A normative approach to the criminalisation of cartel activity

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Although cartel behaviour is almost universally (and rightly) condemned, it is not clear why cartel participants deserve the full wrath of the criminal law and its associated punishment. To fill this void, I develop a normative (or principled) justification for the criminalisation of conduct characteristic of ‘hard core’ cartels. The paper opens with a brief consideration of the rhetoric commonly used to denounce cartel activity, eg that it ‘steals from’ or ‘robs’ consumers. To put the discussion in context, a brief definition of ‘hard core’ cartel behaviour is provided and the harms associated with this activity are identified. These are: welfare losses in the form of appropriation (from consumer to producer) of consumer surplus, the creation of deadweight loss to the economy, the creation of productive inefficiency (hindering innovation of both products and processes), and the creation of so-called X-inefficiency. As not all activities which cause harm ought to be criminalised, a theory as to why certain harms in a liberal society can be criminalised is developed. It is based on JS Mill’s harm to others principle (as refined by Feinberg) and on a choice of social institutions using Rawls’s ‘veil of ignorance.’ The theory is centred on the value of individual choice in securing one’s own well-being, with the market as an indispensable instrument for this. But as applied to the harm associated with cartel conduct, this theory shows that none of the earlier mentioned problems associated with this activity provide sufficient justification for criminalisation. However, as the harm from hard core cartel activity strikes at an important institution which permits an individual’s ability to secure their own well-being in a liberal society, criminalisation of hard core cartel behaviour can have its normative justification on this basis.

INTRODUCTION

In recent years a great deal of rhetoric has been directed at cartel activity, comparing it to theft and suggesting it be treated similarly. In Europe, the former EU Competition Commissioner has likened cartel activity to theft, claiming that cartels ‘rip-off consumers’.¹ One influential British scholar has remarked, ‘on both a moral

* bruce.wardhaugh@ncl.ac.uk. Earlier versions of this paper were presented at the Newcastle Law School, the Annual Meeting of the Socio-Legal Studies Association in April 2011 and the Annual Meeting of the Society of Legal Scholars in September 2011. Thanks to all who have commented, and in particular Jonathan Galloway, Angus MacCulloch, Andreas Stephan, Bill Kovacic, Morton Hviid and two anonymous referees. The usual disclaimers apply.

and practical level, there is not a great deal of difference between price-fixing and theft... Similar comments have been made by other commentators and influential organisations.

By ‘cartel’ what is typically meant is two or more competitors operating under an agreement to restrict competition which manifests itself in price fixing, output restrictions, market allocation, and/or bid rigging. This definition reflects international consensus and is at the core of every competition law regime. Cartel conduct has been criminalised since 1890 in the US. In Europe, Ireland, the UK, Estonia, Greece, and (to some extent) Germany criminalise this sort of behaviour.

The justification for this criminalisation is that cartels, under simple microeconomic analysis, cause (or contribute to) five different sorts of economic harm, namely:

1. Consumers pay more for their goods, i.e. the cartelist appropriates some or all of the consumer surplus to itself;
2. Cartelists create a deadweight loss to the economy;
3. In creating and protecting a cartel, the cartel participants engage in socially wasteful expenditures;
7. Sherman Act, 15 USCA § 1–7; Clayton Act, 15 USCA § 12–22, 19 USCA § 52–53.
11. As cartelists have the economic effect of acting as divisions of a monopoly, the same criticisms (and analyses) are levelled at monopolies.
12. The terms ‘consumer surplus’ and ‘producer surplus’ are defined and discussed in s 3(a), below.
4. The cartelist is inefficient, stunting the development of new products and hindering the development of more efficient production processes; and,
5. The existence of cartels exacerbates any existing managerial ‘slack’ (or, in the parlance, ‘X-inefficiency’), thereby hindering efficient, productive and profitable growth for both a firm and the economy.\textsuperscript{14}

However, in spite of these harms, calls for criminalisation are themselves not unproblematic. Criminal laws are of a sui generis nature. By threatening loss of property or liberty, criminal sanctions are a legal order’s most coercive mechanism for regulating the conduct of those within its jurisdiction. Additionally, the criminal law and its sanctions carry a nontrivial element of moral force, require higher standards of proof and include an inquiry into the defendant’s mental state which bears upon culpability. The coercive nature of the use of criminal sanctions and their purported moral content requires some normative justification for their use. The reason is clear: to deprive someone of their property or liberty requires a reason; otherwise there is apparently little difference between the state and the kidnapper or burglar.\textsuperscript{15} Likewise, it is a fair retort to anyone who expresses moral indignation regarding certain behaviour to ask them to justify their condemnation.

