

Optimal Penalties

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4 November 2006

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The Economic Approach to Anything

1. **Prices--costs-- incentives—tradeoffs--utility maximization--the rational actor model.**
2. **Markets--social interactions -- Invisible Hand, Prisoner's Dilemma.**
3. **Positive vs. normative—**
what is vs. what should be.
4. **Maximize surplus.** Cost-benefit analysis.
Gains from trade. Contracts. Social Contracts.

Cost-Benefit Decisions

Criminal: Should I commit the crime?

Society: How should we punish the crime?
Should it even be a crime?

(Even: What is immoral?)

Asking what maximizes surplus- Economics

Gains from trade: if Joe is willing to pay up to \$9 for a sandwich, and Tom is willing to accept as little as \$3 to make it for him, then Tom should make the sandwich for Joe.

(markets)

Cost-benefit analysis: If the cost of a bridge is \$10 million and the benefit is \$12 million, build the bridge.

(government decisions)

Asking what maximizes surplus-Law

Efficient breach of contract: If Smith could gain \$3,000 by breaking his contract with Jones, and Jones would only lose \$1,000 as a result, break the contract.

The Hand Rule in tort: If Tom could spend \$200 on precautions and reduce the probability of a \$1,000 accident by 50%, he should take the precautions.

Crime: If Doe only would pay \$5,000 for the right to murder Roe, and Roe would accept no less than \$1 million in exchange for his life, Doe should not kill Roe.

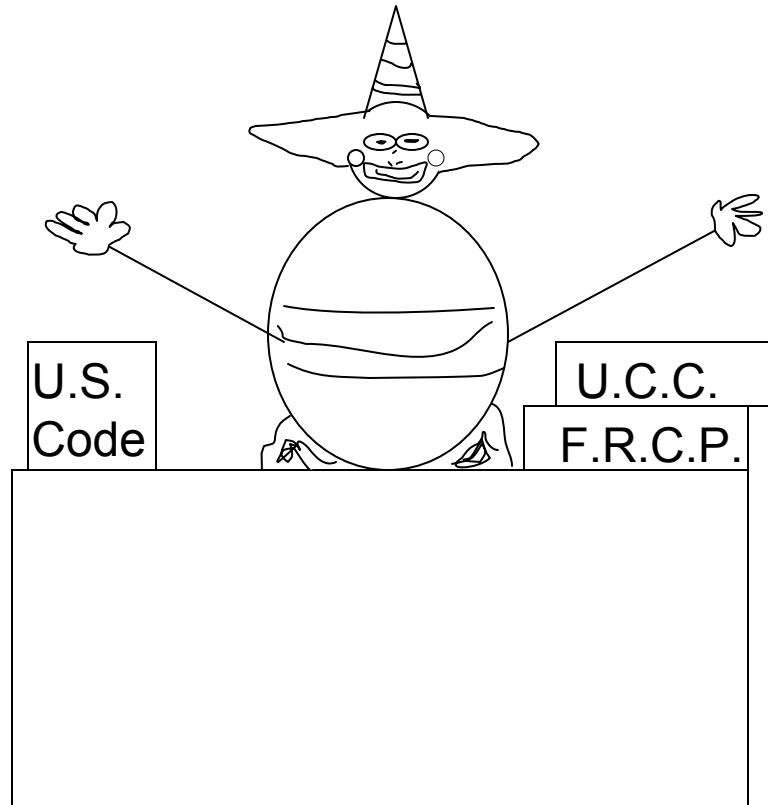
Policing: If it would cost \$40,000 in extra police time to prevent a burglary costing the victim \$9,000 in property and worry, don't prevent the burglary.

Six Approaches to Punishment

1. Economic, Surplus-Maximizing
2. Kantian, Authority protecting Dignity
3. Divine Law, revelation, tradition
4. Natural Law, what anyone can deduce from studying the world
5. Formalist, consistency, precedent
6. Power, Marxian, Thrasymachus: benefit your own group

Blackstone v. Bentham v. Kant

Dignity



“Don’t worry. If I weren’t a VERY good lawyer, could I get away with wearing a clown suit? 8

