to believe the witness.¹¹⁸

114. See R.M. SAINSBURY, PARADOXES 111–17 (2d ed. 1995) (describing and analyzing the “Liar Paradox,” exemplified by semantically defective statements such as, “What I am now saying is false.”).

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

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

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

118. See, e.g., *Holbrooks v. Commonwealth*, 85 S.W.3d 563, 569 (Ky. 2002) (holding that “materiality specifically includes all false statements which could have affected the outcome of the proceeding, regardless of the actual effect or admissibility of the statement”) (emphasis in original) (internal quotation marks omitted); *State v. Hawkins*, 620 N.W.2d 256, 259 (Iowa 2000) (stating that testimony is “material” when “it directly or circumstantially . . . supports or attacks the credibility of a witness, or . . . has a legitimate tendency to prove or disprove some relevant fact irrespective of the main fact at issue, or . . . is capable of influencing the court, officer, tribunal or other body created by law on any proper matter of inquiry”); *United States v. Giarrantano*, 622 F.2d 153, 156 (5th Cir. 1980) (observing

Likewise, the witness need not harbor an intent to mislead the court or even perceive any risk that his false statement might do so; mere awareness of the statement's untruthfulness satisfies the mens rea requirement.¹¹⁹ In short, witnesses must always tell "the truth, the whole truth, and nothing but the truth," and any deliberate violation of this duty qualifies as perjury.¹²⁰ The reason for this approach is simple. Broadly defining perjury in this way strengthens the incentives of all witnesses to testify truthfully and eases the prosecution's burden in cases in which witnesses have in fact lied.¹²¹

But it also creates a problem. The definition of perjury becomes overbroad in that it condemns and punishes individuals who do not necessarily produce the harm at which the prohibition against perjury aims. That harm is an erroneous verdict that false testimony actively induces.¹²² Openly evasive testimony does not do this because everyone can see that the witness is passively refusing to assist the court in its pursuit of the truth. At its worst, such testimony amounts to

that "[t]he test for materiality is a broad one," specifically, "whether the false testimony was capable of influencing the tribunal on the issue before it," and that false testimony "need not be material to any particular issue but may be material to any proper matter of inquiry"); Alan Heinrich, Note, *Clinton's Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 *LOY. L.A. L. REV.* 1303, 1311-16 (1999) (demonstrating that courts uniformly interpret the "materiality" requirement for perjury in very broad terms).

119. See *United States v. Williams*, 874 F.2d 968, 980 (5th Cir. 1989) (explaining that for perjury purposes, absence of a motive to deceive the court does not exonerate a witness who knowingly gives false testimony on one of the material issues); *United States v. Lewis*, 876 F. Supp. 308, 312 (D. Mass. 1994) ("[P]erjury does not require proof that the defendant had the specific intent to impede justice."); CAL. PENAL CODE § 123 (West 1999) ("It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding."); cf. 18 U.S.C. § 1623(a) (2000) (in order to convict a defendant of making false statements to a grand jury or court, the prosecution only has to show knowledge by the defendant that the statement was false).

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

120. See, e.g., MODEL PENAL CODE § 241.1 (1962) ("A person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation . . . when the statement is material and he does not believe it to be true."); Jared S. Hosid, *Perjury*, 39 *AM. CRIM. L. REV.* 895 (2002) (analyzing the definition of perjury).

121. See generally Robert Cooter & Winand Emons, *Truth-Bonding and other Truth-Revealing Mechanisms for Courts*, 17 *EUR. J.L. & ECON.* 307 (2004).

122. See, e.g., *Bronston v. United States*, 409 U.S. 352, 362 (1973) (holding that literally true statements made under oath that are evasive or unresponsive must be resolved through further questioning by counsel, not by prosecution for perjury, and that such statements do not fall within the federal perjury statute, 18 U.S.C. § 1621 (2000)); see also *United States v. Shotts*, 145 F.3d 1289, 1299 (11th Cir. 1998) ("[T]he prosecutor's purpose must be to obtain the truth. Perjury, of course, thwarts that proper purpose. It must not be the prosecutor's purpose, however, to obtain perjury, thus avoiding more precise questions which might rectify the apparent perjury.").

contempt of court¹²³—conduct that is certainly reprehensible, but not as pernicious as perjury. As many commentators have noted, evasive as opposed to affirmatively misleading testimony raises normatively difficult questions about the extent to which an individual's moral entitlement to privacy and nonexposure should limit her truth-telling obligations to society.¹²⁴ From a moral (as opposed to formal legal) point of view, it is one thing to actively bring about an injustice, and it is quite another thing to withdraw one's testimonial assistance from a justice-making proceeding. From the moral perspective, only outright liars who actively mislead the court can properly be identified and condemned as perjurers.¹²⁵

