THE CRIMINAL CONTRACT CONUNDRUM: A SOLUTION TO A CLASH OF VALUES

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INTRODUCTION

Courts generally do not enforce illegal contracts—contracts in which the performance entails a crime. "Generally, courts will not enforce illegal contracts."[1] The various statements of this rule across the law mention, without much specificity or complexity, things like illegality, crime, statutory violation, and public policy, couched in broad, normative terms—"should," "fault," "encourage," "policy," "morals"—reflecting the simple idea that crimes are bad and contract courts shouldn't turn a blind eye to that badness. Taken together, these statements cast the contract court in an odd role—a defender of social, moral, and *criminal-law* values—often at the cost of *contract-law* values.[2]

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[1] 22A N.Y. JUR. 2D *Contracts* § 546 (2022). *See also* 33 SARAH B. BISER, ET AL., NEW YORK CONSTRUCTION LAW MANUAL § 2:28 (2d ed. 2021); John E. Rosasco Creameries, Inc. v. Cohen, 11 N.E.2d 908, 909 (N.Y. 1937); Unger v. Leviton, 787 N.Y.S.2d 625, 628 (N.Y. Sup. Ct. 2004).

[2] *See, e.g.*, 22 N.Y. JUR. 2D *Contracts* § 170 (2022) ("Where the performance of a contract would make the parties guilty of a crime, it should not be enforced, and the contract is invalid as against public policy. Similarly, where the consideration involves an illegal act, the agreement is void."); 17A AM. JUR. 2D *Contracts* § 266 (2022); 22A N.Y. JUR. 2D *Contracts* § 546 (2022) ("Where the parties are equally at fault, the courts will refuse to enforce rights arising out of an executory illegal agreement, even where the agreement has been executed in whole or in part by one of the parties and one party has received a benefit without giving anything in return."); RESTATEMENT (SECOND) OF CONTS. § 197 (AM. L. INST. 1981) ("[Generally,] a party has no claim in restitution for a performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy unless denial of restitution would cause disproportionate forfeiture."); 82 N.Y. JUR. 2D *Payment and Tender* § 79 cmt. (2022); Alleghany Corp. v. James Found. of New York, 214 F.2d 446, 450 (2d Cir. 1954) ("No court should encourage violation of the clear statutory policy by enforcing performance of [a criminal] contract—whether by awarding specific performance of the acquisition or damages for not performing . . . ."); *In re* Sprinzen, 46 N.Y.2d 623 (N.Y. 1979); Youshah v. Staudinger, 604 N.Y.S.2d 479, 480 (N.Y. Sup. Ct. 1993) ("[T]his court will not 'close its eyes' to an enterprise which is illegal in nature and grant a judgment for money expended in conducting a business that is illegal under the Penal Law of our State. . . . [C]ourts den[y] relief to . . . litigant[s] due to the fact the relief sought [is] against public policy. . . . [N]o person shall profit from a criminal enterprise. . . . Our courts have historically refused to aid illegal enterprises."); Toffler v. Pokorny, 598 N.Y.S.2d 445 (N.Y. Sup. Ct. 1993); Castellotti v. Free, 27 N.Y.S.3d 507, 515 (N.Y. App. Div. 2016) ("[C]ourts [have] invoked public policy principles to deny recovery where illegality was manifest.") (first citing McConnell v. Commonwealth Pictures Corp., 166 N.E.2d 494 (N.Y. 1960); then citing Anonymous v. Anonymous, 740 N.Y.S.2d 341 (N.Y. App. Div. 2002); then citing Abright v. Shapiro, 626 N.Y.S.2d 73 (N.Y. App. Div. 1995); then citing United Calendar Mfg. Corp. v. Huang, 463 N.Y.S.2d 497 (N.Y. App. Div. 1983); and then citing Braunstein v. Jason Tarantella, Inc., 450 N.Y.S.2d 862 (N.Y. App. Div. 1982)); Harris v. Econ.

This no-effect rule has exceptions in cases of asymmetry—where one party knows more about the illegality or is more involved or interested in the illegality.

> A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if (a) he was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, or (b) he was not equally in the wrong with the promisor.[3]

The courts draw various lines to carve their intricate doctrinal edifice.[4] But the central premise animating much of the law in this area is simple: Contracts that entail crimes are bad for society, and that is a good reason not to enforce them. I argue against this premise, suggesting the right premise that should replace it and a way to do justice to that better premise. In short, I argue that it is inefficient to give social costs infinite weight—as the law of illegal contracts effectively does—and that contract law should care about efficiency. And I propose an approach courts should adopt in order to be efficient—one involving a combination of damages and penalties and based on the logic of both contract and criminal law. I argue that contract law should not bow to criminal law—it should care about efficiency, which involves caring not just about social costs, but also private gains. However, it should look to criminal law to answer some questions about social costs—questions relevant to efficiency. This is an area of contract law that lies close to criminal

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Opportunity Comm'n of Nassau Cnty., 575 N.Y.S.2d 672 (N.Y. App. Div. 1991); Mendelsohn v. A & D Catering Corp., 473 N.Y.S.2d 481 (N.Y. App. Div. 1984).

[3] RESTATEMENT (SECOND) OF CONTS. § 198 (AM. L. INST. 1981). *See also* 82 N.Y. JUR. 2D *Payment and Tender* § 79 (2022) ("As a general rule, one may recover back money paid under an illegal contract where the payor is not in equal fault with the payee, but there can be no recovery if the parties are in equal fault . . . ."); *id.* at cmt. ("[A] party has . . . a claim in restitution if excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, or if not equally in the wrong with the promisor."). *See generally* Union Exch. Nat. Bank of New York v. Joseph, 131 N.E. 905 (N.Y. 1921); Platt v. Elias, 79 N.E. 1 (N.Y. 1906); Knowlton v. Congress & Empire Spring Co., 57 N.Y. 518 (N.Y. 1874); Curtis v. Leavitt, 15 N.Y. 9 (N.Y. 1857); City of New York v. Bee Line, Inc., 284 N.Y.S. 452 (N.Y. App. Div. 1935), *aff'd*, 3 N.E.2d 202 (N.Y. 1936); O'Connor Transp. Co. v. Glens Falls Ins. Co., 197 N.Y.S. 549 (N.Y. App. Div. 1922); Galtrof v. Levy, 22 N.Y.S.2d 374 (N.Y. City Ct. 1940).

[4] *See* Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 120 (1988).

law; the latter can and should shed light on the former, as long as it does not blind.

In Part I, I discuss my model—my proposed approach, how it works, and its strengths (and weaknesses)—and some applications. In Part II, I discuss the key assumptions and claims that define my model's scope and justify or make feasible its workings.

I. THE MODEL

Courts should simultaneously enforce and penalize illegal contracts, awarding expectation damages while also extracting a penalty that equals the contracted-for crime's social cost, with each party paying half the penalty.

Before I explain my proposal, I will briefly list the constraints within which it operates and the key claims that underlie it—that justify it and make it feasible. These claims perform crucial supporting roles. Each deserves a deep dive, which it gets in Part II—after I discuss the model. Ideally, I would want the reader to be convinced of each claim before seeing the model, but I also do not want to keep the reader waiting too long for it—hence this arguably clunky approach!

The model's constraints, and the key claims that animate it, are as follows. (1) The law of illegal contracts need not take the deterrence of crime as its goal—contract law need not bow to criminal law (discussed at length in Section II.A). (2) I will focus on contracts between equally knowledgeable, involved, and interested parties—where the deterrence of crime should *clearly* not guide contract law, even if it should in asymmetrical situations (Section II.B). (3) I will focus on situations where, thanks to a breach, a crime has not been committed and where the breach's remedy need not entail or approximate the contracted-for crime's commission (Section II.C). (4) I will focus on contracts where it is not the case that the buyer's performance alone entails the contracted-for crime (so I will focus on situations like murder in exchange for money or sex in exchange for money) and assume the seller breaches (Section II.C). (5) Underlying (3) and (4) is the idea that the performance—*but not* the making or enforcing (through damages)—of such contracts, by entailing the committing of crimes, costs society (Section II.C). (6) I will also discuss buyers' breaches, and situations

where the contracted-for crime is not avoided (Section II.C). (7) Criminal penalties measure these social costs (Section II.D).

I will now discuss my proposed reform—a way of making the law of illegal contracts efficient, *period*, rather than just efficient *at* deterring crime.

An illegal contract, like any contract, entails a surplus—the gain enjoyed by the set of two parties. Let this surplus be X. Let each party's gain be X/2—this assumes equal bargaining power, such that the price splits the surplus down the middle. This is consistent with my focus on symmetrical situations (see Section II.B).

An illegal contract, if performed, entails the committing of a crime (or some illegality—I'll refer to all of it as "crime" for simplicity)—which, per criminal law, entails an external, social cost (see Section II.C). Let this cost be Y. The criminal penalty for the contracted-for crime provides a measure for Y, given our criminal law's retributivist logic (see Section II.D).

Looking to maximize welfare rather than simply deter criminal conduct (see Section II.A), contract law should create incentives that encourage all illegal contracts in which $X > Y$, and deter all illegal contracts in which $X < Y$. A no-effect rule does not do that. It deters all illegal contracts without attention to their welfare-enhancing potential, serving the deterrence goal but failing to maximize welfare—failing to be efficient.

One way to get closer to efficiency is to both enforce and penalize all illegal contracts—awarding expectation damages while also extracting a penalty that equals Y, with each party paying Y/2 (as a mandatory rule, not a default one).

Often, a breached illegal contract will entail no crime—for example, when the seller breaches in a hitman contract. My enforce-and-penalize proposal applies to all illegal contracts, no matter who breaches, and no matter whether the crime contemplated by the contract was actually committed. So, my proposal will often require the court to impose a criminal penalty without a crime. As I will show, the court needs to do this to create the right incentives—the incentives that encourage efficient contracts and deter inefficient ones. Of course, penalizing someone for no crime may seem unpalatable—but this is no different from the typical tension in contract law between ex post fairness and ex

ante efficiency. Contract law chooses the second over the first all the time,[5] so why not here, too?