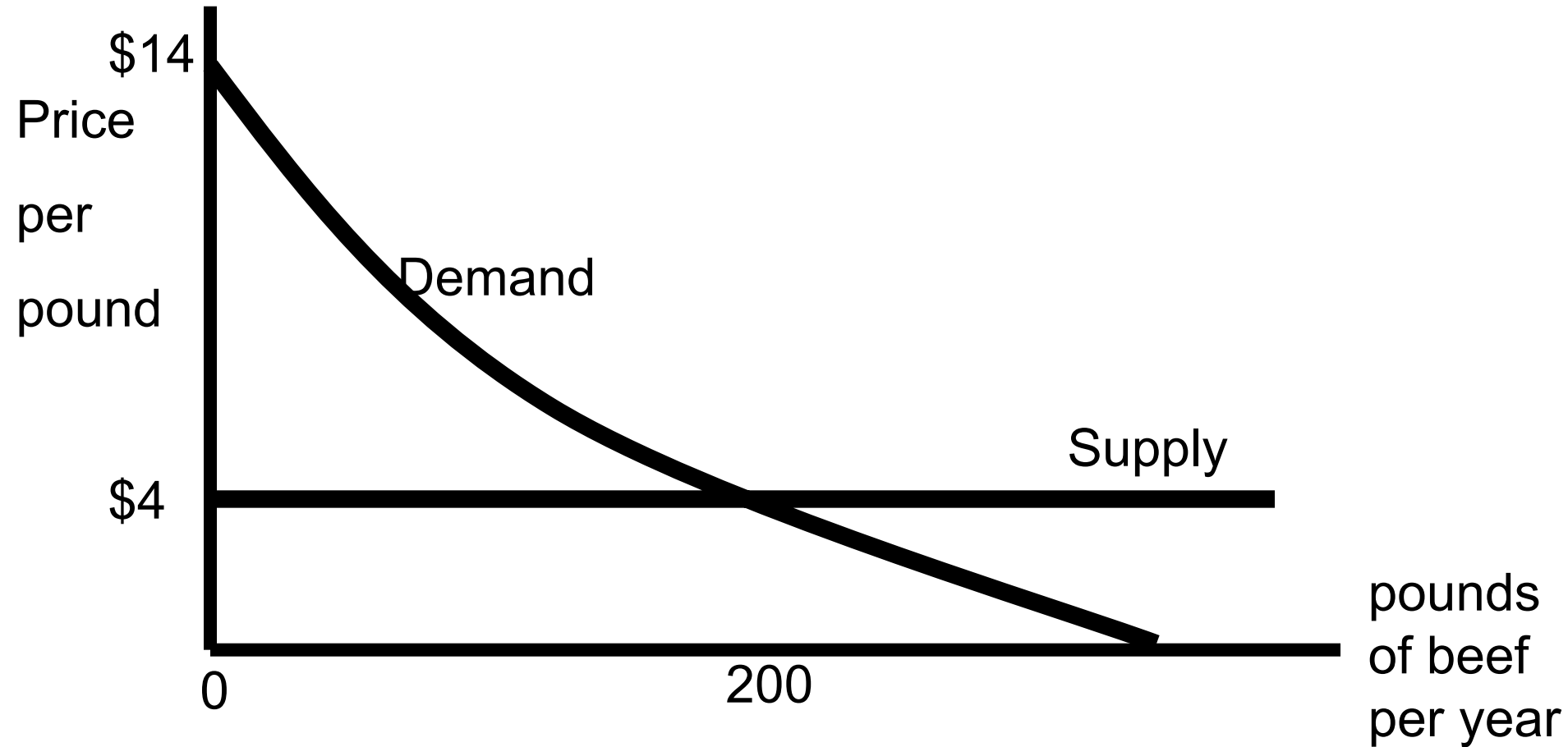
Three Similar Ideas

- 1. Surplus Maximization:** Act so that the winners win more than the losers lose.
- 2. The Golden Rule:** Do unto others as thou wouldst have them do unto thee.
- 3. The Categorical Imperative:** Avoid actions that if taken by everyone would make the actions meaningless.

