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BEYOND THE TORT/CRIME DISTINCTION

DAVID FRIEDMAN*

I take it that the chief purpose of Professor Seipp's Paper¹ is to establish two propositions about the history of the tort/crime distinction: that the distinction goes back very far in English law, and that the distinction is based on whether the principal consequence of conviction was compensation of the victim or punishment of the offender. To me, however, the Paper is interesting for two other reasons: the similarities, in function more than form, between English law enforcement in the Middle Ages and in the eighteenth century, and the implications of both for the tort/crime distinction.

I. THE RETURN TO PRIVATE ENFORCEMENT

The medieval appeal of felony was a private action. As Blackstone put it, "on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject . . . the king can no more pardon it than he can remit the damages recovered in an action of battery."² By Blackstone's time, the appeal remained in law but had almost completely vanished from practice.³

The disappearance of the appeal of felony, however, did not signify a shift to the modern model of public prosecution of crime. In the eighteenth century almost all crimes were privately prosecuted.⁴ The actions took the form of public prosecution—the title of the action would read "Rex (or Regina) v. Y" rather than "X v. Y"—but a private party, usually the victim, initiated the action, located witnesses, arranged for them to appear in court, and fulfilled almost all of the functions that we associate with a public prosecutor.⁵

This suggests an interesting historical question to which I have no good answer: Why, after abandoning private prosecution in one form, did the

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¹ David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996).

² 4 WILLIAM BLACKSTONE, COMMENTARIES *316.

³ *Id.* at *312-13 ("As this method of prosecution is still in force, I cannot omit to mention it: but . . . it is very little in use . . .").

⁴ J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 35-36 (1986) (discussing the crucial role of private prosecution).

⁵ For a more detailed description of these institutions, see David D. Friedman, *Making Sense of English Law Enforcement in the 18th Century*, 2 U. CHI. ROUND-TABLE 475 (1995).

English legal system reintroduce it in another?⁶ It also provides an opportunity to observe how similar problems worked themselves out in two legal systems several centuries apart, different in form but similar in substance.

One such problem concerns the incentive to prosecute. A modern tort suit, if successful, results in a damage payment to the victim, giving victims an incentive to sue. But a successful private criminal suit, whether a fifteenth century appeal or an eighteenth century indictment, produced only a penalty for the defendant. Why, under such circumstances, did anyone prosecute?

The conventional answer is vengeance.⁷ In a recent piece on eighteenth century law enforcement, I offer two other explanations, both also relevant to the earlier period.⁸ One is that private prosecution was a way of producing deterrence as a private good. The other is that private prosecutors commenced cases in the hope of being paid to drop them.

The logic of private deterrence is simple. Whether potential criminals choose to commit crimes against me depends, in part, on what they believe will happen if they are caught. If they expect to be prosecuted, convicted, and punished, they may not commit the crimes. It is therefore in my interest for potential criminals to believe that I will energetically prosecute crimes committed against me. One way I can acquire such a reputation is by prosecuting such crimes. This is a practical strategy, however, only if I am frequently a victim of crimes.⁹

The eighteenth century solution to this problem was an institution called an association for the prosecution of felons.¹⁰ A group of potential victims, usually residents of the same town, would each contribute a few pounds to a common fund that they would use to pay the cost of prose-

⁶ This assumes that the public action—the indictment—was publicly prosecuted in the middle ages. An alternative possibility is that both the nominally public action (indictment) and the nominally private (appeal) were, in practice, privately prosecuted in the middle ages, just as the indictment was in the eighteenth century.

⁷ Douglas Hay, *Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850*, in *POLICING AND PROSECUTION IN BRITAIN 1750-1850*, at 343, 345 (Douglas Hay & Francis Snyder eds., 1989) (“[M]any commentators have acknowledged frankly enough that the satisfaction of a desire for revenge is a legitimate, indeed important, aspect of many lawful criminal prosecutions.”); Seipp, *supra* note 1, at 63 (discussing medieval victims’ feelings of vengeance and their belief that “vengeance was a virtue and sometimes a duty”).

⁸ Friedman, *supra* note 5, at 484-88.

⁹ A familiar modern example is the case of a department store with an announced policy of prosecuting shoplifters.

