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## UNDERSTANDING ADMINISTRATIVE SANCTIONING AS CORRECTIVE JUSTICE

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Eithan Y. Kidron\*

### ABSTRACT

*When should a regulator prefer criminal sanctions over administrative sanctions? What procedural protections should apply if a process is labeled civil but the sanctions are, in fact, criminal in type? And can the state justifiably conduct parallel proceedings for punitive sanctions against the same person or entity for the same conduct?*

*Throughout the years, judges and scholars alike have tried to understand and classify administrative sanctioning. Common to all of these conceptions is their failure to provide a complete normative framework for this unique body of law, which in turn makes it difficult to identify its practical limits and to resolve the practical difficulties mentioned above.*

*This Article proposes a novel, normative paradigm for understanding administrative sanctioning. This Article suggests that an administrative violation is a manifestation of an ex-ante excessive risk to public right. Based on the rationale of corrective justice, administrative sanctions correct the excessive risk in the form of a preventative sanction. Thus administrative sanctioning restores equality in the correlative relations between the violator and the public right. The Article applies this suggested approach to address some of the practical difficulties administrative sanctioning raises.*

### INTRODUCTION

Administrative sanctioning is hardly new. Administrative sanctioning developed as a separate body of sanctioning law alongside the criminal and civil fields.<sup>1</sup> Yet the state's power to enforce and impose sanctions do not fit into the customary paradigms of civil

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1. *Id.* at 1813 ("The third arena of sanctioning law, punitive civil sanctions, developed simultaneously with the criminal and civil paradigms.").

and criminal law.<sup>2</sup> Over the years, judges and scholars have tried to characterize and distinguish this body of sanctioning law from other bodies of sanctioning law, mainly criminal law. Their endeavors can be classified into four conceptual paradigms of administrative sanctioning.

The first paradigm rejects characterizing administrative sanctioning as a type of law. Instead, it conceptualizes administrative sanctions as police power, as opposed to criminal sanctioning, which it identifies as law. Markus Dubber, for example, has contended that “[t]he project of ‘police law’ or for that matter of ‘administrative law’ in general” is not justice but, rather, prudence.<sup>3</sup> In his view, criminal sanctioning is internal to law—its building blocks are rights and it is engaged in remedying violations of autonomy. Police power, by contrast, is extraneous to the law—its building blocks are efficiency and it is engaged in preventing risks to welfare.<sup>4</sup> Dubber builds on the claim he developed in his seminal book *The Police Power* that “the distinction between law and police as alternative modes of governance [is] best viewed in contradistinction to one another.”<sup>5</sup>

For those who regard administrative sanctioning as a body of law as opposed to police power, the classification is usually divided into either civil or criminal categories. Thus, the second paradigmatic approach to administrative sanctioning characterizes it as civil law. For example, when administrative sanctioning conflicts with criminal law principles as a violation of double jeopardy, the rationale commonly given is that it is civil law.<sup>6</sup> The Supreme Court considered the potential double jeopardy issue in two cases—one in the 1980s and one in the 1990s. Within these cases, the Court came to opposite outcomes. In the first decision, *United States v. Halper*,<sup>7</sup> the court broadened the scope of the double jeopardy doctrine in cases of parallel civil and criminal proceedings. In the second decision,

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2. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1800 (1992).

3. Markus D. Dubber, *Preventive Justice: The Quest for Principle*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 47, 64 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013).

4. See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 104–17 (2005).

5. Dubber, *Preventive Justice*, *supra* note 3, at 49; see also Andrew Ashworth, Lucia Zedner & Patrick Tomlin, *Introduction*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 1, 2–3 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (describing Dubber’s argument).

6. The literature and case law on double jeopardy are vast. For an overview of the Fifth Amendment from a historical perspective, see David S. Rudstein, *Brief History of the Fifth Amendment Guarantee against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193 (2005).

7. 490 U.S. 435 (1989).

*Hudson v. United States*,<sup>8</sup> the Court overruled *Halper* and adopted a narrower interpretation of double jeopardy protection.<sup>9</sup> Common to both decisions, however, was the use of the term “civil” to describe administrative sanctions, mirroring the legislator’s reference to them as civil monetary penalties.<sup>10</sup>

The third approach sets administrative sanctioning in the criminal law rubric but distinguishes between two types of criminal law. This distinction takes many shapes. Particularly familiar is the common law distinction between *mala in se* and *mala prohibita*.<sup>11</sup> Another well-known distinction is that made between core offenses and periphery offenses or, alternatively, between real crime and public welfare offenses or regulatory offenses.<sup>12</sup> Given the absence of some

8. 522 U.S. 93 (1997).

9. See Marco Ventoruzzo, *When Market Abuse Rules Violate Human Rights: Grande Stevens v. Italy and the Different Approaches to Double Jeopardy in Europe and the US*, 16 EUR. BUS. ORG. L. REV. 159 (2015).

10. See Charles R. Mills, W. Shaw McDermott, Andrew E. Porter & Kalun Lee, *Litigating Administrative Proceedings: The SEC’s Increasingly Important Enforcement Alternative*, in KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP, THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 323, 325–26 (Nicole A. Baker & Richard M. Phillips eds., 2d ed. 2007).

11. See WAYNE R. LAFAVE, CRIMINAL LAW §§ 1.6(a)–(b) (4th ed. 2003) (defining and discussing the difference between *malum in se* and *malum prohibitum*).

12. See ALAN BRUDNER, PUNISHMENT AND FREEDOM 170–73 (2009) (discussing the distinction between real crime and public welfare offenses); William J. Stuntz, *Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–15 (2001) (discussing the distinction between core offenses and periphery offenses) (“Begin with the proposition that criminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI’s crime index—murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else.”) (footnote omitted).

For further discussion on the distinction between core offenses and periphery offenses, see Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 756 (2003) (arguing that in the book, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978), Fletcher “was the first to suggest that the criminal law contains a core”). On the difference between the two types of criminal law, see Klaus Günther, *Responsibility to Protect and Preventive Justice*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 69, 86 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (“Criminal law is now characterized by an internal tension between a core of protection of basic rights of civil citizenship by responsible subjects, and a penumbra of offences which violate public interest and public safety standards. In the penumbra, negligence and strict liability become the paradigm cases of legal responsibility.”).

Brudner reviews several different views of the distinction between real crimes and welfare, or regulatory, offenses. BRUDNER, *supra*, at 170–71. One approach construes real offenses as protecting the interests of individuals, while regulatory offenses protect the public interest as a whole. *Id.* at 170; Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 83 (1933). A second approach holds that real offenses prohibit certain types of harmful behavior per se, whereas regulatory offenses govern behavior that would otherwise be lawful, in the interest of public health and safety. BRUDNER, *supra*, at 170; see R v. Beaver, [1957] S.C.R. 531, 539. Under a third approach, real offenses constitute “fundamental rules” that are vital to society, whereas regulatory offenses constitute “non-fundamental rules” that are only helpful to society. BRUDNER, *supra*, at 170; LAW REFORM COMM’N OF CAN., STUDIES IN STRICT LIABILITY 194 (1974). A fourth approach holds that real offenses typically impose sanctions to prevent harmful behavior with zero benefit to society, while regulatory offenses “price” behavior that generates both costs and benefits, so as to promote the socially optimal level of activity.

of the important characteristics of criminal law (such as subjective fault or retrospectivity), administrative violations cannot be, in their essence, criminal law or, in other words, real crime under this approach. Nonetheless, administrative sanctioning resembles punishment and is, therefore, located in the periphery of criminal law.<sup>13</sup>

A fourth conception characterizes administrative sanctioning as a middleground between criminal law and civil law. As Kenneth Mann argued, “[t]hough attractive to the legal mind . . . the bifurcation of legal sanctions into two categories is misleading.”<sup>14</sup> He uses the term “middleground” to describe the hybrid jurisprudential arena of punitive-civil sanctions. This hybrid draws on the two basic paradigms of sanctioning law where “the sanction’s purpose is punishment, but its procedure is drawn primarily from the civil law.”<sup>15</sup>

Common to all of these conceptions is their failure to provide a comprehensive normative framework for this unique body of sanctioning law, which, in turn, makes it difficult to set its practical limits. The first approach does not attribute any normative framework to administrative sanctioning, leaving it virtually unrestricted as police power.<sup>16</sup> Under this approach, administrative sanctioning is not law, and thus there are no internal constraints on its application. As Dubber himself explains, “[f]rom the perspective of the police power, ideas of justice and legitimacy have no purchase . . . because the exercise of the police power is unconstrained by principles of any kind.”<sup>17</sup>

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BRUDNER, *supra*, at 170; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 228 (6th ed. 2003); ROBERT COOTER, *Prices and Sanctions*, 84 COLUM. LAW REV. 1523 (1984). Under a fifth approach, real offenses punish “stigmatic” violations, and regulatory offenses impose sanctions for “non-stigmatic” violations. BRUDNER, *supra*, at 171; A. P. SIMESTER, *Is Strict Liability Always Wrong?*, in APPRAISING STRICT LIABILITY 21, 23–24 (Andrew Simester ed., 2005).

13. See BRUDNER, *supra* note 12, at 169–70, 173–78.

14. Mann, *supra* note 2, at 1797.

15. *Id.* at 1799.

16. DUBBER, *THE POLICE POWER*, *supra* note 4, at xi–xv (arguing that the essential features of police power reflect its origins in the (almost) limitless patriarchal power of the householder over his household).

17. Ashworth, Zedner & Tomlin, *supra* note , at 3 (describing Dubber’s argument in Dubber, *Preventive Justice*, *supra* note , at 64–65). Dubber admits that “the project of ‘police law,’ or for that matter of ‘administrative law’” is limitless. *Id.* at 64.

Within the realm of police, there is no “principle”, and there is no “justice” (unless, of course, one simply defines justice as police, with Bentham and Pound). There may be maxims, guidelines, standards, recommendations, counsel, advice, and so on. But there is no “principle”, if by principle we mean something like a norm that requires compliance because of its normative significance, [that is], in politics (as opposed to in morality, or ethics), because of its legitimacy significance.

The second and third paradigms do not view administrative sanctioning as having a complete normative framework of its own. Rather, they attempt to attribute to administrative sanctioning an existing framework, either civil or criminal. However, proponents of both paradigms dismiss this framework for leading to uncertainties and inconsistencies.

The tension between the *Halper* and *Hudson* rulings, and within *Halper* itself, demonstrates the difficulty of sustaining the civil approach to administrative sanctioning. Many critics argue that this approach leads to double jeopardy and a weakening of due process rights.<sup>18</sup> This stance recently found expression in the European Court of Human Rights' 2014 *Grande Stevens v. Italy* decision,<sup>19</sup> which addressed the nature of administrative sanctions in the context of insider trading and market manipulation. Marco Venterrozo described this decision as follows:

In short, the Strasbourg Court held that the administrative procedure followed by Consob—the Italian Securities and Exchange Commission—violates the due process requirements of the European Convention on Human Rights, in particular with respect to the separation between prosecution and adjudication and right to a full defense of the accused. In addition, the ECHR concluded that the possibility to cumulate “administrative” pecuniary sanctions (or “civil penalties”) and criminal sanctions is contrary to the prohibition against double jeopardy, or *ne bis in idem*, also set forth by the European Convention on Human Rights.<sup>20</sup>

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Dubber, *Preventive Justice*, *supra* note 3, at 63.

18. See, e.g., Troy D. Cahill, *Supreme Court's Decision in Hudson v. United States: One Step Up and Two Steps Back for Multiple Punishment Protection Under the Double Jeopardy Clause*, 33 WAKE FOREST L. REV. 439, 464 (1998) (“[A]s government increasingly turns to punitive civil sanctions to meet administrative and regulatory law objectives, multiple punishment protection must be applied in a manner to limit the increased threat of abuses by government.”); Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. 1235, 1238 (1995) (arguing that a defendant “cannot twice be put in jeopardy of punishment for the same actions, regardless of whether the punisher wears a civil or criminal hat”); Lisa Melenzyer, *Double Jeopardy Protection from Civil Sanctions after Hudson v. United States*, 89 J. CRIM. L. & CRIMINOLOGY 1007, 1042 (1998) (“Those who believe that the Double Jeopardy Clause was intended to protect against repeated prosecution by the government believe that the Clause should provide protection from the imposition of civil sanctions as well as criminal sanctions. Any other reading fails to fully protect citizens from abuse of power by the government.”) (footnote omitted).

