

THE NEW DETERRENCE:  
CRIME AND POLICY IN THE AGE OF GLOBALIZATION

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Crime has historically been a local phenomenon. Most murder victims know their killers;<sup>1</sup> most victims of child abuse know their abusers;<sup>2</sup> victims of theft often need not look beyond their own neighborhoods for the thieves. Crime is regulated locally. In the United States, it is the states, not the federal government, that prosecute the vast majority of criminal cases.<sup>3</sup> Law enforcement budgets may rely on funds from the federal government, but enforcement priorities are set locally. And although there is some coordination among law enforcement agencies from different states in the U.S. and between agencies from different countries, crime remains a local problem.

Globalization is changing this in ways that have yet to be fully explored. Although crime as an event will always have a substantial local component because it is typically responded to by officials and victims in the place it occurs, it is becoming much more of a transnational phenomenon. It is increasingly common for activity that is regulated in one country because it is dangerous or unwanted to become more common in other countries where the activity is equally (or almost equally) unwanted but much less

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<sup>1</sup>The victim and offender know each other in approximately 76% of homicide cases. SHANNAN M. CATALANO, *CRIMINAL VICTIMIZATION*, 2003 1 (Bureau of Justice Statistics National Crime Victim Survey 2004).

<sup>2</sup>LAWRENCE A. GREENFELD, *CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR Victims* 10 (Bureau of Justice Statistics 1996) (reporting that 85.9% of child victims knew their victimizer).

<sup>3</sup>AMERICAN BAR ASSOCIATION, *THE FEDERALIZATION OF CRIMINAL LAW* (1998) (reporting that only 4% of all crimes in the United States are prosecuted in federal court).

effectively regulated. What happens when activity that is unwanted in two places is more effectively regulated in one place than in the other? Does the unwanted activity migrate from the first state to the second? How much of it migrates, and what factors influence the amount of displacement? How should we conceive of regulation in these circumstances--as a local response to a local problem or as part of a broader effort to reduce the overall incidence of the unwanted activity? These questions are fundamental to determining what globalization will mean in the new century, but so far have not been fully explored. The existing scholarship on deterrence will be of limited use in a globalized context.

This article is the first attempt to fill the gap by developing a richer approach to deterrence for a globalized world. I draw insights from both law-and-economics and criminology literature to enrich our understanding of deterrence. To ground my theoretical discussion in a real-world problem, throughout the article I use sex tourism as an example of the kind of unwanted activity that now crosses borders and has complicated our understanding of deterrence. I focus on two issues central to deterrence in a globalized world that have not gotten sufficient scholarly attention: the phenomenon of displacement and the role of status. I add three important considerations. First, I argue that informal sanctions, as opposed to formal, legal sanctions, are increasingly important and must be part of any effective deterrence policy. Second, I argue that substitution—when activity migrates from one location to another because of changes in enforcement policy in the first place—is a complicated process that can be manipulated to enhance deterrence. Finally, I argue that when unwanted behavior involves people from different countries, we must consider the role of status in deterrence. Differences in status can distort the social processes of judgment and disapproval that allow communities to control unwanted behavior without recourse to law. These are vitally important issues. Because globalized crime is so widely dispersed, it will be almost impossible for the local communities affected to get together and develop a coordinated plan. If we are to prevent law enforcement successes in the West from turning into social disasters for those in the developing world, we must bring theory into step with the ways that globalization has changed the reality of crime.

This Article proceeds in five parts. In Part I, I begin with an illustration of the kind of phenomenon that drives my analysis: sex tourism, the practice of tourists traveling abroad to engage in sex with prostitutes, often children. Any discussion of deterring unwanted activity on a global scale could have significance in the spheres of terrorism, white collar crime, money laundering, environmental activity, and commercial regulation. But I use the example of sex tourism because it contains stark examples of the kinds of legal and social issues at the heart of deterrence. In this part, I

describe the ways that the tools of globalization have allowed sex tourism to grow and thrive.

In Part II, I lay out and critique the literature that frames the current discourse on crime and its deterrence. The literature fits into two broad categories: economics and sociology (or criminology). The law-and-economics literature assumes that people deciding whether to engage in activity that is unwanted by the larger society behave rationally. That is, potential offenders weigh the utility they will receive from the activity against two factors: the probability of being caught engaging in the activity and the sanction they would suffer if caught. The law-and-economics approach is general; it simplifies complex phenomena so they can be modeled and examined. But simplification can render the results of the model of only marginal use in a world populated by individual people, each motivated by her own reasons and emotions. At the other extreme is the work of criminologists and sociologists. This literature often considers the motivations of individual offenders in an attempt to understand the amalgam of reasons that people commit crimes (or, for that matter, engage in any activity, criminal or not).<sup>4</sup> This literature is often too specific to be of use in shaping policy.

Parts III and IV are the heart of the article. Part III contains the first of my refinements of the traditional view of deterrence. The most basic model draws on a straightforward law-and-economics framework and considers three variables: the utility that the desired illegal behavior will bring to the offender, the probability that he will be detected, and the expected legal sanction. This rational choice framework underlies most discussions of deterrence. More sophisticated law-and-economics models attempt to account for the possibility that an increase in the cost of one crime (either through a harsher punishment or stricter enforcement) will lead the offender to substitute another activity for the preferred crime.<sup>5</sup> These models

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<sup>4</sup>Dan Kahan, among a handful of others, has attempted to chart a “third way” that “combines the virtues of both economics and sociology without succumbing to the vices of either.” Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997). Kahan’s work has highlighted many of the issues important to a richer understanding of deterrence, but does not (and does not purport to) address the complex issues that arise when unwanted activity crosses borders.

<sup>5</sup>Underlying my argument are two broad assumptions that I must acknowledge at the outset. First, I assume that, in most cases, the regulation of unwanted activity is more effective in the West than in the developing

compare two deterrence equations to ask if the benefit from new activity, reduced by the costs mentioned above, is greater than the benefit from the original activity (also reduced by the two costs). I argue that these models, in their attempt at simplicity, leave out an important factor. In most models, substitution is assumed to be a costless transaction. This assumption--dubious even with regard to domestic crime--is at odds with the reality of transnational activity. There are substantial risks associated with displacement or substitution,<sup>6</sup> including the costs of switching from one activity to another, gathering information on the second activity, and the cost of violating norms against the new activity. When these factors are included in the equation, what seem to be adequate policy responses begin to look inadequate.

Part IV addresses the complicated role that status plays in deterrence. Most considerations of deterrence spend no time considering the effect of status differences in deterring transnational crimes.<sup>7</sup> Status is important to deterrence in a variety of ways. My discussion centers on its role in the creation, enforcement, and erosion of social norms, the social rules and customs that guide and govern the behavior of most people. In Part V I briefly conclude by attempting to apply the lessons of theory to policy options.

Before moving on, three clarifications are in order. "Globalization" is a slippery term that is used to explain any number of ills and benefits. I use a

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world. Because of this, globalization combined with the difference in the effectiveness of regulation between the West and the developing world can have the effect of displacing illegal, unwanted, or anti-social activity from the West to other parts of the world. In other words, effective regulation in the West can lead to the export of social or commercial problems from the West to the developing world. Such displacement can carry serious consequences for both the West and the developing world. Second, I argue that regulations that target unwanted activity can and should account for the potential for displacement. To be considered effective, regulations must reduce the incidence of the problem they seek to regulate, not merely transfer it elsewhere.

<sup>6</sup>I use the terms "substitution" and "displacement" interchangeably. For my purposes, both describe the same phenomenon; substitution is the term preferred by economics, while criminologists typically use displacement.

<sup>7</sup>Criminologists study status when considering the relationship between victims and perpetrators, for example, but my consideration of status focuses on its role in deterrence.

definition adopted from Joseph Stiglitz, formerly chief economist at the World Bank and the head of President Bill Clinton's council of economic advisors. As I use it, globalization means the closer integration of the countries and peoples of the world due to a radical reduction in the transaction costs associated with transnational activity. This is due mostly to a reduction in costs of transportation and communication.<sup>8</sup> It means that transnational activity happens more quickly, more easily, and more often than in the past. In other words, it is now possible for vast numbers of people to do very often what small numbers of people used to do only occasionally. Two types of activity fit into my definition of "unwanted activity." Unwanted activity either violates the law or violates norms or customs, regardless of whether it is legal or illegal. I define unwanted activity in this way to account for both illegal and socially-unacceptable but legal activities. By "regulation," I mean actions that aim to reduce the incidence of behavior. This can take the form of criminal prohibitions, which have as their goal the elimination of an activity. It can take the form of administrative rules or other statutes that seek to set the conditions under which an activity may be undertaken. It can also take the form of the intentional creation or support of helpful norms that reduce the incidence of unwanted activity by encouraging people to choose not to engage in the activity. By using this broad definition, I wish to encompass any attempt to restrain, limit, or regularize activity that is in any way unwanted.

#### I. THE NEW MOBILITY OF UNWANTED ACTIVITY: THE EXAMPLE OF SEX TOURISM

Sex tourism happens when tourists from North America, Western and Northern Europe, Japan, and Australia travel to the developing world to have sex with prostitutes, often including child prostitutes. It has exploded in recent years.<sup>9</sup> Sex tourism, and the illicit sexual activity that is at its heart, has many elements, as do the many forms of regulation that exist to suppress it. On the supply side of the equation are prostitutes, including

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<sup>8</sup>Stiglitz writes that globalization is "the closer integration of countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders." JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 9 (2002).

<sup>9</sup>*See, e.g., Sex Tour Travel Agencies Targeted*, USA TODAY, Feb. 13, 2004.

children,<sup>10</sup> and those who facilitate their exploitation, like brothel owners and sex tour organizers and operators. On the demand side are tourists who patronize prostitutes. The industry thrives because suppliers and tourists can exploit the tools of globalization to find each other. Brothel owners take advantage of porous borders and the easy flow of capital to find, buy, and transport prostitutes.<sup>11</sup> They also rely on the inequalities brought to light by globalization for a steady supply of recruits, either misled into the industry or sold by their families. Tourists use the Internet to gather information about sex tourist destinations, including strategies on ways to avoid detection, and they rely on easier travel to get to the prostitutes. The purpose of examining sex tourism is to better understand the problem of globalized crime and to provide a real-world example to ground the theoretical discussion.

#### A. *Illicit Sexual Behavior and Globalization*

Although it is little known in the U.S., the problem of sex tourism has begun to attract significant attention internationally. In recent years there has been a spate of reports on the increase in sex tourism.<sup>12</sup> Accurate

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<sup>10</sup>See Heather Montgomery, *Child Sex Tourism in Thailand*, in *TOURISM IN THE LESS DEVELOPED WORLD: ISSUES AND CASE STUDIES* 191-201 (David Harrison, ed., 2001); see generally CHRIS RYAN & C. MICHAEL HALL, *SEX TOURISM: MARGINAL PEOPLE AND LIMINALITIES* (2001).

<sup>11</sup>See JOANE NAGEL, *RACE, ETHNICITY, AND SEXUALITY: INTIMATE INTERSECTIONS, FORBIDDEN FRONTIERS* 212-216 (2003); see generally RYAN BISHOP & LILLIAN S. ROBINSON, *NIGHT MARKET: SEXUAL CULTURES AND THE THAI ECONOMIC MIRACLE* (1998); SIETSKE ALTINK, *STOLEN LIVES: TRADING WOMEN INTO SEX AND SLAVERY* (1995).

<sup>12</sup>See, e.g., UNICEF, *STUDY ON THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN IN THE GAMBIA* (2003); CASA ALIANZA, *REGIONAL INVESTIGATION ON TRAFFICKING, PROSTITUTION, CHILD PORNOGRAPHY AND SEX TOURISM WITH CHILDREN IN CENTRAL AMERICA AND MEXICO* (2001); ELENA AZAOLA, UNICEF-DEF, *BOY AND GIRL VICTIMS OF SEXUAL EXPLOITATION IN MEXICO* (2000); UNICEF, *CHILDREN ON THE EDGE: PROTECTING CHILDREN FROM SEXUAL EXPLOITATION AND TRAFFICKING IN EAST ASIA AND THE PACIFIC* [hereinafter *CHILDREN ON THE EDGE*]; JUDITH O'CONNELL DAVIDSON & JACQUELINE SANCHEZ TAYLOR, *ECPAT, CHILD PROSTITUTION AND SEX TOURISM: COSTA RICA* (1995); JUDITH O'CONNELL DAVIDSON & JACQUELINE SANCHEZ TAYLOR, *ECPAT,*

numbers are hard to come by, but the United Nations estimates that there are at least 2 million child prostitutes worldwide.<sup>13</sup> The most common destination countries are in Asia, the Caribbean, and Latin America. UNICEF estimates that there are 400,000 child prostitutes in Thailand,<sup>14</sup> and that half of those involved in prostitution are trafficked; that is, they are sold or traded to brothel owners. Reports by non-governmental organizations put the number of adult female prostitutes at 300,000 and children at 75,000 in the Philippines and between 10,000 and 15,000 in Cambodia.<sup>15</sup> The

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CHILD PROSTITUTION AND SEX TOURISM: THAILAND (1994); HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND (1993) [hereinafter A MODERN FORM OF SLAVERY].

<sup>13</sup> CNN, “*Sex Tourism*” *Rapist Jailed in France* (Oct. 20, 2000), available at <http://archives.cnn.com/2000/WORLD/europe/france/10/20/france.trial/> (last visited Mar. 26, 2005).

<sup>14</sup>*Id.* In my discussion of sex tourism, I group together those who patronize child prostitutes and those who patronize adult prostitutes. Even though these activities are normatively distinct, I consider them together for several reasons. First, both kinds of prostitution are part of the same market; they rely on the same supply chain for prostitutes (often human trafficking), and they advertise to the same pool of potential customers. *See, e.g.,* A MODERN FORM OF SLAVERY, *supra* note 12; FRANCIS T. MIKO & GRACE JEA-HYUN PARK, CONGRESSIONAL RESEARCH SERVICE, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE (2002). Second, it is often not possible to make clean age distinctions. For example, consider a country in which the age of majority is 15, meaning that a prostitute who would be considered a child in the U.S. is considered an adult. When a customer patronizes a 15-year-old prostitute, it is unclear whether he is engaging in “child sex tourism” or just “sex tourism.” *See generally* RYAN & HALL, *supra* note 10, at 22-46. Finally, some who patronize prostitutes in the developing world do so because they want to engage in illicit sexual activity with someone who appears to be a child or adolescent, even if she really is not. For all of these reasons, it is more helpful to treat child and adult prostitutes together than to separate them.

<sup>15</sup>COALITION AGAINST TRAFFICKING IN WOMEN, *Facts and Statistics: Trafficking and Prostitution in Asia and the Pacific*, at [www.catw-ap.org/facts.htm](http://www.catw-ap.org/facts.htm).

problem is not limited to Asia. In San Jose, the capital of Costa Rica, there are an estimated 2000 girl child prostitutes.<sup>16</sup> According to estimates by the Organization of American States, there are 2000 child prostitutes in Guatemala City; 25,000 in the Dominican Republic; and as many as 500,000 in Brazil.<sup>17</sup> Cuba receives as many as 200,000 male sex tourists every year.<sup>18</sup> Children become prostitutes through a variety of means. Some are sold or traded away by relatives.<sup>19</sup> Some are promised legitimate jobs in the city and willingly accompany procurers, only to be sold or traded to brothel owners.<sup>20</sup> Some run away from home and enter the trade to feed themselves.<sup>21</sup>

### B. The Logistics of the Industry

The demand side of the business is equally complex and also depends on globalization. Sex tourists rely on technology to exchange information about the best places to exploit children and avoid detection by law enforcement, use global transportation to travel to destination countries, and exploit income inequalities and market pressures that have forced so many children into prostitution. It starts with travelers, usually but not always men,<sup>22</sup> who sexually exploit local people, often including children. Like

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<sup>16</sup>ALISON PHINNEY, ORGANIZATION OF AMERICAN STATES, TRAFFICKING IN WOMEN AND CHILDREN FOR SEXUAL EXPLOITATION IN THE AMERICAS, available at [www.oas.org/cim/english/proj.traf.alisonpaper.htm](http://www.oas.org/cim/english/proj.traf.alisonpaper.htm).

<sup>17</sup>*Id.*

<sup>18</sup>Michael Clancy, *The Globalization of Sex Tourism and Cuba: A Commodity Chains Approach*, 36 STUD. COMP. INT'L DEVELOPMENT 63 (2002).

<sup>19</sup>*See, e.g.*, CHILDREN ON THE EDGE, *supra* note 12, at 5-6.