So why not re-interpret the perjury prohibition more narrowly to reflect these nuances? The answer parallels the answer to the similar definitional problem we faced with the safe versus unsafe drivers: operational constraints prevent it. Because the line between lying and evading is often hard to discern, narrowing the prohibition to capture only outright liars but not evaders would substantially increase the difficulty of successful perjury prosecutions.¹²⁶ It also would substantially decrease the incentives that a witness has not to lie. The substantive law's resolution of this difficulty is to err on the side of casting a wide net by leaving the broader definition of perjury in place. In doing so, the law produces overenforcement of the definitional spillover variety by pooling non-liars with liars and imposing its sanction on both.

The common law corroboration requirement counteracts this effect by leavening the overbroad definition of perjury with a special evidentiary rule through which many evasive—but still not affirmatively misleading—witnesses escape criminal liability. The net effect of this mechanism is to require the prosecution to identify a particular falsity in the defendant's testimony, to demonstrate its materiality, to show that the defendant knew about the falsity when he testified, and to provide additional and independent proof on each of these points to back up a witness who testifies about the falsity. Such particularized proof typically exists only in cases involving outright liars as opposed to merely evasive witnesses. In general, therefore, a prosecutor will have a much harder time bringing a successful perjury case against the latter sort of witness than she will

123. See 28 U.S.C. § 1826(a) (2000) (“Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.”).

124. See, e.g., WILLIAMS, *supra* note 115, at 96–100.

125. See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 179–80 (2001) (distinguishing on moral grounds between lying and misleading and defending the “literal falsity” approach to perjury); *id.* at 172–73 (arguing that defensive deception is excusable on self-preservation grounds).

126. See *Holbrooks v. Commonwealth*, 85 S.W.3d 563, 569–70 (Ky. 2002) (observing that a broadly defined perjury prohibition is necessary for “a practical and workable statutory scheme which is not overly restrictive to prosecution”).

against the former.¹²⁷ While an evasive witness still runs the risk of being identified as a perjurer under the overbroad definition of the crime, he at least faces a decreased risk of being prosecuted and convicted. This tradeoff substantially reduces the chilling effect that the overbroad definition of perjury exerts upon prospective witnesses. It does so, moreover, while partially sorting perjury suspects into evasive witnesses and outright liars by encouraging prosecutors to tend toward charging the latter more than the former. The tradeoff admittedly remains imperfect, but it is better than the alternative.¹²⁸

III. OVERENFORCEMENT AND CORPORATE CRIME

The doctrine of corporate criminal liability creates unique problems of overenforcement. Those problems come in two forms. The first is a straightforward market spillover. Investigations and convictions of corporations, like those of individuals, often trigger significant extralegal sanctions for the defendants and their employees. These sanctions include loss of morale,¹²⁹ damage to reputation and corporate image,¹³⁰ damage to relationships with customers, suppliers,

127. Some scholars claim that the prosecution's burden is too heavy, to the detriment of society. *See, e.g.,* GLANVILLE WILLIAMS, *THE PROOF OF GUILT* 68 (3d ed. 1963) (noting the difficulty of proving the guilty mind as affecting all prosecutions for perjury); Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1488–89 (1997) (book review) (“Oaths are taken less seriously today [F]ewer people believe in hell, and an oath is no longer thought to be effective because of extratemporal consequences for false swearing. The only real bite behind an oath is the specter of a perjury prosecution, and perjury is notoriously difficult to prove. . . . Indeed, the ethos of today is that perjury is commonplace”); Harris, *supra* note 116, at 1774–75 (explaining that proving perjury is difficult because “there is often no physical evidence and the prosecutor must not only prove that the statement was false, but [also] that the witness believed that the statement was false” and “that the false statement was material to the case”).

128. For another similar example, consider Article III, Section 3(1) of the United States Constitution, which provides, “No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in Open Court.” U.S. CONST. art. III, § 3, cl. 1. This constitutional corroboration requirement counterbalances a definition of treason in the same provision that is both overbroad and ambiguous: “Treason against the United States shall consist . . . [inter alia] in adhering to their Enemies, giving them Aid and Comfort.” *Id.*; *see also* 18 U.S.C. § 2381 (2000) (“Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.”).

129. *See, e.g.,* BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 35 (1983) (describing impact of accusations and findings of corporate wrongdoing on employee morale); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 321–22 (1995) (describing the “stigma and public opprobrium and the concomitant fall in employee morale which often result in defections of talent [that] can hobble the corporation well after the financial loss from a fine has been recouped”).