19. Final Judgment, *Grande Stevens v. Italy*, App. No. 18640/10 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/eng?i=001-141794>.

20. Venterrozzo, *supra* note 9, at 146.

It is no less difficult to sustain the criminal paradigm of administrative sanctioning. Alan Brudner argues that none of the criteria for distinguishing between real crime and regulatory offenses succeeds in keeping the categories distinct.<sup>21</sup> Petter Asp contends that the central problem with the criminal approach is its lack of normative limits on preventative measures which characterizes administrative enforcement:

The boundary of the deterrent threat, the end of the rehabilitation efforts is no more than the achievement of the result, [that is] the realization of the preventive purpose; the limits of prevention are empirical and are not determined by normative parameters. Unlike a criminal law response thought of as retaliation—which has its own built-in limits, since a response has to be adjusted to the thing which it is an answer to—prevention has no antenna for excess.<sup>22</sup>

And indeed, a significant amount of scholarly work has criticized the “grey line” between these two types of criminal law.<sup>23</sup>

The fourth approach is the only model that gives administrative sanctioning its own unique normative framework. But it fails by attempting to create an unnatural hybrid between the civil and criminal frameworks. For example, Mann suggested that the decision as to whether to impose a sanction should be determined by

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21. BRUDNER, *supra* note 12, at 171–72.

22. Petter Asp, *Preventionism and Criminalization of Nonconsummate Offences*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 23, 29 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (roughly translating Winfried Hessemer, *Strafrecht, Prävention, Vergeltung*, 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 266, 270 (2006)); *see also* Frederick Schauer, *Ubiquity of Prevention*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 10 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013).

23. For discussions of the ambiguous boundaries of criminal law, see ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 79–81 (Hart Publ'g 2004) (1996) (suggesting that the identification of criminal law with regulation is problematic, in part due to the fact that most regulatory offenses do not require *mens rea*); Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 502 (2004) (“[T]he question is whether the conduct engaged in was more or less acceptable behavior, at least in the realm in which it was performed, and therefore, should not have been subject to criminal sanctions in the first place.”) (footnote omitted); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425 (1963) (noting the difficulty of distinguishing some white-collar crimes from acceptable aggressive business behavior); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 959 (2003) (“Compared to other forms of criminal activity, white collar crime is famously written in shades of gray.”); Marilyn E. Walsh & Donna D. Schram, *The Victim of White-Collar Crime: Accuser or Accused?*, in WHITE-COLLAR CRIME: THEORY AND RESEARCH 32, 36 (Gilbert Geis & Ezra Stotland eds., 1980) (“[M]any frauds and larcenies by trick or false pretenses can be viewed as excesses in what is normally accepted, aggressive salesmanship or shrewd economic behavior.”).

the function of the sanction: “the more severe the sanction, the more the procedure must protect against the sanctioning of the innocent” and “the more it must protect the accused’s dignity and privacy.”<sup>24</sup> Yet as Coffee argues, this solution only further blurs the boundaries between criminal and administrative sanctioning. Coffee maintains that Mann’s proposition creates only procedural limitations, rather than substantive limitations. While Mann “would encourage less frequent resort to the criminal sanctioning by offering public enforcers the alternative of broadly overlapping [administrative] penalties, this strategy does not ‘shrink’ the scope of the criminal law, but only the frequency of its actual use.”<sup>25</sup>

What, then, is administrative sanctioning? If it is not a type of law, then there are no internal limitations on its application. If it is law, it is not clear which body of law—criminal, civil, or a hybrid of the two—sets the normative limits on its application and if any of them is even adequate for this purpose.

This is not just a theoretical question. The lack of clear normative boundaries on administrative sanctioning also impacts its practical application. The growing debate on the boundaries and distinctions between the different types of punitive enforcement forums in financial regulation exemplifies this problem. In that field, the use of criminal sanctions is conventionally viewed as both unjust and inefficient.<sup>26</sup> The government, therefore, uses both administrative and civil forums as alternative avenues for addressing criminal violations of securities laws.<sup>27</sup> But critics have recently suggested that there is a fundamental difficulty in distinguishing between

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24. Mann, *supra* note 2, at 1870.

25. John C. Coffee Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1877 (1991).

26. See Matthew Scott Morris, *Securities Enforcement Remedies and Penny Stock Reform Act of 1990: By Keeping up with the Joneses, the SEC’s Enforcement Arsenal Is Modernized*, 7 ADMIN. L.J. AM. U. 151, 153–54 (1993) (arguing that Congress viewed criminal sanctions as an inappropriate remedy for specific violations of the federal securities law, which often prevented the government from seeking a remedy commensurate with the alleged violative conduct); see also Ralph C. Ferrara, Thomas A. Ferrigno & David S. Darland, *Hardball—The SEC’s New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33, 33 (1991). Morris argues that Congress viewed criminal sanctions as an inefficient remedy and therefore not providing a sufficient level of deterrence. Morris, *supra*, at 153–54. Congress determined that “the risk of detection had decreased and the potential for gain had increased.” Ferrara, Ferrigno & Darland, *supra*, at 33–35.

27. See Morris, *supra* note 26, at 153–54. Morris argues that the alternative punitive forums were meant to address both over-criminalization and under-enforcement: “[The 1990] Passage of the Remedies Act embodied congressional desire to rectify two perceived deficiencies in the SEC’s enforcement program: lack of deterrence and insufficient flexibility to tailor appropriate remedies to specific violations of the federal securities laws.” *Id.* (footnotes omitted); see also Ferrara, Ferrigno & Darland, *supra* note , at 33; Mills, McDermott, Porter & Lee, *supra* note 10, at 324–25.

these forums. For example, Jed Rakoff, a U.S. district judge, has sharply criticized the ambiguity that led to the failure to criminally prosecute Wall Street executives for their role in the most recent financial crisis and to instead settle for administrative punitive measures.<sup>28</sup> Other critics have emphasized the concerns this ambiguity raises regarding justice,<sup>29</sup> legality,<sup>30</sup> good faith,<sup>31</sup> fairness, accountability,<sup>32</sup> and the balance of power between the branches of government.<sup>33</sup> In addition, this lack of legal clarity has also led to numerous constitutional challenges against the administrative forum. In the past few years, the constitutionality of the SEC's administrative proceedings has been contested regularly<sup>34</sup> on

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28. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/>. Judge Rakoff wrote this article in the aftermath of the *Citigroup* and *Bank of America* cases. SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y.2011), *vacated and remanded*, 752 F.3d 285, 289 (2d Cir. 2014); SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507 (S.D.N.Y. 2009). For further criticism, see Pub. Inv'rs Arbitration Bar Ass'n v. SEC, 771 F.3d 1 (D.C. Cir. 2014).

29. See Ann Lipton, *What Hath Judge Rakoff Wrought?*, BUS. L. PROF. BLOG (Nov. 15, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/11/what-hath-judge-rakoff-wrought.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=feed:TMtypepad/rMru+%28Business+Law+Prof+Blog%29](http://lawprofessors.typepad.com/business_law/2014/11/what-hath-judge-rakoff-wrought.html?utm_source=feedburner&utm_medium=email&utm_campaign=feed:TMtypepad/rMru+%28Business+Law+Prof+Blog%29). Lipton argues that "the SEC (and federal prosecutors) prefer easy wins in insider trading cases to aggressive policing of large financial institutions." *Id.*

30. See William Shotzbarger, *Business and Friendship Don't Mix: The Government's Expansion of Insider Trading Liability Under SEC Rule 10b5-2*, 65 SYRACUSE L. REV. 579, 599 (2014) ("There are many policy concerns surrounding the SEC's expansive ability to enforce its rules through litigation. . . . These fundamental concerns [are] issues of legality, lack of notice, and retroactivity . . .").

31. See LARRY DOYLE, IN BED WITH WALL STREET: THE CONSPIRACY CRIPPLING OUR GLOBAL ECONOMY 181 (2014) (Doyle links the government's failure to prosecute individual executives of leading financial institutions for actions that precipitated the financial crisis, to an "additional lubricant that greased the wheels"). See generally *id.* at 167–82.

32. For the fairness and accountability critiques, see CTR. FOR CAPITAL MKTS. COMPETITIVENESS, U.S. CHAMBER OF COMMERCE EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES (2015), [http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882\\_SEC\\_Reform\\_FIN1.pdf](http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf); Peter J. Henning, *New Criticism Over the SEC's Use of In-House Judges*, N.Y. TIMES: DEALBOOK (July 20, 2015), <http://www.nytimes.com/2015/07/21/business/dealbook/new-criticism-over-the-secs-use-of-in-house-judges.html>; Peter J. Henning, *SEC Seeks More Power, but Does It Need It?*, N.Y. TIMES: DEALBOOK (Dec. 5, 2011, 4:05 PM), <http://dealbook.nytimes.com/2011/12/05/s-e-c-seeks-more-power-but-does-it-need-it>; Peter J. Henning, *The SEC's Use of the "Rocket Docket" Is Challenged*, N.Y. TIMES: DEALBOOK (Aug. 25, 2014, 11:48 AM), <http://dealbook.nytimes.com/2014/08/25/the-s-e-c-s-use-of-the-rocket-docket-is-challenged>.

33. See Dan M. Berkovitz, *The Resurrection of CFTC Administrative Enforcement Proceedings: Efficient Justice or a Biased Forum?*, FUTURES & DERIVATIVES L. REP., Mar. 2015, at 10, [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/the-resurrection-of-cfte-administrative-enforcement-proceedings.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/the-resurrection-of-cfte-administrative-enforcement-proceedings.pdf).

34. For further discussion, see Thomas Glassman, *Ice Skating Up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. BUS. & SEC. L. 47 (2015).

grounds of violating due process rights,<sup>35</sup> equal protection,<sup>36</sup> jury trial rights,<sup>37</sup> separation of powers,<sup>38</sup> and the non-delegation doctrine,<sup>39</sup> amongst other things.

The lack of a normative framework that shapes coherent institutions, procedures, and principles in administrative sanctioning are the common ground of this criticism. Thus, the crucial questions Mann raised some twenty-five years ago remain relevant: when should a regulator prefer criminal sanctions over administrative sanctions? What procedural protections should apply if a process is labeled civil but the sanctions are, in fact, criminal in type? And can

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35. *Chau v. SEC*, 72 F. Supp. 3d 417, 420, 437 (S.D.N.Y. 2014). In this case, the defendants argued that the SEC had violated due process by depriving them of discovery and the opportunity for a jury trial to decide the case, something that was afforded to others accused of the same violations. *Id.* at 426–27. Judge Lewis Kaplan of the Southern District of New York refused to stop the administrative proceeding against Chau and Harding Advisory. *Id.* at 437; see Thomas K. Potter, *A Renewed Fight Over SEC's Admin Forum Constitutionality*, LAW360 (Oct. 9, 2014, 10:30 AM), <http://www.law360.com/articles/585756/a-renewed-fight-over-sec-admin-forum-constitutionality>; see also *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 34 (D.D.C. 2014), *aff'd*, 803 F.3d 9 (D.C. Cir. 2015). Jarkesy accused the SEC of prejudging the matter by issuing findings against other defendants that also implicated him, claiming that he could not receive a fair hearing before the Agency. *Id.* at 35. The District Court for the District of Columbia rejected his request to stop the case because it found that it did not have jurisdiction over his complaint. *Id.* at 40.

36. *Gupta v. SEC*, 796 F. Supp. 2d 503, 506–07 (S.D.N.Y. 2011). Gupta's complaint alleged that the SEC's unjustified decision to deprive him, alone, of the opportunity to contest the allegations in federal court singled him out for uniquely unfavorable treatment in violation of the Equal Protection Clause. Although the court held that his complaint was adequate for exceptional judicial review, the parties subsequently settled, with the SEC dropping its administrative claims and Gupta dropping his constitutional claims. Potter, *supra* note 35.

37. *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016). Hill argued that since the matter was brought as an administrative proceeding, he was denied the opportunity to request a jury trial, thereby violating his Seventh Amendment rights. The District Court for the Northern District of Georgia rejected this argument.

