

TOWARDS A GENERAL THEORY OF PROFIT-DRIVEN CRIMES

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This paper attempts to provide a general theoretical model and a clarified terminology by which profit-driven crimes can be understood in economic rather than in sociological terms. It proposes a typology that shifts the focus from actors to actions in a way that differs from, though is compatible with, the 'scripts' and situational crime approaches. Rather than focusing on a profit-driven crime as a logical sequence of actions, it deconstructs a profit-driven crime into its inherent characteristics, which differ radically according to whether a crime is predatory, market-based or commercial in nature. Among the principle characteristics are whether transfers of property occur by force, free-market exchange or fraud; whether those transfers involve redistribution of wealth, distribution of income, or redistribution of income; whether the crime occurs in a non-business, underground network or legitimate business setting; and whether the optimal response is restitution, forfeiture or compensation. This approach also permits crimes to be better assessed as to their impact on national income and economic welfare levels. It helps separate the primary offence (the illegal acquisition of criminal proceeds) from secondary ones (such as corruption, violence, tax evasion and money laundering). And it has implications for the definition and relative seriousness of various profit-driven offences. If traditional criminology has focused almost exclusively on the 'who' and the 'why', and the new situational and script approaches on the 'how', this paper focuses on the 'what' by drawing out the essential characteristics of the three major forms of profit-driven crime.

Introduction

The process of understanding profit-driven crimes has long been impeded by the fact that most traditional paradigms are designed to elucidate the 'who' and the 'why', rather than the 'what' and the 'how'. Recently there has been some shift in emphasis towards situational models of crime reduction, towards analysis of the actual material objectives of crimes such as theft, and towards the notion that crimes follow 'scripts' which permit them to be broken down into a series of constituent acts regardless of the identity of the particular criminal.¹ These developments throw new light on the 'how' factor. But, oddly enough, there is still a lack of analysis of the 'what'. This refers not to legal definition—

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¹ See, for example, the series of works on 'hot products' by Ronald Clarke and published by the British Home Office at www.open.gov.uk. The scripts approach has been developed by Derek Cornish. The alternative developed in this paper focuses not on scripts as a sequence of actions but rather on inherent characteristics of major crime models. After those characteristics are elucidated, a 'script' analysis can logically follow for each crime that falls into each of the three models.

something specified in criminal codes, then wrangled over by lawyers and judges. Rather it refers to inherent economic logic of profit-driven offences.

This relative absence of attention to the 'what' factor reflects the fact that the main function of criminology has been to serve the needs of the criminal justice system. Since offenders are treated under a common criminal code, and the principal task of the system is to investigate, prosecute and punish perpetrators, there has historically been little incentive to investigate what, in terms of economic structure and economic consequence, really differentiates contract killing from smuggling cigarettes, snatching purses from peddling kiddy porn, cracking a safe from pulling off a telemarketing scam. Yet the information required to identify perpetrators of criminal-code offences, and to deal with those perpetrators in court, is quite different from that required to understand the *modus operandi* of criminal enterprises and, beyond them, criminal markets as a whole.²

Analysis of the inherent nature of the criminal acts is further plagued by terminological vagueness. 'Economic crime' is one of the worst examples. The frequency with which it is used contrasts starkly with the infrequency with which it is defined. Usually 'definition' comes down to a list of the latest business-related scams to concern law enforcement.³ 'Economic crime' at times is used as synonymous with 'commercial crime', also undefined, while at other times the term 'white-collar crime' is used as if interchangeable with them both. (In fact, if they mean anything at all, the first refers to a set of acts, while the second to a set of actors.) There are even on occasion efforts to assimilate the term 'organized crime' (notoriously resistant to definition) with 'economic crime' on the apparent assumption that it requires an exceptional degree of 'organization' to commit 'complex' business-related offences.⁴ Even the alternative term, 'business crime', is of little help—for it leaves unstated whether the problem is crimes against business, crimes by business or simply crimes using business structures.

Nor does the problem stop there. The offences typically collected under the economic or commercial or business or white-collar umbrella are things like: securities fraud, telemarketing fraud, internet fraud, payment card fraud, commercial fraud, unauthorized use of computers, theft of telecommunications, fraud against governments, tax evasion and currency counterfeiting. Among other failings, such a list confounds means (telephone pitches and computerized communications) with ends (fraudulent transfers of wealth). For example, in most types of 'economic crime', the perpetrator might well use a computer at some point, albeit for a variety of purposes. Although there are even administrative divisions of police forces dedicated to 'computer assisted crime', the concept is about as informative as 'pen-and-paper assisted crime' would have been a couple of technological generations back. Similarly, many of the scams pulled off over the telephone, routinely lumped into the 'telemarketing' class, have nothing whatsoever

² This is a point forcefully made by Reuter (1983). His own work, applying micro-economic logic to the structure of criminal markets, had a revolutionary impact. The theory proposed in the present paper focuses not on the 'organization' or lack thereof of profit-driven crimes, but on their economic characteristics.

³ There is such a list, for example, on the RCMP website, www.rcmp-grc.gc.ca/html/commerc.htm.

⁴ In fact the organizational complexity of even the more serious profit-driven crimes is usually greatly exaggerated in comparison to legitimate business activities. And the popular analogy of profit-driven crimes with business firm activities hides much more than it reveals (Levi and Naylor 2000).

to do with ‘marketing’. They include things like fake prize awards requiring prior payment of ‘fees’; phoney promises of credit cards similarly requiring advance fees; offers of free trips or discount travel which never materialize, etc. Calling them ‘telemarketing fraud’ makes as much sense as calling burglary through a second-floor window, ‘ladder fraud’.

Indeed, on one level, the very term ‘crime’ as a composite category is misleading. Ultimately what is important is not ‘crime’ but ‘crimes’, a term which automatically focuses attention onto what makes them different instead of forcing upon a wide range of offences an artificial unity.⁵ Applied to profit-driven offences the composite category of ‘crime’ lumps together actions which, judged in terms of their inherent nature and/or consequences, are quite distinct—some involve force or fraud, and some free-market exchange; some have victims and some have clients; some occur by stealth at night and some take place in a normal business context by day; some are plotted by men with black eye-patches in smoky dives and some by people in the latest brand-name sportswear on the golf fairway. The only thing they have in common, apart from the motive of money (which may be only a partial explanation) is that they violate statutes which prescribe criminal sanctions for certain acts.