130. *See, e.g.,* Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 73 (observing that the consequences of investigation and prosecution can be “particularly severe for business entities that rely upon their reputation to survive: even if they ultimately prevail on the merits at trial, it is usually too late and the business is ruined”); Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 969 (1999) (noting how the first prosecutions of business leaders under the Racketeering Influenced and Corrupt Organizations Act (RICO)

and the government,¹³¹ bars to future business,¹³² and (as a consequence of all of this) significant drops in share price and market share.¹³³ The size of these extralegal penalties often dwarfs that of the formal legal penalties. In an empirical study involving corporate criminal fraud, for example, Jonathan Karpoff and John Lott concluded that “the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud.”¹³⁴ Decreasing firms’ legal sanctions by the sum of these costs, however, would be both practically infeasible and expressively unjustifiable, for it likely would require reduction of the legal sanction to near zero.¹³⁵

The second type of overenforcement that occurs in the corporate crime context is more complicated and follows from the incentives created by the substantive law of corporate criminal liability. The scope of corporate criminal liability under American law is very broad. Corporations “may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.”¹³⁶ The standards that courts use to

triggered a significant “reputational rub-off effect”); cf. David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1831–32 (2001) (noting the reputational damage to Texaco and Denny’s in the wake of their respective racial discrimination suits).

131. See Alexander, *supra* note 25, at 504 (concluding that legal sanctions for fraud may lead to “termination and/or suspension of business relationships with customers as a significant form of real-world reputational sanction”).

132. See, e.g., 41 U.S.C. § 354(a) (2000) (barring corporations convicted of violating the Service Contracts Labor Standards Act from receiving new contract awards for three years); 42 U.S.C. § 7606(a) (2000) (prohibiting federal agencies from entering into any contracts with companies convicted of violating the Clean Air Act until Administrator’s certification that the condition has been corrected); Brown, *supra* note 129, at 321–22 (listing collateral consequences of indictment and conviction for corporations as including disqualification from doing business in regulated areas and loss of contracts with government).

133. See Alexander, *supra* note 25, at 505–06 (reviewing data suggesting that the average decline in stock price for companies publicly charged with corporate wrongdoing was four times greater than legal penalties ultimately imposed by the court); see also Karpoff & Lott, *supra* note 24, at 773 (concluding that publication of stories in the *Wall Street Journal* of “alleged or actual fraud correspond with statistically significant and economically meaningful losses in equity value”); cf. Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 109 (2000) (describing how investor reaction to news of tape recordings and other evidence of discrimination contributed to a loss of more than one billion dollars in Texaco’s market capitalization).

134. Karpoff & Lott, *supra* note 24, at 758. Specifically, Karpoff and Lott found that under the sentencing scheme in effect at the time, only 6.5 percent of the share value lost by firms that were investigated for or convicted of fraud was attributable to court-imposed costs, with penalties and criminal fines accounting for only 1.4 percent. *Id.* at 759. The remainder of the loss—93.5 percent—was attributable to lost reputation. *Id.* at 796.

135. See *supra* section I.A. Indeed, as Karpoff and Lott themselves noted, despite the substantial extralegal sanctions associated with conviction, at the time of their article, the expected penalty for conviction of fraud “seemed surprisingly low.” Karpoff & Lott, *supra* note 24, at 758. Amendments to the organizational sentencing guidelines have now raised the potential fine substantially, but the disparity between the legal penalty and the extralegal sanction is still very large, and the same constraints remain. See Alexander, *supra* note 25, at 492–93.

136. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1488 (1996). But see *People v. O’Neill*, 550 N.E.2d 1090 (Ill. App. Ct. 1990) (implying that a corporation may be convicted even of murder).

attribute liability to corporations also are easily satisfied.¹³⁷ Corporate liability is vicarious and, from the firm's standpoint, strict. A firm can be criminally liable for any crimes committed by its employees while acting within the scope of their employment and to benefit the firm.¹³⁸ The "firm's benefit" qualifier is much less restrictive than it sounds. So long as the employee was carrying out a job-related activity, the firm can be liable, even if it expressly prohibited the wrongdoing and implemented procedures to prevent it.¹³⁹

The basic idea behind this doctrine is that vicarious liability for corporations reduces wrongdoing on the part of their agents by fostering optimal deterrence of those agents. Vicarious liability, the thinking goes, does this by inducing firms to control their employees in a number of ways.¹⁴⁰ It causes firms to implement preventive measures, such as compliance programs and similar measures which decrease the risk of crime *ex ante*.¹⁴¹ It encourages firms to undertake policing measures, or measures that increase the probability that employees who do break the law are apprehended and sanctioned.¹⁴² And, when employees are apprehended, it reduces sanctioning costs by encouraging the firm itself, rather than the government, to penalize the employees in cases in which the firm is in a better position than the government to do so.¹⁴³ The ultimate effect of all these measures—compliance programs, self-policing, and swift internal sanctioning—is to increase the expected liability for individual wrongdoers. By deterring misconduct on the part of the firm's individual employees, the measures reduce the firm's likelihood of being held criminally liable.