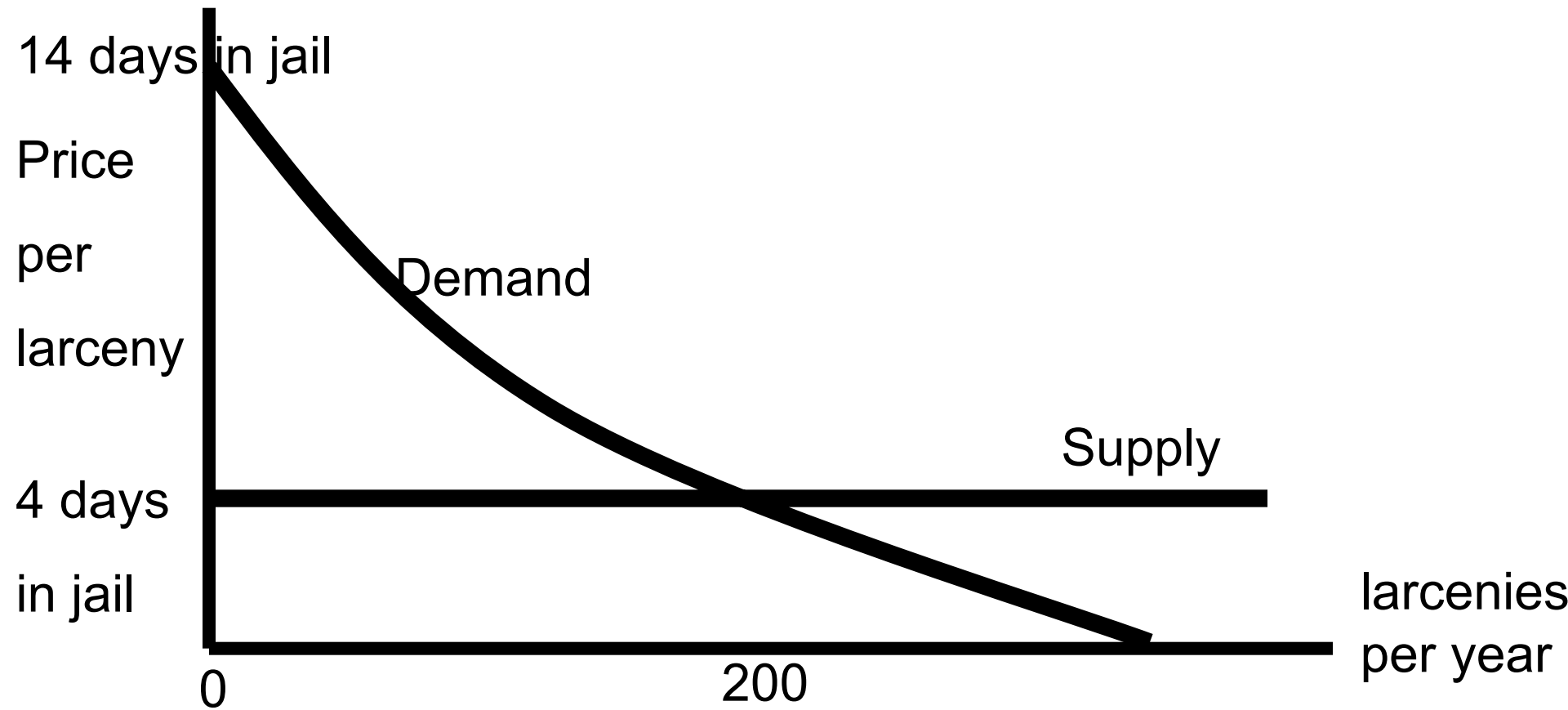
Is the Economic Approach “Self-Defeating”?

- 1 Surplus maximization requires that I do things for society’s good, not my own
(Moral rule against stealing)
- 2 Surplus maximization might even require a moral rule that in some cases benefits nobody
(I must not kill one baby to save two others.)

The Criminal's Demand Curve for Beef



The Criminal's Demand Curve for Larceny



Drugs and Crime as Complements: Drug Use by Arrestees

City	Any drug	Marijuana	Cocaine	Opiates
Chicago	86%	53%	50%	24%
Indianapolis	66	44	34	5
Los Angeles	68	40	23	2
New York	72	43	25	15
Portland	72	38	29	15

How Many People Drink before Committing a Crime?

	Proba- tioners	Jail inmates	State prisoners
All offenders	.16	.19	.27
Violent	.18	.20	.28
Property	.24	.22	.30
Drugs	.14	.15	.19
Public-order*	.14	.19	.23

*Includes offenses like driving while intoxicated, weapons offenses, and commercial vice.

Law and Morality

“ You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law.

A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”

(1897) (Holmes, “The Path of the Law”)

Two Margins

The Intensive Margin: How often do I steal?

-- one person stealing more

The Extensive Margin: Do I steal?

---more people stealing

What's Wrong with Theft?

If Smith values his car at \$20,000, and Jones values it at \$5,000, Smith should keep the car.

How do we know the current owner (Smith) values the car most?

We don't. But if we prohibit stealing, and Jones actually values the car the most, we've done no harm. Jones can pay money for the car.

If we allow stealing, what do people do that reduces total surplus?

The Implication:

Prohibit as crimes activities which reduce surplus.

Owners value their goods more than thieves do.

Victims value their lives more than murderers do.

Other drivers lose more from drunk driving than the drunk drivers gain in convenience.

Sellers gain less from a cartel than consumers lose.

Child-abusers benefit less from the abuse than the children lose.

Two Questions

1. Why make the penalty proportional to the crime, if we want to deter all crime?

Why not make life imprisonment the penalty for both burglary and murder?

2. Why punish recidivists more?

Fairness is one answer, but that begs the question. Why do we think some things are fair and not others?