¹⁰ See generally P.J.R. King, *Prosecution Associations and Their Impact in Eighteenth-Century Essex*, in *POLICING AND PROSECUTION IN BRITAIN: 1750-1850*, *supra* note 7; David Philips, *Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760-1860*, in *POLICING AND PROSECUTION IN BRITAIN 1750-1850*, *supra* note 7; Friedman, *supra* note 5.

cuting a felony committed against any of them.¹¹ The members of the association would publish their names in the local newspaper, in part, presumably, for the benefit of local criminals.¹² Thousands of such associations were created in England in the eighteenth and early nineteenth centuries.¹³

So far as I know, there were no prosecution associations in medieval England. But a society of small villages and low mobility made a more informal approach to reputation and commitment possible. A reputation for allowing oneself to be pushed around could be a serious liability, and could be avoided by demonstrating a willingness to retaliate, either directly or through legal action. One way of interpreting the “revenge” explanation for prosecution is as the working out of a rational commitment to retaliation, designed to deter potential aggressors.¹⁴

A second explanation for private prosecution is that the objective was not conviction but an out-of-court settlement. Professor Seipp suggests this possibility in the medieval context,¹⁵ and I have made the same point for the eighteenth century.¹⁶ In both eras there were legal rules designed to prevent private prosecutors from dropping their charges in exchange for payment,¹⁷ but in both there is reason to believe that the courts did not always enforce those rules.¹⁸

This second explanation brings me to the one point on which I would take issue with Professor Seipp. He accepts, with some qualifications,¹⁹ the claim that the medieval English legal system was biased towards rich defendants: A rich felon’s victim would prefer a writ of trespass, which

¹¹ Philips, *supra* note 10, at 132-35 (describing the structure and function of prosecution associations).

¹² *Id.* at 139 (noting that the advertisements were frequently coupled with warnings that the association would prosecute any offender).

¹³ *Id.* at 120 (citing estimates of up to 4000 associations, but accepting 1000 as “a good working estimate”).

¹⁴ Commitment strategies based on emotions, such as vengeance, are discussed in DAVID D. FRIEDMAN, *PRICE THEORY: AN INTERMEDIATE TEXT* 288-90 (1990). See generally ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988).

¹⁵ Seipp, *supra* note 1, at 70.

¹⁶ Friedman, *supra* note 5, at 486-88.

¹⁷ 2 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 138 n.2 (1956) (“The compounding of penal actions, originally allowed, was made illegal by 18 Eliz. c. 5, made perpetual by 27 Eliz. c. 10.”); see also 4 BLACKSTONE, *supra* note 2, at *133-34, *136 (categorizing compounding as a private wrong); Seipp, *supra* note 1, at 79 n.130.

¹⁸ *E.g.*, Seipp, *supra* note 1, at 79.

¹⁹ *Id.* at 83-84 (“One interpretation of the choice between crime and tort is that it created one law for the rich and another for the poor. . . . but th[is] simple equation . . . fails to account for the real differences between victims seeking vengeance and victims seeking compensation.”).

provided compensation, to an indictment of felony, which did not. The rich felon would thus be able to preserve his life at the cost of some or all of his wealth.

This argument misses an important respect in which the system was biased against rich defendants, one familiar to any observer of the modern American tort system. Plaintiffs are likely to seek damages in the deepest available pockets. To the extent that the hope of gain motivated private prosecutions, whether payment for compounding an appeal of felony or damages awarded in a writ of trespass, victims had a stronger incentive to prosecute rich criminals than poor ones. There may well have been situations in which a rich felon would be convicted and fined and a poor one would be convicted and executed. There were surely also situations, however, in which it was worth prosecuting a rich felon but not a poor one.

II. POSSIBLE REASONS FOR THE SHIFT TO PUBLIC ENFORCEMENT

The history of English law enforcement, from the Middle Ages to the present, shows a gradual and uneven shift from private to public enforcement. It starts with an Anglo-Saxon law based largely on private feud²⁰ and ends with the present system of public police and public prosecutors. At least three different classes of explanation for why these changes occurred are worth considering.

The first, which interprets legal history as a steady improvement, a very slow learning by doing, strikes me as unpersuasive. I am aware of no evidence that human intelligence has increased significantly over the past thousand years. Englishmen in the fifteenth century, or in the eighteenth, were better acquainted with the circumstances of their society than we are, and were better equipped to create suitable institutions for those societies. We cannot assume that public enforcement is a better system simply because it is the method that we use today.

A second possibility is that legal institutions changed in response to changes in other features of the society. Thus it might be argued that a law enforcement system without public police was workable, perhaps optimal, in rural England, but became increasingly unworkable in the anonymous, mobile, urban society of late eighteenth century and early nineteenth century London. Similarly, private prosecution motivated by private deterrence might work in a society where potential criminals knew the identity and reputation of their victims, but not in a society with larger and more mobile urban populations.