38. *Whitman v. United States*, 135 S. Ct. 352 (2014). Justice Scalia challenged the SEC, stating that “[w]ith deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain.” *Id.* at 353 (Scalia, J., concurring in the denial of certiorari); see also *Hill*, 114 F. Supp. 3d at 1312 (N.D. Ga. 2015) (rejecting the argument that the Dodd-Frank Act was unconstitutional because it “delegates [decision-making] authority to the [SEC] to bring an administrative proceeding for civil penalties against unregulated individuals”).

39. *Hill*, 114 F. Supp. 3d at 1304–05. Hill argued that administrative proceedings violate Article II of the Constitution because ALJs are protected by two layers of tenure protection. *Id.* Moreover, he claimed, Congress' delegation of authority to the SEC to pursue cases before ALJs violates the Article I delegation doctrine. *Id.* On June 8, 2015, a federal district judge issued a preliminary injunction, halting the administrative proceeding because it found that the ALJ's appointment is likely unconstitutional and in violation of the Appointments Clause. *Id.* at 1316–19. The SEC appealed to the Eleventh Circuit. *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016) see also *Duka v. SEC*, No. 15-CV-3572015 WL 1943245, at \*1 (S.D.N.Y. Apr. 15, 2015).

the state justifiably conduct parallel proceedings for punitive sanctions against the same person or entity for the same conduct.<sup>40</sup>

Considering this background, this Article will propose an autonomous and unique normative paradigm for administrative sanctioning, which sets the boundaries between the different punitive enforcement frameworks. This Article begins by presenting a paradigm of criminal sanctioning construed as core offenses and then proposes a paradigm of administrative sanctioning based on periphery offenses. To construct a framework for administrative law, the Article takes a legal formalist approach and assumes an immanent, normative rationale to the law in general and to criminal and administrative sanctioning in particular.<sup>41</sup> Understanding the immanent, normative rationality of these two bodies of law will clarify the borderline between them.

This proposition may seem radical to those who reject outright the conception of administrative sanctioning as law or, alternatively, those who assert that it must be seen as law through the lens of a contemporary functional approach. They may, therefore, regard a formalist endeavor to identify administrative sanctioning as an autonomous legal body as unorthodox. In addition, there are acute implications to this proposal. It challenges practices that are today taken for granted, such as the state's authority to impose civil monetary penalties and to conduct parallel proceedings for the purpose of deterrence.

Yet as I suggested elsewhere,<sup>42</sup> the ambiguity of the forum selection process does not stem from a lack of clear policy considerations but rather from the functional legal theory behind them, which has created systemic ambiguity in punitive forum selection. As a result of this ambiguity, not only can the regulated entity not know in advance whether its conduct will be deemed criminal or administrative in nature, but the regulator itself cannot provide coherent justification for its forum selection decision.<sup>43</sup> Furthermore, a clear, coherent paradigm can be constructed through legal formalism that sets the necessary internal limits on administrative enforcement. This paradigm will elucidate certain positive practices that are common to administrative enforcement, as well as explain the general unease with certain positive practices as due to their inconsistency with the paradigm. This Article's contribution is,

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40. See Mann, *supra* note 2, at 1802.

41. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950–57 (1988).

42. Eithan Y. Kidron, *Systemic Forum Selection Ambiguity in Financial Regulation Enforcement*, 53 AM. CRIM. L. REV. 693 (2016).

43. *Id.* at 694–95.

therefore, twofold. On the theoretical level, the Article presents a comprehensive framework for understanding administrative sanctioning. On the practical level, the Article applies this approach to address some of the difficulties administrative enforcement raises.

The Article proceeds as follows. Part I presents the criminal offense as reflecting the denial of the public right. Under this approach, the rationale underlying criminal sanctioning is corrective justice. That is to say, equality is restored in the correlative relations between the offender and the public right, and this correction is legal and its viewpoint ex-post. Part II argues that an administrative violation, in contrast to a criminal offense, represents the creation of an excessive risk to the public right. Administrative sanctioning is also grounded on the rationale of corrective justice. Here too the correction is legal, but in contrast to criminal law, its perspective is ex-ante since it constitutes a prevention of excessive risk created by the violator. Lastly, Part III discusses the implications of the novel, normative paradigm the Article offers for administrative sanctioning. It considers the conclusions that can be drawn from the Article's discussion regarding the choice between the criminal and administrative forums and the ability to maneuver between them. Additionally, it considers the theoretical challenge that monetary sanctions pose to the preventative justice approach in terms of their suitability to criminal and administrative sanctioning.

## I. CRIMINAL SANCTIONING

First and foremost, for the purposes of this Article, criminal sanctioning must be understood from the perspective of legal formalism. Legal formalism went underground during the second half of the twentieth century and only recently reemerged. Formalism is commonly held to maintain a separation between law and politics. This depicts formalism as, at best, a pathetic attempt to evade social responsibility and, at worst, a brutal camouflaging of the reality of power relations.

Ernest Weinrib, one of the most eminent contemporary legal formalists, has argued that, to a large extent, this view stems from a fundamental misunderstanding of legal formalism.<sup>44</sup> Weinrib contests current functional approaches, which understand law through its purpose and focus on the goals it can attain. He argues that,

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44. Weinrib, *Legal Formalism*, *supra* note 41, at 950–53.

despite its popularity, this purposive understanding of law is a mistake because law should be understood inherently and not as the legal embodiment of external goals. Weinrib contends that legal formalism enables an understanding of law through law itself and that it accommodates the possibility of an immanent, normative rationale to the law.<sup>45</sup>

Accordingly, per Weinrib, legal formalism has three foundational principles. First, law has a unique rationale that is distinct from any political justification. Second, this rationale has normative power. Third, it is possible to understand and develop law from the inside out. The rationality, normativity, and immanency that characterize the formalist approach to law are interconnected.<sup>46</sup>

The internal perspective of legal formalism looks at the manifestation of these three characteristics in criminal law. In line with this approach, then, this Part will examine the relationship between criminal law and the Kantian concept of right, the form justice takes in criminal sanctioning, and the unique contents of criminal law.

### A. Public Rights and Criminal Sanctioning

The normative power of the different forms of justice stems from the fact that they are based on the Kantian concept of right. This concept constructs the intelligibility of legal relationships on the notion of free action as required by the categorical imperative of reason. According to Kant, ethical human beings must interact with one another in a manner that is consistent with their equal status as human beings: their actions, as actions of free beings, must facilitate the freedom of all others.<sup>47</sup>

To understand this connection between criminal sanctioning and the Kantian concept of right, let us return to the distinction between core and periphery offenses.<sup>48</sup> Formalist tradition understands criminal law as constituted by core offenses.<sup>49</sup> According to this tradition, the core of criminal law deals with the protection of

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45. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1–8, 17–18 (1995); Weinrib, *Legal Formalism*, *supra* note , at 950–57.

46. Weinrib, *Legal Formalism*, *supra* note 41, at 950–57.

47. *See id.* at 995–99, 997 n.100 (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 24 (John Ladd trans., 1st ed. 1965) (1797)).

48. *See* Stuntz, *supra* note 12, at 512–15; *see also* Husak, *supra* note 12, at 756 (arguing that Fletcher “was the first to suggest that the criminal law contains a core. Unfortunately, he does not explicate this claim in detail, but allows it to remain intuitive”).

49. *See, e.g.*, BRUDNER, *supra* note 12, at 169–73 (calling core offenses “true crimes” as opposed to “regulatory offences” or “welfare offences”).

the agent's rights (to life, physical integrity, property, and the legal mechanisms that uphold and implement these rights).<sup>50</sup> As opposed to private law, where a private right is harmed, in criminal law it is the public right or, put differently, the principle of right itself that is violated.<sup>51</sup> The basic idea under this approach is that private rights can only be exercised if they are publicly defended;<sup>52</sup> they are meaningless in a world without public institutions that facilitate them or, in Kant's terms, in the "state of nature."<sup>53</sup> Therefore, all free action is subject to the condition of what Kant called "public right," whereby public institutions pass laws that protect the rights of all<sup>54</sup> The state, as the legal representative of the public right, has an interest of its own: that its laws be upheld, separate and distinct from the interest of a particular private party. Whereas every individual has an interest in preventing or correcting a violation of her rights, the state has an interest in preventing any deviation from the state of public right to the state of nature. Criminal sanctioning, therefore, is a means of responding to violations against the state as the formal representative of the public right.<sup>55</sup> In other words, criminal law does not proscribe with infringements of the private rights of an individual but, rather, with infringements against the legal system that facilitates and protects the individual's rights.<sup>56</sup> When the state punishes an offender, it is functioning as the defender of the public order. To illustrate, an act of assault can be construed differently on two parallel levels: in private law, it constitutes a violation of the *private* right to the bodily integrity of *an individual*; in criminal law, the same act is a violation of the *public* right to the bodily integrity of *all individuals*.

There are two essential conditions to an infringement of the public right. The first condition is that the perpetrator denied the

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50. See BRUDNER, *supra* note 12, at 28–37. "The formal agency model of penal justice is . . . organized around the familiar liberal idea: that the fundamental end of coercive authority is to protect the agent's liberty to pursue ends of its choosing insofar as its liberty is compatible with an equal liberty of others." *Id.* at 35.

51. See BRUDNER, *supra* note 12, at 31–33, 45–48.

52. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 145–47, 146 nn.1–3 (2009) (citing IMMANUEL KANT, *LECTURES ON ETHICS* 338 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., 1997)).

53. For elaboration on Kant's state of nature, see RIPSTEIN, *FORCE AND FREEDOM supra* note 52, at 145–147.

54. See ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* 172–74, 173 n.58 (2012) (citing RIPSTEIN, *FORCE AND FREEDOM, supra* note , at 145).

55. See WEINRIB, *CORRECTIVE JUSTICE, supra* note 54, at 172–74.

56. See BRUDNER, *supra* note 12, at 45–48. Brudner relies on Hegel's *Philosophy of Right* to argue that "the point of punishing is to realize everyone's right to act for any material end against an intentional interloper's denial of right." *Id.* at 46.

public right (the law) willfully.<sup>57</sup> The identification of an act as an offense indicates that the offender willingly removed himself from the requirements of the public right. The state has no interest in punishing an individual if his act was involuntary.<sup>58</sup> In other words, criminal intent is required, along with awareness of the act's possible infringement of the public right. A denial of the public right occurs in any one of the following circumstances: when the perpetrator interfered with the rights of another person, with the aim of demonstrating the nonexistence of rights; when the perpetrator believes that the victim has no rights or that he or she belongs to a group whose members have no rights; when the perpetrator consciously risks infringing the rights of the victim; or when the perpetrator commits an act that does not amount to a violation of the victim's right but does express the intent to violate that right.<sup>59</sup>

The second condition of an infringement of the public right is that the offending act must be explicit.<sup>60</sup> The desire to deny the public right (the law) must be explicitly evident in the act, which must manifest the actor's criminal purpose to violate the order of community life: "[n]eutral third-parties would be able to recognize the activity as dangerous and harmful without knowing the actor's intention."<sup>61</sup> The criminal offense is, therefore, a willful and explicit denial of the public right.<sup>62</sup>

### B. Criminal Sanctioning as Corrective Justice

Law is grounded on two different and discrete systems of logic. Aristotle was the first to describe these two systems in his discussion of the two forms of justice.<sup>63</sup> The first form he identified is corrective justice, which relates to the correlation between the wrongful

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57. Husak, *supra* note 12, at 757 (attributing this argument to Fletcher). Husak argues that "crimes in the core of the criminal law tend to conform to one of three distinct patterns of liability." *Id.* One of those patterns is "labeled subjective criminality. Intentions to violate a protected interest are the essence of these crimes." *Id.*

58. See WEINRIB, CORRECTIVE JUSTICE, *supra* note 54, at 172-74.

59. See BRUDNER, *supra* note 12, at 38-45.

60. Husak, *supra* note 12, at 757-58 (attributing this argument to Fletcher); see *supra* note 57.

61. *Id.*

62. See *id.* Contrary to my argument, Husak says that Fletcher set a third condition, which is *harmful consequences*. *Id.* at 757. "Liability is based on the objective attribution to a responsible person of a harmful event that is conceptually independent of human action or state of mind." *Id.* Husak argues that the condition of harmful consequences has generated considerable controversy. *Id.* at 758.