True, *criminal* law—which is less about incentives and more about blame—might care more (or only) about ex post fairness. But again, that is no reason for contract law to follow suit (see Section II.A). The penalty I propose is unabashedly just a tool for efficiency and not a response to specific instances of blameworthiness.[6] Perhaps such a penalty offends the logic of *criminal* law—but not more than the *absence* of such an efficient penalty offends the logic of *contract* law. Yes, it may be irredeemably unfair—illogical, even—to impose a penalty on the blameless in the name of efficiency, in the eyes of criminal law. But it would be just as illogical in the eyes of *contract* law to *refuse*—in the name of fairness—to impose the efficient penalty. Our instinctive revulsion at penalizing people for crimes not committed is quite understandable and rooted in our criminal law values. But we are in contract land, where these notions of fairness—punishment only as a response to blame—are not integral to the logic of the law.

Of course, it should be known in advance that courts will treat illegal contracts this way. Ex ante efficiency cannot justify a violation of due process—courts cannot impose criminal penalties on non-criminals without warning them. Due process, common sense, and basic humanity stand in the way of that.[7]

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[5] *See generally* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY (5th ed. 2013).

[6] By this, I mean that in any given case of an illegal contract's breach, the penalty I propose does not respond to blame. The parties are blameless—they have not committed the crime they contracted for—yet they are penalized. But of course, as I discuss in Section II.D, blame is relevant to deciding the measure of the penalty—but it features in the calculus only at that higher level. In other words, the penalty does respond to blame at a high level: it sets incentives that prevent contracts in which social harm exceeds private gain, and that social harm is intimately linked to criminal law's notions of blame. But at the level of individual cases, this penalty is meted out to blameless people. This blame-blind meting out is necessary to set the right incentives—*which*, in turn, *are* sensitive to blame. So, the proposed penalty is blame-conscious ex ante, but not ex post.

[7] A clarifying, procedural note. My approach requires a court in a contract case to penalize the parties whose contract, if performed, would have resulted in crime Q but was breached, resulting in no crime. The penalty to be imposed is the criminal penalty for the crime Q. So, to decide the penalty, the court must step into the shoes of a court in a hypothetical criminal case in which the crime Q was committed in the way in which it would have been committed had the contract been performed. Since the contract was not *actually* performed, and the crime was not *actually* committed, there will not be a rich

I will now illustrate how my proposal achieves efficiency. In a nutshell, the enforceability encourages, but the penalty deters, the formation of illegal contracts. My formula for the penalty draws the line where we want it: between efficient and inefficient illegal contracts. While this is closer to efficient than the no-effect rule—which draws no line at all—it is not perfectly efficient, for it under deters the performance of some illegal contracts that started out efficient but became inefficient. Further, if we ignore the possibility of settling, my proposal also over deters breaches of some illegal contracts that started out efficient but became inefficient. But the incentives to settle negate this potential for inefficiency. In sum, my approach is sensitive to social costs, like the no-effect rule, but also sensitive to private gains, unlike the no-effect rule. My approach balances both, maximizing (or coming close to maximizing) total welfare.

Let the buyer B be the breachee-plaintiff and seller S the breacher-defendant.[8]

A. Inefficient Contracts Deterred

Ex ante inefficient illegal contracts will not form.

An inefficient illegal contract is one which, if performed, entails a net decrease in total welfare. The change in total welfare is the private surplus enjoyed by the set of contracting parties, less the contracted-for crime's social cost. So, an inefficient illegal

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factual tapestry surrounding the hypothetical committing of the crime. But such factual detail and nuance are more relevant to the question of whether someone is guilty, which is not a question the court is asking. It is assuming the crime was committed and the parties are guilty. To the extent that the contract is not clear enough to tell the court precisely who would be guilty of what if the contract were fulfilled, the court should make an approximate guess, filling gaps like it would in any contract. If even gap-filling does not create a clear picture of guilt, then the contract likely is not an illegal contract, and the court should treat it like a legal contract. After assuming guilt, the court will need to decide a sentence like a criminal court. The sentencing stage in criminal law is conceptually and procedurally distinct from the guilt determination stage. And the sentencing question welcomes mitigating factors and character testimony, unlike the guilt question. The contract court sitting as a hypothetical criminal court should consider mitigating factors and character to the applicable extent. And without much else to go on, it should err on the side of lower penalties—perhaps not straying too far from legislative minimums. Ultimately, these procedural issues will not matter. As I will show, the incentives my proposal creates will make parties strongly favor settling.

[8] My proposal works in the inverse situation, too. *See infra* note 50.

contract is one whose criminal, social cost (measured by the contracted-for crime's criminal penalty) exceeds its private surplus:

$$\Delta W = X - Y;$$

$$\Delta W < 0 \Rightarrow X < Y,$$

where W is total welfare: the size of the total pie (social plus private).[9]

A contract will form only if it is enforceable: B will not pay S in advance if B has no guarantee of obtaining his share of the surplus from the trade (or at least recovering the price).[10] But enforceability, while necessary for a contract to form, is not sufficient. Inefficient illegal contracts are enforceable in my prescribed approach, but enforcing them is not worth it, and parties know that ex ante. Enforcing the contract will get B his share of the surplus (through expectation damages)—X/2—and cost him his share of the penalty—Y/2. By assumption, $X < Y$, making $X/2 < Y/2$. Therefore, enforcing makes B incur a net *cost* (relative to where B was before entering into the contract); and so, B would prefer not to enter into a contract than to enforce a breached one. So, parties will treat such contracts as though they are unenforceable—not because they *cannot* be enforced but because the parties *will not* enforce them.[11]

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[9] Usually, contract law is concerned only with the size of the parties' pie, but that's just because, usually, externalities are small enough to be ignored. This is not so in the case of illegal contracts. *See* SCOTT & KRAUS, *supra* note 5, at 480-81. Indeed, the current law in this area simply ignores the size of the parties' pie. My approach, more soundly, takes into account *all* pies—*total* welfare.

[10] *See* Kostritsky, *supra* note 4, at 120 ("[B]ecause nonenforcement will be costly to the parties in terms of wasted resources, they will be careful to avoid proscribed transactions." (footnote omitted)).

[11] The analysis is more complicated if the price is high, but the conclusion is essentially the same. If B pays in advance and S breaches, B would rather enforce than let S off the hook if the price ($p \geq X/2$ by definition) is sufficiently high. But B would rather settle for just the price than go to court ($p > p + X/2 - Y/2$ because $X < Y$ by assumption). And S would rather settle to repay B the price than refuse to pay anything because B would rather enforce than let S off the hook completely. So, the result of S's breach of an inefficient illegal contract is B's recovery of the price—and the parties will have no incentives to enforce the benefit of the bargain (that is, the recovery of their surplus via expectation damages). Such contracts are therefore empty promises, but with the safety net of being returned to the pre-contract state: The change in each party's welfare from the pre-contract state to the post-settling state is zero. Parties will be indifferent about forming such contracts.

It is key that each party pays Y/2. If only the breacher pays Y, inefficient illegal contracts will form—for each party will, ex ante, be willing to enforce the contract if the other breaches. Further, if just one party pays the penalty, parties may negotiate away from the penalty, distorting the efficient incentives of my proposal.[12]

B. Efficient Contracts Encouraged

Ex ante efficient illegal contracts will form.

An efficient illegal contract is one whose private surplus exceeds its social cost: X > Y. B will enter into an illegal contract with S if the contract is enforceable and worth enforcing. If the illegal contract is efficient, it is worth enforcing: Enforcing gets B X/2 and takes from B Y/2 and X/2 > Y/2—because X > Y, by assumption. Enforcing gives B a net *gain* relative to not contracting.

Of course, this enforcing will never actually happen, at least in clear-cut cases where S will very likely be held liable. Both B and S would be happier to have S pay B a settlement equal to expectation damages outside court—because stepping into court will entail that very transfer *along with* a penalty, paid by both B and S. But B needs to have a credible threat of enforcement in order to convince S to settle—otherwise, S would simply refuse to pay, knowing there is no risk of judicial enforcement. And B does have a credible enforcement threat: B would rather enforce than let S off the hook after a breach, because enforcement gives B a clear net gain relative to B's state pre-enforcement but post-breach: p + X/2 – Y/2 > 0 (because X > Y by assumption). So, the parties will settle; S will pay B X/2 outside court. B's change in welfare—from his pre-contract state to his post-settling state—is therefore X/2 > 0: B gets a net gain from settling relative to not contracting. So, B will enter into such a contract: Efficient illegal contracts will form, even when we account for settling incentives.

This incentive to settle does not hurt efficiency—the settlement's effect on total welfare is the same as that of enforcement, as I show in Section I.E. In a nutshell: Outside court, S transfers X/2 to B (relative to the parties' pre-contract state); in

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[12] *See* Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV. 483, 496-97 (2010).

court, S transfers X/2 to B, and S and B collectively transfer Y to society; both outside and inside, $\Delta W = 0$.[13]

C. Some Inefficient Performances Undeterred

Performances of some ex ante efficient contracts that become inefficient will be under deterred, creating some inefficiency.

If S's cost of performance rises neither too much nor too little, an ex ante efficient illegal contract will become inefficient but will still be performed because it will remain efficient *for the parties*.

So far, I have assumed S's cost of performance C = 0. But C could rise unexpectedly, making breach possible. If C rises above X – Y, the contract becomes inefficient; but as long as C remains below X, the contract will be performed, and its inefficiency will be realized. S will not breach: Performing will cost him C less his share of the surplus X/2, while breaching would cost him (relative to his pre-contract state) B's expectation damages X/2 (in settlement);[14] and C – X/2 < X/2, because C < X, by assumption. S's performance is efficient for the two parties: Both collectively gain the surplus X, and lose the cost of performance C—and X > C, by assumption. The performance, of course, costs society Y—through the crime's commission. And society's loss Y exceeds the private gain X – C, because X – Y < C, by assumption. So, my proposal creates a small window of inefficiency.