This is a possible, even a plausible, explanation for much of the change that occurred. I would like, however, to suggest a less optimistic possibili-

²⁰ For an analysis of a similar system in Iceland, see David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979).

ty: that the changes reflected a continued and ultimately successful attempt by the state to benefit itself at the expense of victims of crime.

Consider the shift during the Middle Ages away from private actions that the parties could settle on their own towards public prosecutions. If a felony victim initiates an appeal and then drops it in exchange for payment, the money goes to the victim. If the grand jury initiates an indictment of felony and the crown then agrees to pardon the convicted felon in exchange for a fine, the money goes to the crown. Increasing the income of the crown at the expense of victims of crime is one possible reason for legal rules designed to prevent compounding, both by punishing it and by permitting the grand jury to convert a dropped appeal into an indictment. One would expect such rules to reduce prosecutions and to reduce payments by felons to victims, while increasing payments by felons to the crown.

In general, a realistic attitude towards the economics of justice prevailed in the Middle Ages. The right to run courts and collect fines was a valuable property right, part of the bundle of rights held by a feudal lord. Both kings and barons regarded the power to enforce the law as a potential source of income.²¹ In the eighteenth century, this power may still have been a source of income, although not necessarily monetary income. The nominally public form of private prosecutions meant that the crown retained the power to pardon. Although felons could no longer buy pardons with cash payments to the crown, their friends and relatives may have purchased them by petitioning for pardons and incurring implicit obligations to those in positions to grant them.²²

A similar argument may help explain the shift towards professional police in the early nineteenth century. The government presumably sought power, not money. The opposition to public police—and later to public prosecutors—seems to have been largely rooted in the belief that they would increase the power of the central government at the expense of the general population.²³ Support for public police arose in part from concern about the central government's ability to put down public distur-

²¹ For examples of revenue from law enforcement under the Angevins, see W.L. WARREN, *KING JOHN 176-77* (1978).

²² See Douglas Hay, *Property, Authority and the Criminal Law*, in DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 45-49* (1975) (“[T]he common course was for a plea to be passed up through increasingly higher levels of the social scale, between men bound together by the links of patronage and obligation. . . . [T]he power of gentlemen and peers to punish or forgive . . . maintain[ed] the fabric of obedience, gratitude and deference.”); see also Friedman, *supra* note 5, at 497-98.

To the extent that out-of-court settlements between defendants and prosecutors were practical even if illegal, some of the gains from prosecution in the eighteenth century would have gone to the prosecutor, usually the victim.

²³ Douglas Hay & Francis Snyder, *Using the Criminal Law, 1750-1850: Policing, Private Prosecution, and the State*, in *POLICING AND PROSECUTION IN BRITAIN 1750-*

bances, as during the Swing riots.²⁴

A scholarly analysis of the possibility that changes in English law enforcement resulted in part from attempts by the state to gain revenue and power would require more space than this Comment provides, and more historical knowledge than its author commands. My purpose here is merely to suggest that the conjecture is worth considering.

III. LESSONS FOR THE TORT/CRIME DISTINCTION

Many people, including several participants in this conference, have tried to answer the question, "What is the essential difference between tort law and criminal law?" One important lesson of historical studies such as Professor Seipp's is that the question has no answer.²⁵

Institutions for enforcing law can vary in many dimensions. Examples include whether the state or the victim controls the prosecution,²⁶ whether punishment is designed to impose costs on the offender or to transfer wealth from him, whether enforcement is intended to prevent offenses or to price them,²⁷ and whether conviction is or is not accompanied by moral stigma. Our current legal institutions represent combinations of choices from the menu of alternatives, but not the only possible combinations. The typical modern tort action (Column A on Table 1), a liability suit for an automobile collision for example, is prosecuted by the victim through an attorney, is designed to transfer wealth from tortfeasor to victim and to price offenses, and does not impose moral stigma. The typical criminal action (Column B on Table 1), such as a murder prosecution, is publicly prosecuted, is designed to impose costs on the offender and to prevent offenses, and imposes moral stigma. Observers familiar with such actions conclude that tort and crime are natural categories. Philosophers are likely to view the defining characteristic as presence or absence of moral stigma; economists to view it as private or public prosecution.

Other legal systems provide the clearest evidence that both philosophers and economists are wrong, that, outside of the accidents of a particular legal system at a particular time, there is no natural category of tort

1850, *supra* note 7, at 3, 4 ("In the mid eighteenth century a 'gendarmierie' was an unthinkable incursion on English liberties.").