<sup>20</sup>*See, e.g.*, UNICEF, BROKEN PROMISES SHATTERED DREAMS: A PROFILE OF CHILD TRAFFICKING IN THE LAO PDR 22 (2004).

<sup>21</sup>*See e.g.*, A MODERN FORM OF SLAVERY, *supra* note 12, at 24-29 (1993).

<sup>22</sup>*See* Mario Scarpati, *Preliminary Results of a Study on the Profile of CSEC Clients: Sex Tourists and Internet Users*, in PROCEEDINGS OF THE REGIONAL CONSULTATION FOR ASIA AND THE PACIFIC ON THE PROTECTION

most tourists, the vast majority of sex tourists follow one of two typical routes: organized tours and individually-planned vacations. Both routes have been enhanced by globalization. Those on organized tours avoid many of the risks faced by independent sex tourists, who must arrange their own travel and encounters with prostitutes. Philippine Adventure Tours (which is no longer in business), provided a typical tour. For less than \$2000, a tourist could receive round-trip airfare, a hotel in Manila, and a guide tour of bars where he could obtain the services of a prostitute.<sup>23</sup> A tour guide was even available to help the sex tourist negotiate with the prostitute or her procurer. Other tour operators offer similar tours to Thailand for \$1800-\$2500.<sup>24</sup>

Notwithstanding these organized tours, the majority of sex tourists are independent. They travel alone,<sup>25</sup> and find prostitutes on their own. Those who travel alone face the risks associated with making their own arrangements, such as how much to pay or whom to bribe.<sup>26</sup> For many, their activity is possible only because of the disparate elements that make up globalization, such as easy international travel and wealth disparities that help push children into prostitution. But the improvement in information technology is likely the single most important factor in the explosion of sex tourism. Usenet newsgroups provide a useful forum for sex tourists because most focus on a single topic and allow users to post information anonymously. Although they are typically not secure--access is not restricted by password, for example--an estimated 1000 illegal pornographic

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OF CHILDREN FROM SEXUAL EXPLOITATION IN TOURISM 53-54 (2003) (reporting that 99% of clients of child sex workers are men).

<sup>23</sup>CAPTIVE DAUGHTERS, CD FACT SHEET 1: SEX TOURS - A LEARNING MODEL (1999).

<sup>24</sup>Toddi Gutner & Ron Corben, *Asian Sex Tours are an American Business, Too*, BUS. WK., June 17, 1996.

<sup>25</sup>Joshua Kurlantzick, *Harm's Way: Child Sex Tourism Feeds Thailand's Economy*, IN THESE TIMES, Aug. 7, 2000.

<sup>26</sup>See Kay Johnson, *Pedophile Playground*, TIME, Nov. 13, 2000, at 29 (describing sex tourist's unsuccessful attempt to bribe law enforcement officials and his subsequent conviction in local court); see also *Teacher Jailed for Kiddie Porn*, MELBOURNE HERALD SUN, Nov. 22, 2000, at 34 (same).

images are posted on newsgroups each week.<sup>27</sup> Bulletin and message boards, which often require users to enter a password, ensuring an added layer of security, have become another important forum in which sex tourists can exchange information.<sup>28</sup> On some message boards, users seek and provide information about the kinds of acts they desire from prostitutes and identify for others the names of prostitutes who are willing to engage in them.<sup>29</sup> There is also information about the cost of the acts and even news about particular prostitutes.<sup>30</sup> The various technologies allow sex tourists to gather all the information they need for a "successful" trip: where to find prostitutes, where to stay to avoid discovery, how much to pay (depending on the status of the prostitute and the sexual act), and how much to bribe local law enforcement officials to avoid prosecution if caught.<sup>31</sup>

## II. THEORIES OF OFFENDING AND DETERRENCE

None of the existing theories of offending and deterrence provides an adequate account of how we should address unwanted activity that crosses national boundaries as sex tourism does. This Part focuses on the two dominant existing approaches to deterrence (and to understanding criminal behavior generally), economic analysis and sociological (or criminological) analysis, and examines their deficits in a globalized world. Deterrence is to many the holy grail of criminal law policy. Preventing the commission of a crime not only spares potential victims, it also reduces the costs to society of investigating, prosecuting, and punishing offenders. The law-and-economics approach to deterrence policy is to find just the right balance between the costs of enforcing the laws on the one hand and the severity of

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<sup>27</sup>See DONNA M. HUGHES, COUNCIL OF EUROPE, THE IMPACT OF THE USE OF NEW COMMUNICATIONS AND INFORMATION TECHNOLOGIES ON TRAFFICKING IN HUMAN BEINGS FOR SEXUAL EXPLOITATION 10 (May 2001).

<sup>28</sup>See *id.*

<sup>29</sup>See, e.g., COUNCIL OF EUROPE, FINAL REPORT: GROUP OF SPECIALISTS ON THE IMPACT OF THE USE OF NEW INFORMATION TECHNOLOGIES ON TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF SEXUAL EXPLOITATION 18 (2003).

<sup>30</sup>See HUGHES, *supra* note 27, at 20.

<sup>31</sup>See Scott Worden, *E-Trafficking*, FOREIGN POLICY, March 2001, at 92; Kurlantzick, *supra* note 24.

the penalty for an unwanted activity on the other. The goal is to reduce the activity to the desired level as efficiently as possible. Underlying the law-and-economics approach is the idea of rational choice, the assumption that individuals “are forward looking and behave so as to maximize their expected utility.”<sup>32</sup>

Sociologists have the same goal--reducing crime--but approach it by attempting to identify the myriad influences on a potential offender: her choice of crime, her selection of victims, her relationships with other potential offenders, and a host of others. This is, of course, immensely complicated, and has spawned a welter of writing. Sociologists typically focus on individuals or small groups of offenders and try to uncover the many motivations that move every offender.

Just as economists and sociologists have different approaches to understanding criminal behavior, so too they have different approaches to deterring offending behavior. Economists typically focus on only two variables: the level of investment in enforcing the law, and the severity of the legal sanctions that an offender faces upon conviction of a crime. The solutions proposed by sociologists typically use a broader array of policy interventions. To reduce crime, sociologists might suggest alleviating poverty, changing family dynamics, or improving education.

In this Part I lay out the conventional analyses of deterrence and draw lessons from the various theories. I start by describing the first law-and-economic model, which weighs the utility that a person expects to receive from an activity against the costs of the activity. The first models were followed by more complex analysis, including consideration of the substitution effect, which occurs when an offender responds to the rising cost of his preferred activity by abandoning it and moving into another activity, which may be equally harmful. After describing the law-and-economics approach, I consider sociological or criminological theories of deterrence. These theories focus to varying degrees on individual traits that incline a person toward unwanted activity or environmental factors which might encourage criminal behavior. Finally, I draw lessons from conventional approaches. First, the law-and-economic model is useful because it helps to identify the costs associated with each choice. By identifying these disincentives, policy makers can more accurately determine how to increase the costs of unwanted activity. I use sociological theories and evidence to expand the list of costs beyond those considered by the law-and-economics models. Second, I conclude that informal sanctions--those in addition to formal legal sanctions--are increasingly important and

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<sup>32</sup>STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC LAW 1 (2004).

must be included in any model. Finally, I conclude that sociological models consider, in a way that law-and-economics does not, one of the consequences of globalization--that the transaction costs associated with unwanted activity have declined significantly, thereby changing the entire cost structure of criminal behavior.

#### A. *Economic Analysis and Deterrence*

In the last forty years, some of the most important work on deterrence has been influenced by the insights of economists. Gary Becker, in an article in 1968, initiated the modern use of economic analysis to study the criminal law.<sup>33</sup> The goal of most writers has been to determine how to most efficiently deter crimes by setting an appropriately severe sanction and investing adequately in enforcement of the laws. Becker argued that, for most potential law breakers, deterrence depended on a simple balance.<sup>34</sup> On one side were the benefits that committing the act would bring to the law breaker.<sup>35</sup> On the other side were the costs of the crime, which Becker defined as a function of the probability of detection and the severity of the expected legal sanction.<sup>36</sup> Since Becker's influential work there have been many refinements, but most economic models of deterrence have contained the same simplifying assumptions and many of the same elements.

In this section, I trace the development of economic models of deterrence. I begin by reviewing the first, simple models. I then discuss an important addition to the model: consideration of the substitution effect. Substitution occurs when the cost of the preferred activity goes up and the actor chooses to substitute a less costly activity in the place of the preferred activity. As I will explain, the substitution effect is critically important to any discussion of transnational unwanted activity.

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<sup>33</sup>Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker was not the first to apply economic analysis to the study of criminal law. See, e.g., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS; JEREMY BENTHAM, PRINCIPLES OF PENAL LAW.

<sup>34</sup>Becker, *supra* note 33, at 176 ("a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities").

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 169.

## 1. A Simple Model of Deterrence

Deterrence models typically involve a simple calculation: a criminal will "commit the act if and only if his expected utility from doing so, taking into account his gain and the chance of his being caught and sanctioned, exceeds his utility if he does not commit the act."<sup>37</sup> That is, a person considering whether to break the law weighs the benefit to him of the crime against the costs of committing the crime.<sup>38</sup> The costs of committing a crime are the severity of the expected legal sanction and the likelihood that the criminal will suffer the sanction.<sup>39</sup> Combining the two elements accounted for the intuition that potential criminals care about the severity of the sanction and the chance that they will actually suffer it, and that the two are closely linked. Measures that increase the costs of committing a particular crime are assumed to make it less likely that a criminal will commit that crime, thereby contributing to deterrence. The conventional model is useful because it highlights the two most important elements of the criminal law equation, not just for potential law breakers but for policymakers as well. Both enforcement and severity carry substantial costs for society and the model is a way of seeking the most efficient level of investment in each element.<sup>40</sup> A massive investment in enforcement will not operate as a significant deterrent if sentences are too low, and even a

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<sup>37</sup>A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 47 (2000).

<sup>38</sup>This is, of course, a version of rational choice theory. There are many definitions of rational choice. See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (rationality means "choosing the best means to the chooser's ends"); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (2d. Ed. 1989) (economic analysis assumes "utility maximization," which means that "individuals ... maximize their benefits, less their costs"). What all the definitions have in common is the presumption "that individuals act so as to maximize their expected utility." Russell B. Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075 (2000).

<sup>39</sup>Becker, *supra* note 33, at 204.

<sup>40</sup>See, e.g., George J. Stigler, *The Optimum Enforcement of Law*, 78 J. POL. ECON. 526, 526-27 (1970) ("society must forego 'complete' enforcement' of the laws because enforcement is costly").

severe sentence will be a weak deterrent if criminals know that they will not be caught.

## 2. The Substitution Effect

The conventional model has much to commend it, but it leaves out several important elements. After Becker's groundbreaking work, others refined his model because it did not account for the full complexity of decision making. One problem arises when two crimes, one of which causes substantially more harm than the other, are subject to the same penalty. The fear is that increasing the costs associated with one crime may actually cause the incidence of another crime to go up. According to the conventional model, in this circumstance a potential law breaker has no incentive to choose the less harmful of the two acts. The problem is perhaps most salient when considering closely related activities that differ only in magnitude: "If the offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder. If the thief has his hand cut off for taking five dollars, he had just as well take \$5,000."<sup>41</sup> One response to the problem, which George Stigler called "marginal deterrence,"<sup>42</sup> is to impose harsher penalties for more severe crimes to remove any incentive to commit a more severe version of the same crime.<sup>43</sup>

Marginal deterrence is most commonly discussed in terms of the severity of the penalty for unwanted acts. Indeed, Stigler's discussion of marginal deterrence was a response to Becker's argument that penalties should always be set at the most severe level. Becker's argument was that, because potential law breakers consider both the severity of the penalty and the probability of detection, and because it is less expensive to increase the severity of a penalty than it is to invest in more effective enforcement, increasing the severity of the penalty is a costless way to increase deterrence. The costs associated with a crime can also be increased by making it more likely that the criminal will suffer the legal sanction by, for example, investing in greater enforcement.<sup>44</sup>

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<sup>41</sup>*Id.* at 527.

<sup>42</sup>*Id.*

<sup>43</sup>See Polinsky & Shavell, *supra* note 37, at 63 ("Deterrence of a more harmful act because its expected sanction exceeds that for a less harmful act is sometimes referred to as *marginal deterrence*").

<sup>44</sup>Dilip Mookherjee & I.P.L. Png, *Marginal Deterrence in*

Marginal deterrence is a version of the substitution effect, an idea central to economic theory. To see the substitution effect in operation, suppose that a person derives the same level of satisfaction from two goods, and that the price of one of the goods rises. If this increase prompts the person to consume more of the second good (which brings the same satisfaction but is now less expensive relative to the first), the two goods are considered substitutes. For example, if the consumer enjoys plain pizza as much as she enjoys pizza with pepperoni, and the price of pepperoni pizza rises, her consumption of plain pizza will increase because she will substitute the cheaper (and equally satisfying) plain for pepperoni.<sup>45</sup>

Applied to criminal law, substitution analysis goes a step beyond marginal deterrence (which concerned itself with different versions of similar crimes) to ask if an enhanced penalty "for X will distort behavior and lead people to commit an altogether different crime (Y, Z, or some combination of the two)."<sup>46</sup> When we shift our attention from crimes that vary only in magnitude, the importance of substitution as a separate consideration becomes even more clear. The goal of deterrence, after all, is to raise the cost of committing a particular crime to the point at which a potential law breakers will conclude that the costs outweigh the benefits. Implicit in this model is the assumption (or hope) that the time spent on criminal activity would be spent on other, non-criminal pursuits. Substitution analysis recognizes that the opportunity set for potential law breakers includes both non-criminal and criminal activity. Thus, an increase in the penalty for one crime might deter that crime and others closely linked to it--for example, causing a criminal to swear off theft of any kind, large sums and small--but might encourage the commission of other unrelated crimes like drug sales or assault.<sup>47</sup> The goal of accounting for substitution is

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*Enforcement of Law*, 102 J. POL. ECON. 1039, 1040 (1994) ("In [the] context [of] marginal deterrence, stepping up enforcement against one level of activity may induce a switch to a more harmful act instead"); *see also* Polinsky & Shavell, *supra* note 37, at 63 ("marginal deterrence can be promoted by increasing the probability of detection as well as the magnitude of sanctions").

<sup>45</sup>EARL L. GRINOLS, MICROECONOMICS 130-31 (1994). *See generally* ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 109-118 (5th ed. 2003).

<sup>46</sup>Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2391 (1997).

<sup>47</sup>*See* Polinsky & Shavell, *supra* note 37, at 63 (when a potential law

to set penalties and enforcement strategies at a level that will cause a decrease in all crimes, not merely displace criminal activity from one category of crime to another.

### B. *The Sociology of Offending and Deterrence*

Sociologists typically approach anti-social or deviant behavior with a wider perspective. Deterrence is just one of the many theories of offending within sociology.<sup>48</sup> I will first sketch out some of the general trends in the sociological or criminological approach to crime, then I will focus on deterrence theory. This is a vast field; my goal is to provide some examples of the richness of the sociological approach and then identify the ways that sociology can modify the law-and-economics model to help us arrive at a better a better approach to deterrence. This approach can be divided into two very broad strands. One emphasizes “theories of the person,” which focus on “enduring” individual traits that incline people to commit crimes through their lives.<sup>49</sup> The other strand focuses on “theories of the environment, which attribute crime to circumstances and situations.”<sup>50</sup>

Perhaps the most influential criminological theory is Edward H. Sutherland’s theory of differential association.<sup>51</sup> Sutherland argued that criminal behavior is learned, not the result of innate characteristics.<sup>52</sup> His

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breaker has a choice of several harmful acts, "the threat of sanctions plays a role in addition to the usual one of deterring individuals from committing harmful acts: for individuals who are not deterred, expected sanctions influence which harmful acts individuals choose to commit").

<sup>48</sup>For an excellent discussion of the ebb and flow of sociological theories of offending see RONALD L. AKERS, *CRIMINOLOGICAL THEORIES: INTRODUCTION AND EVALUATION* (1999). See also John H. Laub, *The Life Course of Criminology in the United States: The American Society of Criminology 2003 Presidential Address*, 42 *CRIMINOLOGY* 1 (2004).

<sup>49</sup>Daniel S. Nagin & Raymond Paternoster, *Personal Capital and Social Control: The Deterrence Implications of a Theory of Individual Differences in Criminal Offending*, 32 *CRIMINOLOGY* 581, 581-82 (1994).

<sup>50</sup>*Id.*

<sup>51</sup>See EDWARD H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (4th Ed. 1947); see also AKERS, *supra* note 48, at 59-62.