These shortcomings of traditional methods of classifying profit-driven offences call for an alternative. Ideally it should be possible to disaggregate the concept of profit-driven ‘crime’ through a typology that is functional, rather than sectoral, which is process-rather than offender-based, which is more general than any crime-related ‘script’, and which is therefore applicable to all offences where profit is at least partially the motive. That would have a number of advantages.

One would be to clarify the nature of the economic forces at work, and therefore gain a better understanding of the possible economic (and social) costs. It may be that once the economic logic and impact of a particular offence is better understood, not only can its relative seriousness be more accurately judged, but in some cases it might serve to call into question whether it really should be a crime.

Second, once the actual division of labour is understood, it might help better delineate responsibility within multiple-person crimes. As ‘script’ analysis also makes clear, a typical profit-driven crime is not an isolated act, but a complex series of interrelated actions in which various participants perform a host of different roles that have different degrees of importance and show different degrees of awareness and involvement.

Third, arguably the more is known about the actual economic ‘organization’ of crimes in terms of details which might be irrelevant to prosecution under given statutes, the more efficient and effective can be tools designed instead for deterrence and prevention.⁶ It might also be useful for rewriting statutes to make the law better fit the crime.

⁵ Thanks to Mike Levi for this point.

⁶ Following the lead of recent Home Office research noted above, by understanding which items are likely to be stolen and by whom, it is much easier to devise a strategy to interrupt the operation of the illegal markets that deal in those goods and to work with manufacturers for improved preventive security devices (Clarke 1999). The point here is to devise a schema that has similar advantages with respect to other forms of profit-driven crime.

The Basic Theory

Profit-driven crimes can be divided provisionally into three categories.⁷

Predatory offences

First are crimes of a *predatory* nature—everything from purse-snatching to ransom kidnapping to extortion. Though there may be many complexities (derived, for example, from technological choice) in how predatory offences are conducted, their essence is simple.

Predatory crimes involve:

- redistribution of existing legally owned wealth from one party to another;
- bilateral relations between victim and perpetrator(s);
- involuntary transfers which generally use force (or its threat), though guile and deception may suffice;
- readily identifiable victims (individuals, institutions or corporations);
- use of a non-business context, or an apparent business front concocted purely to mislead;
- transfers which take place in cash or kind (physical goods, securities, even information);
- losses that are simple to determine—the robbed or defrauded person or institution or corporation can point to specific money and property;
- no notion of fair market value;
- an unambiguous morality—someone has been wronged by someone else;
- the need for restitution or compensation to the victim for his/her losses.

Predatory crimes could be further subdivided into those that victimize:

- private citizens;
- business institutions;
- the public sector.

Although this distinction is commonly made, and useful in compiling information relevant to understanding and compensating victims, it does not affect the essential core of the definition of a predatory offence. The key is the nature of the act itself, the involuntary transfer of property, not the nature of the victim or the perpetrator.

Historically, the justice system and law enforcement apparatus were designed to deal primarily with the predatory form of profit-driven crime, where there was a clear victim, readily identifiable losses through involuntary transfers, and a straightforward resolution based on simple moral principles which enjoyed a broad social consensus. The commandment, ‘Thou shalt not covet thy neighbour’s ass,’ made matters crystal clear. The division of responsibilities between police officer, tax collector and economic regulator was also reasonably well defined.

⁷ The distinction between predatory and market-based offences was elaborated in Naylor (1996b and 1997.) It was developed to include commercial offences in Naylor (1999), Beare and Naylor (1999) and Naylor (2000). It was tested in actual application in Naylor 2001.

To be sure, there were always exceptions and complications. In some societies where private property was of little socio-economic significance, theft was more a game than a crime. In others, theft conducted at the expense of outsiders won the perpetrator laurels rather than condemnations, for it increased the total resources available to the group. Nonetheless, as private property relations gradually overwhelmed communal ones, and the principle of individual accumulation took centre stage, certain broad principles governing profit-driven crime came to be widely accepted. And these principles virtually all had to do with predatory offences.⁸

To this day the mindset of law enforcement remains heavily biased towards the view that crime is essentially a predatory phenomenon (a ‘cops and robbers’ perspective). However other forms of profit-driven crimes are quite different in terms of their inherent nature, and their economic impact. In these other categories, the harm is harder to assess, the identity or even the existence of victims more problematic, and the borderline between the responsibilities of economic regulator, tax authority and police no longer so clear.

Market-based offences

The second category consists of *market-based* crimes.⁹ Although there are certainly incidents of contraband goods and services which date back centuries, if not millennia, most of what are today regarded as market-based offences date from decisions in the early part of the twentieth century to criminalize personal vice—the consumption of drugs or alcohol, gambling, prostitution etc.¹⁰

Market-based crimes involve:

- production and/or distribution of new goods and services that are inherently illegal;
- multilateral exchanges involving producers, distributors, retailers and money-managers on the supply side and willing consumers on the demand side;
- an institutional context which consists of an underground network;
- voluntary transfers;
- difficulty defining a victim unless it is some abstract construct like ‘society’;
- income earned by suppliers;
- transfers which take place mainly in cash or bank instruments;
- an implicit notion of fair market value;
- ambiguous morality subject to sudden and radical change;
- a need to find a means to treat ‘proceeds’ in the absence of individual victims.

Market-based crimes can be further subdivided into those involving evasion of:

- regulations;
- taxes;
- prohibitions.

See Table 1.

⁸ To be sure, fitting the law to the economic circumstances of the time, even with predatory offences, was not so easy. See the discussion of the famed *Carriers’ Case* in Hall (1952).

⁹ These are sometimes called ‘enterprise crimes’ but that term has the disadvantage of stressing the institutional context of the perpetrator rather than the process involved in the transfers.

¹⁰ For a critical view of the creation of market-based offences in the early part of this century, see, among others, Gray (1998) and Thornton (1991).

TABLE 1 *Market-based offences: A typology*

Type	Created by	Price relationship
Relative contraband	Restriction	Illegal higher than legal
Fiscal contraband	Taxation	Illegal lower than legal
Absolute contraband	Prohibition	No legal reference point

Regulations in turn can be further subdivided into those which affect:¹¹

- terms of sale (e.g. by limits on prices or rates charged);
- the range of clients permitted (e.g. by prescriptions for certain drugs);
- the total, type or timing of product on the market (e.g. by quotas on fisheries catches).