Efficient Crime: The Cabin

A hunter, lost in the woods and starving, stumbles across a locked cabin containing food. He breaks in and feeds himself.

His gain is more than the owner's loss, so his crime is efficient.

Solution 1: It's not a crime (defense of necessity)

Solution 2: Prosecutorial discretion (policeman escorting a mother about to give birth to the hospital at 70 mph)

“Zero Tolerance”



If you attend school in the Los Angeles Unified School District, don't carry a toy key fob like this one in your pocket. A 7-year-old boy was suspended in school for carrying one of these because it violates the district's "zero tolerance" policy on "weapon possession".

Efficient Crime: Parking Tickets

The value to the criminal of illegal parking must be more than the cost, which he pays in his punishment, or he wouldn't do it.

Illegal parking imposes costs on others. If it is sufficiently important to me, I demonstrate that by being willing to pay the price of parking tickets. It is a price, not a penalty.

But the main reason is that
punishment is costly...

**“But if any harm follow [fighting],
then thou shalt give life for life, eye for
eye, tooth for tooth, hand for hand, foot
for foot, burning for burning, wound for
wound, stripe for stripe.”**

(Exodus 21)

Proportionality, but no penalty for recidivism

Expected Penalties

“If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall pay five oxen for an ox, and four sheep for a sheep.

If the thief be found breaking in, and be smitten so that he dieth, there shall be no bloodguiltiness for him.

If the sun be risen upon him, there shall be bloodguiltiness for him;

he shall make restitution: if he have nothing, then he shall be sold for his theft.”

(Exodus 22)

Judicial Discretion

“If there be a controversy between men, and they come unto judgment, and [the judges] judge them; then they shall justify the righteous, and condemn the wicked;

and it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, **according to his wickedness, by number.**

Forty stripes he may give him, he shall not exceed;...”

(Deuteronomy 25)

Fines: Low-Cost Penalties

Suppose we have a 20% probability of a ten thousand dollar punishment for some crime.

Why not switch to a 10% probability of a twenty thousand dollar punishment?

We will only have to catch and try half as many criminals so we can save money by firing some police, judges and prosecutors.

How about a 5% chance of a \$40,000 penalty?

How about a 1% chance of a \$200,000 penalty?

A Problem: Corrupt Enforcers

If the penalty is efficient, what the criminal loses, someone else gains.

Examples: fines, convict labor, asset forfeiture

But then the courts have incentive to falsely convict.

Thus: We have a rule that courts cannot keep the revenue from fines.

Criminal Law and Morality (Stephen)

“Before an act can be treated as a crime, it ought to be capable of distinct definition and of specific proof, and it ought also to be of such a nature that it is worth while to prevent it at the risk of inflicting great damage, direct and indirect, upon those who commit it. These conditions are seldom, if ever, fulfilled by mere vices.

It would obviously be impossible to indict a man for ingratitude or perfidy. Such charges are too vague for specific discussion and distinct proof on the one side, and disproof on the other.

Moreover, the expense of the investigations necessary for the legal punishment of such conduct would be enormous.

It would be necessary to go into an infinite number of delicate and subtle inquiries which would tear off all privacy from the lives of a large number of persons.”

Optimal Costly Penalties

If **all** burglaries would be deterred by having a 30-year sentence, then that would be a good idea--- a costless punishment.

If some people will still offend, then it becomes a costly punishment.

Thus, we need to balance extra deterrence against extra cost. More harmful crimes should have higher penalties, to deter more.

Why penalize recidivism?

Recidivists have shown that the experience of a 1-year penalty will not deter them.

Rather than giving them a series of 30 1-year terms, we could give them a single 30-year term.

Another consideration: After three trials, we are more sure that they are truly guilty.

Crime

Public enforcement

Penalty unequal to harm
(prison=greater,
probation=smaller)

Penalty doesn't aid the victim

Penalty bigger for recidivists

Jury unanimity
(just a judge, in most
countries)

Tort

Private enforcement

Penalty equal to harm
(caveats: punitive damages,
disgorgement)

Penalty aids the victim

Penalty same for recidivists

Jury majority

The value of the economic approach

“One of the attractions of the economic analysis of law is that it provides a way of answering questions about what the law ought to be, what rights we ought to have.

It starts with what looks like a very weak premise--- that one should design legal rules to maximize the size of the pie.

It assumes nothing at all about the sorts of things we expect legal and ethical rules to be based on: desert, rights, justice, fairness.”

(David Friedman)

From one ethical principle, we get

Theft and murder should be punished, but only if there is mens rea.

More harmful offenses should be punished more heavily.

Contracts should be enforced, and with expectation damages.

Criminal penalties should require higher standards of proof than civil penalties.

Procedures should try hard not to punish the innocent.