In this paper, we provide a normative basis for the criminalisation of cartel conduct, from a liberal perspective. We look first at establishing a liberal justification for the use of criminal law, based on Mill’s ‘harm to others’ principle (as refined through the work of Feinberg\textsuperscript{16}) and Rawls’s notion of ‘justice as fairness’.\textsuperscript{17} We then turn to the nature of the harm caused by cartel activity and show that it is the harm that these conspiracies do to the market (and not to individuals) which justifies the use of criminal sanctions.

1. LIBERALISM AND THE HARM TO OTHERS JUSTIFICATION OF THE CRIMINAL LAW

(a) Harm (generally) and criminalisation

Although hard core cartel activities can be readily described, and their social costs made apparent and estimated; further argument is needed to justify the control of these activities through criminal sanctions. Not all costly or harmful activities should be illegal. For instance, both tobacco use and binge drinking impose extensive economic costs and social harm in the UK,\textsuperscript{18} yet it would be a daunting task to argue in favour

\textsuperscript{14} H Leibenstein ‘Allocative efficiency vs. x-inefficiency’ (1966) 56 Am Econ Rev 392.
\textsuperscript{17} J Rawls \textit{A Theory of Justice} (Cambridge MA: Harvard University Press, revised edn, 1999).
\textsuperscript{18} S Allender et al ‘The burden of smoking-related ill health in the UK’ (2009) 18 Tobacco Control 262, estimating that in 2005–2006 the direct effects of smoking were responsible for 109,164 deaths with a cost to the National Health Service of £5.2 billion in the UK. The NHS estimates that in 2005 there were 14,982 deaths attributable to alcohol abuse, with an estimated cost to the NHS in England in 2004 of £2.7 billion. The NHS Information Centre \textit{Lifestyles}
of the criminalisation (as opposed to other methods of regulatory control) of either activity on the basis of these costs or harms. Accordingly, to focus upon a certain activity, even if such activity is admittedly harmful and costly, and single it out as requiring criminal sanctions to eradicate it, requires an additional argument. This is not a legal matter, we are not describing what a law does or does not do; nor is it a sociological or anthropological matter, as we are not describing social or cultural attitudes towards certain practices. It is a normative matter, we are advocating what ought (or should) be the case. That is, we make the claim that cartel participants should occasion the wrath of the criminal law because X, where X provides the normative (i.e. ‘principled’ or ‘ethical’) reason for the use of criminal sanctions.

As such, our task is quite specific: we seek a moral principle which can justify the criminalisation of those anticompetitive practices characteristic of hard core cartels. Discussion of anticompetitive practices can only make sense within the context of a market-based economy. Indeed, legislation regulating and criminalising such practices is only found in that context. It makes no sense to discuss anti-competitive practices of the sort mentioned earlier in the context of, say, a Soviet-style centrally planned and controlled economy. Market-based economies are a hallmark of a liberal society, in which individuals are permitted to order their own lives, and determine this ordering from the choices with which they are presented. Our task, therefore, becomes that of providing a normative justification for the criminalisation of hard core cartel activities within the context of a liberal economy or – at minimum – within the context of a liberalised society, i.e. one which adopts market-based institutions for the distribution of goods and services (as a principle of distributive justice).

Briefly put, the liberal conception of society is that of a group of individuals who are varied in their abilities, strengths and tastes, all of whom are in pursuit of their individual well-being. Civil society is organised to permit its members the greatest opportunities to achieve those goals conducive to their individual well-being. If there were a genus-species taxonomy of liberalism, the foregoing would constitute a rough definition of the genus. As there are numerous conceptions of how this organisation comes about, and role of social (governmental) constraints to the individual, these would roughly define species of liberal theories of the state. But common to all species of liberalism is the recognition of the value of freedom of individuals to enable them to make those choices crucial for the pursuit of individual well-being, i.e. self-determination. Accordingly, a recurring theme in liberal thought concerns legitimate bounds to the state’s constraints on an individual’s exercise of his liberty.