²⁴ *Id.* at 6-7, 10.

²⁵ This is not Professor Seipp's conclusion; his focus is on the historical development of concepts, not the logic or propriety of different ways of enforcing law.

²⁶ There are other alternatives; in eighteenth century England the private prosecutor was not necessarily the victim.

²⁷ This is an oversimplification, but is adequate for the purposes of this Comment. For a more detailed analysis of optimal deterrence, see David D. Friedman, *Reflections on Optimal Punishment or Should the Rich Pay Higher Fines?*, 3 RES. L. & ECON. 185, 190-98 (1981); David D. Friedman, *Should the Characteristics of Victims and Criminals Count? Payne v. Tennessee and Two Views of Efficient Punishment*, 33 B.C. L. REV. 731, 732-43 (1993).

	A	B	C	D	E	F	G	H
Prosecution Victim/State	Victim	State	Victim	State	Victim	State	State	Victim
Transfer/Punish	Transfer	Punish	Punish	Punish	Transfer	Transfer	Transfer	Transfer
Prevent/Price	Price	Prevent	—	—	—	—	Price	Prevent
Moral Stigma?	No	Yes	—	—	—	—	No	Yes
Example	Auto Tort	Murder	Appeal of Felony	Indictment of Felony	Writ of Trespass	Indictment of Trespass	Speeding Ticket	Punitive Damages

TABLE 1

or crime and thus no essential distinction. Consider the English legal system of the Middle Ages as described by Professor Seipp. Precisely the same offense can be prosecuted in four different ways.²⁸ An appeal of felony (Column C on Table 1) is private prosecution with punishment,²⁹ an indictment of felony is public prosecution with punishment (Column D on Table 1), a writ of trespass is private prosecution with wealth transfer (Column E on Table 1), and an indictment of trespass is public prosecution with wealth transfer (Column F on Table 1).³⁰ Thus a single wrong, with, one presumes, a single moral status, can result in legal actions corresponding to all possible combinations of the choices shown by the first two rows of the table.

²⁸ Seipp, *supra* note 1, at 61-78 (discussing appeal of felony, indictment of felony, writ of trespass, and indictment of trespass).

²⁹ In practice, appeals of felony could result in transfers of wealth if the parties settled out of court. Out-of-court settlements between private prosecutors and their victims seem to have been common during some parts of the period and illegal during others; there may have been times when they were both.

³⁰ The system was actually more complex than I have shown here. In the case of a writ of trespass, the transfer was both to the victim and to the crown; in the case of an indictment of trespass, it was usually to the crown alone, although occasionally to the victim as well. In addition, both appeal and indictment of felony resulted not only in punishment (execution of the convicted felon), but in a transfer of the convicted felon's property and land to the crown and the feudal lord. See Seipp, *supra* note 1, at 61-78.

The current American legal system also contains examples that defy any simple attempt at defining the difference between tort and crime. Consider speeding or parking tickets (Column G on Table 1). They are publicly prosecuted, designed to transfer wealth (to the state), designed to price offenses, and impose no moral stigma. Or consider punitive damages (Column H on Table 1). They are privately enforced, transfer wealth to the victim, are designed to prevent offenses, and attempt to impose moral stigma.

The right question to ask is not what the essential distinction is between tort and crime; there is none. The right question is how choices in the different dimensions relate to each other, and what makes particular combinations of choices more or less appropriate for dealing with particular kinds of offenses in a particular society. A full answer to that question would require a book,³¹ not a Comment. But let me offer a few fragments of an answer.

Perhaps the most obvious connection is between control of prosecution and form of punishment. A legal system that attempts to combine private prosecution with state punishment, such as criminal enforcement in eighteenth century England, faces a serious problem: how to prevent the private prosecutor from converting a *de jure* criminal punishment into a *de facto* damage payment. Although control of prosecution need not include the right to drop charges, it does include the ability to prosecute poorly. Thus in order for such a system to prevent *de facto* out of court settlements, it must not only prohibit them, it must spend substantial resources enforcing this prohibition. Modern tort law avoids this problem by combining private prosecution by the victim with damage payments to the victim, with no attempt to prevent out of court settlements.³² The same argument explains why the writ of trespass, which resulted primarily in a damage payment to the victim, was privately prosecuted, but the indictment of trespass, resulting in payments primarily to the crown, was publicly prosecuted.