Torts should be punished by fines, not prison, but only if there is negligence.

Negligence should be defined as omitting precautions whose cost is greater than their benefit.

Purposes of Punishment

1. Deterrence
2. Incapacitation
3. Rehabilitation/Education
4. Retribution
5. Stigmatization/Vindication

Vengeance

It is not, however, difficult to show that these acts [*Crimes*] have in fact been forbidden and subjected to punishment not only because they are dangerous to society, and so ought to be prevented, but also for the sake of gratifying the feeling of hatred--call it revenge, resentment, or what you will--which the contemplation of such conduct excites in healthily constituted minds. If this can be shown, it will follow that criminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance above-mentioned are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.

The strongest of all proofs of this is to be found in the principles universally admitted and acted upon as regulating the amount of punishment. If vengeance affects, and ought to affect, the amount of punishment, every circumstance which aggravates or extenuates the wickedness of an act will operate in aggravation or diminution of punishment. If the object of legal punishment is simply the prevention of specific acts, this will not be the case.

The Two Prisoners (Stephen)

“A judge has before him two criminals,

[A] one of whom appears, from the circumstances of the case, to be ignorant and depraved, and to have given way to very strong temptation,

under the influence of

[B] the other, who is a man of rank and education, and who committed the offence of which both are convicted under comparatively slight temptation. “

Deterrence and Retribution are at odds here

Arrests in thousands (14 million total)

Murder	14	Other assault	1,285
Rape	26	Fraud	282
Robbery	109	Drugs	1,745
Agg. Assault	440	Dr. driving	1,432
Burglary	294	Liquor laws	613
Larceny	1,191	Drunkenness	550
Car theft	147	Dis. Conduct	683

Lots of “victimless” crimes

Public Order Crimes

Prostitution?

Heroin use?

Cruelty to animals?

Cannibalism?

-----these reduce surplus if they bother people enough. If 10,000 people would each pay \$1 to make prostitution illegal, and 50 people would each pay \$100 to make it legal, the score is \$10,000 to \$5,000, and it should be illegal.

Mill and Stephen: *Mixing Morality and the Economic Method*

Mill: "The object of this essay is to assert one very simple principle as entitled to govern absolutely all the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force or the moral coercion of public opinion. That principle is, that **the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.**"

Stephen: "How can the State or the public be competent to determine any question whatever if it is not competent to decide that gross vice is a bad thing?"

Mill: “...that it is the absolute social right of every individual that every other individual should act in every respect precisely as he ought, *that **whosoever fails thereof in the smallest violates my social right*** and entitles me to demand from the Legislature the **removal of the grievance....**”

The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each according to his own standard.”

Stephen: It is surely a simple matter of fact that **every human creature is deeply interested not only in the conduct, but in the thoughts, feelings, and opinions of millions of persons who stand in no other assignable relation to him than that of being his fellow-creatures. ...**

A man would no more be a man if he was alone in the world than a hand would be a hand without the rest of the body.”

London Call Girls

Prostitution is not illegal in London, but soliciting business on the streets, and brothels, are.

Prostitutes leave their business cards in public places.

Should the phone companies refuse to put through phone calls to prostitutes?

Vice as Pollution

“ ... the analogy between health and disease and virtue and vice.

They differ in several essential respects, but they resemble each other in several leading points. Vice is as infectious as disease, and happily virtue is infectious, though health is not. Both vice and virtue are transmissible, and, to a considerable extent, hereditary.

Virtue and vice resemble health and disease in being dependent upon broad general causes which, though always present, and capable of being greatly modified by human efforts, do not always force themselves on our attention.

Stigma: Different from Morality

Fines are a zero-cost penalty.

Jail is a positive-cost penalty.

Stigma is a **negative**-cost penalty.

The Embezzler and the Accounting Firm

The Speeder and the Insurance Company.

Courts are useful to make stigma accurate. An acquittal may or may not leave stigma--- but the trial has improved our information.