<sup>52</sup>*Id.* at 6-7.

theory focused on relationships and argued that criminal behavior is learned “within intimate personal groups.”<sup>53</sup> People learn both “techniques of committing the crime” and the “motives, drives, rationalizations, and attitudes” that encourage criminal behavior.<sup>54</sup> He argued that people become criminals when the influences favoring criminal activity outweigh the influences favoring compliance with the law.<sup>55</sup> Sutherland’s approach opened the field to inquiries about the nature and importance of social interactions. Ronald L. Akers’s social learning theory built on and expanded Sutherland’s work.<sup>56</sup> Akers’s work sought to explain the “variables that operate both to motivate and control criminal behavior.”<sup>57</sup> One important element of Akers’s work is that it addressed both behavior and attitudes. He argued that when a person commits a criminal act, the response to that act will affect his future behavior and it will affect his “definitions,” that is, his preferences and attitudes.<sup>58</sup> Akers’s work is also important because it recognized the importance of a wide range of factors, such as a person’s religious beliefs, relationships with others, mental health, and many others.<sup>59</sup> Another criminological theory relies on the idea of *anomie*, a concept taken from the work of Emile Durkheim, referring to a “state of normlessness or lack of social regulation.”<sup>60</sup> Building on Durkheim’s work, Robert Merton focused the disjunction between the goals that most members of society hold and the means by which people can attain those goals. Merton argued that socially-acceptable goals (like wealth or status) are strongly reinforced, but socially-acceptable means of achieving

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<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*; *see also* AKERS, *supra* note 48, at 61.

<sup>56</sup>RONALD L. AKERS, *DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH* (1973).

<sup>57</sup> AKERS, *supra* note 48, at 63.

<sup>58</sup>RONALD L. AKERS, *DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH* 60 (3d ed. 1985).

<sup>59</sup>AKERS, *supra* note 48, at 62-67.

<sup>60</sup>AKERS, *supra* note 48, at 119. *See also* EMILE DURKHEIM, *SUICIDE* (John A. Spaulding & George Simpson, Free Press 1951) (1897).

those goals are not as well developed.<sup>61</sup> Like Sutherland and Akers, Merton sought to explain the forces that shape both behavior and preferences.

Deterrence theory is the closest criminological theory to a rational choice, law-and-economics model.<sup>62</sup> It relies on rules to deter people from committing crimes, and does so by convincing potential law breakers that the benefits they would gain from crime would be outweighed by the pain they would suffer if caught.<sup>63</sup> But when sociologists analyze deterrence theory, they do so in a different way than economists. In the economic model, the cost of committing a crime is the expected legal sanction.<sup>64</sup> As I explore more fully below, sociologists have a much broader conception of costs. For example, they consider the effects of the way that those we care about react to our behavior and the way that individuals react to their own behavior (feelings of pride or guilt, for example).<sup>65</sup> For sociologists who study deterrence, the issue is not just whether formal sanctions do or do not deter, but whether and how formal legal sanctions and informal social

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<sup>61</sup>Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672, 677-78 (1938).

<sup>62</sup>Although I focus on those aspects of deterrence theory that rely on rational choice, not every vein of deterrence theory draws heavily on rational choice. For example, some deterrence theorists focus on places and crimes, rather than on offenders. These scholars consider the “spatial aspects of offences and offending” by looking at the “natural and built environment, the political, economic, social and cultural contexts of structures of areas and the actions of individuals and corporate bodies within areas.” Anthony E. Bottoms & Paul Wiles, *Explanations of Crime and Place*, in CRIME, PLACE AND POLICING: ESSAYS IN ENVIRONMENTAL CRIMINOLOGY 31 (David J. Evans, et al., eds. 1992).

<sup>63</sup>Daniel S. Nagin, *Deterrence and Incapacitation*, in THE HANDBOOK OF CRIME AND PUNISHMENT 345 (Michael Tonry ed., 1998).

<sup>64</sup>Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC’Y REV. 837, 839-840 (1990) (discussing the conventional economic deterrence model’s focus only on formal legal sanctions).

<sup>65</sup>See, e.g., Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC’Y REV. 549, 579 (1996); Grasmick & Bursik, Jr., *supra* note 64, at 840-41.

sanctions combine to affect behavior.<sup>66</sup>

### C. *The Lessons of Theory*

In the end, the differences between the law-and-economics approach and the sociological approach are perhaps not as profound as they might first appear. For example, there is no inherent contradiction between the hypothesis that individuals act so as to maximize their utility and the belief that poverty or abuse contributes to (or causes) criminal behavior. The rationality hypothesis does not assume that people gain utility only from socially useful activities. So some of the differences between law-and-economics and sociology may have to do more with terminology than actual differences in theory.

Nonetheless, some differences are meaningful to our inquiry. Most fundamentally, the law-and-economics approach tries to explain offense behavior as a general matter and does not attempt to explain the preferences that individual offenders hold.<sup>67</sup> Most law-and-economics models assume that preferences are fixed, and that people act rationally. In addition, law-and-economics aggregates people; it is not interested in individual differences, but in broader generalizations. These assumptions limit the kinds of policy responses that a law-and-economics approach can support because any policy response must be broad enough to affect a vast number of potential offenders.<sup>68</sup> Typically, the law-and-economics approach

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<sup>66</sup>See, e.g., Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in *CRIME AND JUSTICE: A REVIEW OF RESEARCH 1* (Michael Tonry ed., 1998); Bradley R.E. Wright, et al., *Does the Perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control, and Crime*, 41 *J. RES. CRIME & DELINQ.* 180, 205-06 (2004).

<sup>67</sup>Karl-Dieter Opp, *The Economics of Crime and the Sociology of Deviant Behaviour: A Theoretical Confrontation of Basic Proportion*, 42 *KYKLOS* 405, 424-25 (1989).

<sup>68</sup>See generally James S. Coleman, *The Impact of Gary Becker's Work on Sociology*, 36 *ACTA SOCIOLOGICA* 169, 169-70 (1993) (economics uses "a narrow theoretical frame, self-consciously sacrificing much of the rich detail of social and economic activity in return for the power provided by a parsimonious theory" while sociology shows "an unwillingness to sacrifice the rich detail of social activity, and ... more interest in empirical description than in theoretical power").

suggests only two responses to deviant behavior: changing enforcement priorities or changing the official sanction for criminal conduct.

The sociological approach is broader in that it considers a much greater number of ways to motivate individuals. It does not assume that preferences are fixed; indeed, many of the policy responses recommended by sociologists or criminologists aim to change preferences. But the broader focus comes at the cost of making many policy responses unrealistic. It would be wonderful to end poverty, for example, and doing so might be the best way to reduce crime, but it is a tall order and not likely to provide comfort to policy makers who want faster and cheaper solutions.

My goal is to try to learn from both the law-and-economics and sociological models, and examining sex tourism in detail will help do this. In the sections that follow, I draw lessons from both models for three main reasons. One strength of the law-and-economics model is that it counts as costs the factors that make it less likely that a person will commit a crime. One weakness is that its list of costs is too often unrealistically (and unhelpfully) undeveloped. The sociological model recognizes that every person has a different constellation of motivations and constraints and that different people are moved to avoid criminal behavior by different reasons.<sup>69</sup> I therefore use the idea of costs, but expand the list of possible costs to include more factors.

A second reason to use ideas from both models is that globalization has changed the issues that are central to criminal behavior. For reasons that I explain in detail below, formal sanctions are much less important than they used to be. The basic law-and-economics model, which includes the expected formal sanction as one of its two costs, is therefore impractical.<sup>70</sup> The sociological model recognizes the centrality of non-formal sanctions.<sup>71</sup>

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<sup>69</sup>Some sociological models consider “constraints” on behavior that operate much as costs do in the economic models. This approach is helpful, but does not go far enough because it too often lists constraints that are so idiosyncratic as to be unhelpful to policy makers.

<sup>70</sup>There are obviously many law-and-economics scholars whose work examines norms, and I draw on their work throughout this Article. My point here is not to suggest that law-and-economics has ignored norms, but to suggest that the formal law-and-economics model has not accounted for the insights of norms scholars, and that norms are more important to transnational activity than previously thought.

<sup>71</sup>*See, e.g., AKERS, supra* note 48, at 22. Indeed, some argue that non-formal sanctions are more important than formal sanctions. *See, e.g.,*

Both models provide some insights into the complicated ways that non-formal sanctions can interact with formal sanctions, and I explore this issue in detail.

Finally, as the sex tourism example makes clear, globalization has reduced the transaction costs of crime radically. Transactions costs operated as an uncounted but powerful constraint on criminal behavior, and their reduction has changed the calculus of many potential offenders.<sup>72</sup> The sociological approach recognizes this in a way that law-and-economics does not. Gathering information about new offenses and modifying preferences regarding new offenses are important to any discussion of deterrence, and the sociological model provides valuable insights on these processes.

### III. DETERRENCE AND SUBSTITUTION IN THE REAL WORLD

Most deterrence policy relies on the typical economic model. When policymakers want to attack crime, they typically see themselves as having two levers to pull, sanctions and deployment of law enforcement resources. Because this formulation implicitly adopts the law-and-economics model, it is important to take a close look at the assumptions and mechanics of the law-and-economics approach. No one who uses economic models really thinks that they precisely predict human behavior; most models incorporate too many simplifications and occasionally unrealistic assumptions to be accurate. Models are useful because they help identify assumptions, describe relationships between variables, and map a complicated transaction in a simple, useful way. They identify the broad structure and basic components, but they are often crude and do not fit specific situations well. Recently there has been an attempt to introduce insights drawn from cognitive psychology, sociology, and other disciplines to challenge, or at least modify, the assumptions of the rational choice model.<sup>73</sup> The goal of these attempts is to "modify the implausible elements of rational choice theory and supplement the inadequate elements in order to create a tool with

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Grasmick & Bursik, *supra* note 64, at 837. Others argue that formal sanctions are most important when they trigger non-formal sanctions. *See, e.g.,* Kirk R. Williams & Richard Hawkins, *The Meaning of Arrest for Wife Assault*, 27 *CRIMINOLOGY* 163 (1989).

<sup>72</sup>*See* Opp, *supra* note 67, at 410.

<sup>73</sup>*See, e.g.,* Korobkin & Ulen, *supra* note 38, at 1051; Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998); Kahan, *supra* note 4, at 2477.

more predictive power in specific situations."<sup>74</sup>

*A. The Problem: Transnational Crime Requires a New Model of Deterrence*

None of this work has attempted to account for the changes brought by globalization.<sup>75</sup> The goal of this Article is to modify the deterrence and substitution models to make them more powerful tools for shaping transnational deterrence policy. I do this by adding two important and as-yet unexplored refinements to the conventional model of deterrence to better account for the complexity of transnational activity. First, I argue that traditional deterrence models combine two variables that must be separated and analyzed as distinct costs. Most deterrence models consider the "probability of apprehension and conviction"<sup>76</sup> to be a single, unitary cost. Although this might be a rational simplifying assumption for domestic crime (at least in the United States), it is not appropriate for a globalized world in which unwanted activity crosses borders. This is true for two primary reasons. To begin, the conventional model implicitly assumes that the legal sanction is the only sanction; that the only costs imposed on people who engage in unwanted activity are those imposed by the state. This is not the case. Although legal sanctions are obviously important, the threat or imposition of non-legal sanctions are also important costs, and can act as deterrents to unwanted activity. Such sanctions could take the form of a reduction in public reputation or esteem, or the internal guilt associated with being associated with an accusation that the person engaged in activity that violated social norms. Accounting for these costs in the deterrence

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<sup>74</sup>Korobkin & Ulen, *supra* note 38, at 1074-75.

<sup>75</sup>Recall that, for my purposes, globalization means the closer integration of the countries and peoples of the world brought about by many factors, chief among them a significant and rapid reduction in costs of transportation and communication. See STIGLITZ, *supra* note 8, at 9. As I use the term, I mean more than just economic globalization, which is concerned mostly with the process and results of linking national economies together into a unified (or at least partly unified) global economy. See JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 3-4 (2004). I also include cultural and social integration, travel for purposes in addition to business, and exchanges of information among people from different parts of the globe.

<sup>76</sup>Becker, *supra* note 33, at 204.

calculation is complicated, but necessary.

The second refinement I make is to recognize that substitution or displacement is a process, not a simple act. Briefly stated, substitution occurs when the costs associated with an activity increase and the actor decides either to engage in a different activity or to engage in the same activity in a different place. Thus, if the penalty for the preferred crime rises sharply, then an actor may substitute another activity--either a lawful activity or a different, less-costly crime--for the preferred crime. Conventional deterrence analysis treats substitution or displacement as a costless transaction. As I will show, it is a complicated transaction that carries within it substantial costs. If, for example, a sex tourist decides that the cost of engaging in sexual activity with children has gotten too high in the U.S., he might decide to travel to another country. The costs associated with this move can be significant, ranging from the practical costs of gathering information about a new place and engaging with his victims to the losses involved with abandoning the sunk costs associated with developing the expertise that allowed him to engage in the original behavior.

Finally, before moving on, a short explanation of why we should attend to the possibility of substitution, and why we should do so through legal rules (or purposeful attempts to alter norms), is in order. There are three main reasons, one theoretical, one normative and one much more practical. The theoretical reason is that because the entities affected by transnational crime are widely dispersed and lack sufficient information, legal rules are the best way to account for substitution. The normative reason is that because substitution is often geographic, the consequences of U.S. and European regulation are felt in other parts of the world as harms. The practical reason is that deterrence policy should fully explore all the costs in a criminal transaction as a way of identifying those costs that can be increased in an effort to reduce crime.

One of the consequences of globalization is that in some instances geography matters less than it used to. As discussed above, if the costs associated with an activity rise in the U.S., those who wish to pursue the activity can easily travel to another part of the world where the activity is less expensive. Sometimes this migration is intentional. The source country might intentionally increase the costs associated with an activity so as to drive it out of the country, or the destination country might strategically modify its regulations to attract the activity. When this happens in commercial relations, it can often be a good thing. For example, some scholars argue that regulatory competition in Europe helped to develop the economy as leaders pursued policies to encourage commercial enterprises to

locate in their territory rather than in a rival's.<sup>77</sup>

Not every migration of activity is beneficent or caused by intentional policy shifts. Sex tourism is an obvious example. When the activity migrates not because of a purposeful modification of regulation but as an unintended side-effect of a policy, it is helpful to think of the migration as an externality. In economic terms, an externality occurs when "production or consumption activities involve benefits or costs that fall on people not directly involved in the activities."<sup>78</sup> The problem is that because the costs of the activity are not paid by those considering whether to engage in it, there is a chance that there will be too much or too little of the activity.<sup>79</sup> Put another way, if one goal of deterrence policy is to decrease the incidence of undesirable behavior, not merely to move it from one place to another, we must look at the effects of regulation not just in the place where the regulation is imposed, but elsewhere as well. This poses a fundamental problem, because "it will be socially desirable for individuals to engage less often in acts that cause detrimental effects than is in their immediate self-interest."<sup>80</sup> To analogize this to the sex tourism example,<sup>81</sup> when countries that are able to effectively regulate illicit sexual behavior do so (out of their immediate self-interest, of course), they cause harm in the developing world.

Economists recognize that the best way to account for externalities is for the parties involved to communicate with each other and arrive at a mutually-beneficial agreement.<sup>82</sup> They also recognize that there are often

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<sup>77</sup>See MARTIN WOLF, WHY GLOBALIZATION WORKS 26-28 (2004).

<sup>78</sup>FRANK, *supra* note 45, at 613.

<sup>79</sup>MATTHEW BISHOP, ESSENTIAL ECONOMICS 95 (2004).

<sup>80</sup>SHAVELL, *supra* note 32, at 80.

<sup>81</sup>This is not, of course, a perfect analogy. To be clear--I do not argue that the U.S. and Europe engage in *too much* regulation of illicit sexual activity, or that they should not regulate such behavior. I argue instead that they engage in the wrong kind of (or even insufficient) regulation. I argue that the U.S. and Europe have not fully accounted for the consequences of their regulations, and that the solution is not to decrease their regulation of illicit sexual activity, but to increase the scope of their regulation to capture, or internalize, as much of the displaced activity as possible.

<sup>82</sup>SHAVELL, *supra* note 32, at 81-87.

significant impediments to this process.<sup>83</sup> There are a number of reasons why such communication may not occur. Among the reasons are that it is difficult or impractical for parties to communicate, that the number of entities with an interest in the situation is so high that bargaining is difficult, that the party causing the harm does not recognize the harm (or that the party suffering the harm does not know where it came from), or that everyone knows from the beginning that any discussions are likely to fail.<sup>84</sup> Considered through the lens of the sex tourism example, it is clear that activity that crosses borders is susceptible to many of these impediments to bargaining. There are many interested parties spread around the globe and many of them do not have adequate information about the consequences of their activity or the sources of the harm that befalls them. It is in situations like this, in which bargaining is unlikely to occur and, if it does happen, unlikely to succeed, that economists recommend legal rules as a way alter undesirable or sub-optimal behavior. To summarize this point--the theoretical reason that we should account for substitution through legal rules is because sex tourist source countries (and, in the U.S., the states) and destination countries are unable to efficiently negotiate, and because neither side has the necessary information, displacement should be addressed through changes to legal rules or purposeful attempts to change norms, rather than leaving it to the affected parties to work out.