Whether the restrictions affect price, client allocation or total-type-timing of supply, in all three subcategories there emerges a *parallel* market in which *relative contraband* (the commodity is legal, the mode of delivery is not) is available at a *higher price* than on the legal-but-controlled market. This is the case, for example, with black market steroids or Viagra diverted from the legal pharmaceutical distribution system, and, to some degree, with the illegal trade in wildlife.

Taxes, too, subdivide—into indirect taxes which fall on items purchased and direct taxes which fall on income or wealth. It is the first category (sales, value-added, excise, import etc. taxes) that cause the emergence of a parallel market dealing in *fiscal contraband*. In this case the goods subject to excise, sin or luxury taxes may be available on that parallel market at a *lower price* than on the legal one: the difference is largely (though not exclusively) a function of evaded tax. The most obvious cases of markets in fiscal contraband involve tobacco, alcohol and fuel. In places with a luxury tax, items like jewellery might also fit.

Prohibitions can also be subdivided into those which explicitly prohibit certain goods and services and those which ban the acquisition of certain goods because of how they were acquired. In the first case, the goods and services are *absolute contraband*. There is no corresponding legal price. Hence the illegal market stands alone. (It is a ‘black’ rather than a parallel market.) This is clearest in the case of recreational drugs, but also with such things as kiddy porn and certain types of sex-for-sale.

However, the case of stolen goods is more complex. Traffic in the commodity in general is legal while traffic in a special subset of the commodity is banned, not because of the commodity per se, but because of how the particular subset was acquired. Furthermore there is a legal reference price. In this case, it is unclear if the result should be classified as a black market in relative contraband or as a parallel market in absolute contraband! Further complicating the situation, in this case the illegal price is lower than the legal, making the market operate in a way more akin to that for fiscal contraband.

¹¹ This can produce another complication. Some countries try to make a clear distinction between regulatory and criminal offences; others treat what they deem the worst forms of regulatory offences as criminal ones. The boundary is always fuzzy. Hence the frequency of the term ‘quasi-criminal’, itself a symptom of the growing confusion between what used to be fairly neat divisions between civil, criminal and regulatory matters.

While these distinctions are easiest with goods, there are also certain services, which could fall into any of the three subcategories depending on legal context. Underground gambling, for example, is absolute contraband in areas which ban it completely. It is, however, fiscal contraband where placing bets is permitted in outlets which pay taxes. It is relative contraband, subject to diversion onto a parallel market, if the law permits only state-owned establishments to offer citizens the right to ruin themselves financially in the long run in exchange for an adrenaline rush in the short.

These differences are important, both for the kinds of policy options which might be called for, and for methods of evaluating success or failure of such policies. For example, a policy which is successful against the first type of good or service, the regulated ones, will work by restricting the flow onto the parallel market and thereby increase the spread between legal and illegal prices. A policy successful against the second, the taxed good or service, will increase the supply on the legal market relative to the illegal and therefore reduce the spread. A policy successful against the third, prohibited one, cannot be evaluated by reference to price alone. With no legal source or substitute, price hikes as a result of increased enforcement may do more to increase the amount of income spent on the banned item than to reduce the quantity consumed.

Nonetheless all three types fall into the general category of market-based crimes, and are therefore fundamentally different from profit-driven crimes of a predatory nature.

To be sure, in practice the contrast between predatory and market-based offences at times seems murky. Some predatory crimes, for example, require market-based ones to dispose of the merchandise or launder the proceeds. Nevertheless, complex though such subsequent transactions might on occasion be, they are secondary. The primary act to generate the money is predatory since it involves an involuntary transfer of existing wealth. The matter becomes clearer when the acts are put in sequence—first the predatory act to acquire, then the market-based one to dispose of the proceeds, then perhaps another market-based one to launder the money.

Similarly, some market-based offences are committed in an environment punctuated by force or fraud. Sometimes (though much less often than the pop stereotype suggests) drug dealers settle accounts at gunpoint. But that affects distribution of profit between dealers, not the relations of dealer and customer. Sometimes dealers secretly adulterate their merchandise before sale or con their customers. But most illegal markets seem to be competitive, and most dealers anxious to maintain customer loyalty. The norm in market-based offences seems to be consensual market exchange.

Another complication occurs in defining the institutional form through which market-based crimes occur. This is often confounded with a business firm—there is a huge literature premised on this exaggerated analogy.¹² But in reality, since the market-based offence deals with illegal goods and services, it should be seen as occurring via an underground *network*, even if that network is hidden within a legal business structure. The result may be radically different types of networks interacting with legal business structures in radically different ways. Illegal wildlife, for example, starts with poachers; it is then traded to underground traffickers. Subsequently the product, alive or dead, as the case may be, is turned over to smugglers, and eventually sold overtly in pet stores or in perfectly respectable Chinese traditional pharmacies. Guns, however, start with legal

¹² For a discussion of the shortfalls of the analogy, see Levi and Naylor (2000).

suppliers, licensed dealers or gun-shows, and enter black market chains to be sold covertly on the street. Jewellery, in contrast to both, starts in a legal manufacturing operation (even though the materials may be smuggled) and is traded through regular channels (though often with no paper), to be sold through apparently respectable shops (with the jeweller either making the client a cash deal or selling the item for full price and himself pocketing the tax money).¹³

Commercial offences

A third category might be called *commercial crimes* (with a more restricted meaning than usually ascribed to the term by police forces with ‘commercial crime’ divisions). These crimes are committed *by* otherwise legitimate entrepreneurs, investors and corporations. (Crimes committed *against* them—for example, an employee embezzling from a purchasing account—would fall into the predatory category.)

Commercial crimes involve:

- production or distribution of inherently legal goods and services;
- use of illegal methods to produce and/or distribute those legal goods and services;
- multilateral exchanges;
- a normal business setting;
- seemingly voluntary exchanges with a fraudulent, therefore involuntary aspect;
- definable victims (workers, suppliers or customers or the public as a whole);
- income earned but unmerited by virtue of the illegal method employed;
- transfers overwhelmingly using normal bank instruments;
- some notion of unfair market value;
- unambiguous morality (in theory) since fraud is involved;
- the need for restitution or compensation.

Commercial crimes can be further subdivided into those involving:

- fraud against suppliers of inputs;
- deception against customers of output;
- externalization of costs at the expense of the larger society.