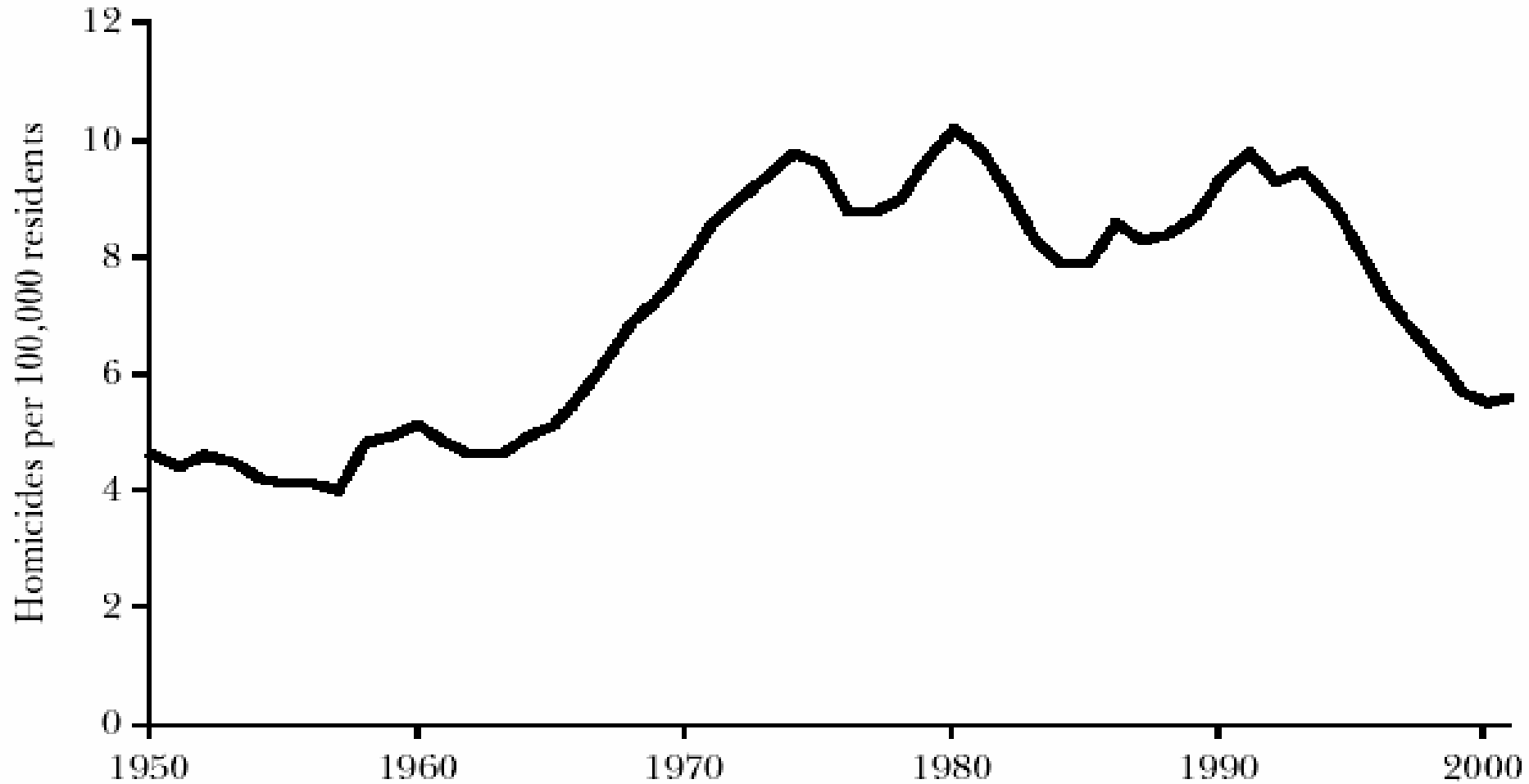
The 1960's: Stigma, Morality, or Penalties?

Why did crime go up so much in the 1960's, and then not fall as much when penalties became high again in the 80's?