63. See Weinrib, *Legal Formalism*, *supra* note 41, at 977 & n.57 (citing ARISTOTLE, NICOMACHEAN ETHICS 115-23 (Martin Ostwald trans., 1st ed. 1962)).

act and the suffering inflicted through that act.<sup>64</sup> This is the structure of the bilateral relations between the doer and the sufferer of a specific damage, like tortious or contractual damage. Corrective justice is manifested in law in the monetary amount that a particular defendant must transfer to a particular plaintiff. Therefore, corrective justice is expressed in terms of quantity.<sup>65</sup> The second form of justice is distributive justice.<sup>66</sup> Here, the parties are not connected as doer and sufferer of a particular damage but as human beings who are subject to mutual benefits or burdens. In this relationship, the task of the law is to distribute the benefits or burdens according to specific criteria. The interaction between the two sides is defined, not by what one did to the other, but in terms of the reciprocal nature of the benefits or burdens and the entitlement or obligation that derives from the criteria that allocate the benefits or burdens. In other words, distributive justice is expressed in terms of proportion.<sup>67</sup> The law thus encompasses two forms of justice, each with its own system of logic. Corrective justice is founded on the logic of the relationship between doer and sufferer, while distributive justice is founded on the logic of the relationships between people's benefits or burdens.<sup>68</sup>

The normative force of these two forms of justice stems from Kant's concept of right, which governs the relationship between free beings.<sup>69</sup> Corrective justice assumes that parties bear a mutual obligation to not interfere improperly with the rights of others. When wrongful interference occurs, corrective justice ignores variables such as the wealth, power, and talents of the parties to the interaction.<sup>70</sup> The correction produced by corrective justice is the reinstatement of the initial state of equality between the parties as free beings. The monetary amount transferred from the defendant to the plaintiff represents the extent of the violation of the initial equality.<sup>71</sup> Distributive justice is also grounded on the Kantian idea of right. It mediates the relations between human beings through an external goal, which is decided upon by the political authority,

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64. See *id.* at 977–79.

65. See *id.*

66. See *id.* at 979.

67. See *id.*

68. See *id.* at 1012 (“These two forms exhibit differing structures and are not reducible one to the other. . . . Justifications that blend the components of these two different forms are necessarily incoherent.”).

69. See WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 45, at 18–21; Weinrib, *Legal Formalism*, *supra* note 41, at 995–99, 998 n.102 (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (John Ladd trans., 1st ed. 1965) (1797)).

70. See Weinrib, *Legal Formalism*, *supra* note 41, at 980.

71. See *id.* at 995–99.

and it requires that that political authority respect the rights of human beings by the convergence into the internal structure of division, which justifies all divisions.<sup>72</sup> Corrective justice and distributive justice combine the normative relationships of ethical human beings from a Kantian perspective and express this normativity through their unique structures of quantitative and proportional equality. Hence, the two forms of justice have inherent normative force because they presuppose the Kantian idea of right.<sup>73</sup>

Criminal sanctioning follows the Aristotelian logic of corrective justice. It restores the parties to the offense (the offender and victim) to the initial state of equality in which all individuals have equal rights.<sup>74</sup> In the context of criminal sanctioning, corrective justice is referred to as retributive justice. But there is disagreement between formalistic thinkers regarding the character of retributive justice as corrective justice. Brudner argues that while corrective justice restores parties to the *status quo ante*, retributive justice sets the offender back from the initial state of affairs to demonstrate its validity.<sup>75</sup> In other words, retributive justice is not satisfied with restitution and goes one step further by denying the offender his freedom. Therefore, Brudner continues, “retributive justice is not simply a form of corrective justice. It must be regarded as *sui generis*, so that, pace Aristotle, there are three forms of justice, not two.”<sup>76</sup>

Weinrib, by contrast, asserts that the logic of criminal justice is the logic of corrective justice. Weinrib argues that the logic of criminal law is complex.<sup>77</sup> To him, criminal law is not distributive justice because “the norms on which criminal law insists seem to crystallize conspicuous wrongs rather than to embody the proportionate distributions of benefits and burdens.”<sup>78</sup> Weinrib thus argues that criminal sanctioning falls under the rubric of corrective justice since it presupposes the uniqueness of doing and suffering.<sup>79</sup> In private law, corrective justice means restoring the private parties to the

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72. See *id.*

73. See *id.* at 999, 1012.

74. See BRUDNER, *supra* note 12, at 38–45.

75. See *id.* at 47 n.32.

76. See *id.*

77. Weinrib, *Legal Formalism*, *supra* note 41, at 982 n.73.

78. *Id.*

79. WEINRIB, CORRECTIVE JUSTICE, *supra* note 54, at 172–74; Weinrib, *Legal Formalism*, *supra* note 41, at 982–83 n.73. see also Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 700 (1991) (“I think it is fair to conclude that Aristotle’s elaboration of corrective justice is consistent with, and indeed seems to have the same general contours as, our current notions of just criminal and civil liability.”). For another perspective, see HERBERT MORRIS, ON GUILT AND INNOCENCE 31–59 (1976) (arguing that criminal law disrupts the distribution of benefits and costs by taking unfair advantage of the system based on mutual

*status quo* prior to the breach of the right. The restitution is not factual. The wrongdoer cannot undo the physical damage caused to the victim's body, for example, but rather can only compensate her for the damage she has suffered. Restitution is, therefore, a legal and not a factual reality. Corrective justice, however, restores equality between the two parties by way of compensation.<sup>80</sup> The corrective logic holds in both criminal and private law, but there is a fundamental difference between how the two operate. As explained, the criminal prohibition is not directed at the infringement of another person's private right but of the public right. A criminal offender not only damages the victim but also denies the general principle of rights, i.e., the law. The criminal offender's willful rejection of the rules of the social order constitutes wrongful conduct that causes injury to the dignity and security of each and every member of the state as well as to "the state itself."<sup>81</sup>

The correction of the injury to the law should, therefore, be in direct proportion to the extent of the infringement.<sup>82</sup> Applied in the context of criminal sanctioning, the logic of corrective justice is that equality is restored in the relationship between the offender and the victim. The victim of a criminal act is a member of the state (or the state itself), represented by the prosecutor, who, if successful, obtains a remedy from the defendant through the bipolar adjudicative remedial procedure. Here too, the correction is not factual but legal.<sup>83</sup> Rather than being eye-for-an-eye, retributive punishment is a correlative legal response to the denial of public right. Through proportional punishment, the law that has been violated reaffirms its binding force, and equality is restored.<sup>84</sup>

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restraints). Duff compellingly criticized this position in R.A. DUFF, TRIALS AND PUNISHMENTS 205–17 (1986).

80. See WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 45, 114–44.

81. Weinrib, *Legal Formalism*, *supra* note 41, at 982–83 n.73; see Wright, *supra* note 79, at 639.

82. See Weinrib, *Legal Formalism*, *supra* note 41, at 982–83 n.73; Wright, *supra* note 79, at 639.

83. See Weinrib, *Legal Formalism*, *supra* note 41, at 982–83 n.73; Wright, *supra* note 79, at 639.

84. See, e.g., Shai Lavi, *Citizenship Revocation as Punishment: On the Modern Duties of Citizens and their Criminal Breach*, 61 U. TORONTO L.J. 783, 805, 807 (2011). Lavi suggests that citizenship revocation is the proper retributive measure for certain political crimes:

The citizen who has breached the constitutional bond has violently attempted to undermine the power of the community to self-govern. The proper punishment for such an act would be to deny her the right of membership in the political community. . . . [T]he will of the criminal to be exempted from the rules which apply to all is turned against him. He who wishes to be excluded from the civil or political community is

This may explain the discomfort some courts express with the United States Sentencing Guidelines' emphasis on the loss attributed to the defendant.<sup>85</sup> Some judges have maintained that loss serves different purposes in the civil and criminal contexts.<sup>86</sup> Moreover, some district courts have begun to deviate from this focus on loss in the Guidelines, especially where it results in disproportionate and unreasonable sentences.<sup>87</sup>

The essential logic of corrective justice or, in other words, the logic of retribution, underlies the criminal sanction. The term retribution might be confusing. Contemporary theoretical thought on criminal law tends to hold to a moral version of retributive justice, viewing punishment as justified because it is the suffering that is appropriate—or the appropriate condemnation in Antony Duff's words—for the prohibited behavior.<sup>88</sup> Other moralists, such as Michael Moore, treat the imposition of deserved suffering as intrinsically good and, therefore, requiring no additional justification.<sup>89</sup> Duff, in contrast, regards the punishment of those who deserve it as justified by another good—an internal reward, such as repentance.<sup>90</sup> Either way, moral retributivists believe that the inherent good of punishing the morally guilty justifies the state's use of power to punish.<sup>91</sup> With moral retribution, the penal law advances the moral good of giving offenders what they deserve. The formalistic theory of criminal punishment is termed legal retribution. It is legal in the sense that it justifies state punishment as serving corrective justice and the authority of law, as opposed to moral retributive justice, which focuses on ensuring that the offender receives his

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punished by being excluded from the civil society or the political community, respectively.

*Id.*

85. See Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1036 (2010) (“The Sentencing Guidelines pertaining to white-collar crime are deeply flawed. They recommend ranges that are generally too high, and are too narrowly focused on the loss calculation, an imprecise measure that poorly approximates a defendant’s culpability.”).

86. See *United States v. Berger*, 587 F.3d 1038, 1043 (9th Cir. 2009) (declining to adopt civil methodologies because the policy rationale for civil remedies does not apply in the criminal context and the civil approach is inconsistent with the principles of the guidelines).

87. See Vollrath, *supra* note 85, at 1012; Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 734 (2007); Lana L. Freeman, Note, *Sentences Should Be Reasonable, Not Shocking: A De-emphasis on Loss for Federal Securities Fraud Sentencing*, 2012 U. ILL. L. REV. 969 (2012).

88. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 30 (2001).

89. MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 87–91 (reprint, 2010) (1997).

90. See DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY, *supra* note 88, at 106–36.

91. See BRUDNER, *supra* note 12, at 19–20.

due.<sup>92</sup> With legal retribution and in contrast to moral retribution, the penal code upholds the link between punishment and freedom in the sense of respecting the individual's immunity from being compelled, or his right not to be compelled, to serve the goals of others. With this right-based focus, legal retribution disconnects itself from the moral premise that the sole and sufficient reason for punishing people is that they deserve it.<sup>93</sup>

### C. *Understanding Criminal Sanctioning from the Inside*

The law can be understood from within. This internal viewpoint looks to the form and content of the law. The form is a set of features that constitute a given matter as identical to other matters of the same type and distinguishable from matters of another type. Form, while not autonomous of content, constitutes the totality of features that identify content as predetermined and thereby identify the content as content. Form and content are, therefore, inseparable and interrelated. Form is how we understand certain content, and content is the manifestation of how we understand the particular form.<sup>94</sup>

Legal form relates to the understanding of legal relationships. Legal intelligibility derives from the mutual reciprocity between legal content and legal form: form is the organizing idea embodied in the content of law, and the supreme test of legal content is its suitability to the form of justice it expresses.<sup>95</sup> For example, private law is characterized by the direct link between a particular plaintiff and a particular defendant; the action of the plaintiff as directed against the defendant; the process of judicial adjudication; the judicial decision that reinforces retroactively the rights and obligations of the parties; and the entitlement to relief or compensation for a breach of a right or obligation. These are the contents of private law that enable us to identify and understand it as such.<sup>96</sup>

The identification of a specific legal content is subject to its suitability to one of the forms of justice.<sup>97</sup> Judicial adjudication in private law can be understood as the realization of corrective justice. The legislative ordering of the community can be understood as the realization of distributive justice. These two forms of justice

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92. *See id.* at 38–45.

93. *See id.*

94. *See* Weinrib, *Legal Formalism*, *supra* note 41, at 958, 965–66, 1012.

95. *See id.* at 957–58, 974.

96. *See* WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 45, at 8–14.

97. *See* Weinrib, *Legal Formalism*, *supra* note 41, at 982–85, 1012.

are the most general conceptual patterns, and every fundamental ideal of legal ordering must adapt to one of them for it to have internal coherence.<sup>98</sup> Coherence is, accordingly, a matter of matching the content of the given body of law to one of the forms of justice.<sup>99</sup> Law authoritatively governs the relationships between people, and justice is the intelligibility of this authority. Intelligibility of law, then, is the exposure of the relationship between the contents of law and the forms of justice.<sup>100</sup>

Thus far, I have argued that the normativity of criminal law derives from its protection of the public right; that the criminal offense is constituted in a willful and explicit denial of the public right; and that corrective justice is the underlying logic of criminal law. I proceed to identify the unique, definitive content of criminal law based on five of the features that constitute a matter as criminal law: the definition of the wrong; the purpose of the sanction; the type of sanction; the moving party; and the evidentiary rules. All of these form the unique content of criminal law, which is distinguishable from the unique content of private law.