There is, however, a downside. On the ground, this scheme can lead to substantial overenforcement for firms attempting to comply in good faith. Assuming that the legal sanctions for corporate criminal liability are set high enough so that firms want to avoid them, firms will implement some or all of the measures just discussed in an attempt to decrease their liability. But despite their best efforts, firms can never stamp out all misconduct. Some residual offenses will occur. In those cases, the same measures that firms employ to attempt to decrease their own liability will backfire. By increasing the probability that the government will detect and sanction any residual offenses, the firm

137. See Khanna, *supra* note 136, at 1488–89.

138. See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493–95 (1909); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1227, 1247–49 (1979) [hereinafter *Developments*].

139. See *Developments*, *supra* note 138, at 1249–50 (discussing how courts broadly interpret the "scope of employment" prong to include any job-related activity, including prohibited as opposed to merely unauthorized employee conduct).

140. See Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 324–25, 333–49 (1996) (offering an economic rationale for this doctrine, limited by the condition that corporations should pay no more than the social costs of the crimes perpetrated by their agents).

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

142. See *id.* at 706–12.

143. See *id.* at 700–01.

will actually increase its own expected liability.¹⁴⁴

This “liability enhancement effect,” as Jennifer Arlen and Reinier Kraakman call it,¹⁴⁵ is a variant of definitional spillover which results from the failure of the substantive liability standard—strict vicarious liability—to distinguish between firms that self-police and self-monitor and firms that do not. Perversely, the overenforcement flowing from the liability enhancement effect can lead to underdeterrence of corporate misconduct. If by self-monitoring and self-policing a firm increases the probability of its own conviction under the vicarious liability standard, then firms subject to that standard will have a disincentive to undertake such measures, or at least to undertake them in good faith past a certain point.¹⁴⁶ Firms facing a disincentive to self-monitor and self-police may find it harder to credibly threaten their employees with sanctions. The paradoxical result of these effects is underdeterrence. Neither raising nor lowering the legal sanction can remedy this problem, because both a weaker and a stronger sanction would produce a disincentive for the firm to root out misconduct by its employees.

One might attempt to solve this dilemma by tinkering with the substantive liability rule to eliminate the definitional spillover. For example, the law could specify the preventive and policing measures that the firm needs to take, both before and after the crime, to avoid or at least mitigate its criminal liability. Arlen and Kraakman and others have advocated this approach, a variant of which is now embodied in the federal Organizational Sentencing Guidelines.¹⁴⁷ This solution is a good start for mitigating the problem of the definitional spillover. But it is far from complete. It leaves the market spillover without a remedy. It also creates counterproductive incentives for firms to comply only “cosmetically” with their prevention and policing duties, in order to reap the benefits of a duty-based regime (avoidance or mitigation) without incurring the costs (discovery and consequent investigation of misconduct and possible conviction).¹⁴⁸

144. See *id.* at 708. See generally Jeffrey W. Nunes, Comment, *Organizational Sentencing Guidelines: The Conundrum of Compliance Programs and Self-Reporting*, 27 ARIZ. ST. L.J. 1039 (1995).

145. See Arlen & Kraakman, *supra* note 141, at 707–09 (observing that in a strict liability regime, a firm’s self-policing measures increase its expected liability when either the firm reports detected wrongdoing to the government or the government suspects the wrongdoing independently).

146. See sources cited *infra* note 148 (discussing “cosmetic compliance”).

147. See Arlen & Kraakman, *supra* note 141, at 718–38 (advocating mixed or composite liability standards in place of purely strict or duty-based liability); see also V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1268–69 (2000) (describing composite liability approaches); 18 U.S.C. app. § 8B2.1 (2004) (mitigating sentences for convicted companies that, among other things, have bona fide compliance programs in place).

148. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 487 (2003) (“[A] growing body of evidence indicates that internal compliance structures do not deter prohibited conduct within firms and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability.”); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1408 (1999)

Within our framework, one way to supplement this approach is to introduce evidentiary and procedural barriers that encourage the corporation to self-police while reducing its probability of being found guilty of a crime. A broad attorney-client privilege is one such barrier. This privilege would allow a corporation to investigate potential crimes within the firm confidentially by entrusting the investigation to its attorney. The privilege should attach whenever the attorney is fulfilling this role, whether the attorney communicates with corporate officers or low-level employees. This in fact corresponds to the form of corporate attorney-client privilege that the Supreme Court upheld in *Upjohn Co. v. United States*.¹⁴⁹ In this form, the privilege is available only to corporations.

Even so, a corporation's *Upjohn* privilege is still very limited. Like the garden-variety attorney-client privilege, it only protects from disclosure information that attorneys and clients exchange between themselves to facilitate the attorney's legal advice to the client or the client's legal representation by the attorney.¹⁵⁰ Corporate crime cases are document intensive. The papers involved often include documents from clients, business partners, and any number of other sources. To receive protection and consequent exemption from disclosure under the attorney-client privilege, however, documents must qualify as the "work product of the lawyer."¹⁵¹ The attorney-client privilege thus by no means exempts from disclosure all potentially incriminating information that a corporation may uncover in an internal investigation. Moreover, empirical evidence suggests that even when the privilege would exempt information, corporations often waive it to avoid adverse inferences and other repercussions.¹⁵²

In these circumstances, the Fifth Amendment's privilege against self-incrimination is another evidentiary barrier that calls for consideration.¹⁵³ As the law stands now, this privilege protects only natural persons and not corporations.¹⁵⁴ Nor does it extend to a corporate agent or employee who is required by

(arguing that many firm compliance programs are ineffective and "are often adopted for the appearance of legitimacy and legal protection").

149. 449 U.S. 383, 395 (1981).

150. See 1 McCORMICK, *supra* note 9, at 322-30.

151. *Id.* at 353-60.

152. See *Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, in CORP. L. & PRAC. COURSE HANDBOOK SERIES 2004, at 381, 384 (PLI Order No. 3220, 2004) ("[M]any corporations choose to go f[u]rther in order to demonstrate their commitment to cooperation by voluntarily waiving privileges and forging a much closer relationship with Government investigators in order to uncover wrongdoing.").

153. U.S. CONST. amend. V.

154. See *Braswell v. United States*, 487 U.S. 99, 120 (1988) (Kennedy, J., dissenting) ("[L]abor unions, corporations, partnerships and other collective entities have no Fifth Amendment self-incrimination privilege."); *United States v. White*, 322 U.S. 694, 698 (1944) (holding that the self-incrimination privilege only protects natural persons and does not extend to organizations); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) (holding that the self-incrimination privilege does not protect corporations in light of the social need to obtain inside corporate information in order to effectively police corporate abuses).

law to provide to the government documents or other information tending to incriminate the corporation.¹⁵⁵ In addition, although an agent or employee can still claim the privilege in her personal capacity, her right to do so is limited by the “collective entity” rule.¹⁵⁶ Under that rule, a person’s assumption of a corporate job entails a duty to produce corporate documents regardless of the self-incriminating consequences.¹⁵⁷ A corporate agent or employee holding corporate documents in her representative capacity therefore “has no right to resist a demand for production of those documents . . . on the basis of his [or her] Fifth Amendment privilege.”¹⁵⁸ The reason for this limitation is straightforward. Allowing an agent or employee to exercise her privilege in such circumstances would circumvent the inapplicability of the privilege to corporations and other organizations.¹⁵⁹ This, in turn, would disarm police and prosecutors in their fight against corporate crime.¹⁶⁰

These limitations on the privilege against self-incrimination in the corporate context are not without merit. Yet, to ameliorate the overenforcement problem, the law might consider providing corporations at least some protection against compulsory self-incrimination. The best way of doing so would be to grant corporations a removable privilege against self-incrimination. Corporations would have the privilege, but police and prosecutors would be able to obtain judicial warrants for its removal. Judges would issue such warrants upon a showing of probable cause. To show probable cause, prosecutors would need to produce their own evidence pointing to the perpetration of a corporate crime. Together with the attorney-client privilege, this evidentiary barrier would reduce overdeterrance by reducing the corporation’s *ex ante* probability of conviction and allowing it to safely self-police (but not to commit misconduct with impunity).¹⁶¹

We conclude this part of the Article with empirical observation. Unlike the examples discussed in Part II, in the case of corporate crime, law enforcement already faces substantial informal barriers and constraints.¹⁶² These constraints counteract overenforcement on the ground and thereby lessen the practical need for offsetting evidentiary and procedural mechanisms. This helps explain the absence of any robust development of privileges for corporations. Practical

155. See *Wilson v. United States*, 221 U.S. 361, 377–85 (1911); 1 McCORMICK, *supra* note 9, at 472–73.

156. See *Braswell v. United States*, 487 U.S. 99, 110–15 (1988) (reaffirming the “collective entity” rule); *Wilson*, 221 U.S. at 377–85 (establishing the “collective entity” rule).