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[13] Does the possibility of such settlements suggest that *inefficient* illegal contracts might form? No. In the case of inefficient illegal contracts, no settlement will happen for damages—only, at most, for the recovery of the price. If the price is low, B cannot convince S to pay any settlement because B cannot credibly threaten S with enforcement. Enforcement imposes on B a net cost (relative to letting S go scot-free): p + X/2 – Y/2, where X < Y by assumption, and p is small by assumption. B would rather let S off the hook than enforce. So, because enforcement is not worth it, the enforcement threat is non-credible, making settlement unfeasible. With no incentives for either settlement or enforcement, inefficient illegal contracts will not form. And if the price is sufficiently high, parties will be indifferent about formation. *Id.* B would be able to threaten enforcement over letting S off the hook but would rather settle just for the price than recover through enforcement. So even if the price is high, B will not recover more than the price.

[14] S will settle to pay B because B's enforcement threat is credible. Enforcing gets B a gain relative to his pre-enforcement, post-breach state: p + X/2 – Y/2 > 0 because X > Y by assumption.

So, while my approach fosters efficiency by encouraging the formation of ex ante efficient illegal contracts, it fails to crush some contracts that started out efficient but *became* inefficient—it fosters freshness initially but may let rot fester later. However, its failure is limited to the finite range from X – Y to X, in which C may fall, and so this failure is not debilitating. And even if my proposal is not perfectly efficient, it is still closer to efficient than the current approach is, which does not enforce illegal contracts at all. The current approach prevents all good illegal promises; my approach just allows some bad ones which did not start out bad.

D. Some Efficient Breaches Potentially Deterred

Breaches of some ex ante efficient illegal contracts that become inefficient may be over deterred, creating some inefficiency—but incentives to settle will prevent this inefficient overdeterrence.

For legal contracts, the expectation damages remedy creates incentives for efficient breach. S will breach if and only if what he loses on performance (his cost of performance less his share of the surplus) exceeds what he loses on enforcement (B's expectation damages, which are B's share of the surplus):

$$\text{S breaches if and only if } C - X/2 > X/2,$$

$$\text{i.e., } C > X.$$

Again, I have assumed C = 0 ex ante; and C could rise unexpectedly, making breach possible.

Ignoring for now the possibility of settling, my proposed approach raises the breaching bar for illegal contracts. S will breach an ex ante efficient illegal contract if and only if his (risen) cost of performance less his share of the surplus exceeds B's expectation damages *plus S's share of the penalty*, for enforcement would require him to dish out both:

$$\text{S breaches if and only if } C - X/2 > X/2 + Y/2,$$

$$\text{i.e., } C > X + Y/2.$$

So, the situations that give rise to performance that is inefficient for the parties are those in which:

$$X < C < X + Y/2.$$

Let Z be such a C; and I'll call the (X, X + Y/2) range the Z-range. As discussed, my proposal forces performance in the Z-range.[15] In the Z-range, no performance is a Pareto improvement for the two parties—S suffers a net loss on each such performance (because his cost Z exceeds his share of the surplus X/2 because Z > X by assumption). More importantly, nor is any Z-range performance a Kaldor-Hicks improvement for the two parties—it decreases the size of the parties' collective, private pie (the parties' collective loss from performance exceeds their collective gain: Z > X, by assumption). Nor is any Z-range performance a Kaldor-Hicks improvement in *total*—it decreases the size of the *total* pie (private plus social), because it decreases the size of the private pie (as discussed) *and* it decreases the size of the social pie (by Y—the criminal, social cost of performance).

So, while the penalty *prevents* ex ante inefficient illegal contracts from being formed (which a no-penalty, only-damages regime would not), it also *encourages* the performance of some contracts that started out efficient but *became* inefficient—not just in total, but even for the parties (which also a no-penalty, only-damages regime would not).[16] It nips some inefficiency in the bud but also fuels some that blooms late. Given that the Z-range is finite—and thus the small chance of costs rising unexpectedly to fall within that range—it seems like the nipping is stronger than the fueling: The net effect of the penalty on welfare is likely positive (relative to a no-penalty, only-damages regime). That is, my proposal—with its penalty—is likely closer to efficient than a no-penalty, only-damages approach would be.

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[15] I say it "forces" performance because the seller performs even though his cost of performance exceeds the parties' surplus, which is inefficient for the parties. And he does that, as discussed, because the court will make him pay not just damages, but a penalty too.

[16] A no-penalty, only-damages regime would encourage the performance of *some* illegal contracts that started out efficient but became inefficient. These are contracts where X – Y < C < X—discussed in Section I.C. These contracts are inefficient in total, but not inefficient for the parties—which is why even an only-damages regime would encourage their performance. The contracts I'm discussing in this section are inefficient not just in total, but also for the parties. And the penalty is the reason they are performed.

Also, despite the penalty's inefficient side, my proposal is likely closer to efficient than the *current* approach (which is effectively a no-penalty, no-damages regime). The current approach blocks all illegal contracts, even good ones. My proposed penalty helps weed out the bad ones from the good ones—which is good for efficiency. It just also forces *some* bad ones that started out good—in a finite cost-range.

Further, this (limited) inefficiency will likely never come to pass—*even if* C rises to the Z-range. The same settling-incentive that would make B and S settle after a breach (discussed in Section I.B) would make S breach in the Z-range and simply give B X/2 outside court rather than follow B to court. The fear of the penalty is the only reason a Z-range performance would occur. But if the parties are going to settle, S need not take the penalty into account when deciding whether he should breach. His calculus would ignore the penalty—and he would breach precisely when breaching is efficient for the parties (that is, when C > X, and not just when C > X + Y/2)—*if* he can be sure of B accepting a settlement. And B would accept it—he would gladly take X/2 outside court after a Z-range breach instead of taking X/2 and giving Y/2 in court. And S would agree to settle because, as discussed in Section I.B, B's threat of enforcement is credible: B gets a net gain from enforcement, relative to letting S go scot-free, since the contract is ex ante efficient—X > Y.

Of course, this does not mean the penalty is useless. On the contrary, the penalty ensures that inefficient illegal contracts do not form. The point here is that, the potential *inefficiency* created by the penalty—the inefficiency of forced performances in the Z-range—may be a false alarm.

E. Enforcements Don't Affect Welfare

Post-breach enforcement of ex ante efficient illegal contracts does not hurt total welfare.

The discussion so far has established the following. Given the incentives my proposal creates, only ex ante efficient (X > Y) illegal contracts will form. That they are ex ante efficient means that, if they are performed, they will add to total welfare (by adding X to the parties' welfare and taking Y from society's welfare, where X > Y)—unless cost of performance rises above X – Y but stays below X,

in which case they will be performed and this will reduce total welfare. They will be breached if the cost rises above X. So, the question that remains is: How does a breach, under my proposal, affect total welfare?

A breach—by avoiding the crime's commission—saves society from the contract's criminal, social cost Y (see Section II.C). A breach's enforcement entails a transfer from S to B equal to B's expectation damages (if measured relative to the parties' pre-contract state)—his share of the surplus, X/2. Further, enforcement by the court—by using expectation damages instead of specific performance—saves society from incurring Y (see Section II.C), and—by collecting the criminal penalty from the parties—gives society Y (which goes to society through the government, just like taxes, and penalties in criminal cases). This is a transfer from each S and B to society. These transfers entail no change to total welfare.[17]

As discussed in Section I.B, a breach will not likely be remedied in court. S will likely settle given the credible threat of enforcement, and settling will—by letting the parties avoid the penalty—be better for both parties than the judicial remedy. A settlement entails only the S-B transfer. And again, this transfer does not change total welfare.

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Let me take stock of the discussion so far and summarize the efficiency implications of my proposal.

My proposal prevents inefficient illegal contracts from being formed by making their enforcement too costly to the parties. It lets efficient illegal contracts form by making enforcement a feasible option. These contracts, once formed, may be performed or breached, depending on whether the cost of performance rises and by how much.

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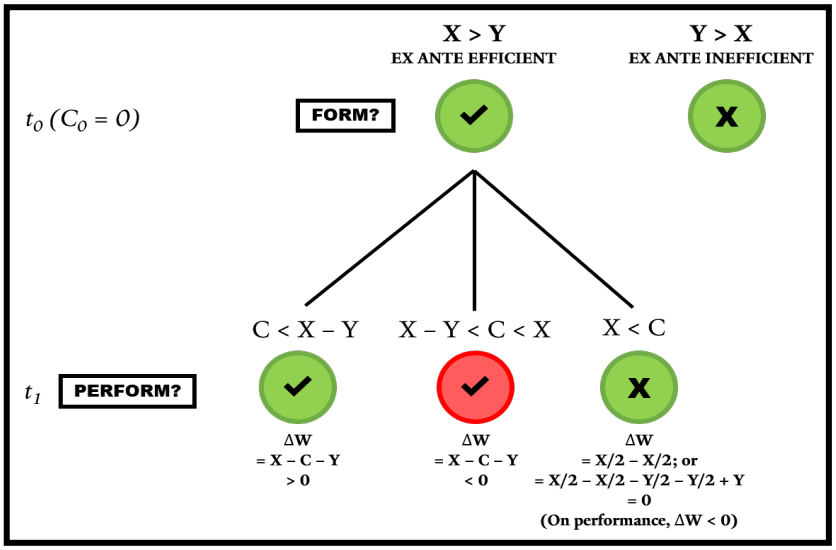
[17] In some cases, like prostitution (where the crime is the payment for a particular service), if S performs and B breaches, and the court awards expectation damages, enforcement approximates the crime and makes society incur a cost Y. Here, enforcement itself entails more than just transfers and therefore does entail a net cost. But the net change to overall welfare—taking into account pre-enforcement actions as well—is still positive. In other words, my proposal sets the right incentives here too. *See infra* note 50.

If the cost of performance remains low enough to justify performance from the parties' point of view (C < X), the contract will be performed. The parties' welfare will increase; society's will decrease. If the cost of performance is low enough (C < X – Y), the increase will outweigh the decrease (X – C > Y).

If the cost of performance rises enough to no longer justify performance from the parties' point of view (C > X), the contract will be breached, and the parties will settle. Neither the parties' collective welfare, nor society's welfare, will change.