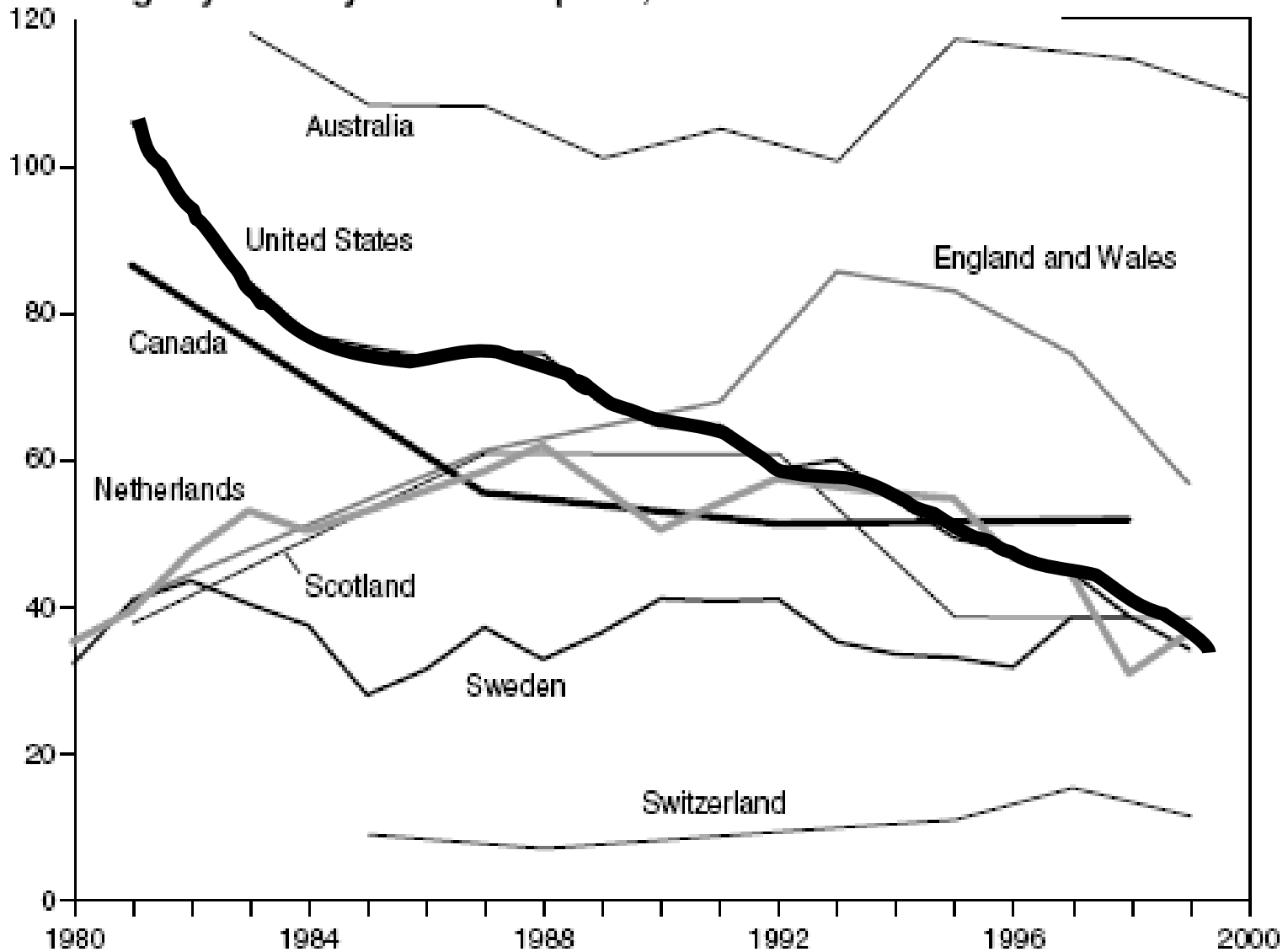
A shift in morals or stigma changes the base level of crime.

But changes in such things as prison terms will still make a difference.

Murder Rates 1950-2000



Burglary: Survey crime rate per 1,000 households



Punishment

Prison inmates: 1.39 million, 93% male, 92% state

Total under supervision, in thousands:

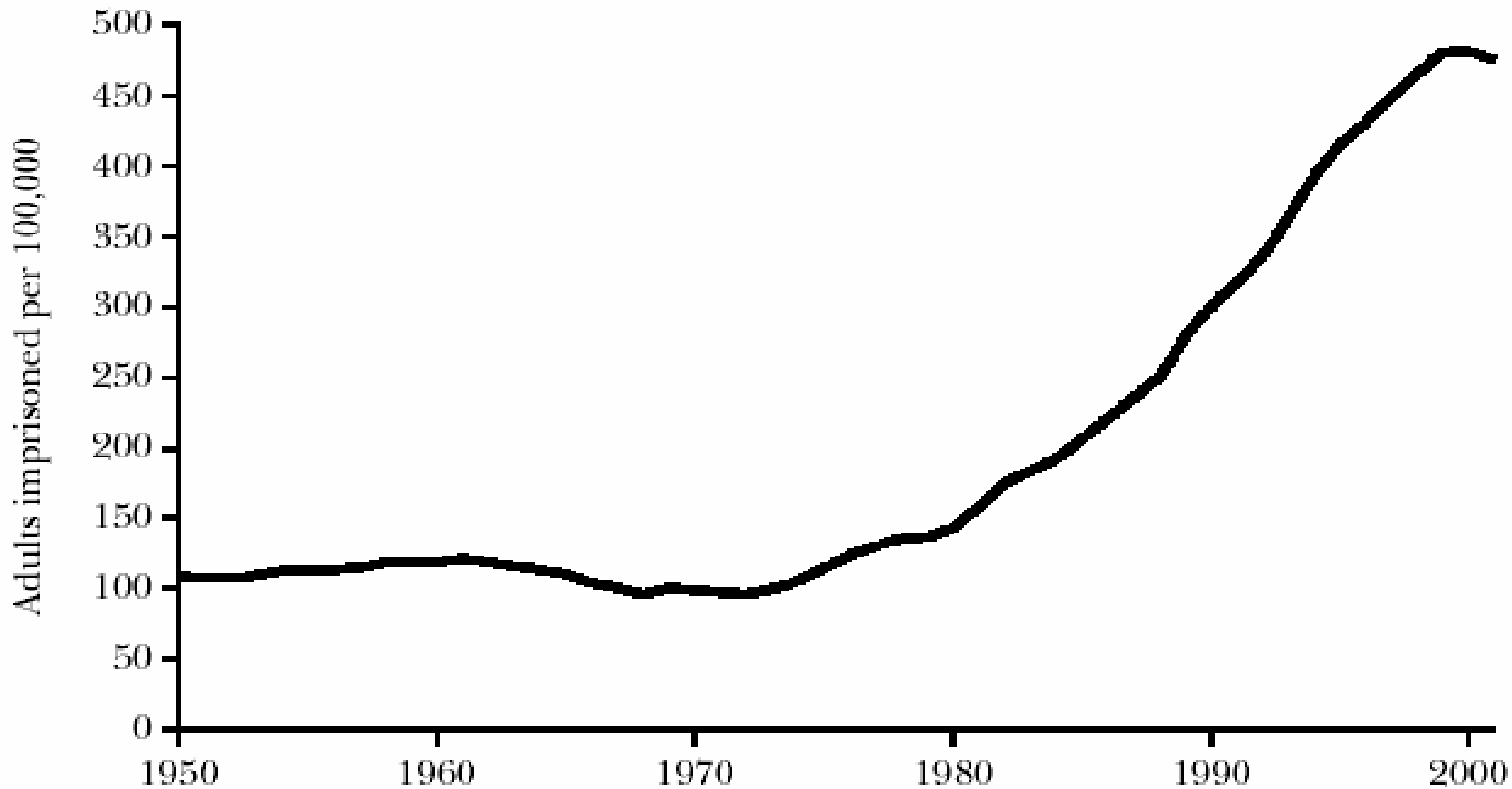
6,900 (3.2% of population)

Probation: 4,073, Jail: 684, Prison: 1,394, Parole: 774

State prison inmates	1995	2002
Total	100%	100%
Violent	47	51
Property	23	20
Drug	22	21
Public-order	9	7

Corrections staff: 747 thousand

Adult Incarceration Rate: 1950-2001



Levitt's Four Factors

• Police	5%	(15%)	
• Prisons	10%	(30%)	
• Crack decline	3%	(10%)	
• Abortion	10%	(30%)	????
• Unexplained	2%	(15%)	
Total	30%	(100%)	

STUNTZ: tough sentencing and tough policing as substitutes

The Claim: When judges reduced the toughness of policing, voters increased the toughness of sentencing.

The courts constrain procedure too much, and law too little.

Four Ways to Control Crime

- (a) Lax procedure: Intrusive searching, foolish confessions, tough interrogations
- (b) Low spending on public defenders
- (c) Long prison sentences
- (d) More plea bargaining power for prosecutors

Federal judges disallowed (a),

so state legislatures and governors turned to (b), (c) and (d) instead.

Problems with Judicial Rules

1. Judicial rules are made without unbiased staff, public input, and an integrated view of crime policy.
2. Judicial rules are slow to change even if they're immediately seen to be mistaken.
3. Federal judicial rules are inflexible across locations.
4. Federal judicial rules are made by people who aren't held accountable for mistakes.
5. Rules are complements to high-priced lawyers, and hence help the rich the most.
6. Rules don't help victims; the big problem in poor neighborhoods is police doing too little, not too much.

Stuntz's Solution

Courts should care about whether rules are applied discriminatorily, not about the rules themselves.

Why would voters vote for politicians who make bad rules?

But a majority of voters might well vote for politicians who apply the rules discriminatorily to help the majority and hurt the minority.

--- so use injunctions, police dept. "receiverships"₅₆

Abatement: US vs. Parsons

If a convicted defendant dies before paying his fine, should his estate have to pay it? No, says “abatement ab initio”.

1. Punishment rationale: He’s dead and can’t be punished.

“In our view, an uncollected fine in a criminal case is comparable to the balance of the defendant's prison sentence; the uncollected fine, like the remaining sentence, abates with death.”

United States v. Morton, 635 F.2d 723, 725 (8th Cir. 1980).

2. Finality rationale: If his appeals aren’t done, he oughtn’t to be punished.

What are the incentive effects?

More Topics in Posner

- Impossibility
- Conspiracies
- Intent and Awareness
- Felony Murder and Statutory Rape
- Insanity
- Civil versus Criminal Trespass