The normative reason that we should attend to substitution is much easier to state: those who cause harm should pay for it. This normative version of the economic argument that actors should seek to account for externalities has a long pedigree. Lord Bramwell, the 19th Century English jurist, famously wrote that “It is for the public benefit that trains should run; but not unless they pay their expenses.”<sup>85</sup> He argued that the costs of a public benefit should be borne by those who enjoy the benefits, not by individuals without compensation.<sup>86</sup> The economic case thus focuses on supply; if the true costs of an activity are not borne by those who benefit from it but instead shifted to someone else, the beneficiaries will engage in too much of it. The normative argument is simpler: it is fundamentally

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<sup>83</sup>*Id.* at 87-92.

<sup>84</sup>*Id.* at 88.

<sup>85</sup>*Bamford v. Turnley*, 122 Eng. Rep. 27, 33 (1862).

<sup>86</sup>*See* Anita Ramasastry, *The Parameters, Progressions, and Paradoxes of Baron Bramwell*, 38 AM. J. LEGAL HIST. 322, 326 (1994); P.S. Atiyah, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 389-380 (1979).

unfair for one party to force another to pay for the first party's pleasure.

There are a couple of practical reasons that we should pay attention to substitution. The first is what some refer to as "blowback," purportedly "a CIA term of art for the unintended, even ironic consequences of intelligence operations."<sup>87</sup> Blowback refers to the risk that policy measures that attempt to fix one problem can create another. The most commonly-cited example comes from events that followed the Soviet occupation of Afghanistan. During the occupation, the U.S. provided arms to Osama bin Laden and his allies to fight the Soviets. After the occupation, bin Laden and his allies used those same weapons against U.S. forces and interests.<sup>88</sup> The point is that policies, even those intended to do good, can cause unanticipated harm, and that self interest (apart from any concern for those affected by the policies) should compel us to consider those harms.

A second practical reason to consider substitution is that it can help reduce unwanted behavior. By definition, those who substitute out of their preferred activity to another activity have been at least partially deterred. Some substitute into desirable activities and some into unwanted activities. Those who go to new undesirable activities are forced to give up valuable expertise, making them vulnerable to detection. Thus even if policies result in substitution, they can still be effective. Accounting for substitution is a way to make policies more effective by attempting to predict the quantity and direction of substitution. Imagine that the U.S. government clamps down on illicit sexual activity. Some of those who engaged in the activity decide to quit and do something else. Some decide to try to find the same activity in another location. The nations affected, either as the source of those who wish to engage in the activity or their likely destination, would surely like to be able to predict where those who were not completely deterred were likely to go, and which of them was likely to travel. This information could lead to better coordination and widen the reach of law enforcement to capture more of the unwanted activity. Accounting for displacement does not mean avoiding it at all costs; instead, it means recognizing that it can occur and taking additional steps to capture some of the displaced activity.

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<sup>87</sup>James A. Nathan, *El Dorado Canyon: Reagan's Undeclared War with Qaddafi*, 33 *PRESIDENTIAL STUD. Q.* 935 (2003); see also CHALMERS JOHNSON, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* (2d ed. 2004).

<sup>88</sup>See Evan Thomas, *The Road to September 11*, *TIME*, Oct. 1, 2001, at 38.

*B. Displacement: Sex Tourism and Other Real-World Examples*

Researchers and law enforcement officials have long recognized the potential for displacement. Displacement comes in many forms, but all occur when some kind of enforcement action prevents a potential offender from doing what he wants, when he wants, where he wants, and in the way he wants.<sup>89</sup> Displacement can be geographic, in which case criminal activity is driven from one place to another; “tactical,” in which case the criminal changes methods but not crimes; or substantial, in which case the offender changes crimes entirely.<sup>90</sup> There is evidence suggesting that geographic displacement can occur. For example, when the police crack down on a drug market in one neighborhood, sellers may move to an adjacent neighborhood.<sup>91</sup> There is also evidence regarding substantial displacement; that is, the risk that offenders may switch from one crime to another. The evidence on this issue is complicated. For example, a population of offenders whose preferred crime was credit card fraud encountered new technologies that should have made it profitable for them to switch to a related crime.<sup>92</sup> They did not do so, for at least two reasons. First, the payoff from the new crime, even with the new technology, was simply not high enough to justify the switch.<sup>93</sup> Second, the second crime was tightly controlled by an ethnically-defined criminal syndicate, which did not permit

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<sup>89</sup>Lorraine Green Mazerrole, et al., *Civil Remedies and Drug Control: A Randomized Field Trial in Oakland, California*, 24 EVALUATION REV. 212, 232 (2000).

<sup>90</sup>*Id.* at 232 citing Thomas Gabor, *Crime Displacement: The Literature and Strategies for its Investigation*, 6 CRIME ET JUSTICE 100 (1978) and Thomas A. Reppetto, *Crime Prevention and the Displacement Phenomenon*, 22 CRIME & DELINQ. 166, 168-69 (1976).

<sup>91</sup>Evan Wood, et al., *Displacement of Canada’s Largest Public Illicit Drug Market in Response to a Police Crackdown*, 170 CAN. MED. ASS’N J. 1151, 1154-55 (2004).

<sup>92</sup>See Francois Mativat & Pierre Tremblay, *Counterfeiting Credit Cards: Displacement Effects, Suitable Offenders and Crime Wave Patterns*, 37 BRIT. J. CRIMINOLOGY 165 (1997).

<sup>93</sup>*Id.* at 181.

members of other ethnic groups to engage in the activity.<sup>94</sup>

These two real-world examples of displacement are helpful for several reasons. First, they demonstrate that displacement can, under certain conditions occur. Second, they demonstrate that demand can be stronger than enforcement efforts; in other words, if demand is sufficiently inelastic, then displacement is more likely than if demand is very sensitive to increases in price. Third, displacement can actually increase harm if it forces criminals into a new location, one where law enforcement officials are not prepared to combat the new crime and where social rules against the activity are not sufficiently strong to prevent the creation of a new group of consumers. Finally, they show that displacement is both complicated and difficult. It is not the costless transaction that some law-and-economics theorists seem to assume, and it can be disrupted in some cases.

Other areas of criminal behavior have also exhibited what looks like a substitution effect. One useful example is international terrorism, which has long been a transnational phenomenon, making it perhaps the closest analogy to sex tourism. The modern history of terrorist activity shows that differences in the effectiveness of regulation have caused terrorists to migrate to the areas of lowest regulation.<sup>95</sup> There is evidence, for example, that “the installation of metal detectors in airports” that began in 1973 “had primarily a substitution effect” because the policy made airplane hijackings more difficult, but encouraged terrorists to substitute into other kinds of terrorist activities.<sup>96</sup>

One reason for the substitution was that, although the change in policy that caused substitution drove up the cost of one kind of terrorist act, it did not affect the “resources, knowledge, or wherewithal”<sup>97</sup> of those wishing to engage in terrorist acts. Terrorists still had the desire and means to engage in terrorism even if their preferred venue was no longer available. Researchers concluded that in the case of terrorism an effective policy

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<sup>94</sup>*Id.*

<sup>95</sup>Eric Iksoon Im, Jon Cauley & Todd Sandler, *Cycles and Substitutions in Terrorist Activities: A Spectral Approach*, 40 *KYKLOS* 238, 250-51 (1987).

<sup>96</sup>Walter Enders & Todd Sanders, *What Do We Know about the Substitution Effect in Transnational Terrorism?*, in *RESEARCHING TERRORISM: TRENDS, ACHIEVEMENTS AND FAILURES* 119, 131 (Andrew Silke ed., 2004).

<sup>97</sup>*Id.*

intervention must "increase the cost of all terrorist modes of operation simultaneously."<sup>98</sup> An effective deterrent must not only disrupt the specific activity, it must also disrupt its component parts.

Finally, there is evidence that sex tourism is an example of displacement. There has been a substantial increase in prosecutions for illicit sexual activity in the United States, and a corresponding decrease in the number of reported victims of such crimes. Taken alone, this evidence tells a welcome story for the U.S. But when considered in light of the other evidence I present, the story becomes more complicated. Effective regulation in the U.S. may lead to substitution or displacement, encouraging those who want to engage in the activity to seek other venues. In economic terms, this means that the cost of the activity has risen in the U.S. and has led those who wish to engage in it to seek less expensive alternatives.

### Prosecutions in U.S. District Courts

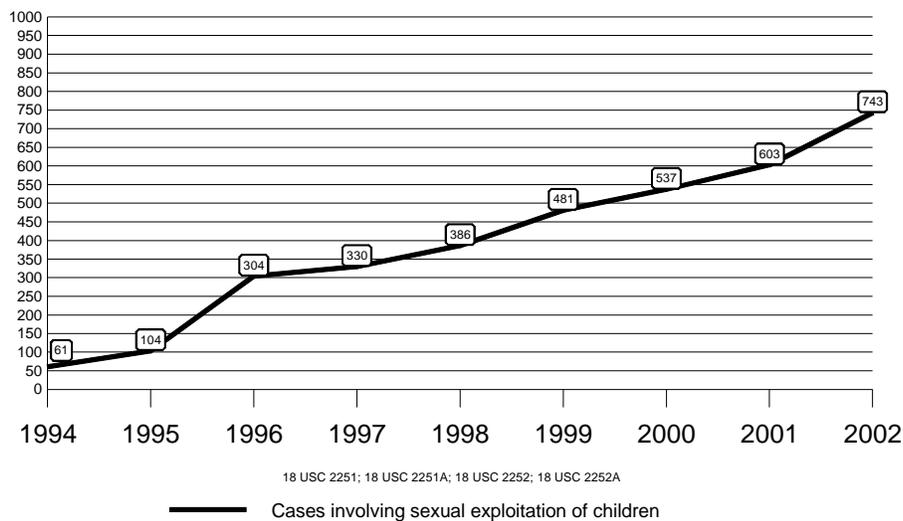


Table 1

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<sup>98</sup>Jon Cauley & Eric Iksoon Im, *Intervention Policy Analysis of Skyjackings and Other Terrorist Incidents*, 78 AM. POL. SCI. REV. 27, 30 (1988).

### Prosecutions in U.S. District Courts

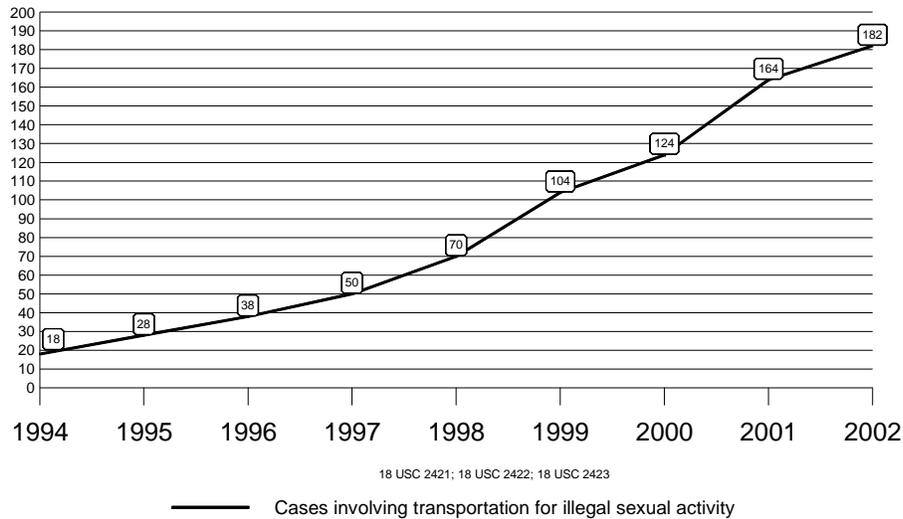


Table 2

One piece of the evidence comes from statistics showing that prosecutions for similar crimes in the U.S. have increased. Prosecutions in U.S. District Courts of cases involving the sexual exploitation of children rose every year between 1994 and 2002. The first table below shows the number of prosecutions for the sexual exploitation of children.<sup>99</sup> Table 2 shows the increase in prosecutions for the transportation of minors (and others) for sexual purposes.<sup>100</sup> Both tables show a sharp increase in prosecutions in the past decade. Neither table is a perfect measure of the behavior that underlies sex tourism, but taken together they support the

<sup>99</sup>The table includes cases prosecuted under four statutes: 18 U.S.C.A. § 2251 prohibits the sexual exploitation of children; 18 U.S.C.A. § 2251A prohibits buying or selling children; and 18 U.S.C.A. §§ 2252 & 2252A prohibit the production, transportation, receipt or possession of sexually explicit material involving children.

<sup>100</sup>Table 2 includes cases prosecuted under three statutes: 18 U.S.C.A. § 2421 prohibits the transportation of any person in interstate or foreign commerce with the intent that the person engage in prostitution; 18 U.S.C.A. § 2422 prohibits the entice or coercion of any person to travel for the purposes of engaging in prostitution; and 18 U.S.C.A. § 2423 prohibits travel in interstate or foreign commerce for the purpose of engaging in illicit sex and making arrangements for others to do so.

inference that the sexual activity that underlies much of sex tourism is increasingly effectively regulated in the U.S.

Tables 1 and 2 reflect prosecutions in federal court. But the majority of sex offenses, like all criminal cases, are prosecuted in state courts.<sup>101</sup> When we examine state records, there is a looser fit between the available evidence and the argument that effective regulation has displaced the activity, but there is support for the point. Between 1991 and 2001, the number of reported rapes declined 26%.<sup>102</sup> The victimization rate for children under twelve fell approximately 71% in the same period.<sup>103</sup> During this time, the victimization rate for all victims, including those under 12, fell approximately 42%. Again the data are not perfect, but the fact that there are fewer victims of sexual assault, and fewer child victims of all crimes, supports the inference that the behavior that underlies sex tourism has decreased in the U.S.

There is strong anecdotal evidence to support this inference. Two recent reports, "The Decline in Child Sexual Abuse Cases," written in 2001 for the U.S. Department of Justice,<sup>104</sup> and "Sexual Abuse Decline in the 1990s: Evidence for Possible Causes,"<sup>105</sup> produced for the Crimes against Children Research Center at the University of New Hampshire, both draw on evidence from a variety of sources that points to a sharp decrease in sexual abuse of children in the U.S. in the past decade. Although the authors disagree about the reasons for the decline, they conclude that the evidence indicates that there has been decline of approximately 39%.<sup>106</sup>

Taken together, evidence of a significant increase in prosecutions for

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<sup>101</sup>AMERICAN BAR ASSOCIATION, *supra* note 3 (reporting that only 4% of all crimes in the United States are prosecuted in federal court).

<sup>102</sup>NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 2002, PART II: EXAMINING SERIOUS CRIME 85 (2002).

<sup>103</sup>*Id.* at 86.

<sup>104</sup>LISA JONES & DAVID FINKELHOR, U.S. DEPARTMENT OF JUSTICE, THE DECLINE IN CHILD SEXUAL ABUSE CASES (2001).

<sup>105</sup>DAVID FINKELHOR & LISA M. JONES, CRIMES AGAINST CHILDREN RESEARCH CENTER, SEXUAL ABUSE DECLINE IN THE 1990S: EVIDENCE FOR POSSIBLE CAUSES. Interestingly, displacement is not considered as a possible cause.

<sup>106</sup>*Id.* at 1.

sexual abuse crimes, and a significant decrease in the number of reported victims of such abuse suggest that the cost in terms of likely prosecution has increased and may have contributed to the corresponding decline in the incidence of the behavior, at least in the U.S. This evidence does not, however, tell us anything about whether the activity has declined overall or has been displaced from the U.S. to other countries.

Displacement of illicit sexual activity can occur only if individuals can travel cheaply to common destination countries. A study of changes in travel patterns between Europe and the U.S. and common destination countries reveals helpful but not conclusive evidence. As shown in Table 3, between 1995 and 1999, there was a significant increase in travel from Europe and the Americas<sup>107</sup> to three common sex tourism destination countries.<sup>108</sup>

<b>Percentage Increase in Tourists Arriving Between 1995 and 1999</b>			
	Cambodia	Philippines	Thailand
Europe	36.37%	26.78%	21.26%
Americas	38.89%	21.09%	30.49%

In addition, there is reason to believe that the statistics do not capture the entire increase. Although the numbers show an increase in travel from source countries to destination countries, they do not show the proportion of sex tourists to business travelers and ordinary vacationers. But there is anecdotal evidence that as a location gains a reputation as a sex tour destination, ordinary tourists begin to stay away.<sup>109</sup> Thus the percentage

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<sup>107</sup>The most reliable statistics available, from the World Tourism Organization, group together all travelers from the Americas.