The first of these subdivisions might involve bankruptcy frauds in which an entrepreneur places orders, then diverts stock to black market sale before reneging on commercial debts.¹⁴ The second might involve things like fraudulent product guarantees. The third might involve things like illegal dumping of toxic waste. However all share the fundamental characteristic of dealing in inherently legal goods and services in illegal ways.

Commercial crimes are somewhat more complex than the other two categories. For one thing there may be problems in defining just when an offence occurs. It seems objectively clear when a predatory offence takes place—for example, someone sticks a knife in someone else’s ribs and makes off with their wallet. The occurrence of a market-

¹³ On the arms and gold jewellery black markets, which involve, in the first case, a regulated, and in the second, a taxed commodity, see Naylor (1995, 1996a).

¹⁴ These were thoroughly analysed by Levi (1981).

Table 2 *Summary: Primary offences*

Type	Transfer of	Basic act	Method
Predatory	Wealth	Illegal (theft)	Illegal (force or guile)
Market-based	Illegal g&s	Illegal (trafficking)	Legal (market-exchange)
Commercial	Legal g&s	Legal (market sale)	Illegal (fraud)

based offence, too, is usually objectively quite clear, though there could be considerable debate over whether it *should* be an offence. But if the act falls into the commercial category, it is often difficult to determine if it is really a crime. Where does sharp business practice end and fraud begin? At what point does a high-pressure sales tactic become a confidence trick? At what point does effective advertising become deliberately deceptive? It is at least arguable that all advertising involves deception since people rarely need the goods being offered. In theory a telemarketing fraud involves conning people into paying for either inferior or misrepresented or non-existent goods. But the instructions given to salesmen for bona fide companies using telemarketing techniques to sell genuine good quality products involve such blatant manipulation to make an unwilling potential client say 'yes', that it is really hard to see the distinction.¹⁵

This same ambiguity appears in securities cases, which also fall logically into the commercial crime category. If the instance involves falsifying a prospectus with completed fabricated sales figures or seeding an ore sample prior to announcing an issue of junior gold-mine shares, the fraud is apparent. (In fact, if the gold-mining company is purely bogus, the crime could even be classified as predatory in nature.) However, that kind of clarity is rare. Most prospectuses are designed to excite rather than inform. If this is a crime, then the paddy wagons should be rolling almost non-stop between the financial districts of the big cities and the local jails. It was for good reason that Mark Twain referred to a gold mine as a hole in the ground with a liar on top.

Another problem with the commercial crime category is that fact that at the heart of the definition is a presumed absence of fair market value. But 'fair market value' is difficult, if not impossible, to define accurately: it usually boils down more to an ideological than an operational construct. Efforts to establish a clear meaning usually refer to neoclassical concepts of perfect competition which cannot, except under the most unrealistic assumptions, actually lead to a market-clearing general equilibrium. The theory of market behaviour which most closely approximates reality is not neoclassical but neo-Schumpeterian.¹⁶ In this view, each firm attempts to introduce into the market-place an innovation to create a temporary monopoly and, with it, temporary monopoly profits. Over time others will try to move in to capture those high profits, with the result that competition wipes them out. If this is how markets behave, then 'fair

¹⁵ For example, I have in my files the instructions issued to its salespersons by a manufacturer of very high quality kitchen knives, telling them how to counter each argument against, how to coax people on their sucker lists that the extremely expensive items are a bargain, and how to use people's own insecurities against them. The document insists that the role of the salesperson is not to trick or high-pressure the client but to 'help the customer reach the right decision'. After all, the document stresses, 'Asking people to buy is doing them a favour.'

¹⁶ This assumes that, in the normal course of business, each firm innovates to create a temporary monopoly, and with it monopoly profits which subsequent entrants compete away (Schumpeter 1953).

market value' is objectively meaningless in the short run, which is, realistically, the only time horizon over which criminal transactions can be presumed to exist.

Crime and economic welfare

Thus the three major types of profit-driven crime differ on a number of fundamental economic grounds. But if any one characteristic sums up the distinction between the three major forms of profit-driven crime, it is the following:

- predatory crimes involve the illegal redistribution of existing wealth;
- market-based crimes involve the illegal earning of new income;
- commercial crimes involve the illegal redistribution of legally earned income.

See Table 2.

This threefold distinction is useful in clarifying another common source of confusion—does criminal activity increase or decrease national wealth? Some insist it is a pure negative, entailing losses to legitimate citizens plus the cost of operating the criminal justice and corrections system. Others argue that certain types of crimes, judged strictly in economic terms, constitute a net benefit by generating new incomes to some citizens.¹⁷ The reality is that both sides are right, for they are talking about two quite different things.

To understand this, it is necessary to keep in mind the distinction between wealth and income. In economic terms, wealth refers to a *stock* of assets (physical, financial, even informational) that has been accumulated; and it is measured *at a point in time*. On the other hand, income refers to a *flow* of purchasing power accruing to an economic entity (firm, worker, rentier etc.) *per unit time*. The difference can be handily summed up by the fact that a bank account balance represents wealth, while the interest earned each day or month or year (depending on the convention selected) on the accumulated balance represents income. When income flows increase, GNP rises. But there is no direct relationship between wealth and GNP. It is possible to have enormous amounts of accumulated wealth in an economy functioning on its knees. This distinction is central to what follows.

Predatory crimes are crimes purely of redistribution of existing wealth. They do not generate new goods and services and therefore do not directly increase total income flows. Therefore, barring indirect consequences like the costs of increased security (which could be argued either way), their net effect on GNP is zero.

Market-based crimes, by contrast, involve the production and distribution of *new goods and services*. Judged in strictly economic terms, they have a positive impact on GNP. (Strictly speaking, this should be NNP, but GNP remains the most conventional measure.) Indeed, it is now standard procedure in many countries to try to estimate the value of underground transactions in both legal and illegal goods and services, provided they are based on consensual exchanges, and to add that value to national income data to get a better picture of just how 'well' their economies are doing.

¹⁷ Indeed, some argue that much underground economic activity is actually good in so far as it permits the growth of entrepreneurship otherwise stifled by government regulation, and challenges 'bad' laws which retard economic development. The most extreme, but very influential, version of this doctrine was by de Soto (1989). For a critique, see Naylor (1996b: 87–90) and Thoumi (1995: ch. 2).