(b) Mill and the harm to others principle

JS Mill’s On Liberty represents perhaps the first comprehensive, if not the best known, discussion of this matter. Mill’s thesis is quite simple:

“. . . that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised

over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'

His argument is more complex. He moves from an analysis of the importance of freedom of opinion to its bearing on human conduct.

Mill argues free thought and speech are instrumental for at least two reasons. First, they are the cornerstones of the defence against a tyranny or corrupt government. By exposing an idea openly, any truth contained in an idea will become apparent due to challenge. In a nineteenth century manner, it is the veracity contained in an idea which guarantees the idea’s survival in the world of ideas, just as fitness of an individual guarantees survival in the world of nature.

Additionally, diverse opinions have utility producing value. By acting on these different opinions, members of society can develop their individuality, experiment in their ways of living, thereby enhancing their own (and hence overall) happiness (or utility). As a person is their own best judge of what fulfils them, permitting a person to act on their own opinions allows that person to pursue what is best for them. In Mill’s mind, such freedom of action not only allows the individual to maximise her well-being; but if that action is indeed productive of well-being, it can provide an example for others to emulate (and potentially bring them happiness).

Yet the expression of opinions and freedom of action is not unfettered. There is a legitimate social interest in restricting liberty of opinion and action when such expression or action may harm another. Mill’s well-known treatment of this is worth quoting:

‘No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor...may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard...The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.’

Yet Mill recognises that we are to not be protected from all harms. Every zero-sum activity has ‘winners’ and ‘losers’, and any ‘loss’ is a fortiori harm. However, some such activities may themselves be useful (or productive of general happiness), and thus it is counterproductive to the advancement of general happiness to prohibit these activities on the ground that they cause harm.

Other, supplementary, principles for limiting such activities must be elucidated. Mill comments:

‘In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining. Such oppositions of interest between individuals often arise from bad social institutions, but are unavoidable while those

20. Ibid, p 228.
institutions last; and some would be unavoidable under any institutions. Whoever succeeds in an overcrowded profession, or in a competitive examination; . . . reaps benefit from the loss of others, from their wasted exertion and their disappointment. But it is, by common admission, better for the general interest of mankind, that persons should pursue their objects undeterred by this sort of consequences. In other words, society admits no right, either legal or moral, in the disappointed competitors, to immunity from this kind of suffering; and feels called on to interfere, only when means of success have been employed which it is contrary to the general interest to permit – namely, fraud or treachery, and force. 24

Though fraud, treachery and force are the most obvious criteria, it is certainly a mistake to interpret Mill as intending this list to be an exhaustive enumeration, as – for instance – he recognises that extremely offensive conduct can have the same effect as harmful conduct and thus may legitimately be prohibited. 25

Thus outlined, Mill’s views provide a strong starting point for the analysis of the limits of criminal law (and other coercive state action) within a liberal society. Harm to others, with recognition that not all harms are sufficiently vital for protection and that certain forms of offensive conduct are tantamount to harmful conduct, serves as the skeleton for the legitimate use of criminal sanctions. This skeleton must be fleshed out by a need for supplementary principles to separate protected harms from more trivial harms.

Mill’s very brief account requires the expansion of two points for our purposes. First, as his account of the nature of protected harm is imprecise, further amplification of the concept of harm and why certain harms should be prevented using the threat of criminal sanctions is required. Secondly, Mill’s justification for the narrow legitimate limits to criminal law is ultimately utilitarian. However, as utilitarianism is itself a contentious position, it is appropriate to offer an alternative position (either as a supplement or a substitute) for a position similar to Mill’s. The following two sub-sections develop these points.

(c) Protected harms

Any adequate system of criminal law must prevent some activities on the basis that they do harm to others, thus it is fundamental to secure the precise meaning of ‘harm’. To proceed without this concept being clarified may yield improper results. A too wide notion of what properly constitutes harm (and thus ought to be criminalised) will lead to overbroad legislation: too many activities will be prohibited, leading to unnecessary loss of liberty. A too narrow concept of harm may lead to inadequate protection of the citizen.