157. See *Braswell*, 487 U.S. at 110.

158. See 1 McCORMICK, *supra* note 9, at 473–74.

159. See *Braswell*, 487 U.S. at 110.

160. See *id.* at 115.

161. More narrowly tailored, task-specific privileges might also be constructed. The rise of environmental audit privileges is a good illustration of this. See Arlen & Kraakman, *supra* note 141, at 742–44; Khanna, *supra* note 147, at 1267–68.

162. See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526–27 (2004) (observing that the complexity of corporate crime and the privacy within which it is committed create barriers to investigation and prosecution).

limitations on the government are doing what evidentiary privileges otherwise might.¹⁶³

IV. OBJECTIONS

The framework established in this Article gives rise to several objections. The most straightforward of these is that it is needlessly complicated. A much simpler way to ameliorate any deterrence problems from overenforcement is to reduce the level of detection and prosecution for potential transgressors.¹⁶⁴ Doing so would reduce their *ex ante* probability of suffering excessive harm, but it would do so without introducing the drafting and application costs that procedural and evidentiary mechanisms carry with them.

This solution is available only in a small category of cases, if at all. Underdetection (which we mean to include under-prosecution as well) is not an option in civil litigation between private parties, such as class actions, where the power to file lawsuits is vested in individuals outside the government. A private plaintiff's overarching criterion for filing a lawsuit is the difference between the expected investment in and the expected return from the litigation. She is not concerned about overenforcement and whether refraining from suit would help counteract its effects.¹⁶⁵

In criminal cases, and in civil cases brought by the government, underdetection is theoretically available but still problematic. Underdetection might be a viable solution for the subset of activities that, while nominally criminal or subject to civil penalties, are not widely considered objectionable—say, jaywalking in New York City (as opposed to Los Angeles) or “deviant” sex between consenting adults in private. Of course, this approach still would require costly

163. See *id.* at 529–30 (describing strategies adopted by the executive, legislative, and judicial branches to counter the inherent privacy advantages enjoyed by corporations); V. S. Khanna, Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis 24 (Sept. 23, 2004) (unpublished manuscript, available at <http://www.law.umich.edu/centersandprograms/olin/papers.htm>) (noting that the increased resources that corporations may put into defending suits can have “effects that are analogous to a higher standard of proof”). It was in fact these types of practical limitations that prompted the Supreme Court to refuse to extend the Fifth Amendment privilege to corporations and their officers (whenever they act in their official capacities) in the first place. See *supra* note 154.

164. See, e.g., POSNER, *supra* note 13, at 635 (arguing that discretionary nonenforcement may temper the costs of overbroad laws); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 38–41 (1975) (same).

165. As Steven Shavell points out, there is a fundamental divergence between the privately and the socially desirable level of suit. See SHAVELL, *supra* note 66, at 391–97. One might try to get around this problem by increasing the fees required for initiating suit. Cf. Securities Act § 11(e), 15 U.S.C. § 77k(e) (2000) (authorizing court to require plaintiff to post a bond for attorney's fees and other costs in order to guard against nuisance suits); Exchange Act § 18(a), 15 U.S.C. § 78r(a) (2000) (authorizing a similar bond requirement for similar reasons). To have any appreciable mitigation effect on overenforcement, these fees would need to be very large, so large that they might in fact lead to underenforcement or might undesirably skew the distribution of lawsuits among potential plaintiffs, rich and poor. Financing of lawsuits (by attorneys working on a contingent-fee basis, or otherwise) could rectify this shortcoming. But to the extent this prospect is real, it undercuts the very purpose of the filing-fee mechanism: reduction of the number of lawsuits filed.

measures to ensure the proper level of underdetection and to protect against abusive law enforcement.¹⁶⁶ But for activities that are both criminal and viewed as such—for example, corporate fraud—deliberate underdetection is not viable. The expressive considerations that constrain the dilution of penalties in such cases also limit deliberate underdetection and under-prosecution in the first instance.¹⁶⁷

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

Evidentiary and procedural barriers might well trigger some expressive fallout if the public were to view them as mere “‘technicalities’ that require courts to let admittedly guilty defendants go free.”¹⁶⁸ The exclusionary rule is often cited as one example.¹⁶⁹ The rules most fitting to our paradigm, however, largely avoid this problem. For instance, a qualified privilege of the sort we propose for corporations, removable upon a showing of probable cause, likely would not raise such concerns because it would not apply to corporate crimes for which the government had its own independent evidence of guilt.¹⁷⁰ The same holds true for other mechanisms that reduce overenforcement while effectively sorting between right and wrong liability decisions.