<sup>108</sup>WORLD TOURISM ORGANIZATION, COMPENDIUM OF TOURISM STATISTICS 34 (Cambodia), 147 (Philippines), 182 (Thailand) (2001).

<sup>109</sup>There appears to be a kind of tipping point with tourism destinations, after which the proportion of legitimate tourists begins to decline. There is evidence that this has occurred in Thailand, for example, with “couples, families, and culture-motivated travelers” staying away

increase in sex tourists is likely higher than the increase in total tourists to destination countries because as the number of sex tourists rises, the concentration of sex tourists increases even more.

### C. Discovery, Prosecution, and Sanctions

Whether a person is deterred from committing a crime depends in great measure on what he thinks will happen after the crime. How much will he benefit from the crime? How likely is it that he will be caught? If he is caught, then what--will he be embarrassed, praised, prosecuted? If he is prosecuted, what will the sanction be? This complicated calculation must, of course, be simplified in any economic model. Most scholars follow the lead of Gary Becker, who treated the probability of apprehension and conviction as a single variable, and assumed that "only convicted offenders are punished."<sup>110</sup> The two steps--first apprehension, then conviction--are not separated. Although this might be a reasonable simplifying assumption in the U.S.,<sup>111</sup> it is unreasonable with respect to transnational activity, where it is not at all clear that apprehension will be followed by conviction or social disapprobation.<sup>112</sup> Any deterrence model that leaves out the role of

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"because of the sleazy reputations of its cities." LINDA K. RICHTER, *THE POLITICS OF TOURISM IN ASIA* 100 (1989). See also Donna Tunney, *Travel's Dirty Little Secret*, 60 TRAVEL WKLY. 38, Aug. 6, 2001 (describing reluctance of ordinary tourists to return to location at which other tourists engaged in lascivious behavior). From the vantage of many potential sex tourists, once a destination "tips" toward sex tourism and fewer legitimate tourists arrive, the destination might be even more attractive. For individual offenders, the expected payoff for a crime is higher if other people also commit the same offense in the same location and thereby tax police resources. See Peter-J. Jost, *Crime, Coordination and Punishment: An Economic Analysis*, 21 INT'L REV. L. & ECON. 23, 25 (2001).

<sup>110</sup>Becker, *supra* note 33, at 177.

<sup>111</sup>In state courts (which handle the vast majority of criminal cases), 60% of suspects arrested for homicide are convicted, and 94% of those are sent to prison. For rape, 45% of those arrested are convicted and 70% go to prison. For robbery, 44% of those arrested are convicted, and 75% go to prison. NATIONAL CENTER FOR STATE COURTS, *supra* note 102, at 89 (2002).

<sup>112</sup>See, e.g., Cathy Scott-Clark & Adrian Levy, *The Brothel King's Revenge*, THE GUARDIAN (U.K.), Feb. 21, 2004 (owner of largest sex club in

social norms in governing personal behavior is inadequate. In this section I attempt to consider more fully the range of costs facing a potential criminal.

Deterrence analysis that follows the law-and-economics model holds that if the benefit of an illegal activity outweighs the likelihood of detection and the expected legal sanction, then a person will choose to commit the crime. In this model, the only cost to the potential lawbreaker is the expected legal sanction (as modified by the probability of detection). This simple model leaves out the important role of social norms. Norms are "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both."<sup>113</sup> There is much debate about how norms emerge--from a person's desire to signal to others that she is a worthy partner for future interaction,<sup>114</sup> from a desire for the esteem of others,<sup>115</sup> or from an internalized understanding that cooperation is best so long as others also cooperate.<sup>116</sup> There is, of course, a complicated relationship between norms and the law. Some argue that one important function of the law is "expressive:" by adding the voice of the state on the side of an existing social norm, the law can create or strengthen the norm (or weaken the norm by contradicting it).<sup>117</sup> Others argue that the law is, in many circumstances, made much less relevant by the existence of well-known, efficient norms.<sup>118</sup>

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Bangkok reporting that he had paid bribes to the police of at least £1.5 million); PASUK PHONGPAICHIT ET AL., CORRUPTION IN THE PUBLIC SECTOR IN THAILAND: PERCEPTIONS AND EXPERIENCE OF HOUSEHOLDS 37 (2000) (indicating that the police solicited bribes from 9% of visitors); Nualnoi Teerat, *Thailand: Fight against Corruption* (2004), at [www.fes.or.kr/Corruption/papers/Thailand.htm](http://www.fes.or.kr/Corruption/papers/Thailand.htm) (last visited March 29, 2004).

<sup>113</sup>Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

<sup>114</sup>ERIC POSNER, LAW AND SOCIAL NORMS 11-35 (2000).

<sup>115</sup> McAdams, *supra* note 113, at 340.

<sup>116</sup>Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367 (2002).

<sup>117</sup>Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

<sup>118</sup>ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS

Despite the variety of approaches in the norms literature, what is clear is that norms matter to law, and that if they are consistent with the law, they can supplement the law's deterrent power.

Given the connection between norms and the law, and particularly between norms and deterrence, it is strange that norms are not considered more central to the deterrence model. To be sure, there is much discussion of the role of norms in deterrence,<sup>119</sup> but this discussion mostly focuses on the role of norms as independent mechanisms to deter crime. What is left out is a consideration of norms as an element of the deterrence model.<sup>120</sup> Because engaging in behavior that would violate an internalized norm raises the cost of unwanted activity, the violation of norms should be included as a cost in the deterrence model.

Despite the literature linking law and norms, the implicit assumption often seems to be that, for people willing to commit one crime, all other crimes are, in effect, moral substitutes. That is, that apart from differences in penalty or likelihood of enforcement, a person willing to commit theft would also be willing to commit rape. Underlying this assumption is the belief that people either are or are not criminals. If a person is a criminal, then he must not be influenced *at all* by positive social norms (those against committing crimes) or he must be exclusively influenced by negative social norms (those that encourage or excuse criminal behavior).<sup>121</sup> Put another way, the law-and-economics approach assumes that "[i]f the thief has his

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SETTLE DISPUTES (1991)

<sup>119</sup>See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997).

<sup>120</sup>Neal Katyal, among others, has argued that the violation of a norm can lead to stigmatization, which can, for a variety of reasons, lead to greater criminality. Katyal, *supra* note 46, at 2457-61. This argument, however, identifies a different cost of violating a norm, and does not integrate it into the deterrence or substitution model.

<sup>121</sup>There is empirical support for the argument that because different crimes are governed by different norms, offenders willing to commit one crime may be unwilling to commit another, even one that is closely related to the first. See James J. Teevan & Heather B. Dryburgh, *First Person Accounts and Sociological Explanations of Delinquency*, 37 CAN. REV. SOC. & ANTHROPOLOGY 77, 89 (2000) ("Some respondents see theft from large stores as justified because the stores are making huge profits, whereas theft from individuals, friends, or family is seen to be wrong").

hand cut off for taking five dollars, he has just as well take \$5,000."<sup>122</sup> The assumption that people who are willing to commit a particular crime are immune to *all* norms is at odds with human behavior. A thief who is willing to steal five dollars might not steal \$5000--regardless of the penalty--because he, like many people, had internalized the idea that there are degrees of wrong. In other words, he might have been willing to violate a norm against stealing a small amount of money, but still be unwilling to violate a different norm against stealing a much larger amount.

Criminologists have begun to investigate this insight. In addition to weighing formal sanctions, those who are considering criminal activity also weigh the informal sanctions that might flow from their behavior. Criminologists focus on two informal costs, the "shame for doing something the actor considers morally wrong,"<sup>123</sup> and "social censure or disapproval by significant others."<sup>124</sup> Both have the potential to shape behavior and encourage or discourage compliance with the law.<sup>125</sup> The research suggests that all potential costs work together much in the way that the law-and-economics model would suggest, but that the equation is complicated. The evidence supports the hypothesis that people considering whether to commit a criminal act do engage in the kind of weighing of costs and benefits that Gary Becker suggested in his groundbreaking work.<sup>126</sup> But the evidence

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<sup>122</sup>Stigler, *supra* note 40, at 527.

<sup>123</sup>Grasmick & Bursik, Jr., *supra* note 64, at 840.

<sup>124</sup>Ronet Bachman, et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC'Y REV. 343, 355 (1992).

<sup>125</sup>Some research suggests that both costs are important and powerful. See, e.g., Raymond Paternoster, et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 LAW & SOC'Y REV. 457 (1983). More recent research suggests that moral costs, that is, feelings of guilt or shame that result from violating an internal rule or moral code, are the much more powerful force. See, e.g., Grasmick & Bursik, Jr., *supra* note 64, at 853-54; Ronet Bachman, et al., *supra* note 124, at 365. What these studies highlight is the importance of including informal sanctions in the deterrence calculus.

<sup>126</sup>See, e.g., Bradley R.E. Wright, et al., *Does the Perceived Risk of Punishment Deter Criminally Prone Individuals? Rational Choice, Self-Control, and Crime*, 41 JOURNAL OF RESEARCH IN CRIME & DELINQUENCY

also suggests that people include the costs associated with informal sanctions in the calculation along with the costs associated with formal sanctions.<sup>127</sup> Interestingly, the research also suggests that informal sanctions influence the importance of formal sanctions.<sup>128</sup> Thus informal sanctions operate as both “a powerful and independent source of social control, they also condition the impact of more rational factors,” which include formal legal sanctions.<sup>129</sup> In some circumstances, internal moral rules can trump more practical considerations (such as the likelihood of detection or the likely legal sanction). In other circumstances, where moral rules exert less influence, utility calculations are more important.<sup>130</sup>

An important subsidiary consideration is the potential offender’s perception of the risk of suffering a sanction for his misbehavior. In other words, costs influence behavior only if potential offenders are aware of them. The evidence suggests that “people who perceive that sanction risks and costs are higher” commit fewer crimes.<sup>131</sup> But recognizing this fact is just the beginning of the analysis. More important is to consider whether “the perceptions are themselves manipulable by policy.”<sup>132</sup> The task then is to construct policies that can influence a potential law breaker’s perception of how likely he is to be caught, and what the likely sanctions for his misbehavior will be. Some of the difficulty of this task is explained by the status and community issues discussed below. When potential law breakers receive signals that their conduct is common and unlikely to result in a sanction, they are more likely to engage in the conduct.<sup>133</sup> But the first step in setting effective policies is to recognize what they must accomplish and the multitude of approaches that they should take.

The decision to commit a crime is complicated, and influenced by many factors, among them the probability of being caught, the expected legal

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180, 205-06 (2004); Paternoster & Simpson, *supra* note 65, at 579.

<sup>127</sup>See, e.g., Grasmick & Bursik, Jr., *supra* note 64, at 853-54.

<sup>128</sup>See Paternoster & Simpson, *supra* note 65, at 579.

<sup>129</sup>*Id.*.

<sup>130</sup>*Id.*

<sup>131</sup>Nagin, *supra* note 66, at 2-3.

<sup>132</sup>*Id.* at 5.

<sup>133</sup>See discussion *supra* Part IV.A.

sanction, the probability of actually suffering the legal sanction, and social norms. Norms against committing a crime must be stacked next to the other reasons that person might commit a crime. It is wrong to assume that persons who have decided to commit a crime are not influenced by positive norms. They may not be completely deterred by the norm, but they are as likely to be influenced by a positive norm as any other person. In economic terms, the decision to violate a norm is a cost--perhaps substantial, perhaps negligible--that must be accounted for in the economic deterrence model. Depending upon who discovers the suspect, apprehension (or discovery), can subject the person to significant social sanctions like loss of reputation, ostracism, or disruptions to family or employment dynamics. The likelihood of suffering these sanctions is surely a consideration for a person weighing whether to commit a transnational crime. Whether this cost is high or low depends in large part on the extent to which the suspect is connected to the community in which he is apprehended.

Assume, for example, that a sex tourist is caught with a child prostitute in a remote resort in Thailand. If he is not prosecuted, he might suffer some personal embarrassment and the opprobrium of the people who caught him. But the cost to his reputation at home--the reputation he cares most about--will be low because there is no mechanism for people in the sex tourism destination country to affect his reputation at home. A second type of cost is one that sex tourists certainly consider, and that is the monetary cost associated with avoiding prosecution. This assumes that the entity that apprehended the suspect has the capacity to initiate legal proceedings (or credibly threaten to do so). It is clear that sex tourists not only pay bribes, they exchange information about the amount they should pay.<sup>134</sup>

It is useful at this juncture to recall that the purpose of developing an economic model of deterrence is to identify the costs associated with unwanted activity. The costs are those elements that make the activity less desirable, more difficult, or more risky. Because the threat of apprehension and the threat of prosecution are different factors, and because both are substantial risks for those contemplating transnational crimes, they should be separately included in the deterrence model.

#### *D. The Substitution Process*

Some models of deterrence account for substitution; that is, they account

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<sup>134</sup>See, e.g., *Teacher Jailed for Kiddie Porn*, *supra* note 26, at 34; Mark Baker, *Cambodia a Haven for Australian Pedophiles*, SYDNEY MORNING HERALD, July 13, 2002, at 17.

for the prospect that increasing the costs associated with committing one crime will decrease the incidence of that crime but provide an incentive to commit other crimes. Most models of deterrence assume that individuals make a simple calculation: if the benefits of committing a crime outweigh the costs, calculated as the probability of detection and the expected legal sanction, then a rational criminal will commit the crime. Substitution models combine the simple deterrence calculation with the assumption that a criminal has the opportunity to commit more than one crime, and that the penalty for one crime has increased. Thus, if the benefits of committing the second crime (reduced, of course, by the costs outlined above) outweigh the benefits of committing the first crime (reduced by a similar factor), then a rational criminal will commit the second crime. An increase in the cost of committing the preferred crime (either an increase in enforcement or an increase in penalty, or a combination of both), can lead a criminal to substitute a second, less costly, crime for the first.

In the deterrence literature that considers the substitution effect, substitution is treated as a simple, costless decision:<sup>135</sup> if, for example, the cost of dealing crack increases (through higher penalties or more vigorous enforcement), then a drug dealer will simply sell heroin. Even crimes that might not appear closely related--like rape, assault, prostitution, or murder--are treated as potential substitutes for each other, under the right conditions.<sup>136</sup> Treating substitution as an event rather than a process ignores the many potential costs contained in it, any one of which could be a point of regulation.

One important set of costs associated with the process of substitution are those incurred during the transition from one form of unwanted activity to another. Again, most models of deterrence assume that substitution from one form of unwanted activity is costless. While this might be an appropriate simplifying assumption with regard to closely linked offenses like dealing different kinds of drugs, it is out of place when discussing any kind of activity in which substitution is more complicated than that.

Gathering information, particularly about transnational activity, can be very costly. Recall that in the deterrence model, costs are those factors that make the activity less appealing, thereby reducing the net expected value of the benefit and making it less likely that a person will engage in the activity. Let us consider a common example from the deterrence literature, that of a

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<sup>135</sup>Some writers do include what are essentially sunk costs and the cost of raw materials as a cost of substitution. See Katyal, *supra* note 46, at 2397.

<sup>136</sup>*Id.* at 2393-95.

drug dealer who learns that the penalty for dealing crack has increased.<sup>137</sup> The conventional models predict that a dealer faced with this problem will survey the legal landscape, determine that the penalty for dealing heroin is less severe than that for dealing crack (and, to keep things simple, that the probability of detection is the same). She will then begin to sell heroin.

The model's assumption is again at odds with human behavior. Making the shift from selling one illegal drug to another is likely fraught with risks, some of which may be high enough to deter the shift (especially when combined with all the other costs). Even in this simple example, the potential costs are clear enough. First, like all retailers, drug dealers must identify suppliers for their goods. It is safe to assume (especially with regard to illegal activity) that there is no ready list of potential suppliers. Second, drug dealers must identify new customers (even if we assume that drug dealers are indifferent to what they sell, there is ample evidence that drug users have strong preferences). Finally, drug dealers, like all retailers, succeed or fail based in some part on their reputations. All of this activity--finding a supplier, identifying customers, establishing a brand--is likely to draw the attention of existing heroin dealers, with significant attendant risks. And a novice heroin dealer is more likely to be caught by law enforcement than an experienced crack dealer.