### 1. The Definition of the Wrong

Criminal law protects against the willful and explicit denial of the public right. The explicitness and willfulness conditions to an infringement are manifested in the content of the criminal law in the requirements of *actus reus* and *mens rea* elements of the criminal offense.

One of the criteria that traditionally distinguished criminal law from private law is the definition of the behavior that generates responsibility.<sup>101</sup> Generally speaking, in private law responsibility arises from objectively explicitly negligent behavior without any need for willfulness. In criminal law, however, responsibility arises from conduct that must be accompanied by a subjective mental state of willfulness.<sup>102</sup> The negligent wrongdoer can breach the equality of corrective justice simply by erring about what this equality entails. But this error does not negate the applicability of the requirements of equality to his actions. A tortious wrong, therefore, is a particular injustice to a particular victim, who can reestablish equality through a compensation claim. As opposed to the tortious

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98. *See id.*

99. *See id.*

100. *See id.*

101. *See Mann, supra note 2, at 1805–06.*

102. *See id.*

wrongdoer, the criminal offender willfully inflicts damage and explicitly attributes to others in general the status of a mere means to serve his own purposes. This is not only an injustice to some specific victim but a general injustice to all people as equal human beings. The mental element of the offense is, therefore, the expression in positive law of the offender's denial of the public right.<sup>103</sup> Accordingly, the mental element of *mens rea* is what distinguishes the conduct governed by criminal law from that regulated by private law.<sup>104</sup>

## 2. The Purpose of the Sanction

The purpose of the criminal sanction is to restore the public right through legal retribution. The correction must be proportionate to the injury and to the law. The punishment looks backwards at the injury and corrects it accordingly. This is the application of the principle of correlative justice in criminal sanctioning. It is how criminal sanctioning ensures that justice is simultaneously done both to the violated public right and the offender.<sup>105</sup> The purpose of the criminal sanction, then, is the restoration of rights that have been denied by punishing the denier.

Deterrence, however, is also a purpose of punitive correction. Legal formalism does not, in principle, accept deterrence as an objective of punishment. From its perspective, the only relevant question for determining criminal responsibility is whether the offender committed the offense in question. The court looks back at the crime that has already occurred and should be punished for; it does not look forward to crimes that might occur and should be deterred.<sup>106</sup> Yet despite this apparent contradiction in principle, integration of deterrence as a goal of criminal punishment is possible. Weinrib presents just such an option based on Kant's

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103. See WEINRIB, CORRECTIVE JUSTICE, *supra* note 54, at 172–74; Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473, 474–78 (1974) (arguing that the standard of negligence in tort law is an objective one that merely considers whether you have met the specified standard of care (“legal fault”), rather than a subjective one that takes into account your personal ability and efforts to meet the standard of care (“moral fault” or “blame”)); Weinrib, *Legal Formalism*, *supra* note 41, at 982–83 n.73.

104. See Coleman, *supra* note 103, at 474–78 (arguing that criminal sanctions generally are imposed regardless of actual damage and are scaled to the moral culpability of the wrongdoer's conduct).

105. See Weinrib, THE IDEA OF PRIVATE LAW, *supra* note 45, at 114–44.

106. See Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 635–37 (2002).

treatment of the necessity defense.<sup>107</sup> Weinrib argues that deterrence can be integrated into the consideration of the law's effectiveness.<sup>108</sup> If the law has no potential for effectiveness, it is not in fact law but, rather, a theory of rights. One component of effectiveness of the law is deterrence, not in the utilitarian, forward-looking sense of shaping behavior through incentives but in the sense of preserving the validity of the law through deserved retribution. Through criminal punishment, therefore, the law that was violated is effectively restored and its validity affirmed.<sup>109</sup>

### 3. The Type of Sanction

The meaning of the criminal sanction is the correction of the denial of the public right by denying the offender's right (his freedom). Since the late nineteenth century, imprisonment has been the accepted means of denying an offender his freedom in the West.<sup>110</sup> The prison sentence in criminal sanctioning is the accepted equivalent to monetary compensation in private law. The ability of the prison sentence to correct the injury to the public right is similar to the ability of money to correct the damage to the private right. In both cases, the correction is a legal reality, not a physical one. A criminal offense represents the denial of the public right, and criminal punishment represents the correction of the latter through the denial of the offender's right. Retributive justice in the form of imprisonment (or a fine) restores the parties to the offense—the offender and the state—to the *status quo ante*, where all individuals have equal rights. In this way, the law reaffirms its own validity and that of the public right.<sup>111</sup>

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107. *Id.* at 634–38. Weinrib discusses Kant's well-known example of two shipwrecked sailors swimming for a plank that will support only one of them. Sailor A wins the race, but Sailor B, who would otherwise die, takes the plank away from Sailor A, who then drowns. Kant used this example to explain why Sailor B might be excused because in these circumstances, the law has no potential coercive threat over him. *Id.* at 634–35, 634 n.37 (citing IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 28 (Mary Gregor trans., 1991) (1797)); *see also* BRUDNER, *supra* note 12, at 250–51; ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 165–66 (1999).

108. Weinrib, *Deterrence and Corrective Justice*, *supra* note 106, at 640.

109. *See id.* at 634–38.

110. *See* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 14–16 (Alan Sheridan trans., 2d ed. 1995) (1977).

111. *See* BRUDNER, *supra* note 12, at 38–45.

#### 4. The Moving Party

In private law, since the violated right is private, the moving party is private as well. In contrast, in criminal law, the fundamental equality of all is the violated right. The injury is general and in relation to the violated public right. Since the criminal offense is an infringement of the public right, its correction in a criminal trial is borne by the state, which is the official representative of the public right.<sup>112</sup> The state, through the apparatus of public prosecutors, takes the leading role in the judicial proceedings that determine guilt and, if necessary, punishment of the offender. State prosecution undoes the violation of equality by deploying a punitive measure and restores the parties to their former status.<sup>113</sup>

#### 5. Evidentiary Rules

Criminal sanctioning applies the high beyond a reasonable doubt threshold of proof.<sup>114</sup> This standard is not set high because the state functions as the moving party in criminal proceedings, for it can also be the plaintiff in civil proceedings. Nor is the severity of the criminal sanction the reason for the high standard of proof. On the one hand, civil proceedings can also culminate in a severe sanction, while on the other, criminal proceedings can certainly result in a mild sanction such as probation or a fine.<sup>115</sup> It is the need to

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112. Wright, *supra* note 79, at 639.

113. See Weinrib, *Legal Formalism*, *supra* note 41, at 982–83 n.73; WEINRIB, *CORRECTIVE JUSTICE*, *supra* note 54, at 172–74.

114. *In re Winship*, 397 U.S. 358, 364 (1970) (under the Fifth Amendment due process clause, the government must prove each element of a criminal offense beyond a reasonable doubt).

115. See Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L.Q. REV. 225, 234, 236 (2000). Ashworth argues that the functional distinction between criminal law and various fields of civil law, including regulatory enforcement, is blurred. *Id.* at 236. He claims that “in principle there might be instances where, dealing with essentially the same set of facts, a civil court would award substantial damages when a criminal court might impose a relatively light sentence on conviction.” *Id.* at 234. Further on, he suggests that “yet, again, this is not an absolute distinction, since there are many criminal offences (especially strict liability crimes) that carry such low penalties and low stigma as to have no greater social or professional significance than an injunction or award of damages. *Id.* at 236; see also R.M. Brown, *Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation*, 30 OSGOODE HALL L.J. 691, 710–17 (1992); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 99–101 (2008) (also objecting to the assumptions in relation both to the severity attributed to the criminal sanction and to the supposed leniency of the civil sanction, including administrative sanctions). Brown argues that taking into account the probability and severity of punishment, in the enforcement of occupational health and safety legislation in British Columbia and the United States, the average administrative penalty is generally higher than the average criminal fine in Ontario: “Ontario’s advantage in

uncover the subjective truth of a willful denial of the public right that is at the essence of the stringent proof requirement in criminal law.<sup>116</sup> In private law, as noted, the mental element is measured objectively, and there is no need to show willfulness on the part of the wrongdoer. All that is necessary is to be more persuasive than the other party with regard to the objective truth. For this reason, a party will generally prevail if he proves his case by a preponderance of the evidence.<sup>117</sup> It is my contention that criminal responsibility, as opposed to civil responsibility, arises from a subjective, mental element of willfulness on the part of the accused in denying the public right, and significant evidence must be brought before the court to prove this element.

To summarize, a criminal offense represents the denial of the public right. Corrective justice is the rationale of criminal sanctioning, which means that equality is restored in the correlative relations between the offender and the public right. The correction is a legal act, as opposed to a factual or physical one, and the law takes an ex-post perspective of the violation. Criminal punishment eliminates the denial of the public right by denying the right of the offender. Correction of the infringement of the public right is in direct proportion to the infringement itself and is implemented in the framework of the bilateral relationship between the offender and the legal representative of the public right, i.e., the state. The constitutive features of criminal sanctioning are an objective and subjective denial of the public right, the purpose of ex-ante retribution, a sanction in the form of the denial of liberty (e.g., imprisonment or a fine), prosecution by the state, and the high beyond a reasonable doubt standard of proof.

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[criminal] penalty severity is more than offset by the far greater certainty of [administrative] punishment in the United States. Total penalties in the United States—the product of the probability and severity of punishment—are many times higher than in Ontario.” Brown, *supra*, at 710.

116. For a different approach, see Rosen-Zvi & Fisher, *supra* note 115, at 84. Rosen-Zvi & Fisher propose to cut the Gordian knot tying substance to procedure and replace the current bifurcated civil criminal procedural regime with a model that runs along two axes that are more compatible with the actual goals of our justice system: the balance of power between the parties and the severity of the sanction or remedy. *Id.*

117. For a deliberation of the burden of proof in private law, see *Merzon v. Cty. of Suffolk*, 767 F. Supp. 432, 444–45 (E.D.N.Y. 1991); see also James P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 245 (1944).

## II. ADMINISTRATIVE SANCTIONING

Understanding administrative sanctioning and distinguishing it from criminal sanctioning is challenging because there is a lack of deep theoretical inquiry on this body of law in contemporary legal formalist scholarship. Legal formalism traditionally constructs its conception of criminal sanctioning around core offenses. Here, I will show that a similar conception of administrative sanctioning can be based on periphery offenses. Regulatory offenses form a significant proportion of periphery offenses. Historically, regulatory inspectors were not entrusted with the power to sanction, but rather that authority was left in the hands of the courts for constitutional and political reasons.<sup>118</sup> As a consequence, criminal sanctioning was widely used for regulation enforcement.<sup>119</sup> Thus, political rather than legal considerations dictated the placement of regulatory sanctioning in the penal code. A good starting point for understanding the boundary between criminal and administrative sanctioning, then, is the distinction between core offenses and periphery offenses.

Alan Brudner has attempted to construct a model to explain the common law distinction between these two types of offenses and its normative implications.<sup>120</sup> In his view, a core offense proscribes injury to autonomy or to the legal mechanisms designed to protect it. Periphery offenses, in contrast, prevent injury to particular social preferences (such as laws that promote free competition, transport rules, parking regulations, and hunting and fishing rules) or injury to public goods necessary for the realization of autonomy (such as the regulation of the production of food, beverages, and pharmaceuticals, environmental pollution regulations, and safety regulations in transportation, industry, and aircraft).<sup>121</sup> Brudner's distinction, in other words, focuses on the object of the injury: core offenses violate autonomy or legal mechanisms that protect autonomy; periphery offenses risk the expression of that autonomy through particular social preferences or public goods.

Brudner explains that deterrence is the rationale for sanctioning periphery offenses. In his view, regulatory sanctions for periphery

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118. See OGUS, REGULATION, *supra* note 23, at 79–81.

119. See *id.* at 81.

120. BRUDNER, *supra* note 12, at 171–73. Brudner uses the terms “true crime” and “welfare offences” or “regulatory offences.” See, e.g., *id.* 169–73. Because he is referring to the same kinds of things that the commonly-used concepts refer to, I use the latter.