Commercial crimes involve the application of illegal methods to the production and distribution of legal goods and services, which would otherwise be produced by someone else using legal methods. Their impact on GNP depends on the subcategory into which they fall.

- If the offence involves defrauding a supplier by underpaying or not paying for inputs, it simply redistributes income, leaving GNP *unchanged*.
- If the offence involves cheating a customer who overpays for value not received, GNP, adjusted for the quality of goods, *falls*—the customer will have to divert extra income into making up the shortfall in quality or quantity, therefore reducing that available for other expenditures.
- If the offence involves a firm cutting costs at the expense of a non-transacting party—the environment, for example—the same supply of goods and services becomes available to the market at a lower cost, or a larger supply at the same cost. In both cases conventionally measured GNP actually *increases*—though obviously sensible environmental accounting should factor out such a spurious increase.

In all cases, when assessing the overall economic effects of criminal acts, it is necessary to distinguish between the immediate impact of the act at the micro level, and the consequences of increased expenditure for policing, prosecution and correction at the macro level. If an economy is at full employment, arguably the diversion of resources into economically ‘unproductive’ activity associated with crime control might be seen as a net loss. But if the economy has unemployed resources, increased expenditure on police, prosecution and imprisonment operates just like any other net injection of funds to produce a multiplier effect. Indeed, perhaps one reason the US economy did not stumble in the immediate post-Cold War period was that increased expenditure for the prison-industrial complex more than offset reductions in what had previously gone to the military-industrial complex.¹⁸

Secondary crimes (see Table 3)

The existence of such distinctions has further implications in terms of just what secondary criminal acts are normally involved in their commission. Take as examples violence, money-laundering, tax-evasion and corruption.

TABLE 3 *Summary: Secondary offences*

Type	Violence	Corruption	Money laundering	Tax evasion
Predatory	Normal	Rare	Rare	Nil
Market-based	Sometimes	Sometimes	Frequent	Frequent
Commercial	Rare	Frequent	Sometimes	Sometimes

¹⁸ Over the last decade the military budget has fallen by about \$50bn, while the crime control budget has risen by about \$100bn. Furthermore, the fact that the US employs so many people in construction and maintenance of prisons, and jails such a large percentage of its economically active population, may itself account for the fact that its unemployment rate is noticeably lower than that of other wealthy western countries. An excellent recent treatment of these issues is in Dyer (2000).

Violence (actual or implied) plays a radically different role depending on the specific type of crime. In predatory acts, violence is a central instrument without which, in many cases, the principal act could not take place. Therefore legitimate society is directly and deliberately threatened. By contrast, in market-based acts violence *per se* is not required—the exchanges of money for goods are voluntary. Violence occurs mainly in an ancillary phase, in struggles between rival suppliers over the resulting profits. It is therefore a consequence of the fact that certain goods and services are illegal rather than being inherent in the act of serving the market *per se*. With commercial crimes, violence would be so rare as to be to all practical purposes non-existent except to the extent someone uses it to attempt to cover their traces when their acts are discovered.¹⁹

With money laundering, there is also a difference. With all three types of crimes, it may be necessary for the criminal to, first, hide and, later, launder money to evade detection and enjoy the proceeds. But, in the event the perpetrator is caught, the ultimate fate of the money is quite different.

With predatory offences, there are no ‘proceeds’ in the normal sense, and therefore no presumption of forfeiture. Rather, there is property which must be restored to the victim. In market-based offences, there clearly are illicitly-earned proceeds, with no victim to whom restitution is due. This is the rationale for forfeiture laws. In commercial offences there might be a mixture of both—there may be both fraudulently obtained property and illicit profits. Logically they should be treated distinctly.

The major types of profit-driven crimes also differ according to their fiscal implications. With predatory offences where both the basic act (misappropriation of resources) and the method by which it is carried out (force or deception) are illegal, there are no fiscal implications. Income taxes are levied on net new income flows, not on redistribution of existing wealth. Criminals who commit predatory offences should repay victims and perhaps incur fines in addition to or instead of prison terms. But logically they should not be expected to pay taxes on their ill-gotten gains (other than any gained interest in excess of the victims’ losses—an unlikely event in many cases because of the discount that usually prevails when stolen goods are resold). This is because the victim, to whom full restitution should be made, would end up being the one who bears the burden of the tax in the form of reduced funds available for compensation or restitution.

With market-based offences, where the basic act (the sale of explicitly banned goods or services) is illegal, but the method by which it is carried out (voluntary market exchange) is not, the fiscal implications are also unambiguous. Income taxes are legally due on the proceeds of the sale of any good or service, legal or illegal in nature. Failure to render such taxes to the fiscal authorities adds an additional layer of criminality over and above the basic offence. If the commodity sold is one which is taxed in legal markets, there may be yet another layer of fiscal offence from the failure to pay excise, sales and value-added taxes. This, of course, does not apply in the case of prohibited (including stolen) goods. And with regulated commodities, it may or may not apply, depending on whether the goods were diverted to the black market directly from the supplier or after passing through the formal marketing chain.

¹⁹ Mike Levi has also pointed out that in some cases criminal predators extort crime proceeds from fraudsters using the threat of violence. However, this is more akin to a form of underground taxation.

With commercial offences, the situation is more complicated. Whether or not the offence has any fiscal implications depends on the precise instance and the precise type of tax.

If a commodity is subject to import or excise taxes, evasion itself constitutes the market-based offence. The commodity becomes fiscal contraband, which can be seized and destroyed. However, if a commodity is subject, not to import or excise, but only to sales or value-added taxes, evasion of those taxes constitutes a commercial offence. What is involved is the sale of a legal good or service by illegal means. The commodity is not in itself fiscal contraband. No official seizes and destroys a carton of Cheese Whiz because a corner-store owner sold a few bottles for cash without charging sales tax. If the vendor then goes on to evade taxes on the resulting incomes, that is a separate fiscal offence.

Thus, three distinct fiscal offences are committed. The first, evasion of excise and other special taxes applicable to a particular commodity involves the conversion of that commodity into fiscal contraband. Here the fiscal offence and the market-based crime become synonymous. The second, the evasion of sales tax, involves a crime with respect to methods of production or distribution, and therefore converts a legal act into a commercial crime. The third, evasion of income tax, involves a secondary offence with respect to the financial proceeds of criminal acts of production or distribution. It applies mainly to market-based offences, though could also be present in a commercial one as well.