In addition, even in cases in which the public does view such mechanisms as

166. *See, e.g.*, *United States v. Lockett*, 484 F.2d 89, 90 (9th Cir. 1973) (holding that police impermissibly issued jaywalking citation in order to detain defendant so that they could perform a warrant check and a search); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1151–53 (Cal. 1995) (discussing city’s selective use of jaywalking citations against homeless residents); *supra* notes 50–52 and accompanying text.

167. *See supra* notes 15–27 and accompanying text. Even in the residual category of cases for which underdetection might be available, it is not at all clear how it could work in practice. To counteract the overdeterrence that overenforcement creates, prosecutors would need to credibly pre-commit to underdetection. Randomized and binding underdetection, however, is hardly feasible. Binding underdetection guidelines that instruct prosecutors how and what to detect and prosecute would be more feasible. *Cf.* Memorandum from Deputy Attorney General Larry Thompson to Heads of Dep’t Components, Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (establishing criteria to guide the investigation and prosecution of business entities). But such guidelines would then be an instance of a procedural mechanism that falls within our paradigm.

168. Kahan, *supra* note 4, at 390 (footnote omitted).

169. *See, e.g.*, Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1124–25 (2000) (“[T]he instances of Fourth Amendment violations that seem less than willful to the layperson are the likely origin of the common public perception that the exclusionary rule is a technicality, rather than the important and substantive constitutional remedy that it reflects.”); Kahan, *supra* note 4, at 390 (describing the “expressive effect” of the exclusionary rule); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 77–78 (1992) (describing the unpopularity of the exclusionary rule with the general public).

170. *See supra* note 161 and accompanying text.

mere technicalities, their expressive costs would be less than those of the alternatives. As a general matter, laypersons are likely to perceive a failure to convict or an inability to prosecute in the face of an evidentiary or procedural obstacle as expressively less objectionable than an affirmative decision to forego punishing a criminal whose guilt has already been determined under applicable substantive standards and procedural rules. This is true even when the ultimate end of both the procedural barrier and the setoff or declination decision is to serve broader social welfare goals. The expressive consequences of rules and decisions are matters of social meaning which do not turn solely on the purposes of the rules or the decisionmaker's intent.¹⁷¹ Means matter.¹⁷² Facially neutral procedural and evidentiary rules that make liability more difficult to prove minimize the appearance of overt tradeoffs between instrumental (optimal deterrence) and non-instrumental (moral condemnation) concerns in a way that outright setoff or declination decisions for clearly liable defendants do not.¹⁷³ And it is these overt tradeoffs that the public is most likely to see as morally and expressively offensive.¹⁷⁴ That may well be why, for example, juries deliver higher punitive awards against corporations that explicitly use cost-benefit analysis in their product safety decisions than against those that do not.¹⁷⁵

A final objection has to do with what we earlier described as the unsure

171. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 149 U. PA. L. REV. 1503, 1513–14 (2000) (describing the limited role of legislative intent in the public's ascription of meaning to legislative acts).

172. See *id.* at 1506–14 (arguing that expressive norms are concerned with both the consequences of actions and the means of achieving those consequences).

173. This is because the former pit against each other values that are generally perceived as commensurable, while the latter do not. See Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 256 (1997) (arguing that “values are constitutively incommensurable whenever people believe that entering one value into a trade-off calculus with the other subverts or undermines that value,” and that people reject such comparisons “because they feel that seriously considering the relevant trade-offs would undercut their self-images and social identities as moral beings”); see also *id.* at 288 (stating that “[t]he most viable defense” to public censure for certain types of value tradeoffs “is to minimize public awareness of [them] by maximizing the opacity of the decision-making process”); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1738 (2003) (arguing that “nominal adherence to the proposition that life has infinite value,” although clearly not true, “serves important social purposes that advocates of risk-utility analysis ignore,” particularly where lay perceptions are involved).

174. See Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1135–36 (2003) (arguing that comparing or exchanging money with a “sacred value” such as justice will “strike most people as distasteful and morally offensive”) (citations omitted); Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 856 (2000) (concluding based on experimental evidence that “the longer observers believe a decision maker considered a taboo trade-off, the more punitively they will judge that decision maker”). See generally Fiske & Tetlock, *supra* note 173 (articulating a general theory of “taboo trade-offs”).