121. *Id.* at 169–73.

offenses are intended to prevent injury through deterrence of excessive risk-taking.<sup>122</sup> Underlying regulatory sanctioning is not the essential logic of retribution but the instrumental logic of means and ends. Hence, retribution is irrelevant to regulatory sanctions; they are defined as efficient or inefficient, rather than retributive or non-retributive.<sup>123</sup> Sanctions from which retribution has been extracted, argues Brudner, cannot be considered criminal.<sup>124</sup> The guiding principle of regulatory sanctions is not subject to rights-based restrictions and is constrained only by the rationale of costs and benefits analysis.<sup>125</sup> Therefore, Brudner continues, if the policy behind a given piece of regulation promotes the general welfare, the coercive measures will be effective if they sustain that policy, on the condition that the costs of the sanctions do not outweigh their benefits.<sup>126</sup> According to Brudner, this means that effectiveness cannot come at the expense of autonomy. He thus holds that it is wrong to infringe on a person's liberty as punishment for a periphery offense.<sup>127</sup>

There are two central problems with Brudner's model. The first is that his definition of periphery offenses limits them to injury to public goods or social preferences, i.e., the object of the injury. But his distinction between the two types of offenses collapses almost immediately. Brudner himself clarifies that certain acts of injury to public goods, if committed with subjective guilt, will constitute criminal offenses. For example, he notes that a willful breach of drug production regulations, which injures public health, could amount to a criminal offense.<sup>128</sup> Given this, Brudner refines his distinction, arguing that the crux of core offenses is willful interference (or willful attempted interference) with autonomy, whereas periphery offenses constitute an imposition of excessive risk of interference with autonomy, regardless of the willfulness of that interference.<sup>129</sup> The main problem with Brudner's formalistic model of periphery offenses is that it is not, in fact, legal formalism. He therefore takes the position that periphery offenses are external to the law rather than internal to it; that they are grounded on efficiency rather than on rights; and that they derive from policy needs rather than legal considerations. Although supposedly presenting a

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122. *Id.* at 176.

123. *Id.* at 176–77.

124. *Id.* at 177.

125. *Id.* at 178.

126. *Id.* at 178–79.

127. *Id.* at 179–84.

128. *Id.* at 172–73.

129. *Id.*

formalism-based model of criminal law,<sup>130</sup> Brudner abandons administrative sanctioning to law and economics. As a result, the jurisprudential coherence of sanctioning law is lost.

At this juncture, it is important to review the traditional formalist conception of periphery offenses through which administrative sanctioning can be understood. As mentioned earlier, the distinction between the two types of offenses in criminal law—core and periphery—corresponds with the common law distinction between *mala in se* and *mala prohibita*. Under this distinction, core offenses are seen as *ex post* in nature, i.e., injury must occur before punishment is imposed; periphery offenses, in contrast, are *ex ante* in nature, i.e., they prevent injury before it occurs.<sup>131</sup>

The common law distinction is consistent with Dubber's rich historical description of the relationship between criminal law and police power, first raised by the ancient Greeks. By Dubber's account, criminal justice is a remedy for violated autonomy, whereas police power is the prevention of injury to the public welfare.<sup>132</sup> Anthony Ogus, who uses economic analysis terms, makes the same fundamental distinction.<sup>133</sup> He compares the effectiveness of criminal enforcement policy, which rests primarily on *ex post* deterrence, to regulatory enforcement policy, which rests mainly on *ex ante* prevention.<sup>134</sup> The administrative state's complex tangle of "public welfare offen[ses]" and "regulatory offen[ses]" statutes expresses its power to prevent injury by regulating—compared to punishing—periphery expenses.<sup>135</sup> This formulation has historical roots. William Novak has succinctly described the use of regulatory power in the United States in the nineteenth century.<sup>136</sup> This power, per Novak, was applied in line with common law tradition.<sup>137</sup> Directed at

130. Although I am not sure that Brudner would agree with this definition.

131. BRUDNER, *supra* note 12, at 170. Brudner presents the common law distinction and its criticism by such thinkers as Jeremy Bentham and Jerome Hall. *See, e.g.*, JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 337–42 (1947); Jeremy Bentham, *Essay on the Influence of Time and Place in Matters of Legislation*, in THE WORKS OF JEREMY BENTHAM 171, 193 (John Bowring ed., 1843).

132. *See* DUBBER, THE POLICE POWER, *supra* note 4, at 104–17; *see also* Ashworth, Zedner & Tomlin, *supra* note 5, at 2–3 (interpreting Dubber as arguing that "the ideal of the Rechtsstaat or 'law state' must be set against the historical exercise of the police power, which, insofar as it is concerned with the maintenance of peace and good order, is largely synonymous with prevention").

133. *See* ANTHONY OGUS, *Criminal Law and Regulation*, in CRIMINAL LAW AND ECONOMICS 90, 90–94 (N. Garoupa ed., 2009).

134. *Id.*

135. BRUDNER, *supra* note 12, at 169.

136. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

137. *Id.* at 11–12.

ensuring public welfare and public order, it was based on two common law legal institutions: public nuisance and overruling necessity.<sup>138</sup> The institution of public nuisance is grounded on the goal of public order and permits the restriction of the liberty of the general public. For example, to prevent fires, the public is prohibited from keeping hazardous substances in their homes and obligated to keep fire extinguishing equipment.<sup>139</sup> The second institution overruling necessity derives from the preference for public welfare over individual rights. It therefore allows, for example, the destruction of private property in the attempt to prevent or stop a fire.<sup>140</sup>

Thus, whereas core offenses were commonly used for *ex post* punishment for injury, periphery offenses were commonly used for *ex ante* prevention of injury.<sup>141</sup> We can draw from this basic distinction the conclusion that has already been reached in relation to core offenses: that injury in both types of criminal offenses is a violation of the public right, as opposed to injury to a private right. But whereas core offenses impose punishment only after a violation of the public right has occurred, periphery offenses impose sanctions to prevent a violation of the public right before it occurs. I would like to develop this understanding from inside the law, while discussing the three fundamental features of law under legal formalism and the relationship among them: rationality, normativity, and immanence. To illustrate the normative discussion, I will present examples from the positive law. It is important to note that I am not claiming that all or most of positive law manifests in the same way but rather that examples can be found in positive law of what I deem normative.

#### A. Public Rights and Administrative Sanctioning

I begin with the relationship between administrative violations and the Kantian concept of rights. As discussed earlier, core offenses manifest as a willful denial of the public right.<sup>142</sup> This denial

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138. See *id.* at 53, 60–62, 71–79.

139. See *id.* at 51–71.

140. See *id.* at 71–79.

141. See Schauer, *supra* note , at 11 (arguing that core offenses deal with retrospective punishment for willful offenses and periphery offenses concern prospective prevention for negligent or strict liability offenses and that in important ways, there is more ex-ante prevention in the ordinary operation of the criminal law than is often acknowledged).

142. See *supra* Part I-A.

of the public right is corrected in punishment, whereby the law confirms its binding force and the public right. In contrast, periphery offenses manifest as the creation of an excessive risk to the public right. This risk to the public right is corrected in prevention. In both cases, the enforcement of the law protects the public right.

Recall that to facilitate the exercise of private rights, it is imperative that they be publicly defended, including by way of legal mechanisms that enable their existence and exercise. Private rights have no meaning in the state of nature. It is therefore essential to protect the status of the public right.<sup>143</sup> The state has a duty to prevent deviations from the state of public right to the state of nature. This duty operates both retrospectively to correct past wrongdoings, and prospectively in anticipation of unacceptable risks. Kant's viewpoint is not fixed solely in the past—i.e., on actions that have already occurred—but also looks to the future.<sup>144</sup> Indeed, the need for a public law in itself reflects the prospectivity of law. Public law was born out fear of injury, fear that a particular action does not respect the freedom of all. It is thus necessary to subject everyone to a public law regime in order to ensure, in advance, the protection of equal freedom.<sup>145</sup>

The state must operate on two axes to protect the public right: one through core offenses, which represent retrospective treatment of injury that has already occurred; and the other through periphery offenses, which represent prospective treatment of injury. Although the injury is yet to occur, it has existing indications of its potential. Take assault, for example, which we have already analyzed on two levels: private law, where it is a violation of the individual victim's private right to bodily integrity, and criminal law, where it is a violation of the public right to the bodily integrity of all individuals. But we can add a third layer to this analysis—the perspective of administrative sanctioning, where assault is indicative of a future risk to the public right. Thus, the authority of a police officer with probable cause to detain or arrest a person he believes has committed assault can be understood as a means of preventing a future flight risk and a risk to the community.<sup>146</sup>

Why does the risk to the public right need to be excessive? As in private law, in the context of administrative sanctioning, the state has an interest in preventing only excessive risks. In the context of

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143. See WEINRIB, CORRECTIVE JUSTICE, *supra* note 54, at 172–74.

144. See WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 45, at 108 & n.66 (citing IMMANUEL KANT, THE METAPHYSICS OF MORALS 121 (Mary Gregor trans., 1991) (1797)).

145. See *id.*

146. See ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 597 (2008).

private law, George Fletcher advocates the common law notion of reciprocity as the appropriate function of the tort sanction.<sup>147</sup> This viewpoint considers only the degree of risk imposed by the parties on each other and the existence of possible excusing conditions. This is in contrast to the notion of reasonableness, “which assigns liability instrumentally on the basis of a utilitarian calculus.”<sup>148</sup> The general principle Fletcher expresses is that a victim in tort:

has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from nonreciprocal risks. Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim’s risk-creating activity.<sup>149</sup>

To illustrate, Fletcher compares the case of a pilot who subjects those directly underneath the airplane’s flight path to nonreciprocal risks of injury with the case of two pilots flying in the same vicinity who subject each other to reciprocal risks of a mid-air collision.<sup>150</sup> The same principle can be applied in the context of risks to the public right. The state has no interest in intervening in regular risks that people mutually impose on one another. This type of risk does not pose a threat to the public right. Conversely, the state does have an interest in intervening and regulating the behavior or activities of individuals that create non-regular excessive risks on others, such as the risk that airplanes impose on the general public.

Financial regulation exemplifies this well. Securities legislation protects the public right to property and the capital market is the legal mechanism that enables the realization of this right to property.<sup>151</sup> Indeed, Congress indicated that the purpose of the Securities Act of 1933:

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147. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537 (1972) (detailing his argument in the abstract).

148. *Id.*

149. *Id.* at 542.

150. *Id.*

151. Regarding the purpose of the Securities legislation to protect the capital markets, see generally Frank B. Cross & Robert A. Prentice, *Economics, Capital Markets, and Securities Law* 27–28 (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. 73, 2006), <http://papers.ssrn.com/abstract=908927>. Prentice & Cross argue:

The basic goal of the 1933 and 1934 securities acts was to preserve and facilitate U.S. capital markets. The key to that goal was to restore investor confidence in the markets. The primary tools for restoring investor confidence were mandatory disclosure and punishment for violations of those provisions, including failure to disclose and fraudulent disclosure.

is to protect the investing public . . . . The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; . . . to restore the confidence of the prospective investor in his ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power.<sup>152</sup>

The SEC similarly declared, in taking this role upon itself, that “[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>153</sup> The SEC intervenes and regulates the behavior or activities of individuals that create non-regular excessive risks on investors and on the market.

My proposed distinction between criminal offenses and administrative violations might need some clarification. Criminal offenses can also relate to the creation of risks. For instance, shooting a gun in a public place puts people’s lives at risk, and if the shooting was willful, it is a criminal offense even if no one was hurt. This is a criminal risk, for the focus is on the willfulness of the act and on the past. Yet the fact that the shooting occurred in a public place gave rise to a potential future risk, even if the shooting was unintentional: there is some indication that the gun-owner was careless or that the gun was malfunctioning. For this reason, the police might detain the gun-owner or confiscate the gun. Here the focus is on the risk and on the future.

Another question that might arise is what differentiates between administrative violations and criminal attempts, assuming that the former does not require the realization of the risk. My response is that, whereas engaging in an explicit act to injure the public right constitutes a criminal attempt, an administrative violation requires

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*Id.* (citations omitted); see also Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 925 (1994) (noting that Congress believed when it passed the 1933 and 1934 acts that it “would benefit the capital allocation process by instilling investor confidence in the banking industry and in the securities markets”); Michael E. Schoeman, *The First Amendment and Restrictions on Advertising of Securities Under the Securities Act of 1933*, 41 BUS. LAW. 377 (1986) (noting that the main goals of the 1933 Act were to restore market efficiency and prevent fraud).