On the other hand, evasion of income taxes has no direct implications in terms of criminalization of the underlying transaction. Income tax evasion is a completely separate category, properly dealt with in the income tax act and not the criminal code. A transaction can be perfectly proper in its own right, even if evasion of income taxes on the income generated by that transaction occurs.

These considerations indicate that the three types of crime imply three different types of responsibilities for the criminal justice system with respect to the resulting proceeds (see Table 4). With predatory offences, the role of the justice system is to find and restore to the proper owner misappropriated property, and nothing more. In market-based offences that role may consist of both finding and taxing hidden revenues, or of finding and forfeiting illegal profits—it would be illogical to attempt both. In commercial offences that role may take all three forms—restoring misappropriated (fraudulently obtained) property, finding and taxing hidden revenues and/or finding and forfeiting misbegotten profits. In all cases fines can be used as a form of punishment of the guilty party—they are quite distinct in logic and purpose from restitution or compensation to the victim and either tax collection by or forfeiture to the state.

Finally there is corruption. Here, too, there is a big difference in the categories. With the possible exception of drug trafficking, no criminal act has achieved greater notoriety of late than corruption. The struggle against it is led by transnational corporations worried about the possibility their competitors might steal the edge, particularly if the

TABLE 4 *Fate of the proceeds*

Predatory	Restitution
Market-based	Taxation or forfeiture
Commercial	Compensation, taxation or forfeiture

'victim' corporations come from countries (increasing in number) where bribes are not tax deductible. Politicians, too, routinely rail against corruption in public, though how many continue to practice it in private is anyone's guess. New governments see the fight against corruption as an excellent means of discrediting a predecessor regime and purging the public service of old regime loyalists, clearing space for patronage appointments of their own supporters. The battle has been recently joined by international lending institutions whose main concern is that leakage of foreign exchange into the offshore retirement accounts of Third World officials will threaten the capacity of their countries to repay their foreign debts. Thus, for a variety of reasons, a powerful anti-corruption coalition has formed—albeit with corruption defined, implicitly or explicitly, as nothing more than the direct payment of bribes, most probably in its least insidious form.

Despite the fervour, in profit-driven crime, corruption (in the limited sense of cash payment for economic advantage) is not a primary offence. Predatory acts do not involve corruption *per se*. Nor, strictly speaking, do market-based offences, to the extent the market exchanges involve fair value and free transfer. However corruption can occur as a secondary consequence of both when perpetrators attempt to subvert the law enforcement system to cover up their actions. Corruption may occur more commonly in certain types of commercial offences, when those seeking commercial advantage use it to bypass normal mechanisms for getting access to contracts or resources. Even then it is not likely to be the norm, except for businesses largely dependent on particular outlets. Where corruption is most pervasive is in regulatory offences, often quite distinct from those enumerated in the criminal codes of most countries, in which case it takes a form particularly difficult to root out.

It is no mystery why in some countries economic regulations are so spottily enforced. Regulatory agencies quickly become captive of the industries they supposedly regulate. First, they become dependent on them for the primary information necessary to enforce the rules. Second, between regulator and regulated there is usually a revolving door through which top personnel routinely come and go. But third, even more important, corporations subject to regulation are almost always heavy political donors. They therefore influence directly, through campaign contributions and lobbying of politicians, and indirectly, through information designed to mould public opinion, both the shape of regulatory legislation and the degree of enthusiasm with which it is enforced. Indeed, one of the major reasons why corporations do not face more criminal sanctions is not that they respect the need for workers' safety and the integrity of the environment so scrupulously, but because of their capacity to shape the regulatory context through a form of legalized influence-peddling.²⁰

Who done it?

On the surface, the three types of offences also seem to vary according to the dominant nature of the perpetrator.

²⁰ The connections between US military contractors and the Pentagon is only one particularly well-publicized example (Naylor 1998). See more generally Stone (1975), Clinard (1990) and Burnham (1996).

Table 5 *Offences and offenders: The stereotypical distinction*

Offence	Offender
Predatory	Individual
Market-based	Group
Commercial	Corporation

With predatory crime, the popular presumption is that the great majority of offences are the work of individuals or, at worst, gangs, which are regarded and usually treated under law, as merely aggregations of individuals.

However the rise of market-based offences is associated in the public (and police) mind with 'organized crime'. This involves applying to a group the notion that the whole is larger than the sum of the parts, with the further proviso that it should be so treated in law. Although members of 'organized crime' groups are quite capable of episodic predatory actions, what seems to produce a compelling need to 'organize' is the fact that market-based offences require a continuous supply of goods and services, and, by virtue of being exposed on an ongoing basis, also require organized interface with police and politicians to assure protection.

This view seems to justify two legal departures. One is harsher punishments to members of an 'organized crime' group than would be received had an individual been charged with the same offence. This, in effect, creates two classes of offenders, differentiated not by what they do but by who they are. The second is to make membership in proscribed organizations an offence *per se*. At that point association rather than action becomes the crime.

If predatory offences involve gangs defined as merely the sum of their individual members, and market-based ones involve 'organized crime groups' with a collective existence which is higher than that of a mere gang, commercial crimes are frequently associated with the highest form of collective existence in which the whole is not merely greater than, but qualitatively distinct from, the sum of the parts. At this point the concept emerges of the 'corporate criminal', a reference not just to individual executives or managers, but to the corporate body itself.