So, the only inefficiency in my approach is in the case where X – Y < C < X. In contrast, the current, no-effect rule is *grossly* inefficient. While it deters inefficient illegal contracts from being formed—as does my approach—it does nothing to encourage efficient illegal contracts. Even if X >>> Y, the parties will not be able to enforce their contract, so they will not enter into it. Criminal law principles may be served by this, but contract law principles are not. My approach encourages precisely the X > Y contracts—it just lets *some* of them slip by even when they become inefficient.

For additional clarity, I provide a diagrammatic summary of my arguments, showing the efficiency-implications of my model. Green signals a consequence that serves the goal of setting efficient incentives; red signals the opposite.



F. Examples

I will begin with a hypothetical to make the abstract algebra a bit more concrete, and then discuss some cases to make it a bit more real.

1. Hypothetical

S is willing to have sex with B if and after B pays S $500. B would not pay more than $700; S wouldn't accept less than $300; they have equal bargaining power and thus set the price such that it splits their $400 surplus down the middle: each gains $200 from the trade. The penalty for prostitution is $250; B and S know this. We would like this contract to form and be performed because its private surplus ($400) exceeds its social cost ($250). Assume my proposal is the law.

B pays S in advance; the contract forms. This is because B knows that a court will enforce the contract if S breaches. And this enforcement will be worth it because it will give him a net gain (relative to letting S go scot-free) equal to his share of the surplus less his share of the penalty: $200 – $125 = $75.

Say S breaches (perhaps because S's cost of performance rises above $400).

If B sues, the court would order S to pay B expectation damages: $500 (price repayment) plus $200 (B's share of the surplus).[18] And it would order both S and B to pay, in penalties,

[18] It may be difficult—or even impossible—for the court to measure B's share of the surplus because the court may not be able to measure B's willingness to pay. So perhaps restitution is the best a court can do in some cases. And so, my proposal should be followed even in such cases, but restitution should be awarded instead of expectation damages. The outcome, unsurprisingly, is not as close to efficient as it would be with expectation damages. If the rule is restitution: (1) Inefficient illegal contracts with low prices will not form. As discussed in Section I.A, they will not form even when a party can get expectation damages through enforcement, so it follows that they will not form when all a party can get through enforcement is the price. (2) Parties will be indifferent about forming other illegal contracts, given the incentives. (A) For inefficient illegal contracts with very high prices, the analysis is similar to that discussed earlier except that the price would need to be even higher for indifference to kick in, if restitution is the rule. *See supra* note 13. (B) For efficient illegal contracts, B's enforcement threat is credible: He would rather get the price and pay the penalty than let S go scot-free because $p > Y/2$—because $p > X/2$ (by definition) and $X > Y$ (by assumption). So, the parties would settle for S to give B back the price—entailing a net change of zero to B's welfare (from

$125 each. This would entail a net transfer of $200 from S to B and a net transfer of $250 from S and B to society.

Knowing that a court would do this, and knowing that this gives B a net gain relative to letting S go scot-free (and even relative to getting back from S just the price), S would happily settle with B—giving B what the court would require him to give B, while happily avoiding the penalty. And B would accept, happy to avoid the penalty as well. This settlement would entail a transfer between the parties, not changing total welfare.

The only potential inefficiency here would occur if S's cost of performance rose (from $0) to an amount between $150 and $400, say $350. In this zone, performance is efficient for the parties but not in total, and so S would perform, which would be inefficient. The parties would gain $400 – $350 = $50, and society would lose $250, making the total welfare decrease by $200.

If, instead of my proposal, the court here followed the no-effect rule—as courts currently do in such situations—this B-S contract would never form. While that might serve anti-prostitution criminal law, it offends pro-efficiency contract law because promises of the kind B and S want to make *add* to total welfare.

Several cases involve this sort of symmetrical illegal contract breached by the seller. Yet courts have used the inefficient no-effect rule in them. Below I list a few such cases, briefly discussing their facts, outcomes, and what their outcomes should have been.

2. Woodward v. Jacobs

Woodward v. Jacobs involved a contract between an owner and a builder to build a statutorily proscribed triplex, entered into voluntarily and with full and mutual knowledge of its illegality.[19] The plan was to initially build a duplex and then convert it into a triplex.[20] The builder walked off midway—after the duplex had been built but before it had been converted into a triplex.[21] Later, the builder sued the owner for, among other things, unpaid wages

pre-contract to post-settling). This makes B indifferent about entering into an efficient illegal contract, if restitution is the rule.

[19] 541 P.2d 691, 692 (Colo. App. 1975).

[20] *Id.* at 691.

[21] *Id.* at 692.

on their contract.[22] The court gave the contract no effect and let the parties be as they were, given the contract's illegality.[23] The court should have awarded the contractual remedy to the builder and penalized the owner and the builder, imposing on each party half the statutory penalty that sort of triplex would warrant. This would set efficient incentives. Such a contract would form only if the parties would gain more from it than society would lose—where the penalty measures (as appropriately as anything can) society's cost from a triplex.

3. McCauley v. Michael

In *McCauley v. Michael*, the plaintiff had paid the defendant's agent for corporate stock that regulations prohibited the defendant from selling.[24] The parties had full knowledge of the contract's illegality.[25] The defendant did not transfer the stock.[26] The court awarded neither conversion damages nor specific performance (but did permit rescission).[27] The court should have awarded conversion damages (though it was right to refuse specific performance) and should have imposed the regulatory penalty.

4. Ryan v. Motor Credit Co.

In *Ryan v. Motor Credit Co.*, the plaintiff was a used car dealer who purchased cars from the defendant on credit, on terms that violated a statute governing the extension of credit.[28] The plaintiff defaulted, and the defendant brought a replevin action.[29] The court denied all relief and found that both parties had entered into the illegal arrangement voluntarily.[30] The court should have awarded monetary damages (though it was right to refuse the recovery of the cars) and should have imposed the statutory penalty.

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[22] *Id.*
[23] *Id.*
[24] 256 N.W.2d 491, 494 (Minn. 1977).
[25] *Id.* at 495.
[26] *Id.*
[27] *Id.* at 500.
[28] 28 A.2d 181, 181 (N.J. 1942).
[29] *Id.* at 182.
[30] *Id.* at 182-84.

5. Russell v. Soldinger

The parties in *Russell v. Soldinger* conspired actively with each other to suppress bidding on some land, agreeing not to outbid each other and to then share title to the land.[31] The defendant did not convey the proportionate interest in the title.[32] The plaintiff demanded a transfer of title or monetary damages.[33] The court refused both.[34] The court should have awarded monetary damages (though it was right to refuse the title's transfer) and should have imposed the penalty for conspiracy.

6. Sinnar v. Le Roy

In *Sinnar v. Le Roy*, the plaintiff paid the defendant to illegally obtain a liquor license for the plaintiff.[35] The defendant failed to deliver the license.[36] The plaintiff sued for the amount he had paid.[37] The court refused, leaving the parties as they were.[38] The court should have awarded restitution (assuming it could not measure expectation damages)[39] and should have imposed the penalty for violating the liquor licensing laws.

II. THE MODEL'S SCOPE & UNDERLYING LOGIC

My argument that the law of illegal contracts is inefficient and my proposed solution operate within some constraints and rest on some claims. I listed these earlier and used them throughout; I discuss them in detail below. Some simply narrow the scope of this Article, defining the context within which my argument works. Some are more integral to the logical thrust of my argument, animating its spirit and making feasible its application. And some buttress my argument without being integral to it. The heart of this Article is my argument about efficiency and my proposed, efficient solution—my model and its workings. The claims I make in this

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[31] 131 Cal. Rptr. 145, 146 (Cal. Ct. App. 1976).
[32] *Id.*
[33] *Id.*
[34] *Id.* at 152-53.
[35] 270 P.2d 800, 800 (Wash. 1954).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *See supra* note 18.

Part support the model and should be read in light of that supporting role. Each claim I make below could spawn its own Article; an extended treatment of any is beyond the scope of this one.

A. The Relationship Between Contract Law and Criminal Law

Contract law need not be criminal law's handmaid. And so, the law of illegal contracts need not take, as its goal, the shunning, shaming, or deterrence of criminal conduct.[40] Let criminal law do that. Contract law should focus on creating strong incentives for welfare-enhancing promises[41]—regardless of criminality. Of course, criminality plays a role even in this goal, given that criminality and welfare are linked: Crimes involve social harms—reductions in social welfare. But contract law's criminal concerns should be limited to that link. Contract law should simply try to maximize welfare, even when faced with an illegal contract—and, in determining what helps or hurts welfare and how much, it can and should look to criminal law, as needed. In other words, the law of illegal contracts should not be an *exception* to the rest of contract law, in the name of criminal law. It should instead *cohere* with contract law—it is *contract* law, after all—even if it lets criminal law *complement* it in certain ways. It must ask the questions that make sense for *contract* law, even if some of the *answers* lie in criminal law.

To not be blinded by criminal law in this way, contract law need only look to other areas of law for inspiration. While different areas of law must and do speak with each other, we do see some separation of the kind for which I argue. Tax law taxes criminally obtained income just like it taxes legal income.[42] Tort law applies its own frameworks to death that differ from criminal law's frameworks for the same kinds of death—O.J. Simpson's criminal

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[40] This deterrence is generally accepted as the goal of the law of illegal contracts. *See, e.g.,* Kostritsky, *supra* note 4, at 126-27 ("In deciding whether to aid a party and thereby reallocate a loss, courts should decide whether that party, and others in its position, will be effectively deterred from engaging in the illegal conduct in the future . . . ."); Badawi, *supra* note 12, at 483.

[41] This sort of welfare-maximization is accepted as a significant goal of contract law in general. *See generally* SCOTT & KRAUS, *supra* note 5.

[42] *See* James v. United States, 366 U.S. 213, 213 (1961).

and civil cases, and their different outcomes, illustrate this difference. Indeed, legal historians have shown that tort and crime were simply two different ways of redressing the same wrongs, and the choice was the victim's.[43] So, that the two areas of law treat the same things differently is not a bug, but a feature.