As Feinberg notes, the word ‘harm’ and the concepts described by it are both vague and imprecise. 26 If we look at a standard dictionary definition, say as found in an *Oxford English Dictionary*, we note that the word ‘harm’ has three related meanings: (1) physical injury, (2) material damage and (3) actual or potential ill effect. 27 Likewise, as Feinberg also notes, the term is used in three different senses, first, the sense

in which we say that a nonhuman thing is hurt by something else (eg ‘frost does harm to the crops’); similarly, a sense in which an interest is thwarted or set back; and thirdly, a sense in which someone has wronged (or treated unjustly) another. The third sense is a subset of the second, and the first sense – as Feinberg also notes – stretches the concept: ‘damaged’, ‘mangled’, ‘killed’ and similar terms better describe what transpired. Hence, the first sense can be set aside for our purposes.

The second sense (a setback to an interest) captures the core of the concept of harm, and is exemplified by each of the three dictionary meanings. Thus, it is appropriate to use this sense of harm as the starting point of analysis. But this sense, as it relies on the concept of interest, is also vague and imprecise. Our dictionary lists five separate meanings for the word ‘interest’: (1) the state of wanting to know about something or someone; (2) money paid for the use of money lent, or for delaying the repayment of a debt; (3) the advantage or benefit of someone; (4) a share or involvement in an undertaking; and (5) a group having a common concern, especially in politics or business. However, it is only the third, ‘the advantage or benefit of someone’, which can illuminate what is meant by the principle of ‘harm to others’.

‘Harm to others,’ in the sense that Mill or any legislator would intend, involves a setback to an individual’s interests, with ‘interests’ taken in the sense of advantages or benefits. However, when the nature of human (and quite likely – at least higher – animal) interests is examined, we see that we have a number of types or kinds of interests. For instance, on a hot day we may wish for an ice cream. We wish to engage in physical exercise so that we become or remain fit, as we also wish to be in a state of health. And we have longer-term wants – eg to raise our children, to build our dream home.

From this brief illustration of types of interests (ranging from immediate wants to long-term goals) two things become immediately apparent: first, the types of interests greatly differ from each other; and, secondly, not all of these types of interests are worthy of legal protection (particularly via the criminal law). No one could credibly maintain that hindering another’s ability to exercise or build a dream house merits criminal sanctions, yet at the same time deliberately worsening someone’s health could well be legitimately criminalised.

The above analysis shows that we have roughly four types of interests. Following Feinberg, and using his terminology, they can be cogently grouped as follows:

- Passing Wants, eg an ice cream on a hot day;
- Instrumental Wants, eg get exercise;
- Welfare Interests, eg be in physical health and vigour; and,
- Focal Aims, eg build a dream house.

The third type, welfare interests, is of central importance to the legislator.

Welfare interests are the minimum foundations on which our other goals are based, and without which our survival becomes difficult (if not impossible). A

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28. Feinberg *Harm to Others*, above n 16, pp 32–33.
32. See *Concise Oxford English Dictionary*, above n 27, s v.
33. However, if it is through kidnapping or theft that these interests are hindered, it is the kidnapping or theft which should be criminalised.
34. Feinberg *Harm to Others*, above n 16, pp 55–64 and in particular p 60.
non-exhaustive list of examples includes health, freedom from pain, economic well-being, and personal security. Feinberg emphasises their indispensability:

‘Our interest in welfare, speaking quite generally, is an interest in achieving and maintaining that minimum level of physical and mental health, material resources, economic assets, and political liberty that is necessary if we are to have any chance at all of achieving our higher good or well-being, as determined by our more ulterior goals. Personal welfare, as the term is used here, is an indispensably necessary condition for the achievement of ultimate well-being, but by no means a sufficient condition. One cannot get anything else if one does not have it, but one does not usually have much when one has only it. On the other hand, while one cannot live on bread alone, without bread one cannot live at all.’

Welfare interests are fundamental but are only as strong as their weakest link: ‘All of the money in the world won’t help you if you have a fatal disease . . . ’ These are the sorts of interests which are deserving of legal protection, particularly by criminal law.

The satisfaction of focal aims may result in the feelings of well-being that one has strived for throughout one’s life, and serve as a motivating factor in how one chooses to live one’s life. But the protection of focal aims is not directly the realm of the law. As Feinberg notes, I have my liberty, my health, my economic adequacy, personal security and the like, but ‘the rest is entirely up to me.’ Focal aims are more complex and more individuated than welfare interests. One person’s ideal of a restful life of semi-retirement in their dream house will not necessarily coincide with that of another. Accordingly, these interests are too complex and too varied to merit direct legal protection.