The stereotype is correct in one respect—most predatory crimes are the work of individuals or ad hoc groups with no permanence. However, with respect to 'organized crime', it is seriously flawed. Debate often confounds two quite distinct things—a criminal association and an association of criminals. Time after time, too, serious

TABLE 6 *The criminal firm: Two views*

Model I	Model II
Large 'organizations'	Individuals, small groups
Management hierarchy	Arms-length ad hoc deals
Long-term planning	Opportunistic
Huge profits	Modest profits
Profits concentrated	Profits widely dispersed
Infiltrate legal markets	Most money stays on the street
Legal markets corrupted	Most invested cash behaves legally

research has shown that, to the extent ‘organized crime’ groups actually exist, they are not economic but political and social in nature. They form a kind of underground government to adjudicate disputes and allocate property rights. But once the rules are set, each individual member operates alone or in partnership with others, who may or not be members of the group.²¹

In the same vein, criminal markets are not based on hierarchical administrative structures operating on command to monopolize a market, but loose and *ad hoc* networks engaged in arm’s-length commercial transactions. Furthermore, when fact replaces myth, the notion of huge amounts of criminal profit waiting to take over the commanding heights of the legal economy in order to corrupt its functioning also vanishes. Some criminals are rich, but most seem to have modest incomes, which they quickly dissipate in fast living; and when they do invest in the legal sector, they are more likely to put their money into a retirement savings plan than to stage a fraudulent bankruptcy.²²

On the surface the concept of ‘corporate crime’ fares much better in being assimilated with ‘commercial crime’ than does ‘market-based’ with ‘organized’, with the proviso that ‘corporate crime’ refers to perpetrators and ‘commercial crime’ to the offences. However, there are seemingly intractable problems with defining a corporate *mens rea*, difficulties in determining whether it makes sense to permit jury trials for corporate offences, disputes about whether normal protections afforded persons facing prosecution should be extended to corporations and, indeed, a diatribe over whether it is even possible for a corporate crime to exist independently of the actions of managers and executives.²³ Indeed, that is why in some jurisdictions corporate offences are almost always handled as regulatory matters, with the punishment restricted to fines.

However, one of the strengths of the suggested threefold taxonomy is that it can be applied indifferently to the form of ‘organization’ and the individual, group or corporate nature of the perpetrator. Those considerations are certainly important, but they are not the objective of the analysis.

Implications for the Criminal Justice System

Rather than representing a static taxonomy of simple acts, the categorization suggested above tries to comprehend complex and interactive processes. Therefore, when actually applied, there may be some ambiguities, complexities and complications. There may be cases that fall into the cracks, where a crime could be put in either category.

²¹ For an overview see Naylor (1997).

²² The pioneering work by Reuter (1983) on bookmakers and loan sharks has been replicated since by many analysts. For instance Desroches found exactly the same patterns among incarcerated high-level drug dealers in Ontario. Van Duyne confirmed these patterns with his analysis of the results of proceeds-of-crime actions in the Netherlands (private communication). Of course, most of this work has been on the retail level—one would expect market power and relative size to rise further upstream.

²³ There is an enormously contentious literature dealing with the issue of ‘corporate crime’. This debate started with the Sutherland (1949); was considerably elaborated on in Stone (1975); picked up steam in Clinard and Yeager (1980); and probably reached its peak with Braithwaite (1984). Although there has been much literature since, the battle lines were essentially set—between legalists who saw the corporation as unable to commit crimes separate from those of its executives and those who argued for a distinct and collective corporate responsibility. On the notion of a corporate *mens rea* and the various permutations and combinations suggested, see Mokhiber (1988: 23–4.)

For example, in predatory cases where deception, rather than intimidation, is the primary tool for redistributing wealth, someone gains at another's expense with no pretence to an exchange of value. On the other hand, a commercial crime involving a fraudulent sales pitch implies gaining consent, albeit to unfair or duplicitous terms of exchange. In cases of straight con jobs, where there is no value at all transferred in exchange for the other party's income or wealth, the border becomes so fuzzy that it probably matters little which category is used. The judgment may come down to a purely empirical one based on a secondary factor—did the offence take place within and as an extension of a genuine business context or was the apparent business simply a shell whose sole function was deception?

Another complication emerges because some offences may seem to fall into several categories at once. However this may be due to the fact that they involve a series of subsidiary acts, each of which may have distinct economic characteristics. So it is with currency counterfeiting. When phoney money is passed on the wholesale level to complicit underworld parties, perhaps in exchange for real currency at some deep discount or in exchange for drugs, the act seems to fit the market-based category—there is a consensual transaction in an illegal commodity. But when phoney money is passed to unwitting retail parties, it would involve a predatory offence.

The same occurs with credit-card fraud. Theft of a credit card, or of the number, is a clear case of a predatory offence. Sale of a stolen credit card is a market-based offence. Use of a stolen credit card, or number, is, once again, predatory. However, it is possible to argue that when a merchant does a multiple run-through for the same sale, it is a commercial crime—on the surface this seems to constitute a twisting of the terms of trade in an otherwise legitimate business transaction. This is another instance where the frontier between a predatory and a commercial offence gets so blurred that the choice of category becomes arbitrary.

The same holds true with intellectual property crime, only one step further. The sale of goods using fake brand names, for instance, or of bootleg videocassettes and software, involves a predatory component (the misappropriation of intellectual capital, a form of wealth), a market-based one (the sale of illegal goods), and a commercial one (the misrepresentation of the product if it is sold as if it were the genuine article and at the same high price). What is interesting here are the various layers involved. One person or group commits the predatory offence of manufacturing something based on stolen intellectual property; another markets the product through underground channels to, in most cases, fully knowledgeable distributors; the third sells it to an (often) unsuspecting public. While each layer has committed a distinct offence in terms of this typology, they are all essential to each other's existence.

A different type of complexity can occur in cases that span all three categories. Loan sharking at first seems like a commercial crime—it involves a legal service, the lending of money, on illegal terms. However, it is often argued that the usurious interest rates are only possible to the extent that intimidation stands behind them, making the repayments smack of extortion, a clearly predatory offence. Yet normally the clients are fully aware of the terms on which the loan is negotiated—rarely can it be argued that someone is forced to borrow from a loan shark, and if that person is so forced, it is not the loan shark that does the forcing. This suggests a clear case of a market-based, regulation-evading crime. Ultimately, in such a case, the matter comes down, not to a theoretical, but an empirical issue. Are most instances of usury accompanied by the threat of force, do they involve

duplicity in getting the client to accept the terms, or are the negotiations perfectly open, in which case extremely high interest rates might reflect higher risks and 'market imperfections'?

Despite such complications, the typology has interesting implications with respect to definitions of offences, prioritization of harm, division of responsibility in complex actions, and even whether something should be a crime at all.

For a start it gives much more clarity of meaning than categories like 'economic crime' ('business crime', 'commercial crime', 'white collar crime', etc.) which are poorly defined, if not undefinable, and often confuse acts with actors. It lays the stress on what makes various crimes different, rather than giving the illusion of a catch-all category of 'crime' committed by a readily definable subset of evil beings.