These examples suggest that each area of law prioritizes *its* goals and mechanics when dealing with things that are rightly also the subject of some other area of law. Tax law is about income; some income's criminal flavor is secondary, if not irrelevant.[44] Tort law is

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[43] David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 83-84 (1996) ("Crime and tort were different ways for a victim to pursue justice for the same wrongful act. . . . The crux of the distinction between crime and tort in the early common law was the choice of vengeance or compensation.").

[44] That tax law *taxes* criminal income, *burdening* the criminal—while I propose contract law *enforces* some illegal contracts, *rewarding* criminality—is quite irrelevant. First, tax law also allows *deductions* of certain criminal expenses, just like it allows deductions of legal expenses—and deductions *help* the individual. *See, e.g.,* Comm'r v. Tellier, 383 U.S. 687, 691 (1966). Second, the burden is not as relevant as the *equal footing* between criminal and non-criminal income. This equal footing makes tax law crime-blind, as contract law should be. That tax law's crime-blindness might burden the criminal—adding to the deterrence of crime—whereas contract law's crime-blindness has the opposite effect, is not a deep difference—for two reasons.

First, by placing criminal income at an equal footing with non-criminal income, even if tax law burdens criminals concretely, it legitimizes crime symbolically. Second, even in concrete, efficiency terms, tax law's crime-blindness distorts criminal law's deterrence much like contract law's crime-blindness would, just in the opposite direction. Scholars have argued—and I agree—that the law of illegal contracts today (which I call inefficient in a complete sense) deters crime efficiently, from a criminal-law point of view—that is, it respects criminal law's deterrence calculus by adopting a hands-off approach, letting criminal law do its thing. *See, e.g.,* Kostritsky, *supra* note 4, at 119 n.9.

So, contract law today, by not interfering, achieves the optimal level of deterrence from the standpoint of criminal law, which sees crime as little other than socially harmful. Contract law's crime-blindness (which I argue for), by easing burdens on criminals, would make it deter crime *less* than contract law today does. Of course, as I have argued, this reduced deterrence is efficient in a broad, complete sense—it increases welfare. But this reduced deterrence, even if efficient in a complete sense, is less than the deterrence contract law achieves today—and so, it is less than the deterrence that is optimal from *criminal* law's standpoint. This would effectively make criminal law deter less than it would like to; to compensate for contract law's reduction in deterrence, criminal law would have to inflate its penalties. The penalties would no longer measure genuine social harm; they would exceed social harm, to compensate for contract law's generosity to criminals. This assumes that a criminal penalty measures the social harm of the crime. I discuss this in detail in Section II.D.

While contract law's crime-blindness would effectively make criminal law deter less than it would like to, tax law's crime-blindness (in taxing) effectively makes criminal law deter *more* than it would like to. If society is the beneficiary of taxes, tax law's crime-blindness—by taxing criminal income—lets society benefit from crimes, creating a social

about incentives rather than blame—preponderance of evidence rather than beyond reasonable doubt; some torts' criminal flavor doesn't change that. So why should *contract* law bow to criminal law?

Indeed, *criminal* law doesn't bow to *contract* law. The law of conspiracy imposes criminal logic—blame, punishment—on something rightly the subject also of contract law—whose logic is one of blame-blind efficiency. If criminal law can call a contract a crime, why can't contract law call a crime a contract? Asking contract law not to enforce valid but criminal contracts is no different from asking criminal law to encourage rather than discourage efficient conspiracies. Criminal law refuses, so may contract law.

B. Symmetry

I am concerned primarily with voluntary contracting parties who are equally knowledgeable of the contract's illegality, equally active in it, and equally interested in it: perfect symmetry.

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incentive for crime. If criminal law's deterrence of crime is rooted in and tailored to the social harm of crime, tax law's crime-blindness, by reducing that harm—by adding to the social *benefit* of crime—makes criminal law's penalties deter more than criminal law's social logic would stipulate. *See infra* Section II.D. To compensate, criminal law would need to deflate its penalties. The deflated penalties would measure social harm accurately, accounting for tax law's effect on that harm.

So, tax law's crime-blindness reduces the social harm of crime, making (un-deflated) criminal penalties deter *more* than the accurate (reduced) social harm of crime warrants, in the eyes of criminal law. Contract law's crime-blindness eases the burden on criminals, reducing the deterring effect of the (un-inflated) criminal penalties, making them deter *less* than the social harm of crime warrants, in the eyes of criminal law. The difference between more and less is irrelevant—each offends criminal law's choice of deterrence. Each interferes with criminal law's deterrence calculus.

Alternatively, if criminal law already accounts for the incentives contract law *in general* creates—the incentive to form mutually beneficial agreements—then the special, no-effect rule—an exception to general contract law—distorts criminal law's deterrence calculus, just not by making it deter *less* than it would like to, but *more—like* tax law. Put another way, if the criminal law of conspiracy punishes conspiracies in ways that acknowledge the fact that conspiracies, as contracts, create private gains that contract courts might validate (thereby encouraging conspiracies), then contract law's refusal to enforce criminal contracts is double dipping. Contract law then deters something, in the name of criminal law, that criminal law already deters in ways that count on contract law's non-deterrence. Seen this way, contract law's no-effect rule piles on, adding an unnecessary civil "penalty" (of non-enforcement), upsetting criminal law's calculus. "[T]he [contract] court[] . . . add[s] a sanction to those already provided . . . ." RESTATEMENT (SECOND) OF CONTS. § 179 cmt. b (AM. L. INST. 1981).

In situations that lack this symmetry, we might want contract law to deter illegal contracts outright because perhaps we do not want people being tricked or coerced into doing illegal things.[45] And scholars have shown that in those situations, if deterrence is our goal, contract law should and does put pressure on the cheaper cost avoider—the more knowledgeable, the more active, the less interested,[46] and so on—by denying the cheaper cost avoider relief and granting the worse cost avoider restitution.[47]

My framework is different; I am looking at *symmetrical* situations. In them, the goal should not be efficient deterrence because there is no tricking or coercing involved. The goal should simply be efficiency—in a complete sense—which might, depending on the situation, entail non-deterrence.

Indeed, perhaps even in asymmetrical situations the law of unconscionability—and fraud and duress—may suffice to prevent trickery and coercion. And so perhaps, even there, there is nothing special about *illegal* contracts. On the other hand, perhaps criminality *should* matter. One could argue that trickery and coercion are made much more problematic when crime is added to the mix. Being tricked into selling a good car at too a low price is one thing; being tricked into transporting cocaine is, arguably, far worse. In both, you come out duped; only in one, you come out a criminal. Accordingly, contract law solutions, designed for purely contractual trickery and coercion—where only contractual rights, gains, losses, and values are at stake—will not do when the stakes are also criminal.

But still: Why should *contract* law care about dealing effectively with this special, heightened form of the trickery-coercion problem when it is heightened only because of *criminal*

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[45] *See* Kostritsky, *supra* note 4, at 143-44.

[46] The less interested party may or may not be the cheaper cost avoider. On the one hand, the less interested party is more easily deterrable, for he has less to gain from the criminal conduct. On the other hand, he is likely less involved and less knowledgeable, making him a less effective pressure point. Put differently, he may want to be deterred more than the other party does but may be worse at being deterred. *See id.* at 152.

[47] *See id.* at 126 (discussing factors animating the factual and doctrinal exceptions to the no-effect rule—including parties' relative status, relative knowledge, relative constraints and voluntariness, relative participation in the wrongdoing, relative benefit from the wrongdoing—and showing how each application of the law achieves efficient deterrence—deterrence at least cost—by putting pressure on the cheaper cost avoider).

aspects? Perhaps because contract law is especially good at dealing with trickery and coercion—for these problems abound in the world of promises. And so, when these problems are heightened—even though they are heightened by criminal aspects—contract law should respond.

So, whether the law of illegal contracts should be different from the law of legal contracts in asymmetrical situations is an open question. At any rate, my focus is symmetrical situations—no trickery or coercion, and so, no scope for crime to exacerbate those problems. And in these symmetrical situations, there is no special need to deter criminal conduct—contract law's goal should not be efficient deterrence here, whatever its goal might be in asymmetrical situations.

Scholarship on efficient deterrence claims that in situations of symmetry, the law should not shift losses because shifting losses when neither party is a better cost avoider entails administrative cost without any increase in deterrence. And so, the law's no-effect rule is efficient—*with respect to the deterrence goal*—in these symmetrical situations.[48] To be clear: I agree with this general analysis, but I reject the idea that deterrence *should* be the goal. That goal is not efficient, and so, achieving it efficiently is no cause to celebrate. Getting the biggest *deterrence*-bang for your buck robs you of getting the biggest *bang* for your buck.[49] In other words, efficient deterrence is not the efficiency we should be after. The goal should simply be welfare maximization—*complete* efficiency. And the no-effect rule in symmetrical situations is *not* efficient with respect to *that* goal, as I have shown.

C. What Is a Cost?

I have mentioned that crimes harm—or cost—society. That crimes harm society is not only obvious, it is the foundation of our retributivist criminal law. That's why we have criminal law—to punish the *blameworthy*—those who did something bad with bad

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[48] *See id.* at 124 ("The courts should not incur the costs of loss shifting if the loss falls on a party who is at least as deterrable as the other party."); *id.* at 125 ("[W]hen there are no market imperfections between the parties, the courts should adopt a 'leave-the-parties-where-they-are' approach for illegal contracts." (footnote omitted)); *id.* at 139-40.

[49] *See id.* at 123 ("Efficient deterrence theory seeks to minimize the costs *resulting from the nonenforcement of contracts*." (emphasis added)).

intent. As I will discuss in more detail in Section II.D, the social harm is not simply the injury to the victim, like in torts. It exists by virtue of the injury—the act—*and* the criminal's intent. It is this harm to society—which incorporates both the concrete injury, and the abstract, moral notion of a bad mental state—that society responds to, through criminal punishment. This harm animates all of criminal law.