175. See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 552–59 (2000) (showing through a survey of 489 mock jurors that jurors are more likely to award punitive

relationship between extralegal sanctions and legal penalties.¹⁷⁶ Theoretically, social sanctions may function as efficient supplements to legal penalties. When they do, social sanctions create no overdeterrence because legal penalties underdeter. Our framework therefore should not apply. Using procedural and evidentiary mechanisms to decrease the expected legal sanction in such cases would create underdeterrence. How, one might object, are lawmakers and adjudicators to know when social sanctions function as efficient supplements to legal penalties, as opposed to when they create overenforcement?

At bottom, this objection is an empirical one that requires further investigation into the precise relationship between social and legal sanctions on a case-by-case (or category-by-category) basis. That task is well beyond the scope of this Article. But as things stand now, no readily identifiable means exist by which social sanctions coordinate with legal sanctions to achieve efficient outcomes. To the contrary, although application of one sanction may affect the other, efficient complementarity between the two appears implausible.¹⁷⁷ Lawmakers and adjudicators therefore cannot—and, empirically, do not—generally assume that social penalties work as efficient supplements to legal ones or vice versa.¹⁷⁸

CONCLUSION

Ever since Bentham, the traditional wisdom has maintained that all procedural and evidentiary rules are geared to a single objective.¹⁷⁹ Operating in a legal system that has to live with the ever-present possibility of error and

damages and to give marginally larger punitive damage awards against corporations that use explicit cost-benefit or risk analysis than against those that do not).

176. See *supra* notes 27–28 and accompanying text; see also Khanna, *supra* note 163, at 22–23 (observing that it is difficult to predict the likely magnitude of a reputational sanction for a corporate defendant).

177. See, e.g., ERIC POSNER, *LAW AND SOCIAL NORMS* 172 (2000) (rejecting “the view that social practices and norms are efficient or adaptive in some way” as “empirically false and methodologically sterile”); Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 4–6 (2000) (discussing the uncertain relationship of social sanctions to legal punishments); Cooter & Porat, *supra* note 5 (assuming, without addressing, the implausibility of the coordination scenario). See generally Teichman, *supra* note 28, at 2 (discussing relationship of legal to nonlegal sanctions).

178. See Teichman, *supra* note 28, at 2–3 (arguing that, when determining punishment for sex offenders, policymakers by and large have failed to take into account the harsh nonlegal sanctions triggered by the Sex Offender Registration and Notification Laws that exist in every state). To the extent that courts take such penalties into account in meting out sentences, they tend to do so in an ad-hoc manner. See, e.g., *Am. Exp. Co. v. Am. Exp. Limousine Serv. Ltd.*, 785 F. Supp. 334, 338 (E.D.N.Y. 1992) (reversing earlier order awarding damages for trademark infringement on ground that “defendants have suffered enough [through litigation and other costs] to deter future infringement”); *State v. Ring*, 56 S.W.3d 577, 586 (Tenn. Crim. App. 2001) (affirming non-incarcerative sentence in light of, among other things, defendant’s remorse and depression and noting that “[t]here is no mathematical equation to be utilized in determining sentencing alternatives”).

179. See GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 344–47 (1986) (explaining Bentham’s utilitarian system of procedure as based upon provisions “for minimizing evil in each individual case,” with “evil” representing the cost of decisional error and the cost of avoiding it).

misuse, these rules skew the risk of error in the right direction to effectuate the desirable tradeoff between false positives and false negatives and, correspondingly, between correct and erroneous liability decisions.¹⁸⁰ Corroboration requirements, standards of proof, and pleadings are common examples of these mechanisms.

Our theory introduces a new dimension to this analysis of evidence and procedure. By isolating the phenomenon of overenforcement, we demonstrate how expressive and operational considerations make it unavoidable. In doing so, we highlight how those considerations prevent overdeterrence from being remedied through the adjustment of penalties or substantive liability standards. Where that happens, evidentiary and procedural mechanisms serve an additional goal. They mitigate the overdeterrence that both erroneous and correct liability decisions create on the ground. Descriptively, our paradigm helps to better explain certain features of the evidentiary and procedural landscape in cases involving definitional and market spillovers. Prescriptively, it provides a new analytical framework for generating balanced incentives while respecting other important values and objectives. The specifics of this framework still need to be fleshed out. Its introduction in this Article is a necessary first step in that direction.

180. See POSNER, *supra* note 13, at 599 (stating that the objective of a procedural system, viewed economically, is to minimize the sum of two types of cost: the cost of erroneous judicial decisions and the cost of operating the procedural system that reduces the incidence of errors); SHAVELL, *supra* note 66, at 387–418 (identifying procedural mechanisms that reduce this sum).