#### *E. Investments and Sunk Costs*

In economic terms, sunk costs are “costs that cannot be altered or avoided by current or future decisions.”<sup>138</sup> These can include past investments in infrastructure (whether wise or unwise), consumer goods, real estate--virtually any past expenditure or investment that cannot be altered. Because sunk costs cannot be altered, mainstream economics considers them irrelevant to decision making; a rational decision maker will ignore that which she cannot change.<sup>139</sup> She may no longer think that her previous decision was wise, but she should not consider sunk costs in her future decisions. There are two other ways to state the assumption that rational decision makers will ignore sunk costs. One is to say that the amount we paid for a good is irrelevant to future decisions we make about it. The other is to say that, for the purpose of making future decisions, we should not care whether we received a good for free or if we paid for it; we

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<sup>137</sup> *See id. at* 2402-08.

<sup>138</sup> GRINOLS, *supra* note 45, at 241.

<sup>139</sup> *Id.*

should treat both goods the same. Consider an example. Assume that two consumers obtain identical pairs of shoes. One paid \$200 for them and one got them for free. Both find the shoes very uncomfortable to wear. The rational choice model predicts that the consumer who paid \$200 for the shoes will be as likely to give them away as the consumer who got them for free. But our intuition tells us that the person who paid \$200 is more likely to walk around in pain or even invest more money in stretching the shoes than the person who got them for free.<sup>140</sup>

It is by now widely accepted that this assumption does not accurately reflect actual decision making.<sup>141</sup> Richard Thaler's work on sunk costs has demonstrated that actual consumers do not behave as rationally as economists would predict.<sup>142</sup> In one experiment, he advertised an all-you-can-eat lunch at a local pizza restaurant. He collected an admission price from every customer on the way in, then refunded the admission price to half the customers, selected at random. Rational choice theory would predict that the amount of pizza consumed by those who paid would be the same (or nearly so) as the amount eaten by those who were enjoying a free lunch. Reality was different. Customers who received a refund ate less than those who had paid for their food.<sup>143</sup> There is, of course, no way to know for certain why those who ate more did so. One possibility is that those who paid felt a need to justify their investment.<sup>144</sup> Another possibility is that those who ate less became less engaged in the process of eating because of the refund. In either event, Thaler's work shows that when making future decisions, those who have invested in a good tend, on average, to value it more highly than those who got the same good for free.

### 1. Investments in Expertise

Despite their general acceptance in the world of economics, Thaler's insights have not made its way into the law-and-economics deterrence literature. To see the importance of Thaler's work to criminal deterrence, it

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<sup>140</sup>I take this example from FRANK, *supra* note 45, at 274.

<sup>141</sup>*See, e.g.*, Korobkin & Ulen, *supra* note 38, at 1124-26.

<sup>142</sup>*See, e.g.*, RICHARD THALER, QUASI-RATIONAL CHOICE (1991).

<sup>143</sup>Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 48 n.8 (1980).

<sup>144</sup> Korobkin & Ulen, *supra* note 38, at 1125.

is first necessary to define the elements of criminal behavior that constitute an investment. The decision to substitute one activity for another means abandoning substantial expertise and assuming the role of novice. For most potential offenders, expertise is their most important investment. Consider the crack/heroin example. A successful crack dealer--that is, one who has not been run off by other dealers nor confined in prison--has accumulated a degree of expertise that allows him to avoid detection. For example, he can likely tell an undercover officer from an actual customer or determine when a rival dealer's threats are bluffs and when they pose a real danger. Potential sex tourists will have different expertise, but it is likely to be just as important to them as to anyone else. Potential sex tourists need to know how to negotiate with procurers of prostitutes, how to negotiate bribes with law enforcement officials, and how to shield their proclivities from their friends and acquaintances.

Potential offenders can obtain expertise in two main ways. They can learn through experience, or they can learn from others engaged in the same activity. Developing expertise through experience is costly. For drug dealers, it might involve harassment or violence from rival dealers, unwanted attention from the police, time spent engaging in the low-paying and low-status aspects of the business, or time in prison. For sex tourists, the costs are similar, and are likely to be higher for novices than repeat tourists. They might involve incurring the costs associated with the uncertainty and fear of being caught by (and having to negotiate a bribe with) a foreign police officer, being ripped off by a tour guide or procurer, or ending up in a foreign jail.

The tools of globalization--mainly the Internet, which offers anonymous, asynchronous communication--also offer offenders a way to obtain expertise at almost no cost. For sex tourists, this means that they need not personally expose themselves to the risks associated with being a novice. They can obtain the information they need to develop expertise from others who have gone before them. Expertise developed in this way comes at a much lower price than expertise gained through bitter experience.<sup>145</sup>

Rational choice theory assumes that offenders are indifferent to the way that they gained expertise; because it is a sunk cost that cannot now be

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<sup>145</sup>See Kyung Hwan Baik & In-Gyu Kim, *Optimal Punishment When Individuals May Learn Deviant Values*, 21 INT'L REV. L. & ECON. 271, 274 n.6 (2001). Baik and Kim limit their definition of illicit gains to feelings of satisfaction or thrill that an offender may derive from criminal activity. *Id.* I use their framework, but expand their definition of illicit gains to include gains in expertise in accomplishing the activity.

altered, it should not influence future decision making. The rational choice model would predict that when potential offenders consider what kind of offense to commit--sell crack or sell heroin, for example--they are indifferent to the amount of their investment in expertise. They should only consider the utility they expect to gain from selling heroin versus that they would obtain selling crack, and the cost of each. This assumption is embedded in the law-and-economics criminal deterrence literature on the substitution effect. The substitution effect assumes that criminals freely switch between types of crimes, disregarding (as rational decision makers should) the investments they have made in gaining expertise.

The work of Thaler and others tells us that this is not an accurate description of actual behavior. The extent of investment in a particular good affects the decisions that people make about the good. For example, Barry Staw has shown that people are more likely to invest in a losing activity when they have already invested in it.<sup>146</sup> In other words, good money does follow bad, and the extent of the previous investment helps to determine how much good money will follow the bad money. Thaler's own work shows that people who obtain something for free are more likely to abandon it if it becomes associated with a higher cost in the future. His pizza experiment is the most prominent example of this.<sup>147</sup> One possible reason for this comes from a famous experiment by Elliot Aronson and Judson Mills. They demonstrated that subjects who were forced to undergo a burdensome and unpleasant process as the price of admission to an activity tended to enjoy the activity more than those who had been admitted at a lower cost or for free.<sup>148</sup>

The importance of gaining expertise or entry into a particular criminal activity has important ramifications for understanding the deterrence of transnational crimes. Typical approaches to deterrence, which contain most of the assumptions of the law-and-economics model, assume that if substitution occurs, it is a simple and costless transaction. For the reasons developed above, I argue that this is not so. By identifying the main points in the substitution process we can drive up the cost of the entire process and

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<sup>146</sup>See Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Alternative*, 6 ACAD. MGMT. REV. 577 (1981).

<sup>147</sup>Thaler, *supra* note 143, at 48 n.8.

<sup>148</sup>See Elliot Aronson & Judson Mills, *The Effects of Severity of Initiation on Liking for a Group*, 59 J. ABNORMAL & SOC. PSYCHOL. 177 (1959).

deter more people. The next question is one to which this section is addressed: among potential offenders, which are likely to seek a substitute and which are not likely to do so? Because we know that for most people, sunk costs *are* relevant to decision making, we should expect that criminals who obtain their expertise for free would be more likely to seek substitutes than those who learn through experience. We would predict that those with the smallest sunk costs would be the most likely to seek a substitute because they have the least to lose from abandoning their previous activity.<sup>149</sup> Recall also that for deterrence, substitution is a good thing. Everyone who substitutes a new activity for a preferred activity has, by definition, abandoned the first activity. And some of those who abandon the first activity substitute to activities that are lawful or socially positive.

Returning to the sex tourism example helps to illustrate the point. There are actually two groups of people we want to deter. The first group consists of those who engage in illicit sexual activity in the U.S. or Europe, have noticed that the costs associated with this activity are rising, and are considering whether to substitute sex tourism for their preferred activity. The second group are those who have already engaged in sex tourism and are considering whether to do it again. Assume that both pools of people are divided into two groups, those who are willing to try their luck with little guidance, and those who seek information about the activity on the Internet. Deterrence policy should try to channel as many people into the second category as possible (and to intervene in the information exchange process to dissuade people from engaging in sex tourism). Because they have invested the least, these people are the most likely to be willing to abandon their investment and choose another activity for their substitute. Another component of a strategy targeting those seeking to acquire expertise on the cheap should be to target tour companies and travel agencies that arrange sex tours. Such companies provide expertise for a fee, and work with the tourists who are most likely to abandon the activity. Another component of this strategy should be to focus on novices (regardless of how they seek to acquire expertise). Because those with the smallest investments are the

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<sup>149</sup>It could also be that those who have invested more in developing the expertise necessary to “succeed” in their criminal activity are the most committed to it. Those who invest the least in learning how to succeed at the activity may do so because they care the least about it. It is therefore not surprising that those who have invested the least are the least likely to seek a substitute activity; by definition they are not as committed as the others. For my purposes, it does not matter which explanation is the most likely. In either case, the result is the same.

most likely to abandon them, novices are likely to be the easiest to deter or detect.<sup>150</sup>

## 2. Sunk Costs and Norms

The idea of sunk costs is important in another way. As developed more fully above, I argue that the conventional deterrence models leave out the costs associated with violating the internalized norms that are likely present in all people, even those who break the law. Including the cost of overcoming norms might change the calculation in particular cases, and is important because it highlights the essential role of norms, but it does not change the structure of the model significantly. The weakness of the model is that it assumes that substitution is a simple decision that can be made quickly and easily. It assumes that substitution is costless when there is good reason to believe that the process is (or could be made) very costly.

These models ignore an important insight from the norms literature. Although there are surely general norms encouraging or supporting law-abiding behavior or good citizenship, norms are also individual and specific. So, for example, there are separate norms regarding the use or sale of crack versus the use or sale of heroin; separate norms against rape and against assault, and so on.<sup>151</sup> It is a mistake to assume that once an individual has decided to commit one crime (thereby violating a particular norm) he would be equally willing to commit another crime (thus violating a separate norm).

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<sup>150</sup>Choosing this strategy does not mean abandoning the people in the first group--those willing acquire expertise through experience. These people fit into the group discussed more fully above; they are novices, and must acquire important expertise at a time when they are most likely to be caught.

<sup>151</sup>There is empirical support for this argument. The University of Michigan's Monitoring the Future Study surveys students about their attitudes toward various drugs. Not surprisingly, in 2003, as in all other years in the study, different drugs had different levels of disapproval. For example, 53.4% of students disapproved of trying marijuana once or twice, 86.6% disapproved of trying crack once or twice, and 94.1% disapproved of trying heroin once or twice. Table 8-4: Long-Term Trends in Disapproval of Drug Use by Twelfth Graders, in LLOYD D. JOHNSTON ET AL., U. MICH. INST. SOC. RESEARCH, MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975 – 2003, VOLUME 1, SECONDARY SCHOOL STUDENTS 2003, 338-39 (2004), available at [http://monitoringthefuture.org/pubs/monographs/vol1\\_2003.pdf](http://monitoringthefuture.org/pubs/monographs/vol1_2003.pdf).

As discussed above, violating an internalized norm is a cost that should be explicitly included in any deterrence model. And each separate act involves the violation of a separate norm. Thus, once a person has decided to violate an internalized norm against selling crack and actually begun to sell the drug, he has made a specific investment--paid a cost that might bring benefits, but that might not transfer to other enterprises--that is specific to crack dealing.

Including this insight in the model makes substitution costlier: once a criminal has incurred the sunk cost involved with selling crack, before he will begin to sell heroin, he must incur two costs. First, he must abandon his investment in selling crack. Abandoning this investment--which is, in my model, a violation of an internalized norm--will likely not be perceived as an exorbitant cost, but might be a cost nonetheless. Second, he must be willing to incur the cost of selling heroin. This cost could be negligible or very high, depending on the individual's personal attachment to the norms associated with the activity. Because committing new criminal offenses likely involves incurring the cost of violating norms, substitution should be viewed as an important point at which the criminal enterprise must be "re-capitalized." As such it is an opportunity to turn away from the unwanted activity, not, as is often assumed, an automatic gateway into new and potentially more serious unwanted activity. And because it is a moment of vulnerability for potential offenders, it is also an important juncture for policymakers to focus on.

#### IV. STATUS AND INFLUENCE

As transnational activity has increased, one factor that has taken on greater importance in deterrence policy is status. By this I mean the relative social status of the person who engages in unwanted activity, the social status of his victim, and the status accorded those who attempt to regulate the activity. Among legal scholars, the issue of status is rarely given serious consideration. When it is considered, it is typically in the context of attempting to explain the difference in sentences given to white collar criminals versus perpetrators of other crimes.<sup>152</sup> There is a rich body of behavioral science literature on importance of status that has not yet been applied to transnational criminal activity.

For transnational activity, status is relevant in at least three ways, all of

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<sup>152</sup>See, e.g., Stanton Wheeler et al., *Sentencing the White-Collar Offender: Rhetoric and Reality*, 47 AM. SOC. REV. 641 (1982); Paternoster & Simpson, *supra* note 65, at 549.

which relate to the creation, maintenance, and vitality of norms.<sup>153</sup> The first reason that status matters is that higher status can make norms much more difficult to enforce.<sup>154</sup> Norms are enforced in a variety of ways, but all informal enforcement mechanisms--that is, those that do not rely directly on the intervention of law enforcement agents--work by affecting the offender's reputation. This can take the form of gossip about the offender that causes the community to reduce the esteem it accords her, criticism of the offender that has the same effect,<sup>155</sup> or internal self-judgment that causes the offender to feel guilty or otherwise reduces the esteem she accords herself.<sup>156</sup> This mechanism relies on the victims or observers of the norms violation being able to affect the offender's esteem. When the victim and the offender are not part of the same esteem "market," either because the offender's social status makes him immune to the criticism of his social lessers or because the offender is from another country and is literally absent from the locale after the activity takes place, the offender's reputation is beyond the reach of the people affected by his behavior. This leaves local observers with two choices: they tolerate the behavior or they identify or develop other mechanisms to enforce the norms. Either way, status affects the vitality and enforcement of norms.

A second reason is that because the behavior of people with high status can come to symbolize their status, the actions of high-status people can inspire others to emulate them. The symbols of status can include tangible indicia of wealth, like designer clothes or expensive cars, consumptive behaviors, like smoking different cigarettes or engaging in sex with prostitutes, or assertive behavior, like adopting a particular political or cultural attitude. In this way the activities of foreign tourists can act as signals to poor people who wish to increase their status that those activities symbolize high status. When the symbols of status are themselves illegal,

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<sup>153</sup>A couple of premises underlay my arguments. The first is that Westerners typically have high status in the developing world. The second is that status and wealth are not the same. Differences in wealth can affect the market for bribes, as discussed elsewhere. And individuals with more money than their peers might well be expected to have a higher social status, but this is not necessarily so.

<sup>154</sup>There are, of course, many other ways that a person can exempt himself from the local norms.

<sup>155</sup>*See, e.g.,* McAdams, *supra* note 113, at 362-65.

<sup>156</sup>*See* Opp, *supra* note 67, at 409.

the norms that regulated the unwanted activity are undermined.

The final reason that status matters is that it can distort the very process of judgment. There are two aspects to this argument. First, behavioral science research has shown that the actions of those with high status are judged less harshly than the actions of those with lower status. Put another way, actions that would be considered a violation of norms if engaged in by a person of low status are not judged to be a violation if engaged in by a person of high status. The boundary for appropriate behavior is different for people with high status than for other people, which can also undermine the norms that regulate unwanted activity. The second component of the distortion argument relates to the way that observers judge the actions of people with whom they are not familiar. When people observe others engaging in inappropriate behavior, they judge it harshly at first, then become less severe in their reactions. This happens because the initial harsh judgment is based on two factors: that the activity was unwanted or inappropriate, and that it was unexpected. As the activity becomes routine, the expectations of observers are lowered, and they tolerate behavior that they would have earlier condemned.

#### A. *Status Affects the Maintenance of Norms*

Scholars disagree on the precise mechanism by which social norms are maintained, but there is broad agreement that disapproval is at the heart of the process.<sup>157</sup> People might sanction those who violate norms by talking to others in the community about the violator, thereby reducing the social standing of the violator.<sup>158</sup> People might sanction norms violations by confronting the violator directly and expressing that the observer now holds a lower opinion of the violator than before.<sup>159</sup> People can sanction norms

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<sup>157</sup>See, e.g., Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1096, 1105-06 (1986); William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 566-67 (1994); Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 ETHICS 725 (1990); McAdams, *supra* note 113, at 372-75. It is important to note that, although my discussion of the maintenance of norms focuses on sanctions, there are the other ways that norms can be maintained. For example, norms might be maintained by declarations of the content of a norm or exhortations to follow the norm.