Where in the picture of illegal contracts does this harm fit? Illegal contracts—and their breaches—can be of many kinds. I am concerned with the following situation: a promise for a promise, where either (1) just one (and not the other) promise's fulfillment—even in the absence of the other's—constitutes a crime; or (2) both promises' fulfillments together (but not either's individually) constitute a crime. Put simply, this could be (1) a promise of a crime for a promise of money—like contract killing; or (2) a promise of a service or good for a promise of money, where buying or selling the service or good is a crime, even if rendering the service for free, or gifting the good, is not—like prostitution.

In either case, the contract's performance entails a crime. More specifically, in the first case, the seller's performance, not the buyer's, entails a crime. Of course, the buyer's performance, without the seller's, may entail *a* crime—conspiracy or attempt—but that inchoate crime isn't the one contracted-for, as I will discuss later. So, the contracted-for crime does not accompany the seller's breach, with or without the buyer's performance. Put in terms of crime's social cost: The contract's performance, or the buyer's breach (after the seller's performance), but not the seller's breach, criminally cost society.

So, for example, B promises to pay S, and S promises to murder. If both fulfill their promises, there's a crime—murder—and society incurs a cost. If just S fulfills his promise and B breaches, there's a crime—murder—and society incurs a cost. But if S breaches, there's no murder, and society incurs no cost. Remedying S's breach with specific performance forces the crime's commission, and society incurs a cost just as it would have had S not breached. But remedying S's breach using damages avoids the crime and its cost.

In the second case—where only the transaction is criminal—the contracted-for crime accompanies neither party's breach. But if

the buyer breached and is later made to pay the seller damages in court, that payment is too close, if not identical to, the promised performance—making enforcement effectively complete the bilateral performance that constitutes the crime.

So, for example, B promises to pay S, and S promises to have sex with B. If, and only if, both fulfill their promises, there's a crime—prostitution—and society incurs a cost. If just one fulfills his and the other breaches, there's no crime—regardless of who breached. But if S performed, B breached, and a court awarded S damages, that's the court acting somewhat as a pimp—making the john pay for the prostitute's services. This award of expectation damages to a prostitute is akin to an award of specific performance to a john or a hitman-hirer—they all entail the contracted-for crime's commission.[50] And even if there is more than a formal

[50] In both cases—buying a crime and buying *as* crime—my proposal sets the right incentives no matter who breaches—buyer or seller. I have discussed sellers' breaches throughout; I will now address buyers' breaches.

Consider, first, a contract where the transaction is the crime, even if each performance individually is not—like prostitution. If it is out for efficiency, the court—in awarding the prostitute expectation damages—will need to account for the social cost of the crime of prostitution, even though the john breached. The prostitution whose social cost the court must account for did not occur entirely outside court. The breach, for a while, saved society from the cost of the contracted-for crime—but the court made society incur that cost. Enforcement here necessarily entails performance—and thus the crime, and its cost. My proposal sets the right incentives here. The prostitute S's performance and the john B's breach entail (1) B receiving a benefit that equals his willingness to buy (WB) and (2) S incurring a detriment that equals his willingness to sell (WS). The net effect of this is $\Delta W = WB - WS = X$, the surplus. The court will award S expectation damages (which will equal the price $p \geq X/2$) and impose on each party the penalty $Y/2$. This remedy entails (1) a transfer of p from B to S ($\Delta W = 0$); (2) a transfer of Y from B and S to society ($\Delta W = 0$); and (3) the social cost of (court-assisted) prostitution Y. The net effect of just this enforcement is $\Delta W = -Y$; making the overall $\Delta W = X - Y$ (comparing pre-contract and post-enforcement states). A contract will form if and only if this overall $\Delta W > 0$. So, even when B breaches, my proposal draws the line exactly where we want it: between efficient and inefficient illegal contracts. And taking into account any potential settling simply eliminates the parties-to-society transfer (because, by settling, the parties will avoid the penalty), keeping the overall ΔW unchanged (because transfers do not affect ΔW). Of course, B's settling incentive exists only if S's enforcement threat is credible. And it is, when the illegal contract is efficient: S would rather get expectation damages (which equal price) and pay the penalty than let B off the hook, because $p - Y/2 \geq X/2 - Y/2 > 0$.

This analysis applies to B's breach even when S's performance—taken on its own, without considering B's payment—is itself a crime, like in a hitman contract. There, the social cost Y comes not from the court's award of expectation damages—the court acting

difference between paying a price and paying damages—such that paying damages does not entail the crime of prostitution like paying the price would—the damages will create an incentive to settle to avoid the penalty, or even just to avoid litigation costs. This incentive will make the john pay the "damages" *as* a settlement price outside court. So, even if paying damages does not *itself* cost society criminally, the availability of damages as a remedy does, albeit indirectly.

Crucially though, I claim that the mere *making* of an illegal contract does not create the criminal harm—the social cost—that the contracted-for crime's commission would. True, the contracting may itself be an inchoate crime—like conspiracy or attempt. And so, it may create *some* criminal harm—that which the crime of conspiracy or attempt creates. But that harm is separate from the harm of the contracted-for crime—just like conspiracy to commit crime Q is separate (and punished differently) from crime Q. The crimes are different, and so are their harms. So, it's not the *making* of the contract for Q that costs society the amount Q would; it's the *performance* because the performance, unlike the making, entails committing Q. Prostitution is bad or illegal (and the two are linked, for crimes *harm*, and criminals are *blameworthy*) because *sex is had* for money. Selling weed is bad or illegal because *weed is sold* for money. The mere desire or plan to buy or sell sex or weed is hardly as harmful as actually doing it. Thoughts and feelings are not harmful or punishable without *actus reus*. And the *actus reus* requirement for a crime is not met by a mere desire or plan to commit that crime.

The social cost is thus in the performance, not the making. And so, to the extent that enforcing a contract does not entail performing it, enforcing does not entail the social cost of the contracted-for crime. And, as discussed, I focus in this paper mainly on breaching sellers—where enforcing through damages doesn't entail performing.[51]

While I believe this argument is sound, I see room for reasonable disagreement, so let me push my point further in a way that hopefully addresses objections. Enforcing (without specific

as a pimp—but rather simply from S's performance—the hitman acting as a hitman. The math remains unchanged.

[51] *See supra* note 50 for a discussion of breaching buyers.

performance and with expectation damages) is conceptually somewhere *between* making and performing. It is more than making, for it takes the buyer-breachee from where he was at the time of making, to where he had expected to be after the seller-breacher's anticipated performance. Yet it is less than performing, for it does not entail the actual performance of both promises. It requires the seller-breacher not to perform, but to do something that substitutes for performance.

While the substitute, for the buyer-breachee, is economically equivalent to the actual performance, it is not factually identical to it. And this factual difference is relevant when ascertaining criminal harms, for criminal harms are grounded in the factual characteristics—*mens rea*, *actus reus*, the material elements of the offense (conduct, attendant circumstances, result)—of specifically defined blameworthy acts. Owning five dollars' worth of coffee and owning five dollars' worth of cocaine may look the same to an economist concerned only with the owner's welfare, but not to a criminologist concerned with society's welfare and conscious of cocaine's effect on it. They are both worth five dollars, but only one constitutes an *actus reus*. A contract lawyer seeking efficiency (as all good ones should—see Section II.A) is interested in the welfare of the parties *and* society; he must be both an economist *and* a criminologist. In this dual role, he recognizes that enforcement takes the buyer-breachee to where he had expected to be, but *without* costing society—*unlike* performance. That enforcing is less than performing in this way—even though it is more than making—is enough, I think, to support my claim that enforcing does not make society incur the cost of the contracted-for crime.

Of course, this does not mean that the *policy* of enforcing illegal contracts has no effect on the total social cost from crime. By creating incentives for illegal contracts, enforcement leads to the formation and performance of illegal contracts, and each performance costs society. A particular enforcement (when a seller breaches) does not add to social cost ex post, but the ex ante incentives a policy of enforcement creates can, of course, add to social cost. And the goal in setting the policy must be to minimize *total* cost (maximize *total* welfare)—as my proposal seeks to do.

I have assumed that crimes cost and discussed only *when and how* those costs are incurred, in the context of the making,

performing, breaching, and enforcing of certain kinds of illegal contracts. But there are deeper questions here about *why* certain transactions are problematic, criminally speaking. These questions are particularly relevant to situations where buying and selling are criminal, even if rendering the service for free or gifting the good is not. Scholars have discussed that some transactions have external, social costs because the transactions commodify something society simply does not want commodified—some say we should not sell sex, for example. Other transactions' external costs inhere in the fact that a prevailing unequal resource-distribution decides who gets how much of the commodity. On this view, some might find organ trade unpalatable not simply because it commodifies health and life, but because it gives the rich disproportionate access to health and life—the kinds of things we simply do not want distributed according to wealth.[52]

These ideas raise complicated questions: What property of a thing *makes* its commodification (or unequal access to it) bad? *How* bad is it? These are problems for criminal law, and a deeper dive into these questions is a topic for another paper. I will return to the "How bad?" question below. My point currently is quite simple: Performance and enforcement (through damages awarded to buyers) generally entail different things, and the former costs society.

D. How Much Is a Cost?

Scholarship in the area of illegal contracts has assumed that crimes' social costs are measurable.[53] But this scholarship has not done much more than just assume this. I will attempt to provide a concrete way of measuring these costs—for my model calls on judges to concretely measure.[54] My solution is simple; it involves no fancy arithmetic. The answer lies, unsurprisingly, in criminal law: A crime's criminal penalty measures the crime's social cost.

As discussed, the idea that crimes cost society lies at the core of criminal law. In our retributivist model, criminal punishment is

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[52] *See generally* GUIDO CALABRESI, THE FUTURE OF LAW & ECONOMICS (2016).

[53] *See, e.g.,* Badawi, *supra* note 12, at 494, 496.

