
**COMMENT ON STEPHEN MARKS'S *UTILITY AND
COMMUNITY: MUSINGS ON THE TORT/CRIME
DISTINCTION***

ALVIN K. KLEVORICK*

Stephen Marks provides an interesting exploration of the relation between tort and crime.¹ He tackles a number of difficult issues and raises a variety of interesting questions. Professor Marks works within the social utilitarian tradition as he attempts to use a social utility formulation both to identify the acts a society designates as crimes *and* to determine the optimal enforcement of the criminal law, specifically, the probability and severity of the punishment society attaches to each crime. Marks's foundational observation is that the categorization decision requires a social utility function that *includes* the utility of criminal acts while the enforcement decision should *exclude* the utility generated by the criminal act.² The latter point has a substantial history. It was the basis for George J. Stigler's³ fundamental criticism of the social welfare function used by Gary S. Becker in his seminal article on the economics of crime and punishment.⁴ As Marks argues, "if both criminalization and enforcement decisions have social utilitarian explanations then these explanations must use different social utility functions."⁵

Of course, an alternative to the line of analysis Professor Marks pursues would be to allow for the possibility that while society seeks to optimize a social utility function when setting enforcement policy, it makes decisions about what categories of acts⁶ to criminalize on other grounds—for example, on the basis of non-utilitarian moral considera-

* John Thomas Smith Professor of Law, Yale Law School.

¹ Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215 (1996) [hereinafter *Utility and Community*].

² *Id.* at 223 (suggesting same as a "two step process" by which we can use a social utility function to account for both criminal classification and enforcement strategies).

³ George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970) ("[W]hat evidence is there that society sets a positive value upon the utility derived from murder, rape, or arson? In fact, the society has branded the utility derived from such activities as illicit.").

⁴ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 172-73 (1968) (incorporating the "social value of the gain to offenders" as part of an optimal criminal enforcement model).

⁵ *Utility and Community*, *supra* note 1, at 215.

⁶ Marks uses the words *act*, *action*, and *activity* interchangeably. *Id.* at 215 n.1. I shall follow his lead in this regard, even though I believe it would be helpful to use the

tions. Rather than pursue this alternative in detail, I will use these comments to suggest that even on its own terms, Professor Marks's analysis has not quite pointed the way out of what he calls "the criminal utility conundrum."⁷

Marks's analytical strategy is to begin by examining the problem faced by a society that is privileged to enjoy ideal circumstances. Its members share the same social values and the same informational base; further, they all will fully comply with whatever rules are established. He believes that thinking about this wonderful world provides some insights into the relation between crime and tort, but that even more follow when we relax the assumptions of shared values, common information, and full compliance. In particular, while Marks retains the shared values assumption throughout, he relaxes, in turn, the premises of full compliance⁸ and common information.⁹ First, he relaxes only the assumption of full compliance, and then he allows as well for disparities in the information that the society's members and courts possess.

Professor Marks's principal theme is that a two-step procedure should be used to explain both criminalization and enforcement decisions. Society derives the former from the full-compliance utility function, which includes the utility of all activities (including those eventually characterized as crimes), while society determines levels of enforcement by optimizing a social utility function from which it "strip[s] . . . the utility from prohibited activities and drop[s] the assumption of full compliance."¹⁰ This approach provides a very suggestive metaphor. In deciding on an enforcement strategy, we exclude the utility of criminal activity from the account of society's welfare just as enforcement itself generally excludes or detaches the criminal from the society or the community.¹¹ As attractive as the metaphor is, I have some serious concerns about the analysis Professor Marks uses to derive and support it.

First, in analyzing the world of shared values, shared information, and full compliance, Professor Marks posits that "members choose laws to maximize their shared social utility function."¹² Further he assumes that this society "divides activities into three categories: prohibited activities, activities that are permissible only if accompanied by compensation, and

distinction between act (or action) and activity in discussing differences between suits brought in negligence and those brought in strict liability.

⁷ *Id.* at 223.

⁸ *Id.* Part IV.

⁹ *Id.* Part V.

¹⁰ *Id.* at 216.

¹¹ *Id.* ("By stripping criminal utility from the social utility function, society confirms that extracommunity acts will not receive credit. Typical punishments for crimes . . . symbolize this separation from the community.")