<sup>158</sup>See, e.g., McAdams, *supra* note 113, at 338.

<sup>159</sup>See, e.g., ELLICKSON, *supra* note 118.

violations by refusing to cooperate with the violator in the future,<sup>160</sup> even in the absence of gossip or a direct confrontation. In addition to the sanctions imposed by others, norms can be maintained by internal sanctions. A person who accepts the validity of a norm and nonetheless violates the norm might see his self-esteem erode.<sup>161</sup> All of these mechanisms rely on the fact that the people want (or need for some functional reason) to feel that others approve of them and that they approve of themselves.

Norms do not function everywhere; only where certain conditions are present do norms come into existence and continue to function. Norms rely on information and connection to retain their vitality. Members of the community must have information about the content of norms<sup>162</sup> and the actions of others to set the size of a sanction and to properly target it. There must also be strong connections among the individuals; those who follow norms must care enough about what others in the community think of them to modify their behavior.<sup>163</sup> Caring about the opinions of others can take many forms. It can mean a desire for approval, a desire to avoid disapproval, or a desire to be perceived as a reliable and worthwhile partner for business, social, or other exchanges.

A complicating factor is the possibility that people who find the prevailing norms not to their liking will exit the “norm community.”<sup>164</sup> When this happens, norms lose their power to regulate behavior. It is just this situation that prevails when unwanted activity crosses borders and is facilitated by the processes of globalization. Despite the claims of many that globalization has brought the world closer together, in many ways the opposite is true. Largely because of the Internet, new communities abound. Traditional communities, because they were defined mostly by geography, included people of a variety of interests. On the Internet, new communities include people who may share only one interest. To be sure, specialized communities are not new, but as a general matter, it is clear that the Internet

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<sup>160</sup>See generally POSNER, *supra* note 114.

<sup>161</sup>See, e.g., McAdams, *supra* note 113, at 338.

<sup>162</sup>See, e.g., *id.* at 358-60.

<sup>163</sup>See, e.g., ELLICKSON, *supra* note 118, at 169 (predicting that norms will not evolve in a “transient social environment such as a singles bar at O’Hare Airport”).

<sup>164</sup>Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 919-20 (1996)

has provided a forum for communities united only by a narrow interest. Such narrow communities are not necessarily bad--one can imagine communities devoted to backgammon or quilting--but they can also be havens for individuals whose preferences put them at odds with the geographic community in which they live or the larger society.

One of the benefits of a traditional community was that it typically subjected individuals within it to a range of influences and exposed people to a range of behaviors. From this range of activity, individuals developed perceptions about what constituted appropriate or inappropriate behavior, the frequency of inappropriate or illegal behavior, and the sanction for such misbehavior. In such a community, it is possible--indeed, in some cases likely--that the influence of the community would run counter to an individual's taste or desire on any particular issue. It is, of course, possible to opt out of a community, but doing so will likely be costly (and force the individual to find another community).<sup>165</sup>

Internet communities<sup>166</sup> do not include many contrary voices, in part because it is costless to opt out. Social influence within Internet communities is likely to strongly reinforce, rather than challenge or channel, each individual member's existing tastes or predilections.<sup>167</sup> In addition, virtual communities are self-reinforcing. Returning to the sex tourism

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<sup>165</sup>See Barry Wellman & Keith Hampton, *Living Networked On and Offline*, 28 CONTEMP. SOC. 648, 652 (1999). Wellman and Hampton write that living in "computer-supported networks differ[s] from living in traditional groups" because living in a virtual community "decreases the control that any one social milieu can have, while decreasing the commitment of any one milieu to a person's well-being." *Id.*

<sup>166</sup>Virtual communities are those in which "members interact exclusively through the medium of computer technology." Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOC. THEORY 1, 11 (2001). In such communities, there is a danger that interests will become dangerously narrow. See generally Barry Wellman, et al., *Computer Networks as Social Networks: Collaborative Work, Telework, and Virtual Community*, 22 ANN. REV. SOC. 213, 225 (1996).

<sup>167</sup>Healthy communities rely on dialogue and interaction to smooth out the rough moral edges of their members, and to arrive at a degree of consensus on what is considered appropriate behavior. See, e.g., Amitai Etzioni, *Creating Good Communities and Good Societies*, 29 CONTEMP. SOC. 188, 191-192 (2000).

example will show the relevance of this point. An Internet-based community, because it permits people to isolate themselves into self-reinforcing groups defined by a single shared interest, can create an atmosphere in which members perceive that there is greater lawlessness than actually exists. A community of sex tourists, or those interested in the activity, who interact regularly with other sex tourists, have effectively shrunk their range of influences to the point that they do not receive accurate information about the general level of lawlessness. Like people who live in a community plagued by violence, they may come to believe that misbehavior is common and therefore appropriate.<sup>168</sup> Similarly, they may also inaccurately perceive the likelihood of detection and sanction, which can further encourage unwanted activity.

The possibility that a person might exit a norms community does not depend on globalization, but the issue is much more complicated now. Cass Sunstein cites a high school as an example of a situation in which individuals can freely exit and enter norms communities.<sup>169</sup> He argues that students can leave a norms community that is not to their liking and form a new community with more congenial norms.<sup>170</sup> This is possible, of course, but it is not easy, much less costless.

First, students may be able to leave one community and form or join another, but doing so is not free when the communities are close to each other. There may be many norms communities within a typical high school, but all students remain subject to the norms of the other communities because they cannot avoid interacting with each other. When different norms communities form within the same geographic community, the different groups are stuck with each other; leaving one community and entering another might reduce the power of the first community's norms, but it does not eliminate the pull that the norms will have. Those who exit a community may face the disapproval of others in the first community; joining a new community may bring similar disapproval (it might also bring

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<sup>168</sup>This effect is likely to be even stronger in a virtual community than an actual community. Many (perhaps most) people who find themselves stuck in violence-plagued localities likely retain anti-violence norms, and stay in the locality because of the costs of exit. In other words, they suffer behavior that they disapprove of because they are stuck there. In a virtual community, those who remain in the community likely either share or come to share the norms of the community because exit is free.

<sup>169</sup>Sunstein, *supra* note 164, at 920.

<sup>170</sup>*Id.*

approval). But a student's every move is apparent to the larger community and subjects her to the opinions of others, whether they are in her norms community or not.

Second, students in the hypothetical high school have a variety of reputations; a student may be known as good at math, bad at soccer, or loyal in friendship. These reputations may vary in importance to the student--she may care more about being known as a soccer star than a math whiz--but none of these reputations is irrelevant. Because she cannot completely opt out of the larger community, her social standing and the quality of her life will depend at least in part on the amalgam of her reputations.

Contrast this to the sex tourism example. A tourist who travels from Chicago to Bangkok can completely (if temporarily) leave behind his old norms community. His neighbors and acquaintances do not have the information necessary to express their approval or disapproval for his actions, leaving them without the power to affect his reputation or otherwise sanction him. Even if he has opted out of a norms community in his hometown--imagine, for example, that he left the church to which he used to belong and no longer cares what its members think of him--he is still vulnerable to its disapproval because the members of his old community have the power to influence the members of his new community. When the different norms communities exist in the same geographic space, even leaving one community does not make him immune to its influence. The people with whom he interacts in Bangkok will have more information about him, but will be less able to affect his reputation. As with the high school student, the quality of the tourist's social life will depend, at least in part, on his reputation. But because he lives most of his life in one place but seeks pleasure in another, he can segment his reputations and avoid the sanctions that would otherwise be his due.

As discussed above, when an action violates established norms, there are several possible ways that a community might react in order to maintain the vitality of norms and punish the transgressor. One typical initial response is to try to "ignore or normalize the violation."<sup>171</sup> Observers try to find ways to reconceptualize the violation as normal activity, or simply do not react. If this fails, then observers might modify their perceived relationship with the transgressor, assigning him the role of "norm violator" and taking on the role of "norm carrier."<sup>172</sup> When the norm carrier confronts the norm violator, a typical reaction might be to contest the allegation, provide an

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<sup>171</sup>See Murray Webster, Jr. & Stuart J. Hysom, *Creating Status Characteristics*, 63 AM. SOC. REV. 351, 366 (1998).

<sup>172</sup>*Id.*

excuse for the behavior, or apologize.<sup>173</sup>

The process of negotiating an account for the transgressive behavior is vital to maintenance of norms.<sup>174</sup> Transgressors who show remorse and offer an account of their actions “reestablish themselves as a proper person,” and thereby transform the “infraction into an acceptable act that could be ignored.”<sup>175</sup> Even if the transgressor does not show remorse, that he is confronted with the violation and responds in some way is essential. Doing so helps to maintain the boundary between acceptable and unacceptable behavior, and thereby maintain the vitality of norms. But when the norm violator is a person of high status, he can exempt himself from the norms market of the norms carrier. He is never confronted with his misbehavior and the community never has an opportunity to re-affirm its commitment to the norm. As I argue in the next part, when the allure of high status is combined with an interruption in the process of policing norms, the boundary between acceptable and unacceptable behavior can become blurry indeed.

#### *B. Prominence, Influence, and Unwanted Activity*

Almost anything can come to represent high status.<sup>176</sup> Some attributes or behaviors become status symbols because of their operational utility. For example, the owner of a cell phone in a place where land telephone lines are unreliable may see her status rise because she can provide a service that is otherwise not available.<sup>177</sup> But other attributes become status symbols for

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<sup>173</sup>*Id.*

<sup>174</sup>*See, e.g.,* Etzioni, *supra* note 167, at 188. Central to Etzioni’s conception of a healthy community is the idea of “moral dialogue.” *Id.* at 192. For him this means a process by which “people engage in deliberations” about what constitutes appropriate activity and values. *Id.* A healthy society must address and wrestle with conflicting attitudes and behavior to arrive at a set of norms that represents the moral sense of the community.

<sup>175</sup>Sheldon Ungar, *The Effects of Status and Excuse on Interpersonal Reactions to Deviant Behavior*, 44 *SOC. PSYCHOL. Q.* 260, 263 (1981).

<sup>176</sup>*See, e.g.,* Webster, Jr. & Hysom, *supra* note 171, at 352.

<sup>177</sup>*See generally* Kasra Naji, *Dhaka Rings Rural Poor’s Number*, *FIN. TIMES*, September 18, 1996, at 4.

more abstract reasons. Characteristics that are unrelated to survival can become popular because they are associated with high status. "A person with status sets the standards and norms by which others will act, and in this way embodies the goals of a culture."<sup>178</sup> By engaging in behavior associated with high status, the actor signals to observers that he is of the same standing as others who engage in the same behavior.<sup>179</sup> Because the actions of those with high status can be seen as symbols of their status, observers might emulate or adopt the activity in an attempt to cultivate for themselves higher status.<sup>180</sup>

A good illustration comes from the Democratic Republic of Congo.<sup>181</sup> The DRC is a country of many languages. Swahili is the most common language spoke in Bukavu, a city in Eastern Congo, though a handful of local languages are also spoken. Beginning in the 1990s, Lingala, a language mostly spoken along trade routes and in the capital Kinshasa, began to emerge as a popular language in Bukavu, which is more than 1000 miles away from Kinshasa.<sup>182</sup> There was no linguistic reason for Lingala to spread to Bukavu because the population's linguistic needs were already satisfied by indigenous languages.<sup>183</sup> But Lingala did gain a foothold, and the reason was status. Because it was the language of the capital--a city viewed by those in the interior to be sophisticated and glamorous--Lingala

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<sup>178</sup>See, e.g., MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 29 (1981).

<sup>179</sup>*Id.*

<sup>180</sup>See, e.g., Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 38 (1992) ("those who enjoy high status have an interest in symbolizing their status, while those who lack status seek to appropriate such symbols and construct a 'fraudulent' status for themselves") *citing* GRANT MCCracken, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 33 (1988).

<sup>181</sup>Didier L. Goyvaerts, *The Emergence of Lingala in Bukavu, Zaire*, 33 *J. MOD. AFR. STUD.* 299 (1995).

<sup>182</sup>*Id.* at 307.

<sup>183</sup>*Id.* at 308.

symbolized prestige and high status.<sup>184</sup> The desire to emulate the behavior of those with high status prompted many people in Bukavu to learn a language that would be of no operational utility to them. This small example demonstrates a couple of important points. The first is that almost anything can be a status characteristic.<sup>185</sup> The second is that status is a powerful motivator. People are willing to expend resources to develop a skill with little functional utility just to increase their status.

Finally, the example shows the complicated relationship of status to behavior and characteristics. The possession of characteristics associated with a particular status creates expectations about the behavior of the individual who has the characteristics. For example, male and white employees may be assumed to be more competent at job-related tasks than are women and non-whites.<sup>186</sup> But just as status shapes expectations about behavior, behavior can affect status. People who demonstrate competence can overcome the expectations associated with their initially low status.<sup>187</sup> This process is complicated, but the point I draw is limited: a person who adopts behaviors associated with high status can thereby enhance her status.

A separate but closely related concern has to do with the role of social influence. Individuals decide to engage in unwanted activity based on a number of factors, as discussed above. Among these factors is the individual's perception that the activity is common or rare. Scholars have suggested, most famously in the "Broken Windows" literature,<sup>188</sup> that people who regularly live with indicia of disorder--such as broken windows, graffiti, or litter--are more likely to commit crimes than those who do not live with such disorder. "[I]ndividuals are much more likely to commit crimes when they perceive that criminal activity is widespread,"<sup>189</sup> than if

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<sup>184</sup>*Id.*

<sup>185</sup>*See, e.g.,* Georg Simmel, *Fashion*, 10 INT'L Q. 130 (1904), reprinted in 62 AM. J. SOC. 541 (1957).

<sup>186</sup>*See* Webster, Jr. & Hysom, *supra* note 171, at 373.

<sup>187</sup>*Id.*

<sup>188</sup>*See* James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29.

<sup>189</sup>Kahan, *supra* note 119, at 350.

they perceive it to be rare. Proponents of "social influence"<sup>190</sup> suggest that there are several reasons it plays a role in the decision to commit a crime: "the individual rationality of conforming to behavior of other individuals, ... the reputational benefits of conforming to social norms, and ... a deep-seated affinity between individuals that causes them to value conformity for its own sake."<sup>191</sup> This position is controversial, and scholars disagree about what constitutes social influence and the extent to which it actually affects behavior.<sup>192</sup> Scholars such as Dan Kahan argue that people are motivated to commit crimes when they see indicia of disorder. They do not argue that it is necessary to actually see others committing similar crimes.<sup>193</sup> For example, people who live in neighborhoods marred by graffiti or litter are more likely to commit robberies than people who live in cleaner neighborhoods.

My argument is different in an important way. I argue that social influence is indeed a powerful force, but that its power is limited to similar behavior. In other words, people are not motivated to commit robberies by seeing a lot of litter or graffiti; they are motivated to commit robberies only if they see (or are aware of) a great number of robberies. Social influence operates only when activity is observed. The more individuals know about the actions of others, and the more often they interact with others, the greater role played by social influence in determining individual choices. One cannot be influenced by that which one does not perceive; and, all things being equal, repeated events are more likely to be influential than single events. Thus, my modified social influence argument suggests that if

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<sup>190</sup>*Id.*

<sup>191</sup>*Id.* at 356 (citing JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 197-240 (1990); TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES 24-37 (1995); Sunstein, *supra* note 164, at 916-17; and STEPHEN R.G. JONES, THE ECONOMICS OF CONFORMISM (1984)).

<sup>192</sup>Bernard Harcourt, among others, has attacked the Broken Windows theory, arguing that the evidence to support the theory is unconvincing. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998). Although Harcourt's account is more convincing, I use social influence in a slightly different way than its usual advocates and avoid the problems that he highlights.