[54] At least in theory, because in practice, parties will settle, and courts will not actually have to penalize.

society's response to what it deems blameworthy. "[R]etribution[] mean[s] the harm imposed on wrongdoers because they have committed morally blameworthy acts."[55] And blame is simply a way of expressing society's revulsion to an undesirable act performed with a culpable state of mind—the very revulsion that constitutes the social cost of a crime. Note that this social cost's scope is broad: "the interests, values, and rights that . . . crime tends to impair and the actual harm suffered by the victim."[56] It is "moral indignation against a wrongful act and . . . moral hatred directed toward the wrongdoer for harboring immoral values. . . . [W]hich expresses a commitment to moral values, a sense of desert, and a desire to 'restore . . . proper moral balance.'"[57] It takes into account the concrete harm of the act—*actus reus*—and the abstract moral harm of a culpable mental state—*mens rea.* Blameworthiness is about both these dimensions; you cannot be blameworthy of intending to do something desirable, and you cannot be blameworthy of not intending to do something undesirable. "Harm, along with culpability, lies at the heart of measuring the seriousness of a crime."[58]

So, punishment responds to blame, and blame captures—reflects, expresses, and encodes—the social cost of a crime, which includes concrete and abstract dimensions. In other words, in a retributivist regime, the social cost of a crime animates its punishment, and blame is the language in which this punishment is justified, tailored, and meted out. You are *blameworthy* because you did something undesirable with a culpable state of mind, and *so* we will do something to you in response. Social cost and punishment are thus two sides of the same coin, and

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[55] Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1406 (2003).

[56] Ken Levy, *Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System*, 66 RUTGERS L. REV. 629, 647 (2014).

[57] Sherwin, *supra* note 55, at 1407 (alteration in original) (quoting Jeffrie Murphy, *Hatred: A Qualified Defense, in* FORGIVENESS AND MERCY 88, 89 (1988)).

[58] FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 58 (1999). *See also* Marc G. Wilhelm, *Recidivist Statutes—Application of Proportionality and Overbreadth Doctrines to Repeat Offenders*—Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W. Va. 1981), 57 WASH. L. REV. 573, 592 (1982) ("[T]he amount of harm caused is one measure of moral culpability.").

blameworthiness is the rim. Punishment annuls[59] the crime, wiping[60] away its social cost by making the criminal "repay his debt to society."[61] It's "desert"[62] and "denunciation."[63] It responds, in the name of fairness to the rest of society, to a violation of a social duty.[64] This is "the 'moral alchemy' by which the evil of crime and the evil of punishment 'are transmuted into good.'"[65] And so, the retributivist penalty for a crime—as stipulated by statute or forged in the common law—measures the social cost of that crime, which includes tangible and moral harm packaged together as blameworthiness.[66]

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[59] *See* Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1836 (1999); John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 244-45 (1979); G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS I § 99 (1821).

[60] *See* Cottingham, *supra* note 59, at 244-45.

[61] *Id.* at 238.

[62] *See id.* at 239.

[63] *See id.* at 245.

[64] *See id.* at 242-43. *See also* Sarah G. Vincent, Book Note, *The Hate Within Ourselves: Criminal Law's Attempt to Overcome Bias*, 16 HARV. BLACKLETTER L.J. 229, 236 (2000) (reviewing FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999)) ("[W]hen a person becomes a criminal, she incurs a debt for enjoying the benefits without accepting the burdens of the system. This debt must be paid through punishment."); John Rawls, *Legal Obligation and the Duty of Fair Play*, L. & PHIL. 3, 3-18 (1964).

[65] Garvey, *supra* note 59, at 1836 (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 234-35 (1968)).

[66] *See, e.g.,* James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 6 (2000) ("[T]he magnitude of [retributive] punishment ensures that society imposes a consequence equal to the magnitude of the harm caused. It serves in part to demonstrate there is a consequence for criminal behavior, and *it expresses some measure of society's evaluation of the harm* caused in terms of the magnitude of the criminal sanction.") (emphasis added); W.C. Bunting, *The Regulation of Sentencing Decisions: Why Information Disclosure is Not Sufficient, and What to do About it*, 70 ANN. SURV. AM. L. 41, 46-47, n.13 (2014) ("[A] criminal sanction" has "retributive benefit"—which is "the effect of punishment in assuaging the indignation that serious crime arouses." (citing United States v. Craig, 703 F.3d 1001, 1004 (7th Cir. 2012) (Posner, J., concurring))); *id.* at 93-94 (2014) ("According to the retributivist tradition, the appropriate sanction can be defined as a sanction that varies proportionately with the magnitude of the crime's harm"—punishment has "independent moral value" and constitutes "just desert," as opposed to "solely the means to some other good, either general or individual."); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1514 (1974) ("[M]oral fault [is] the touchstone in the retributive grading of offenses . . . ."); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 592-93 (2005) ("[S]entences reflect the social cost of the crime." (citing James Andreoni, *Reasonable*

Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?, 22 RAND J. ECON. 385 (1991)); Luigi Alberto Franzoni, *Negotiated Enforcement and Credible Deterrence*, 109 ECON. J. 509 (1999)); Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 127-28 (2006) (Within "the just-deserts philosophy . . . Andrew von Hirsch[] has argued that sentences should be proportional to the 'seriousness' of the crime and 'seriousness' should be measured by the harm and culpability associated with the act. Harm, according to von Hirsch, includes only the foreseeable consequences of the act committed by the defendant; culpability varies with the traditional states of mind—purposeful, knowing, reckless, or negligent."); *id.* at 124-27 ("Cesare Beccaria . . . wrote that the 'true measure of crimes' is 'the harm done to society.' . . . Does the phrase mean harm to all individuals suffering any injury as a result of the defendant's actions? Harm to a certain limited universe of individuals? Harm to 'society' as a whole, but not to individual persons? Perhaps surprisingly given his rejection of the blameworthiness approach, [Beccaria] . . . means the last of these[—] . . . injury to a community's overall economic, political and emotional stability rather than as the aggregate pain suffered by citizens affected by the crime."); Payne v. Tennessee, 501 U.S. 808, 820 (1991) ("Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that 'the punishment should fit the crime.' He said that '[w]e have seen that the true measure of crimes is the injury done to society.'" (citing J. FARRER, CRIMES AND PUNISHMENTS 199 (1880))); Victor D. Vital, Note, Payne v. Tennessee: *The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. MARSHALL L. REV. 497, 506 (1994) ("[C]riminal sentencers have historically measured crimes by the harm they cause to society."); Vincent, *supra* note 64, at 236 ("Both the Kantian and Hegelian perspectives share the idea that the severity of the punishment should match the gravity of the choice to violate the law, according to the Hegelian perspective, or the magnitude of the debt to society, according to the Kantian perspective."); Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 504-06 (1996) ("Harm is 'the fulcrum between criminal conduct . . . and the punitive sanction.' Although harm is, by most accounts, a central value in the criminal law, . . . [m]ens rea [also] plays a 'paramount role' in criminal law theory. It is through mens rea ('guilty mind') that the criminal law imports a measure of moral culpability into the equation. The criminal law expresses society's sense of moral outrage and condemnation because the actor's conduct is deemed culpable[—] . . . the actor is not only responsible for harmful conduct, but is blameworthy."); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 438 (2005) ("[R]etribution's intent requirement . . . requires that the punishment not preclude the internalization of [a] 'sense of justice' . . . ."); Levy, *supra* note 56, at 629-30 ("'[R]etributivism[]' . . . says that criminals should be punished in order to give them their 'just deserts,'" not "to bring about such good consequences as deterrence, incapacitation, and rehabilitation."); *id.* at 646-47 ("[R]etributivism is all about just deserts, and just-ness—or justice—implies proportionality. It is clearly not just but unjust deserts—an injustice to the offender—if she is punished far more than her crime merits. [She] may legitimately claim that her punishment does not 'fit the crime'; that . . . her crime merits much less punishment. [Similarly,] a defendant who is sentenced to only thirty days in jail for a violent rape is not 'paying' nearly what he 'owes.'"); Sherwin, *supra* note 55, at 1406 ("[P]unishing wrongdoers is good in itself. For some, this is simply a matter of moral desert. . . . [P]unishment may balance the account of those who have benefited from breaches of social order."); Murphy, *supra* note 57, at 89 (Retribution "restore[s] . . . proper moral balance."); Sherwin, *supra* note 55, at 1409-

This would not be the case if our criminal law were not retributivist. If it focused on rehabilitation or preventive detention, the state's action against a criminal would have little to do with the social cost of the crime, for the goal would not be the retributivist goal of hurting the criminal as much as he hurt society.

Similarly, if the law's logic was one of vengeance—which is subtly different from retribution, for it focuses on harm solely from the victim's point of view instead of social harm rooted in notions of blameworthiness[67]—the penalties would measure the crime's harm

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10 ("Formal retributive punishment is inflicted in the name of the community for transgressions of its common standards."); Garvey, *supra* note 59, at 1835 ("Retribution does a good job of explaining how crime threatens community. It also does a good job of explaining how punishment condemns wrongdoing."); *id.* at 1835-37 ("[R]etributivism is dedicated to a simple proposition: Wrongdoers should be punished only because and to the extent that they deserve it. . . . [P]unishment [is] the institutional means by which the organized community condemns wrongdoing . . . ."); Debra McCloskey Barnhart, Commonwealth v. Bonadio: *Voluntary Deviate Sexual Intercourse—A Comparative Analysis*, 43 U. PITT. L. REV. 253, 274 (1981) ("The case law concerning cruel and unusual punishment in areas other than sodomy has suggested . . . the harm to society caused by the offense is to be taken into consideration" when "determining whether or not a sentence is unconstitutionally disproportionate."); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 566-67 (2008) ("[G]reater clarity regarding the components of a felt sense of justice can be found in the work that Robert Nozick and Joel Feinberg have done to define just punishment in accordance with retributivist principles. . . . Nozick's formulation is as follows: Punishment deserved = responsibility × Harm (Pd = r × H). The r ranges from no responsibility (0), such as where a criminal defendant is not guilty by reason of insanity, to full responsibility (1), where the defendant intentionally committed the crime. The H is defined as the magnitude of the wrongness or harm. Feinberg's formulation mediates between the deserving person (S) and the punishment deserved (X) with the desert basis (F), or (S ↔ F ↔ X). In Feinberg's words, 'S deserves X in virtue of F.' The F in this formulation is related to a felt sense of justice in terms of describing the retributivist tie between the offender and the sentence."); Deirdre Golash & James P. Lynch, *Should Public Opinion Guide Sentencing Policy?*, 12 FED. SENT. R. 30, 30, 1999 WL 1458618 (VERA INST. JUST.) ("[T]he severity of punishment should correspond to the moral seriousness of the crime."); Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1232 (2004) ("*Retributivists* tend to emphasize the harms of crime . . . to the social order . . . ."); *Determining the Sentence*, FCJ FED. SENT'G GUIDELINES MANUAL 406 (2018) ("In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct.").