¹² *Id.* at 224.

unconditionally permissible activities."¹³ It is the set of prohibited activities that Marks identifies with crimes. He distinguishes between his assumption that shared values lead each member of society to "share the same vision of the social utility function" and an assumption—which he eschews—that all people in society have the same individual utility function.¹⁴

If, as Marks assumes, "[e]veryone shares the same values about what constitutes a good society,"¹⁵ it is at least plausible that they all hold the same view about which activities should receive no credit and thus should be prohibited.¹⁶ But then the members of the society will exclude the utility of these activities from the social utility function at the outset. As a consequence, because Marks identifies crime with prohibited activities, the social utility function he uses in this analysis is *de facto* of the *criminal-exclusive* type, rather than the *criminal-inclusive* type he asserts he is using. As a result, it is not clear that Marks's analysis of the world of shared values, shared information, and full compliance can serve as the first step he requires for his analysis.

Some of Professor Marks's analysis of his ideal world, in which all members of society fully share values, information, and a willingness and ability to comply with the rules, follows conventional lines. He observes, for example, that in such a world we may require compensation so as to provide a social test of an individual's decision about the value of an activity when individual utility is unobservable.¹⁷ On the other hand, high transaction costs, including those involved in ascertaining causal relations, forestall a strategy of requiring compensation for all activities. Marks also appeals to the literature deriving from the seminal article by Calabresi and Melamed¹⁸—including recent work by Ayres and Talley,¹⁹

¹³ *Id.*

¹⁴ *Id.* at 223 n.28.

¹⁵ *Id.* at 223.

¹⁶ Marks emphasizes that he takes "a full bodied approach to the social utility function. . . . [M]embers' utility functions may incorporate not only goods and services, but also values such as freedom, autonomy, and respect . . . [and] the utilities of other members of society." *Id.* at 224. Presumably, the individual utility functions can also assign substantial, perhaps overwhelming, negative weight to the activities that everyone in the society agrees are disfavored.

¹⁷ *Id.* at 225 (suggesting that society "prices" conditionally permissible activities to allow individuals to engage in conduct resulting in "sufficiently high utility to the actor").

¹⁸ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV 1089 (1972).

¹⁹ Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); see also Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Non-Consensual Advantages of Liability Rules*, 105 YALE L.J. 235 (1995).

and by Kaplow and Shavell²⁰—to determine when transactions are best governed by property rules and when best by liability rules.²¹ Curiously, though, at one point he describes governing a transaction by a property rule as rendering it “subject to prohibitions.”²² This is odd because both previously and subsequently Marks identifies crimes as prohibited acts or activities. In fact, to describe one of Marks’s prohibited actions in the language introduced by Calabresi and Melamed entails some convolution. One would have to say that the entitlement to be free of the prohibited act is given to everyone in society and *that* entitlement is protected by an inalienability rule.

Further, Marks goes on to say, rather cryptically, that “[i]n this simple world, strict liability law and criminal law both support a transaction structure defined by such laws as property law, contract law, corporation law, the law of estates and trusts, tax law, commercial law, and securities law.”²³ He does not tell us how strict liability law, here consisting of “a list of conditionally permissible acts and a mechanism for the payment of compensation,”²⁴ and criminal law, which here consists of “a list of prohibitions,”²⁵ provide this support. At most, they seem to tell us that in each of these areas of law, there are permissible and impermissible acts. It is, at least to me, not clear what Marks means when he uses the word “support” in this context.

Finally, Marks demonstrates that in his hypothetical world of shared values, common information, and full compliance, neither uncertainty about an act’s consequences nor the continuity or discontinuity of society’s classification of the care the actor exercises determines whether or not the act is a crime.²⁶ Hence, he demonstrates that several explanations of the criminal category offered by other scholars²⁷ do not apply in this perfect environment. If these factors—uncertainty and continuity or discontinuity of the classification—are influential in delineating the criminal category, it is because the assumptions of this socially frictionless world do not hold.

Marks then goes on to use a different set of assumptions to analyze the classification of criminal acts and the choice of enforcement strategies to prevent them. In the model in Part IV, people continue to share the

²⁰ Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules* 109 HARV. L. REV. (forthcoming 1996) (manuscript on file with the *Boston University Law Review*); see also Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 YALE L.J. 221 (1995).

²¹ *Utility and Community*, *supra* note 1, Part III.D and accompanying notes.