It also shifts attention away from the technological fetishism implied by terms like telemarketing fraud, computer-assisted crime etc. In fact it suggests that even terms like 'credit card fraud' might be best avoided since what is involved is a series of distinct acts—from theft of a card (predatory) to resale on the black market (market-based) to fraudulent use (commercial). Similarly with a term like 'intellectual property crime', which, when dissected according to this terminology, consists of acts of theft (of the patent, trade mark or copyright), underground trafficking (when knock-offs are smuggled), and commercial misrepresentation (when they are sold as the real thing), all of which are confusingly lumped together in a common category. Such a confluence makes understanding, not to mention the evolution of effective preventive and deterrent policies, more difficult.

It further serves to bring into relief the reasons why certain types of offences fail to command much public opprobrium. Indeed, in some cases the very existence of the offence can be a subject of considerable dispute. There is not now, nor in the foreseeable future is there likely to be, a credible lobby, including veteran police officers, which calls for the legalization of armed robbery. Similarly, given the difficulty of defining the border between fraud and sharp business practices, although some commercial offences may be clear enough to be fit objects for criminal prosecution, many others will not. As a result, many things now seen as commercial crimes are perhaps better handled as regulatory matters.

The typology, too, sheds light on the question of just who is responsible for particular proscribed acts. This is particularly useful in market-based offences where there is a truly consensual exchange between supplier of and customer for new goods and services. The point is that a market-based crime, like a tango, takes two—there can be no market unless there is a supply side and a demand side. Why, then, should suppliers be singled out for special treatment? That is the usual approach taken today, and it picks up momentum as more countries move towards decriminalization, if not outright legalization, of certain drugs, for example. But it has no basis in morality and logic. There is no victim in any normal sense—that is why it is common to allege that the real victim is 'society', an essentially meaningless phrase. Hence, on the surface, there is nothing to differentiate the supply from the demand sides. But, on a deeper view there actually is. With predatory and commercial offences, the 'supplier', so to speak, takes the initiative against an unwilling victim. On the other hand, an illegal market is always demand driven. The customer is, in that sense, more guilty than the supplier—though the criminal justice system works on precisely the opposite assumption.

In fact, a solid argument can be (and frequently is) made that criminal law has no business attempting to regulate personal moral choices—as distinct from the possible consequences of personal moral choices. By this point of view, the main offence being committed by either party to a consensual but illegal market exchange is purely a fiscal and/or regulatory one. This logic becomes more compelling when it is considered that market-based offences involve not the involuntary redistribution of existing wealth but the creation of new goods and services and therefore of new income flows. Thus, the typology suggests that purportedly nasty crimes like trafficking in drugs, which involve fair market exchange, are in a fundamental way actually cleaner than supposedly less harmful ones like telemarketing fraud where unsuspecting people are ripped off. Yet the punishments are meted out in reverse order.

The typology also permits the deconstruction of an act into a series of constituents which better illustrates the chain of responsibility and the flow of command than stereotypes about ‘organized crime’ that owe more to Hollywood and police hype than to serious research. This is the case, for example, with auto theft. While joy-riding involves a purely predatory act, sale of stolen cars might fall more into the predatory or the market-based category depending on the sequence. Sometimes cars are stolen, and the thieves attempt subsequently to sell them—with no prior guarantee of success or of price in the event of success. (Most such cars probably end up in chop shops.) Such an act should probably be seen more as predatory, since the sale was a secondary part of the process both in sequence and in apparent motivation. However, in more sophisticated operations, cars are stolen to order, with payment terms pre-negotiated. In this instance the market-based crime precedes and creates the need for the predatory act. Use of the typology then permits isolation of, not just the linear sequence, which is more or less in the nature of things, but of the driving force (no pun intended) behind a crime like auto theft.²⁴ While, from the point of view of prosecution, it matters little if the predatory offence precedes and precipitates the market-based one, from the point of view of understanding the *modus operandi* of the criminal economy, and of devising effective preventive and deterrent policies, it well may.

Yet another advantage is that the typology can be useful in questioning whether or not something really should be a crime at all. This is particularly evident with some kinds of securities offences, for example, insider trading.

Insider trading was first conceived as an offence involving officers of corporations about to merge who took advantage of that knowledge to speculate to their own profit. It was then extended to employees of law firms planning mergers and acquisitions, merchant banks involved in financing them, reporters for financial newspapers who got leaks, and even janitors who picked up discarded memos in the trash. If any of them used such information to anticipate stock price movements for their own gain, they were guilty of insider trading.²⁵ It thus became unclear just where the frontiers between ‘inside

²⁴ This seems to be a problem, for example, with script analysis, which seems to identify a linear sequence of subcomponents of a complex criminal act with causation. However it is possible that in some instances the initiative, alterations in direction of an act comes from persons involved anywhere in the chain of subcomponents, even though *ex post* understanding of the completed act requires a linear and logical sequence.

²⁵ For an examination of the Wall Street insider trading scandals of the mid to late 1980s, see Naylor (1987 and 1994: postscript II). The publicity led to a series of copycat cases in other countries, along with a trend towards criminalization of something that had formerly been seen as a regulatory or civil matter.

information' and the normal search by potential investors for data on which to base a stock purchase really fell. Simultaneously the core issue ceased to be breach-of-fiduciary-duty, and became simply obtaining profit that other people thought should rightfully be *theirs*, from correctly guessing stock price movements. This tendency to seek an ever-expanding mandate while blurring the central moral issues seems a danger inherent in all attempts to use the criminal code for purposes of economic regulation.

However, even if the offence of insider trading were redefined to accord better with its original mandate, its logic could still be open to question. Insider trading is not a predatory crime—it does not involve the forced transfer of property. It is not a market-based crime—the object of the exchange, securities, is perfectly legal. It is not even clearly a commercial crime—to trade on privileged information to capture the profits from market movements that take place for independent reasons is quite different from rigging the market to make it move in a particular direction. With insider trading there is no victim in the classical sense. What is at issue is not a contest between predator and victim over forcibly or fraudulently redistributed wealth, but a quarrel between two sets of investors over distribution of profit. In the past (and in the bulk of instances also in the present) most such disputes were (are) left to the civil courts.

Finally, the optimist might suggest that such a terminology could provide some guidance to simplifying existing criminal codes which are so often a bizarre amalgam of overlapping offences, some so arcane as to be preposterous. Alas, given the vested interests of lawyers and legislators, and the ad hoc, reactive way in which new offences are created, that would seem too fond a hope.

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