<sup>193</sup>*See* Kahan, *supra* note 119, at 355-61.

observers notice an increase in the kinds of illicit sexual behavior associated with sex tourism, then local people would be influenced to engage in similar activity.<sup>194</sup>

Understanding the power of status shows the importance of this argument to the deterrence of transnational crimes. Members of a community witness the behavior of countless people every day. But not all behavior is equally influential. The actions of some members of the community are more likely to affect the behavior of observers than are the actions of other members. Some norms scholars have recognized this fact, but their conception of the phenomenon omits an important consideration. Robert Ellickson has put forth the most convincing description of the emergence of norms.<sup>195</sup> He argues that a social norm “is not the product of ‘diffuse social forces.’” Instead, norms result from the “purposive actions of discrete individuals, especially those who are particularly suited to providing the new rule and those who are particularly eager to have it adopted.”<sup>196</sup> Under this view, new norms are created by those who expect to benefit from the new way of doing things.<sup>197</sup> Ellickson names “self-motivated leaders,”<sup>198</sup> “norm entrepreneurs,”<sup>199</sup> and “opinion leaders”<sup>200</sup> as

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<sup>194</sup>There is evidence that this phenomenon can occur with other, less complicated crimes. For example, there is good evidence that if the police crack down on drug use in one neighborhood, they can drive drug deals to a nearby neighborhood. One of the harms that flows from this displacement is that it can “normalize[]” a dangerous and illegal activity among a “previously un-exposed” population. Wood, et al., *supra* note 91, at 1155. Displacement might thus create crime if it introduces an illegal activity into a population that had been previously free or nearly free of the activity.

<sup>195</sup>Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1 (2001).

<sup>196</sup>*Id.* at 2.

<sup>197</sup>*Id.* at 10-16.

<sup>198</sup>*Id.* at 13-15.

<sup>199</sup>*Id.* at 15.

<sup>200</sup>*Id.* at 16-17.

examples of “change agents”<sup>201</sup>--those who supply new norms. Although he describes important differences between types, each is thought to act intentionally. Ellickson argues that those who supply new norms do so because they expect to benefit from the new rule, and are therefore willing to pay a price (or forego current benefits for future gains) because of the payoffs the new norm will bring them.

By considering only purposive action, this conception of the creation of norms ignores the important role of status. Ellickson’s description of the role of “change agents” incorporates much of the social science literature on opinion leaders.<sup>202</sup> They are the people whom others follow. Those who study marketing spend a lot of time trying to identify the characteristics of opinion leaders.<sup>203</sup> They have identified at least one essential trait: public individuation.<sup>204</sup> This means the extent to which “people feel differentiated, to some degree, from other people and choose to act differently from them.”<sup>205</sup> Importantly, public individuation is not necessarily purposive. It “involves behaviors that get attention, regardless of the underlying motive.”<sup>206</sup> It is here that status become relevant. Those with high status--particularly outsiders--are socially prominent; their behavior is observed more closely than that of other people. Like it or not, they are “publicly individuated,” and they act as opinion leaders. They do not necessarily create new norms purposefully, but because of their status and prominence, their behavior is influential.

Recent behavioral science research highlights a final factor that can undermine the power of norms to regulate behavior. Economists have long

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<sup>201</sup>*Id.* at 10.

<sup>202</sup>Those whom Ellickson calls “change agents” (of whom “opinion leaders” are a subset) are sometimes described generally as “opinion leaders” in social science literature. I use the term “opinion leader” in the more general sense.

<sup>203</sup>*See, e.g.,* Becky Ebenkamp, *Under the Influence: Insights into What Consumers are Thinking, How They’re Acting and Why*, 45 BRANDWEEK 18 (2004); Kenny K. Chen & Shekhar Misra, *Characteristics of an Opinion Leader: A New Dimension*, 19 J. ADVERTISING 53 (1990).

<sup>204</sup>Chen & Misra, *supra* note 203, at 53.

<sup>205</sup>*Id.* at 54.

<sup>206</sup>*Id.*

recognized that relative income and relative status can be powerful determinants of well-being.<sup>207</sup> People care not just about their absolute level of wealth or status, but also about how they measure up against others. But economists have only recently recognized that the “others” against whom people measure themselves--their reference standards--are at least in part consciously chosen.<sup>208</sup> People are thought to choose reference standards to fulfill two goals: “self-enhancement” and “self-improvement.”<sup>209</sup> Self-enhancement is a downward comparison; people seek to feel better by comparing themselves to those who are less competent or have less money or a lower status.<sup>210</sup> Self-improvement is an upward comparison; people compare themselves to those who are more competent in order to improve their own performance.<sup>211</sup> Globalization broadens the opportunity to “choose the Joneses” against whom one wishes to compare social standing.

### C. Status Distorts the Process of Judgment and Disapproval

The reaction of observers to unwanted activity depends not just on the act, but also on the status, characteristics, and history of the person engaging

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<sup>207</sup>See, e.g., ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); A.E. Clark & A.J. Oswald, *Satisfaction and Comparison Income*, 61 J. PUB. ECON. 359 (1996); Markus Knell, *Social Comparison, Inequality, and Growth*, 112 J. INSTITUTIONAL AND THEORETICAL ECON. 664 (1999); McAdams, *supra* note 180, at 1.

<sup>208</sup>Armin Falk & Markus Knell, *Choosing the Joneses: Endogenous Goals and Reference Standards*, 106 Scandinavian J. Econ. 417 (2004).

<sup>209</sup>*Id.* at 418, citing Joanne V. Wood & Kathryn L. Taylor, *Serving Self-Relevant Goals Through Social Comparison*, in SOCIAL COMPARISON: CONTEMPORARY THEORY AND RESEARCH 23-49 (Jerry Suls & Thomas A. Wills, eds., 1991).

<sup>210</sup>*Id.* at 417.

<sup>211</sup>*Id.* at 418. The two comparisons are not as contradictory as they first appear. People compare themselves downward to make themselves feel better in the short term. People compare themselves upward to improve their performance, which increase their utility in the long term. Thus both comparisons eventually have the same effect. *Id.*

in the activity.<sup>212</sup> For example, there is empirical evidence that people of high status are treated less harshly than people of low status for violations of the law. High-status offenders might expect to receive less severe punishment than low-status offenders for the same behavior. But the affect of status appears to go beyond differential reactions to acknowledged violations of the law (or norms). Status appears to distort the very process of judging. Observers are less likely to conclude that a given act is deviant when it is engaged in by a person of high status rather than a person of low status.<sup>213</sup> An act that is unacceptable when committed by a person with low status can be acceptable when committed by a person with high status. Not surprisingly, this effect is greater for acts that are normatively questionable.<sup>214</sup> Indeed, some behavioral science evidence suggests that high status persons are judged less harshly for minor transgressions but more harshly for major transgressions than people with low status.<sup>215</sup>

There are several possible reasons for the distorting effect of high status. First, high status is often bestowed upon people who make positive contributions to the community. Regardless of whether the contributions are economic, social, or cultural, those who contribute most to the community can receive greater rewards--or less disapproval--than those who contribute less.<sup>216</sup> Related to this is the fear that a person who makes a disproportionate contribution to the community will withdraw his

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<sup>212</sup>See Sheldon Ungar, *The Effects of Status and Excuse on Interpersonal Reactions to Deviant Behavior*, 44 SOC. PSYCHOL. Q. 260 (1981).

<sup>213</sup>See Bonnie H. Erickson & T.A. Nosanchuk, *The Allocation of Esteem and Disesteem: A Test of Goode's Theory*, 49 AM. SOC. REV. 648, 658 (1984). Erickson and Nosanchuk found that deviance has a weaker effect on people of high status because "the interpretation of an act as deviant is more problematic for high status people." *Id.*

<sup>214</sup>See Calvin Morrill, et al., *It's Not What You Do, But Who You Are: Informal Social Control, Social Status, and Normative Seriousness in Organizations*, 12 SOC. FORUM 519, 532-33 (1997).

<sup>215</sup>See James A. Wiggins, et al., *On Status-Liability*, 28 SOCIOMETRY 197, 206 (1965).

<sup>216</sup>*Id.* at 206.

contribution if he is judged harshly for his deviant behavior.<sup>217</sup> The sex tourism example provides some evidence to support this point. The money foreign tourists spend thought to contribute significantly to the local economy, and their behavior is seen as the price of their contribution to the local economy.

Another possible explanation for the effect status has on judgment is the risk of retaliation more generally. In addition to fearing that a high-status person will withhold his contributions, observers might also fear that the high-status person might retaliate in other ways.<sup>218</sup> This fear recognizes that people with high status often have greater social power and greater ability to influence legal authorities.

The second aspect of the distortion argument relates to the interaction between observers' expectations and their reactions to behavior. There are several ways that expectations shape reactions. First, observers are less likely to disapprove of the actions of a person for whom they already have low expectations than they are when they see a stranger (or someone for whom they have high expectations) engage in the same behavior.<sup>219</sup> "Unexpected unpleasant behavior produces greater annoyance and disappointment than the same behavior would if expected."<sup>220</sup> Indeed, the greater the distance between the observer's expectations and the observed behavior, the more likely it is that observers will condemn the behavior.<sup>221</sup> Second, observers are more likely to sanction a transgressor if they believe

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<sup>217</sup>*Id.* at 207.

<sup>218</sup>*Id.*

<sup>219</sup>This argument does not, of course, include just those with high status. Its focus is more closely linked to familiarity than to status. It is relevant here for two main reasons. First, most sex tourists are foreign, and thus strangers (at least initially) in the area in which they engage in unwanted activity. Second, for the reasons outlined above, high status seems to complicate the process of judgment, which would exacerbate the problem that my argument identifies. Thus my argument includes more than just people with high status, but it is most salient for those people.

<sup>220</sup>Ralph Wahrmann, *High Status, Deviance and Sanctions*, 33 *SOCIOMETRY* 485, 486 (1970).

<sup>221</sup>Peggy G. Giordano, *Sanctioning the High-Status Deviant: An Attributional Analysis*, 46 *SOC. PSYCHOL. Q.* 329, 337 (1983).

that he knew that his actions were causing harm.<sup>222</sup> Observers thus impute knowledge to the transgressor and judge his actions based in part on the imputed knowledge. Finally, observers are more likely to draw a negative conclusion about a transgressor if they conclude that his high status facilitated the deviant act.<sup>223</sup>

The sex tourism example shows the importance of these arguments in two spheres--reaction to the action, and reaction to the actor. Because the actions of people with high status can come to symbolize high status and prompt others to emulate them, their actions can change the attitudes of local people about the activity. If people with high status continue to engage in behavior that was formerly considered deviant, the act can lose its deviant status. This can have several consequences. One is that local people might become more likely to engage in it. The deviant acts of Westerners can thus increase the overall amount of deviant activity. A second consequence is that as local people lose their disapproval for an activity, they are less likely to report transgressions to law enforcement, which reduces the cost of the activity for the actor.

Transnational activity, especially activity that is normatively problematic, involves the creation of an identity. Local people with limited experience with Westerners do not have firm expectations about how they will behave. But as there is more contact, expectations form. It is essential to deterrence policy that expectations form in a way that produces healthy norms. If local people come to expect Westerners to engage in illicit sexual activity, it is much less likely that those engaging in the behavior will pay any social cost for their transgression. As the cost of engaging in the activity goes down, the incidence of the activity is likely to go up. But if local people come to believe that Westerners are able to engage in illicit sexual activity *because of* their high status, or that Westerners know that they are causing harm when they engage in the activity, it is more likely that local people will disapprove of the behavior and impose some sort of sanction.

## V. CONCLUSION

Globalization has changed the reality of criminal opportunities and behavior, but theory has not kept up. This Article has been the first attempt to think through these changes and what they should mean for deterrence theory. Building on the theoretical insights developed above, I take a first

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<sup>222</sup>*Id.* at 334.

<sup>223</sup>*Id.* at 335.

step toward recommending changes in policy.

By drawing on the rigorous models of law-and-economics and the rich detail of criminology literature, I have attempted to arrive at a more helpful approach. For deterrence policy, the goal of developing any model of behavior is to identify points of intervention--those factors that reduce the appeal of criminal behavior or increase the appeal of legitimate activity. Identifying these points of intervention is essential policy because it is at these points that we can target policy initiatives. In economic terms, the goal is to increase the cost of criminal activity; criminology helps us identify the costs.

I have identified several factors that we must consider in assessing the costs of an effective deterrence policy. The first are the informal costs of apprehension. These can take the form of social disapprobation, feelings of guilt, or loss of social position. Regardless of their form, the risk of suffering such a sanction can operate as a cost, reducing the attractiveness of unwanted behavior. The next set of costs are those associated with the substitution process. This process is complicated and fraught with risks for potential offenders, making it a potentially powerful target of regulation. Within the substitution process, there are several important elements to consider. One is where potential offenders obtain the expertise that will allow them to move into the new area of activity. This information can come from personal experience or it can come from the experience of others. Another key element is the question of norms. It is important to recognize that different activities are subject to different norms, and that people who are willing to commit one kind of crime may not be willing to commit another.

Finally, we must consider the critical role that status can play in transnational crime. Status is important in several ways. It is more difficult to enforce social norms against people who are able to exempt themselves from the relevant norms community, either because their status makes them immune from the opprobrium of those whom they have offended or because they can simply leave the area. Status is also important because the actions of people of high status can come to symbolize their status. Attitudes, tangible goods, and personal activities can all come to represent high status, and can inspire others to seek or emulate the status symbols. Finally, status matters because it can distort the process of judgment. The activities of those with high status are often judged less severely than the activities of those with lower status.

What does this mean for policy? This is, of course, a complicated question whose answer will vary for each country and each kind of activity. The first answer is simply to expand the list of policy responses. Globalized activity is not as simple as local crime, and the responses cannot be as

simple. This means shifting the focus from tinkering with the length of a prison sentence to considering thornier issues, like disrupting the flow of information between sex tourists. That sex tourists are able to obtain expertise for free reduces their costs and makes the activity more attractive. Law enforcement officials should increase the cost of gathering information by shutting down news groups or Usenet sites, for example.<sup>224</sup> Another way to attack the flow of information is to target organized tour companies.<sup>225</sup> Those who work as intermediaries facilitate the industry, and targeting them could reduce the attractiveness of such travel to sex tourists.

Another set of responses centers around status and norms. Again, information is critical. The desire to maintain a positive reputation is an important motivation for many people to comply with norms. Sex tourists are able to segment their reputations and avoid the disapprobation they would otherwise deserve because the people who witness their illicit activity are not able to communicate with the home geographic community of Western tourists. This reduces the cost to the tourist and makes the activity more appealing. One way to give local people access to a sex tourist's reputation is to provide for some kind of shaming penalty. For example, if a person is arrested in a sex tourism destination country, law enforcement officials might publicize the arrest in the suspect's home town in the West. Such shaming penalties are not uncomplicated, of course, but might provide a way to prevent potential offenders from segmenting their reputations. A related response would be to publicize the issue of sex tourism in destination countries. Examining the role of status highlights the importance of bystanders in the maintenance of norms. Without the active participation of bystanders, norms against illicit sexual activity cannot be maintained. And, as we have seen, the role of status complicates the participation of local bystanders. If law enforcement officials publicly endorsed the norms against such activity, local bystanders would be empowered and would be more likely to notice and act against such activity.

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<sup>224</sup>For example, law enforcement officials can visit chat rooms anonymously to monitor the discussions on sex-related web sites. See Robert Worth, *Jeanine Pirro's Sting: Visiting Chat Rooms to Chase Pedophiles*, THE NEW YORK TIMES, July 15, 2001, at sect. 14, p.1. Law enforcement officials might also create fake web sites that lure potential sex tourists to sites at which they received warnings about their activity. See Jill Lawless, *Nations to Search Internet for Pedophiles*, [www.bizreport.com](http://www.bizreport.com), June 9, 2004.

<sup>225</sup>Hawaii, for example, has made it a crime to sell travel services to promote prostitution. See HAW. REV. STAT. § 712-1208 (2005).

Finally, and perhaps most critically, it is possible to modify the substantive criminal law to make it more responsive to the potential for displacement. One good example of such a change is the increase in what are essentially long-arm statutes. These statutes allow a source country to punish a citizen for his actions outside the country.<sup>226</sup> Some source countries go further and restrict the travel of convicted sex offenders.<sup>227</sup> All of these measures are ways for a source country to account for the true costs of its regulations and help to prevent the spread of unwanted activity. These sorts of measures require us to do the important work of thinking about crime and crime prevention globally, with an eye toward truly reducing it, rather than shifting it to countries less capable of combating it.

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<sup>226</sup>See, e.g., 18 U.S.C.A. § 2423 (2003) (making it illegal to engage in illicit sexual conduct outside the U.S. and criminalizing the facilitation of sex tourism by travel operators); Sexual Offences Act, 2003, c.42, s.72 (permitting prosecution of acts done outside the U.K. that would have been illegal if committed in the U.K.); see also Nick Madigan, *Man, 86, Convicted Under New Law Against Americans Who Go Abroad to Molest Minors*, NEW YORK TIMES, Nov. 19, 2004, at A12; Sara K. Andrews, Comment, *U.S. Domestic Prosecution of The American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415 (2004).

<sup>227</sup>Sexual Offences Act, 2003, c.42, s.86 & SI 1220/5-8 (requiring sex offenders to give notice to the Secretary of State before leaving the U.K.).