²² *Id.* at 226.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 227-28.

²⁷ See *id.* Part I (discussing various models used to distinguish crimes from torts).

same views about what constitutes a good society and the same objective view of reality, but social decision makers can no longer count on full compliance with the rules that are set.²⁸ This society must decide not only how to categorize acts—as prohibited, conditionally permitted and hence requiring compensation, or unconditionally permitted—but also how to respond when one of its members chooses to violate the law. For this society, Marks proposes his two-step process: “Initially [the decision makers] might consider the sort of laws—prohibiting, compensating, and permitting—they would pass if they could rely on full compliance. Next, they might consider modifying these laws and policies to account for non-compliance.”²⁹ He advocates that in the first step society should use “a social utility function that includes utility generated by all activities,” while in the second step, in which society accounts for noncompliance, the decision maker should use “a social utility function stripped of the utility generated by prohibited activities.”³⁰

Marks aptly notes that this two-step process has both utilitarian and communitarian components.³¹ Society uses the full social utility function to generate rules that govern community behavior, and by determining which acts are prohibited, it decides which behavior to set apart from the community. The utility derived from prohibited acts gets no weight when, in the second stage, society sets its enforcement policy. Marks goes on to say that his “description provides a preliminary account of the moral condemnation associated with criminal law. . . . A prohibited act detaches the actor from the community even if momentarily.”³² Although his approach certainly strikingly symbolizes the criminal’s separation from the community, it is not clear in what sense the description accounts for moral condemnation.

My principal problem with Marks’s development in this section is that he does not provide an argument that his two-step process has desirable properties or that it is optimal in a well-defined sense. He writes that “[w]e can *imagine* our decision makers engaging in [this] two step process”³³ and that “this two step process and its two distinct social utility functions *makes sense*.”³⁴ But he does not provide a more formal argument that the two-step process has desirable properties. For example, can it be demonstrated that the two-step process will provide the solution to optimizing the original social utility function subject to all the relevant constraints? Or does such a proof of optimality require further assumptions about the underlying structure of the problem? I suspect that it

²⁸ *Id.* Part IV.

²⁹ *Id.* at 229.

³⁰ *Id.*

³¹ *Id.* Part IV.B.

³² *Id.* at 232.

³³ *Id.* at 229 (emphasis added).

³⁴ *Id.* (emphasis added).

does and that what must be imposed is a set of separability conditions on the original, full-scale social utility function. As the article stands, Marks's argument is basically intuitionist in character and leaves its claims to persuasiveness purely in the eye of the reader.

Marks goes on to suggest that "[i]f we wanted to distinguish prohibited activities from conditionally permissible activities we could do so by imposing additional costs in the form of penalties."³⁵ Such penalties do more than distinguish the two types of behavior; they provide an added disincentive to those considering to undertake prohibited activities. After describing how such a system would appear, Marks concludes that "[t]he tort system may overlap the criminal system."³⁶ But the overlap exists only because he *adds* a penalty to the requirement of compensation for prohibited acts. Society could also impose a heavier penalty, however, and discard the requirement of compensation for such acts. In that case, in Marks's world of shared values, shared information, but incomplete compliance, the tort system would not overlap the criminal law.

Professor Marks's final step is to relax both the assumption that all members of society share the same information and the assumption that everyone agrees to comply with the promulgated rules.³⁷ He proposes

³⁵ *Id.* at 231.

³⁶ *Id.* at 232.

³⁷ *Id.* Part V. Marks promises a future paper in which he will remove the shared values assumption.

One could also analyze a model in which everyone shares the same vision of the good society and agrees to comply with the promulgated rules, but not all agents have the same objective view of reality. Such an analysis would permit a focus on the pure effects of disparate information, in particular, that members of the community may err and commit prohibited acts and that courts may err and incorrectly impose penalties or require compensation.

There are many ways in which the informational structure could depart from the base-case assumption of common information, and the analysis would have to be precise about the assumed structure of information in the society—who has what information at what point in time. The implications of disparate information for the social decision problem Marks considers in his Paper would depend on the particular informational structure.