152. S. REP. NO. 73-47, at 1 (1933); see also Prentice & Cross, *supra* note 151, at 27–28.

153. *What We Do*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/about/whatwedo.shtml> [<https://web.archive.org/web/20171203025656/https://www.sec.gov/Article/whatwedo.html>] (last visited Dec. 2, 2017).

only the manifestation of an excessive risk to the public right, without any need for willfulness. To return to the shooting example, this act could be interpreted as an, albeit failed, attempted murder if the shooter demonstrated willfulness to murder. However, if the shooting was unintentional, it constitutes only a threat to the public right and, accordingly, an administrative violation.

Similarly, we may ask what differentiates between an administrative violation and civil wrongdoing, assuming a lack of criminal intent in the case of the former. In fact, some scholars contend that a criminal offense that lacks criminal intent is necessarily a tort.<sup>154</sup> However this is not necessarily true. Certainly, there may be circumstances in which an act can be interpreted as both an administrative violation and a civil wrongdoing, as demonstrated in the assault example above. Moreover, an infringement of a private right can have a public dimension, thereby constituting it as an administrative violation. For example, a contractual right is a private right that can also have a public dimension. This is Blackstone's justification for the application of "penal laws" (an early version of administrative sanctions) in certain circumstances of breach of contract between the individual citizen and the civic polity or the King.<sup>155</sup> It is also the justification for state or judicial intervention in contracts of adhesion,<sup>156</sup> where they might compel a redrafting of the contract *ex-ante* or *ex-post*.<sup>157</sup> However, not every risk to a private right has a public dimension, and not every risk to a public right has a private dimension. For example, there are thin-skull scenarios in which a risk arises to a private right but not to the public right.<sup>158</sup> Say a person working in a tobacco processing plant was forced to leave his job due to bronchial asthma that was allegedly caused by inhaling large amounts of tobacco dust during his work. It is possible that the tobacco company maintained reasonable working conditions and that the amount of dust was not a danger to an ordinary person's health, but the company might still be required to compensate the victim given the thin-skull rule. There may, however, be

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154. See, e.g., BRUDNER, *supra* note 12, at 106 & 106 n.24.

155. 3WILLIAM BLACKSTONE, COMMENTARIES \*159 ("The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires."); see Mann, *supra* note 2, at 1820–21, 1820–21 nn. 83–85 (quoting and discussing BLACKSTONE, *supra*).

156. For elaboration on the concept of contracts of adhesion, see Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 137–38 (2008).

157. See *id.* at 139–42, 142 n.93 (describing *ex-post* judicial interference in contracts of adhesion in cases of lack of real consent to the contractual terms; and also critics the lack of *ex-ante* regulatory intervention in the form of various consumer protection laws).

158. See DAN B. DOBBS, THE LAW OF TORTS 464–65 (2000).

cases in which two private actors decide to mutually put each other at risk. Say, for instance, two men challenge each other to a car race. According to Fletcher, if the one hits the other, the hit will not constitute a tort. But it might nevertheless amount to an excessive risk to the public right justifying state intervention in the form of preventing the race.<sup>159</sup>

### B. *Administrative Sanctioning as Corrective Justice*

Corrective justice is the rationale of the enforcement of both periphery and core offenses.<sup>160</sup> In criminal law, corrective justice means restoring equality in the relationship between the offender and the law, and the restitution is effected through retribution. Through proportional punishment, the violated law reaffirms its binding force and restores equality. The same logic applies to administrative sanctioning.

As noted, corrective justice relates to the structure of the bilateral relations between the doer and the sufferer of a specific damage. Corrective justice is the rationale on which administrative sanctioning is grounded, for it presupposes the uniqueness of action and suffering and applies the principle of correlativity. However, in the administrative sanctioning context, it is not damage that needs correction but excessive risk. The norm that administrative sanctioning advances relates to the manifestation of an excessive risk to the public right, not the allocation of benefits and burdens. It is structured on the bilateral relations between the violator and the public right. Administrative sanctioning thus falls under the category of corrective justice since it is premised on the uniqueness of the bilateral relations that characterize this type of justice.<sup>161</sup>

Corrective justice in administrative sanctioning means the restoration of the initial state of affairs before to the manifestation of the excessive risk to public right. Restitution is through prevention: corrective justice prevents the excessive risk to the public right by limiting the rights of the violator and thereby restores equality.<sup>162</sup>

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159. See Fletcher, *Fairness and Utility in Tort Theory*, *supra* note 147, at 542–43.

160. See Wright, *supra* note 79, at 640–41 (“Many . . . areas of public law, including much of the legislative and administrative regulation of safety and pollution, are best understood as prophylactic corrective justice . . .”).

161. See *id.*

162. For the relationship between preventative power and risk, see Carol S. Steiker, *Proportionality as a Limit on Preventive Justice*, in *PREVENTION AND THE LIMITS OF THE CRIMINAL LAW* 194, 196 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (“[T]he proportionality constraint on non-penal preventive policies, by definition, cannot be geared toward the retributive metric of desert, but rather toward the metric of dangerousness. Thus, instead of

The New York Secure Ammunition and Firearms Enforcement Act of 2013 (“SAFE Act”), a comprehensive gun control law, illustrates well how this operates. Among other things, the “Safe Act” requires that medical care professionals report to the state the names of patients whom they believe likely to engage in conduct that would result in serious harm to self or others or, in other words, manifest an excessive risk to the public rights of life and bodily integrity. In these cases, the state has to intervene and to correct the excessive risk. Therefore, those who are reported are disqualified from owning or possessing a firearm for five years. If they have a firearms license, it will be revoked. If they have a firearm, it must be relinquished.<sup>163</sup>

Hence, the “Safe Act” restores the initial state of affairs prior to the manifestation of the excessive risk to public right of life and bodily integrity. Restitution is through prevention: corrective justice prevents the excessive risk to the public right by limiting the rights of the gun owner and thereby restores equality. Through administrative sanctioning, then, the state corrects the risk and protects the public right to life and bodily integrity.

The correction of the risk must correlate with the extent of the risk by applying the principle of proportionality.<sup>164</sup> In other words, the correction should not exceed what is required to eliminate the specific risk. For example, an act of assault represents a high risk to the public right to bodily integrity and, therefore, entails correction in the form of freedom limitation.<sup>165</sup> In contrast, although a driver’s failure to give the right of way to pedestrians at a crosswalk indicates a risk to the public right to bodily integrity, this risk can be prevented by temporarily revoking his driver’s license, without any need for further restrictions on his freedom.

The prevention of a future risk is consistent with corrective justice although the remedy against future violations applies when there is still no violation to correct. Weinrib’s analysis of the structure of corrective justice addresses the unique form in which

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focusing on degrees of offence severity and offender culpability, the proportionality inquiry for preventive purposes must focus on the degree of harm sought to be averted and the likelihood that the harm would occur in the absence of prevention.”) (footnote omitted).

163. James Jacobs & Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York’s SAFE Act*, 14 GEO. J. L. & PUB. POL’Y 77, 78–79 (2016).

164. See Steiker, *supra* note 162, at 196. Carol Steiker argues that “those who have offered various justificatory theories for nonpenal prevention generally agree, despite their differences, that proportionality should be considered a key constraining feature.” *Id.* at 195. For a list of references, see *id.* at 195 n.3.

165. This, as noted, is what justifies the authority of the police to detain and arrest a person reasonably suspected of committing assault. See CHEMERINSKY & LEVENSON, *supra* note 146, at 597.

remedy is the logical response to a violation.<sup>166</sup> Corrective justice relates to a narrow aspect of the wrongful act that connects the doer and the sufferer. Every remedy that responds to responsibility for a wrongful act by reflecting this structure is consistent with corrective justice.<sup>167</sup> Hence, in terms of corrective justice, the focus is on the conceptual structure of the relationship between the offender and the public right. The analysis does not require that the violation was in fact carried out or that the remedy was awarded.<sup>168</sup> His reasoning applies no less to an injunction that prevents damage to a private right in civil law than it does to an injunction that prevents injury to the public right in administrative sanctioning. Under the logic of corrective justice, administrative sanctioning is constructed on the correlative relationship between the public right and the violator's duty to respect the public right. The preventive remedy creates this structure by justifying the state's right to take action against the violation of the violator's correlating duty. What matters is not the temporal context of the violation and prevention but the structure of the violation and the remedy that follows.<sup>169</sup>

To sum up, criminal sanctioning uses retribution to correct willful infringement to the public right. Administrative sanctioning, in contrast, uses prevention to correct an excessive risk to the public right. Like criminal sanctioning, it is grounded on a corrective justice rationale: The correction of the risk (prevention) is in direct proportion to the extent of the risk and is carried out in the framework of the bilateral relationship between the risk and the legal representative of the public right, i.e., the state.

### *C. Understanding Administrative Sanctioning from the Inside*

This last section presents the unique content of administrative sanctioning that constitutes it as such. I will briefly describe five characteristics that identify a matter as administrative sanctioning: the definition of the wrong; the purpose of the sanction; the type of sanction; the moving party; and the evidentiary rules. Together, these comprise the unique content of administrative sanctioning, distinguishable from the unique content of criminal sanctioning.

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166. See WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 45, at 144 n.41.

167. *See id.*

168. *See id.* at 56.

169. See WEINRIB, *CORRECTIVE JUSTICE*, *supra* note 54, at 172–74.

## 1. The Definition of the Wrong

One feature that differentiates administrative violations from criminal offenses is the definition of the behavior that gives rise to responsibility. With a criminal offense, responsibility arises from behavior that is accompanied by a subjective mental state of, among others, willfulness. With an administrative violation, in contrast, responsibility arises from a risk that is measured objectively, without any need for a subjective mental state on the part of the violator.

Were a mental element of willfulness to exist in the act of creating the risk, this act would constitute a criminal offense. As explained, criminal offenses relate to the infringement of the public right and are intended to protect the public right. The infringement of the public right is *subjective*, as the offender acts with criminal intent when she denies the public right. Administrative violations, on the other hand, relate to acts that subject the public right to an *objective* risk. The offender does not subjectively deny the public right, but rather objectively puts it at risk. Nevertheless, this behavior must still be prevented. For example, preventing dangerous, mentally-ill individuals from obtaining guns is completely unrelated to a subjective mental state of willfulness, as some of the mentally ill are understood to be insane and, therefore, incapable of such a state of mind.<sup>170</sup> However, some of the mentally ill nonetheless create an objective risk to the public right that must be prevented.

## 2. The Purpose of the Sanction

From the perspective of corrective justice, the purpose of administrative sanctions is to correct an excessive risk to the public right. The correction must be directly proportion to the extent of the risk. This is the manifestation of the principle of correlativity in administrative sanctioning, maintaining a link between risk and prevention.

When deciding on an administrative sanction for creating a risk, both the degree of the risk and likelihood of its materialization are important considerations, given the requirement for proportionality between the sanction and the expected risk. Accordingly, when there is a high expected risk of a violation of the public right, the

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170. JOSHUA DRESSLER, BLACK LETTER OUTLINE ON CRIMINAL LAW, 181–85 (2015) (Dressler discusses the Defense of “Insanity,” and distinguishes between the “mentally-ill” and “the insane”).

restriction on the liberty of the potential violator should be severe, say, in the form of arrest. But when there is a low expected risk of a violation of the public right, less severe restrictions, such as house arrest, may be sufficient for preventing the risk from materializing.

### 3. The Type of Sanction

Criminal sanctioning denies freedom (through imprisonment and fines), while administrative sanctioning restricts it (through arrest, suspension or revocation of a license, barring from association, etc.).<sup>171</sup> Criminal punishment undoes the denial of the public's right by denying the right (freedom) of the offender in direct proportion to the injury he caused to the public right. In contrast, administrative sanctions prevent the manifestation of excessive risk to the public right by restricting the right (freedom) of the potential violator in direct proportion to the risk. This is illustrated by the Securities Exchange Act of 1934, which provides, “[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder . . . it may in its discretion bring an action . . . to enjoin such acts or practices . . . .”<sup>172</sup> Indeed, preventative injunctive relief was the primary enforcement mechanism available to the SEC for a long time.<sup>173</sup>

There may be factual similarities between the criminal and administrative sanctions. For example, imprisonment and arrest both deprive freedom of movement. But there is a fundamental legal difference between them. The criminal sanction is set in relation to the injury done to the public right and is, therefore, fixed in nature. Thus, a criminal sentence is always predetermined by the court and, in principle, will not change during the time that the prisoner serves it. In contrast, the administrative sanction is relative

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171. See Mills, McDermott, Porter & Lee, *supra* note 10, at 323–24.