One odd feature of tort law, at least from the viewpoint of an economist, is its failure to take account of uncertainty of apprehension and conviction in calculating damages. Suppose I commit an act which imposes a cost of a thousand dollars on you. Further suppose that my chance of being detected and successfully sued is only one in four. If I am sued and

³¹ One is currently in progress. Drafts of early sections are available from the author.

³² This argument provides a possible explanation for one of the odd features of the law of punitive damages—the fact that they are paid to the victim, even though ordinary damages are supposed to be sufficient to make good his loss. In a system in which the state received any excess damages instead of the victim, it would be in the joint interest of plaintiff and defendant to settle, thus eliminating the payment to the state. Preventing such agreements would require substantial changes in civil procedure designed to reduce the plaintiff's control over the case.

I lose, I am required to make you whole—to pay you a thousand dollars. That means that my expected damage payment—the probability of having to pay multiplied by the amount paid—is only two hundred and fifty dollars.³³ Therefore, it is in my interest to commit the act as long as the gain to me is more than two hundred and fifty dollars. But the efficient rule would be for me to commit the act only if my gain is greater than your loss, that is, only if my gain is more than a thousand dollars.

The obvious solution to this problem is to scale up the successful plaintiff's award to make the expected return, allowing for the probability of a successful suit, equal to the damage done. In the example given, this would mean an actual award of four thousand dollars, giving an expected award of one thousand. But our civil law contains no such rule.³⁴

One possible reason may be that tort law is privately enforced by the victim, and it is the victim who collects the damages. A rule that routinely awarded victims a substantial multiple of their actual damages, thus making them much better off as a result of the tort, would be an invitation to fraud. A "victim" could arrange an actual or fictitious tort in the presence of witnesses loyal to him, then prosecute and collect much more than the damage done. We avoid that problem with a legal rule under which even a successful plaintiff is no better off than if the offense had not occurred. To the extent that this rule restricts the tort system's ability to deal with offenses that have only a low probability of producing a conviction, it provides an argument for prosecuting such offenses in some other way.

A related problem arises for offenses such as robbery, where the victim is often the prosecution's key witness. A legal system which awards damages to the victim gives the victim an incentive to commit perjury if doing so is necessary to secure a conviction.³⁵ The existence of that incentive is a good reason for the jury to discount the victim's testimony, which makes it more difficult to convict even guilty defendants. A similar problem arose in the eighteenth century, as a result of rewards for conviction designed to encourage private prosecution.³⁶ Jurors were skeptical of tes-

³³ I am ignoring here both risk aversion and the costs to me of my unsuccessful defense; including such issues would complicate the example without adding anything useful to the argument.

³⁴ For an argument that punitive damages represent such a scaling rule, see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160-63 (1987). But see David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125 (1989) for a discussion of the reasons why I find this argument unconvincing. In any case, punitive damages have only recently come to play a significant role in tort law, and so the puzzle would still apply to most of the history of the Anglo-American legal system.

³⁵ In modern tort law, we associate this problem with stories of victims who abandon their wheelchairs immediately after collecting large damage judgements for permanently crippling injuries.

³⁶ Friedman, *supra* note 5, at 477.

timony by witnesses who might end up sharing in the reward. This seems to have been one of the factors responsible for the eventual scaling back of the reward system.³⁷

It is tempting to look to public prosecution for the solution to both of these problems. But public prosecutors may be no less willing than private prosecutors to convict the innocent, if it is in their interest to do so.³⁸ An alternative possibility is to deter such offenses with inefficient punishments—punishments designed to impose a cost on the offender without benefitting anyone else. But that solution brings back the problem of preventing out of court settlements, which replace an inefficient punishment with a (possibly secret and illegal) payment to the prosecutor.

As these examples suggest, making sense out of the complicated interactions among the different dimensions of law enforcement is a hard problem. Tort law and criminal law as we know them provide two examples of particular sets of legal rules applied to particular offenses. Papers such as Professor Seipp's provide additional examples from other times and places. From such examples, combined with relevant theoretical considerations,³⁹ it may be possible to produce a coherent analysis of both the positive question of why societies use particular combinations of legal rules to convict and punish particular sorts of offenders, and the normative question of what combinations of legal rules societies ought to apply to what offenses.

³⁷ *Id.*

³⁸ Consider, for example, current problems with civil forfeiture.

³⁹ As an economist, the theoretical structure of most interest to me is economic. But others could attempt the same project with other approaches. It may be an interesting philosophical question, for example, to ask whether there is any natural connection between offenses prosecuted by the state and offenses subject to moral stigma.