Not all instances of disparate information would be of interest in such a shared values, full compliance setting. Consider, for example, the situation that Marks analyzes in Part V *but with the full compliance assumption restored*. Problems arise for society here because although the court can determine the socially optimal levels of care to be taken by injurers and victims, it cannot observe the care they actually take. As Marks notes, "[i]f the courts could observe care, they could use a negligence rule to obtain socially optimal results." *Id.* at 235. But if individuals have full information about their care levels, then in a *shared values, full compliance* world, the court could simply announce the care levels that the parties should adopt. The individuals in society would comply, and the social optimum would be achieved. In the example Marks analyzes in this Part, the court knows that social costs are minimized when both the injurer and the potential victim adopt medium care; announcing that requirement,

two alternative approaches to coping with the incentive problems created when these premises are no longer valid. One of the strategies he identifies with tort and the other with crime. The tort strategy "imposes compensation on the basis of correlated proxies," which are observable variables that correlate with the desired or undesired behavior.³⁸ The crime strategy "imposes penalties but limits liability through protections such as higher standards of proof, greater specificity, the requirement of intent, strict rules of evidence, procedural due process, and by limiting application to continuous (categorical) prohibitions or to the extreme range of discontinuous prohibitions."³⁹ He argues that the different characteristics of these strategies—especially the greater expense of the criminal approach—should determine whether we treat a particular prohibition as a crime or as a tort.

Professor Marks's analysis in this part of the Paper is fairly straightforward, and his delineation of alternative strategies is clear. His consideration of correlated proxies follows the lines of conventional law-and-economics analysis of liability rules in two-party accidents.⁴⁰ The novelty is that the court cannot observe the variable it wants to control, namely, the level of care chosen by each party. It would have been helpful to have a more precise statement of the equilibrium concept Marks is using to analyze the important case of bilateral strict liability for inadvertent acts.⁴¹

In addition, Marks should have proven, rather than just illustrated by example, a central conclusion concerning his analysis of the tort strategy in this case. He observes that using correlated proxies to impose liability "can result in liability even when an actor employs the optimal level of care."⁴² But he then states that "as long as liability results exclusively in compensation, this possibility will not deter desirable activity."⁴³ This point is crucial because it provides the foundation of Marks's argument that the alternative, criminal strategy requires more protections than the tort approach does. He writes:

In a sense, the strategy of correlated proxies tolerates occasional mistakes (liability when the actor did indeed do the right thing) but

and doing nothing more, would achieve social optimality. Such a simple solution would not be available if the members of the community themselves lacked information, or had disparate information about their environment, or if the court could not ascertain the social optimum. Analysis of enforcement strategies in these more complex settings would be of interest.

³⁸ *Id.* at 239.

³⁹ *Id.*

⁴⁰ For examples of this analysis, see generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1988); STEVEN SHAVELL, *THE ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

⁴¹ *Utility and Community*, *supra* note 1, at 236-38.

⁴² *Id.* at 238.

⁴³ *Id.*

limits the incentive effects of these mistakes by limiting the consequence of liability to compensation only. However, there may be reasons why we wish to deter prohibited acts by penalizing certain behavior beyond the mere payment of compensation. If so, we must first address the possibility that mistakes will deter desired behavior.⁴⁴

It is for this reason, he argues, that the criminal strategy of penalties requires the adoption of additional precautions to reduce the probability that courts will err in imposing liability.

There is, however, one more gap in the argument in the section on disparate information. In the above-quoted introduction of the criminal approach of penalties, Marks indicates that there may be reasons why society might want to impose penalties and not simply require compensation for inadvertent acts. Because he does not describe what those reasons are, he does not demonstrate that they can be introduced in a logically consistent manner into the theoretical structure he has developed up to this point. Furthermore, if these reasons can be incorporated into his model, does bringing them into the analysis leave Marks's previous conclusions intact?

In concluding his Paper, Professor Marks remarks that he has "tried to resolve the apparent conflict between criminal utility inclusion and exclusion"—to explain "the criminal utility conundrum"—through his theoretical two-step procedure.⁴⁵ I believe that his procedure provides a way of coping with this conundrum, not an explanation of it. More importantly, though, Marks's discussion of his procedure illuminates a number of important features of the tort/crime distinction. His exploration of what he refers to as "the border area between tort and crime"⁴⁶ has added to our knowledge of the terrain at that border.

⁴⁴ *Id.* at 239.

⁴⁵ *Id.* at 240.

⁴⁶ *Id.* at 217.