172. 15 U.S.C. § 78u(d)(1) (2012); see also 15 U.S.C. § 78u(e) (2012) (granting the courts jurisdiction over violation of all rules). *But see* 15 U.S.C. § 78t(e) (2012) (allowing the SEC to obtain injunctions against those who aid and abet in the violation “of any rule or regulation”). Administrative sanctions that the SEC can impose are as follows: censure; cease-and-desist orders; accountings; disgorgement of ill-gotten gains; suspension or revocation of securities licenses and registration of securities; barring from association with securities industry firms; barring of lawyers and other professionals from appearing before the Commission or serving as an officer or director of a public company; and civil monetary penalties. Mills, McDermott, Porter & Lee, *supra* note 10, at 323–25.

173. Comm. on Fed. Regulation of Sec., *Report of the Task Force on SEC Settlements*, 47 Bus. Law. 1087, 1098 (1992).

to the expected risk, and therefore dynamic in nature.<sup>174</sup> Consequently, the extent and nature of the administrative sanction can vary; it can be reduced to house arrest and be for longer or shorter durations, depending on the extent of the expected risk.<sup>175</sup>

#### 4. The Moving Party

As opposed to civil wrongs, with both criminal offenses and administrative violations, the injury or risk affects the public right. The state, as the legal representative of the public right, is therefore the moving party in both types of proceedings, through public prosecutors and a wide network of regulators.<sup>176</sup>

However, as Kenneth Mann has pointed out, the False Claims Act of 1986 allows for *qui tam* actions.<sup>177</sup> “The *qui tam* action authorizes private parties to bring government enforcement proceedings in a representative capacity. The private party sues in the name of the United States and receives part of the money judgment that otherwise would go to the government.”<sup>178</sup> The private party, therefore, acts as public prosecutor and the transfer of part of the judgment is payment for his willingness to collect the necessary evidence and move the legal issue. Another version of *qui tam* actions is the government’s encouragement of whistleblowers to expose corruption in corporations in which they are employed by offering them financial incentives.<sup>179</sup> But this procedure is the exception that proves the rule. The *qui tam* prosecutor does not prosecute on her own

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174. Steiker, *supra* note 162, at 196 (“[T]he proportionality constraint on non-penal preventive policies, by definition, cannot be geared toward the retributive metric of desert, but rather toward the metric of dangerousness. Thus, instead of focusing on degrees of offence severity and offender culpability, the proportionality inquiry for preventive purposes must focus on the degree of harm sought to be averted and the likelihood that the harm would occur in the absence of prevention.”) (footnote omitted).

175. *Id.* at 198 (“Because dangerousness is the product of both the gravity of the harm sought to be prevented (such as the sexual assault of a child, or the commission or facilitation of terrorist acts) and the probability that such harm would occur in the absence of preventive intervention, the proportionality of a preventive intervention fluctuates with any fluctuation in harm or probability.”).

176. For instance, the federal securities laws authorize the SEC to prosecute and impose sanctions for securities law violations through a variety of types of administrative proceedings. Mills, McDermott, Porter & Lee, *supra* note 10, at 323–24.

177. False Claims Amendments Act, Pub. L. No. 99-562, § 2, 100 Stat. 3153 (1986) (codified as amended at 31 U.S.C. § 3729 (2012)).

178. Mann, *supra* note 2, at 1800 n.20.

179. See, e.g., DELOITTE FORENSIC CENT., WHISTLEBLOWING AND THE NEW RACE TO REPORT: THE IMPACT OF THE DODD-FRANK ACT AND 2010’S CHANGES TO US FEDERAL SENTENCING GUIDELINES (2010); Richard E. Moberly, *Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107 (2006); Douglas W. Baruch & Nancy N. Bart, *The SEC’s Whistleblower Program: What the SEC Has Learned from the False Claims Act about Avoiding*

private behalf but, rather on behalf of the public right. She receives only a fair wage for her efforts to correct the risk to the public right and no compensation for her personal damage.

### 5. Evidentiary Rules

Criminal procedure sets a high barrier for the imposition of a criminal sanction. In administrative proceedings, by contrast, a lower threshold suffices.<sup>180</sup> The high standard of proof in criminal sanctioning expresses the need to uncover the truth about a subjective denial of the public right. No such need exists in the process of administrative sanctioning: the risk is objective, and all that is necessary is to convince the court of its existence. Thus clear and convincing evidence is sufficient in administrative proceedings.<sup>181</sup>

## III. CONCLUSIONS AND IMPLICATIONS

### SUMMARY OF THE PRINCIPAL PARADIGMATIC DISTINCTIONS

To summarize, an administrative violation is a manifestation of an excessive risk to the public right. Administrative sanctioning is based on the rationale of corrective justice, meaning it restores equality in the correlative relations between the violator and the public right. The correction is legal not factual but, contrary to criminal sanctioning, the legal viewpoint of the administrative correction is ex-ante. The correction is in the form of prevention of the materialization of an excessive risk that stems from the violator; it is applied in direct proportion to the risk and in the framework of the bilateral relationship between the violator and the state. The content that identifies administrative sanctioning as such is: the objective manifestation of an excessive risk to the public right; the purpose of ex-ante prevention; a sanction in the form of restriction of liberty; the state functioning as prosecutor; and the moderate standard of proof of clear and convincing evidence.

The arrangement of the generic characteristics of sanctioning systems sets the normative framework in which much of the jurisprudence on sanctions develops. Table 1 below presents the key

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*Whistleblower Abuses*, 2 HARV. BUS. L. REV. ONLINE 28 (2011); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91 (2007); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357 (2007) .

180. See Coffee Jr., *supra* note 25, at 1890–93.

181. See *id.*

distinctive characteristics of criminal law and administrative sanctioning.

TABLE 1. SUMMARY OF THE CRIMINAL AND ADMINISTRATIVE SANCTIONING PARADIGMS

<b>Body of Law</b>	<b>Criminal Sanctioning</b>	<b>Administrative Sanctioning</b>
<b>Normativity</b>	denial of public right	excessive risk to public right
<b>Rationale</b>	corrective justice	corrective justice
<b>Definition of the Wrong</b>	objective and subjective infringement of public right	objective manifestation of excessive risk to public right
<b>Purpose of the Sanction</b>	ex-post retribution	ex-ante prevention
<b>Type of Sanction</b>	denial of liberty (e.g., by imprisonment or fine)	limitation of liberty (e.g., by injunction)
<b>Moving Party</b>	the state	the state
<b>Evidentiary Rules</b>	beyond reasonable doubt	clear and convincing evidence

### B. *Implications*

To conclude the Article's discussion, I will explore the implications of its novel paradigm of administrative sanctioning for three issues: the boundaries between the criminal and administrative forums; the legitimacy of civil monetary sanctions; and the scope of double jeopardy.

#### 1. The Boundary between Forums

How should a regulator choose between the criminal and administrative forums in prosecuting cases? Both criminal and administrative sanctioning protect the public right. In both, the state acts as the legal representative of that right and protects it based on the rationale of corrective justice. The criminal forum, however, deals with ex-post subjective infringements, whereas the administrative forum deals with ex-ante excessive risks. Therefore, when a regulator has evidence of subjective fault on the part of an offender, she should opt for the criminal forum. In cases in which

there is evidence of a future excessive risk but no evidence of subjective fault, she should choose the administrative forum. In other words, the administrative forum should operate as a parallel, rather than alternative, enforcement forum to the criminal forum. The regulator may not use the administrative forum as an alternative forum for criminal punishment.

The outcome of this normative position is that the possibility of forum shopping is thwarted. The only consideration in the choice of the criminal forum is the presence or absence of criminal intent; the only consideration in the choice of the administrative forum is the presence or absence of an excessive risk.

Critics may argue that this reintroduces the problems that existed prior to the establishment of civil and administrative alternatives to the criminal forum. For if there is no effective alternative to the criminal forum, the phenomena of under-enforcement and excessive punishment will reemerge. But a correct understanding of the proper forum categorization will result primarily in just enforcement and in a reduction of the undesired consequences of forum selection ambiguity. I say reduction and not elimination because it would be naive to think that the problems with forum selection will completely disappear. Indeed, it is important to clarify that legal formalism does not purport to dispel ambiguity in the sense of ex-ante uncertainty at the outset of each case. However, its construction of coherent and systematic legal reasoning does dispel the ambiguity ex-post.<sup>182</sup>

Not only is the forum categorization under my model just, but it also supports the effectiveness and fairness of enforcement. Once it is clear that these are not alternative sanctioning tools and that all enforcement tools have their own unique features, they can be used effectively in parallel. For instance, a person may provide material, non-public information about a publicly-traded company she works at to another person. If the person who leaks the information believes that it is inside information and that the other person might use it against the law, this transfer of information constitutes a criminal offense and the person who leaked it should be punished. In addition, the very transfer of the information creates an excessive risk for investors and the market. This makes the action an administrative violation as well that must be prevented in the form of a cease-and-desist order, license suspension or revocation, or arrest, for example. The criminal and administrative forums can thus be efficiently used in parallel, and this will be just so long as each forum understands its purpose and limitations.

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182. See Weinrib, *Legal Formalism*, *supra* note 41, at 1008–12.

## 2. Civil Monetary Sanctions

What are the adequate procedural protections that should apply if proceedings are labeled civil but the sanctions are criminal in type? Civil monetary penalties pose a challenge to the preventative justice paradigm, and further inquiry is necessary to explore this issue in depth. I will try, in brief, to outline some guidelines for that inquiry. A monetary sanction can accommodate criminal sanctioning since it is a negation of the offender's right to property. Proponents of the economic analysis of law would certainly claim otherwise and argue that the financial penalty could deter others from committing the same violation. However, its suitability to administrative sanctioning can be questioned for it is not, *prima facie*, a preventative tool. From the perspective of legal formalism imposing a fine on someone to deter others amounts to instrumental use of the individual violator as a means to an end rather than being a goal in itself. Therefore, the procedural protections of the criminal forum should apply.

Yet it may still be possible to justify monetary penalties in administrative sanctioning. One way would be to understand the purpose of the penalty as reimbursement of enforcement costs, that is, the costs the state incurs to provide special treatment to its citizens. This reasoning appeared in *Helvering v. Mitchell*.<sup>183</sup> When a person creates an excessive risk to the public, the state is forced to take protective measures to counter this risk, which cost money. Common sense dictates that if a person creates a risk to the public right, it is certainly legitimate to require her participate in funding the necessary protective measures. In these circumstances the administrative forum's procedural protections should apply.

Another possibility is to allow an administrative forum to impose a criminal penalty in cases of denial of the public right. Under this approach, the administrative forum is not restricted to administrative sanctioning but can accommodate civil and criminal sanctioning as well. Thus, when the SEC imposes a monetary penalty it is wearing its criminal sanctioning hat, due to the violator's willful infringement of the public right. In these circumstances, the criminal forum's procedural protections should apply.

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183. 303 U.S. 391, 401 (1938) (the purpose of the sanction is "to reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud").

### 3. Double Jeopardy Claims

Is it legitimate for the state to conduct parallel proceedings for punitive sanctions against the same person or entity for the same conduct? Given the boundaries between the criminal and administrative forums I outlined in the Article, the parallel use of the two enforcement tools does not give rise to double jeopardy. On the contrary: it is inappropriate to constrain the state's ability to maneuver between the criminal and administrative forums. State authorities should be allowed to make use of all the available tools, in accordance with their purpose and depending on the circumstances of the matter at hand. However, in the current state of affairs and so long as the administrative forum functions as an alternative to the criminal forum and can impose civil monetary penalties, procedural limitations such as double jeopardy are certainly justified.

These specific examples demonstrate the helpfulness of the novel normative paradigm for understanding administrative sanctioning. This paradigm aims to provide a complete, normative framework for this unique body. By using legal formalism's view of law in general and of criminal law in particular, this framework can succeed where other frameworks had failed. Due to the coherence between the two branches of law, criminal and administrative sanctioning, the boundary between them is already clear, and practical difficulties are easily resolved.