67 *See* Markel, *supra note* 66, at 438 ("The philosopher Robert Nozick identified five other characteristics that tend to distinguish retribution from revenge: (a) retribution ends cycles of violence, whereas revenge fosters them; (b) retribution limits punishment to that which is in proportion to the wrongdoing, whereas revenge is limitless in principle; (c) retribution is impartially administered by the state, whereas revenge is often personal; (d) retributivists seek the equal application of the criminal law, whereas

to the victim, which need not equal the crime's *social* cost. This is so in several situations. First, for crimes like prostitution, sometimes it is not clear who the victim is or if there even is a victim. Any harm to any victim is likely less than the harm—moral, long-term, whatever—to society (which society, in criminalizing prostitution, has deemed exists). So, victim-based penalties here would be less than the crimes' social costs.

Second, for crimes like murder, the harm to the victim is next to infinite, yet the social cost is not thought to be infinite. Of course, society despises murder greatly, but the murdered surely despises it more. So, victim-based penalties here would exceed social costs.

Third, intent is relevant to retributivism—and is a crucial dimension of a crime's social cost—in a way in which it is not relevant to a tort-like framework that focuses on harm to victims. Similar acts with different intents harm victims similarly, yet entail different degrees of blameworthiness—costing society differently. A manslaughter and a murder arguably create similar harms to victims. Homicides with different intents are less different to the dead (and their loved ones) than they are to the killer: the difference between killing with intent and killing by accident is much greater than the difference between being killed with intent and being killed by accident. And so, a tort-like criminal framework focusing on harm to victims may not impose significantly different penalties (if they can even be called penalties in such a system) on a murderer and a manslaughterer.[68] But our *blame*-focused criminal framework, which cares about *social* cost—society's revulsion to bad acts *carried out with bad intent*—punishes murderers and manslaughterers differently. So, victim-based penalties in situations where intent is key would mismeasure social costs.[69]

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no generality attaches to the avenger's interest; and (e) retribution is cool and unemotional, whereas revenge has a particular emotional tone of taking pleasure in the suffering of another."). *See also* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366-68 (1981).

[68] *See* Sherwin, *supra* note 55, at 1410 ("[R]evenge, unlike retribution, is not limited to targets that are blameworthy. . . . [E]ven when the injurer is blameless, the victim may resent the fact that his life has been disrupted while the person who caused the disruption continues on unscathed.").

[69] *See* Levy, *supra* note 56, at 642-43 ("[C]riminal punishment . . . does not generally aim at victim restoration. Instead, it intentionally inflicts hardship, deprivation, or

So, the retributivist logic of our criminal law requires criminal penalties to measure the crimes' social costs—penalties are *meant* to measure social costs. Whether criminal law *succeeds* in fulfilling its logical mandate—whether penalties *accurately* measure social costs—is another question—one for criminal law. Contract law, in search for a measure of social costs, need only look at any reliable source—and criminal law qualifies. Indeed, criminal law is the best place to look, because its *specialty* is the social cost of crime.

Social costs of crimes are inherently hard—perhaps even impossible—to measure. There is no free market in crime like there is in typical market goods and services, making prices and costs hard to establish. And the abstract, moral dimension of a crime's social cost—that comes from a focus on intent—makes things even harder.[70] But the relevant point is that, through its retributivist thrust, criminal law *purports* to establish a measure for such costs—or something close to it.

And perhaps there is reason to believe it does a good job: legislators' and judges' moral compasses are as good a barometer of the social costs of crimes—rooted in notions of moral revulsion—as any.[71] Indeed, the legislature *speaks for society* in ways in which

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suffering in order to . . . giv[e] the criminal what she deserves and express[] condemnation of the criminal for her criminal activity." (footnote omitted)); Sherwin, *supra* note 55, at 1396 ("The agency of the wrongdoer in causing a loss creates a 'normative link' between wrongdoer and victim, which in turn requires the wrongdoer to assume the loss. This focus on the wrongdoer's duty deflects attention from the . . . victim . . . ."); *id.* at 1400 (As "state-imposed punishment took the place of personal vengeance[,] [w]rongs came to be seen as affronts to the community.").

[70] Scholars have discussed ways in which even the amorphous, abstract aspects of a crime's seriousness—its social cost—can be measured. *See, e.g.,* Golash & Lynch, *supra* note 66, at 31 ("To isolate the significance of specific factors in the sentencing decision, leading researchers, such as Berk and Rossi, have developed the 'factorial approach.' Using this methodology, a researcher begins from a list of descriptors of offenses, offenders, and victim characteristics that may affect such judgments. These factors are then used to generate scenarios representing every possible combination of circumstances. A sample set of scenarios is selected at random. Given a sufficiently large sample, this approach will theoretically permit identification of all factors affecting the respondents' judgment of seriousness."); Bunting, *supra* note 66, at 95-96 ("In theory, the retributive value of a criminal sanction can be measured using standard willingness-to-pay/willingness-to-accept valuation methodologies. In many cases, an individual likely would be willing to pay some amount of money in exchange for no criminal sanction imposed." (footnote omitted)).

[71] Bunting, *supra* note 66, at 96-97 ("Assuming that the retributive benefit of a criminal sanction can be monetized and included as an input in a broader CBA of a

even judges don't.[72] And so, statutorily specified criminal penalties are especially reliable measures of social costs.[73] And if the legislators' and judges' valuations were off, over time they would improve due to social and legal forces, much like prices in a market reaching equilibrium through competition. Prosecutors, district attorneys, scholars, and the legislators and judges themselves would be actors in this process.[74]

E. Hidden Costs

Contract law's refusal to honor criminal contracts might put an end to the criminal activity such contracts are made for. Or it might not—and it might make their enforcement a private, extrajudicial, extralegal, and indeed *illegal* matter. What the law does not bless does not just vanish—it goes, and can take all of us,

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proposed change in sentencing policy, the question is: which institutional actor is best positioned to perform this valuation exercise? An elite body of independent experts should not attempt to value the retributive benefit of a proposed change in sentencing policy. The retributive benefit of a criminal sentence is better estimated by some combination of democratically elected representatives and judicial actors."). *See also* HART, *supra* note 65, 8-12.

[72] *See, e.g.,* RESTATEMENT (SECOND) OF CONTS. § 179 cmt. b (AM. L. INST. 1981) ("The declaration of public policy has now become largely the province of legislators rather than judges. This is in part because legislators are supported by facilities for factual investigations and can be more responsive to the general public.").

[73] Of course, there are reasons to believe legislatures are not particularly competent at crafting penalties. *See* Golash & Lynch, *supra* note 66, at 30-31 ("[T]he moral seriousness of crimes is not, strictly speaking, a function of public opinion. The moral seriousness of killing a human being, for example, is not less in those times and places where the public believes that the lives of some group of human beings (blacks, Jews, women) are of little value. Assessing the comparability of crimes and punishments can be difficult, but public opinion has no special relevance to this judgment. To justify a particular level of punishment on retributive grounds, we must show that the punishment is proportionate to the moral seriousness of the crime, not that the public supports that level of punishment. . . . There is one legitimate way in which public opinion, properly qualified, could be relevant—as an indirect measure of moral seriousness. In making an assessment of the amount of punishment deserved for a particular type of crime, there is room for reasonable disagreement on the relative importance of various rights and the mitigating or aggravating value of various circumstances. To the extent that such disagreements are otherwise difficult to resolve, one might argue that democratic ends are furthered by having the general public decide the issue.").

[74] *See, e.g.,* Lee, *supra* note 66, at 566 ("As courts make transparent, explicit proportionality decisions, patterns will emerge and formulas like these can assist in explaining how and why a particular sentence is, or is not, grossly disproportionate to a particular crime.").

to hell. Pimps hound johns to pay up. Goons have goons' backs. A cloud of extralegal enforcement overhangs outlawed contracts, carrying in it the potential for grizzly criminal activity and other welfare-reducing activities like coercion, threats, and general unpleasantness. This should make both criminal law and contract law queasy.

Put another way, if the goal is to deter crime, not enforcing criminal contracts may simply amount to little more than burying our heads in the sand. Crimes will continue to be promised and committed, and indeed more crimes will be committed in order to enforce criminal promises. And if the goal is efficiency, as I have said it should be, then this potential for greater crime is simply a hidden cost of judicial non-enforcement—which makes the case against the no-effect rule even stronger.

CONCLUSION

The law of illegal contracts today gives criminal law and public policy in general undue deference. Instead of seeking to prevent crime and other illegal conduct, it should seek to maximize total welfare—just like the rest of contract law. And so, in situations involving illegal contracts entered into by parties with equal knowledge of the illegality, courts should abandon the current no-effect rule, which lets the parties be as they are. Instead, they should award expectation damages or restitution if expectation damages can't be measured. And they should also impose on each party half the penalty that a court would impose on a criminal (or illegal actor more generally) who committed the contracted-for crime.

This proposal works no matter who breaches. Its success is most apparent in a situation where the seller breaches, and the contracted-for crime is therefore avoided. But even if awarding expectation damages approximates the crime's commission or the crime has already been committed and only payment for it has not been made, courts should follow this proposal.

This approach will set efficient incentives. All and only ex ante efficient illegal contracts will form. Incentives to settle will operate to ensure efficient breaches (for the most part—some inefficient performances will occur). Post-breach enforcements will likely give

way to settlements, and neither enforcement nor settlement will affect total welfare in a way that sets inefficient incentives.