Likewise, passing and instrumental wants are also inappropriate candidates for legal protection. Passing wants, eg the ice cream on a hot day, are fleeting. It is rarely a significant setback to someone if these go unsatisfied. Instrumental wants are, as their name suggests, instrumental. We satisfy these wants as a means to achieve something. We want to exercise so that we might be healthy. Although satisfying instrumental wants is important, their importance is solely in obtaining the goal of the want. In the example, it is health which is served by the want, not the exercise. And, we note, health is a welfare interest. So in the end, passing wants are too trivial for legal protection, and the importance of instrumental wants lies in their goals. It is the states achieved by instrumental wants where the borders of legal protection begin, and these states are, or directed through, welfare interests.

The analysis of welfare interests also shows another dimension to the scope of legal protection. Most welfare interests require some form of institutional structure to protect them. Economic well-being requires well-defined property entitlements along with a means to ensure that others respect the interests. Personal security also requires some sort of protection and enforcement apparatus. Our health interests require some safeguard mechanisms: eg public health, food and water inspections.

These institutional interests (our term) serve to safeguard and protect our welfare interests. For instance, tax collecting provides revenue to finance other activities – courts, defence, police and security – which in turn protect our individual welfare. As

35. Ibid, p 57.
36. Ibid.
37. Ibid, pp 61–64.
such, Feinberg notes, these institutional interests in the end belong to individuals.\textsuperscript{40} For our purposes, it is only necessary to conclude that in virtue of their importance, we have a stake in protecting these sorts of institutions through legal coercion, if necessary.

Although welfare interests are the sort of interests suited to legal protection, there are limitations to their protection. These limitations are of two sorts, which we can conveniently term first and second degree limitations. First degree limitations are cases in which the interest is entirely excluded from consideration of protection, notwithstanding its status as a welfare interest of purported importance. The legal maxims volenti non fit injuria and de minimis non curat lex govern first degree limitations. Second degree limitations are cases of two (or more) sufficiently important interests conflicting in a manner which force a legislature to determine which (and by what means) one interest is to be preferred (protected) over another. These latter limitations involve the legislative task of balancing competing interests.

The preceding discussion thus shows the following. At minimum, any system of criminal law must incorporate a harm to others principle. In a liberal society, there is little room for other principles to extend the grasp of criminal sanctions. Profound offence to others may \textit{perhaps} be one such minimal extension.\textsuperscript{41} Not all harms are to be prevented: only those to which one does not consent, extend beyond a de minimis threshold, and affect our welfare interests ought to be secured by the use of criminal measures. Further, and very importantly for our purposes, although individuals may be the bearers of interests in the final analysis, institutional interests (so-called public, community, governmental interests) which serve to protect our welfare interests, can also be deserving of protection via the criminal law.

What the discussion above has not shown, however, is a reason that this liberal conception to the limit of criminal law is to be preferred over other, more far-reaching systems of legal restraint on social conduct. Mill’s views (though a paradigm of liberal thinking) are ultimately based on utilitarian principles. Utilitarianism is not a self-evident truth. A further defence of the narrow bounds preferred by the liberal (and preferably based on non-utilitarian foundations) is thus essential. In the following section, we outline such a defence, based on the work of J Rawls.

\textbf{RAWLS’S ‘VEIL OF IGNORANCE’ AND THE CHOICE OF SOCIAL INSTITUTIONS}

Rawls’s task, in his \textit{A Theory of Justice}, is to provide an explicitly anti-utilitarian account of a conception of justice, one which he sees as the philosophical underpinning of any constitutional democracy.\textsuperscript{42} Given this anti-utilitarianism,\textsuperscript{43} it provides a useful complement to Mill’s argument. If Mill’s reasoning for the restriction of legal coercion to only cases of harms to others is rejected \textit{due to its utilitarian foundation}, then Rawls’s position can provide an alternative justification for the principle. Accordingly this limitation of the legitimate exercise of criminal power can be viewed as having an alternative foundation, if not be a more universal principle underlying the moral limits of legislation within a liberal society.

\textbf{Notes}

\textsuperscript{40} Ibid, p 63.
\textsuperscript{41} Risk of harm may also provide another extension. See Feinberg \textit{Harm to Others}, above n 16, p 11.
\textsuperscript{42} Rawls, above n 17, p xi.
\textsuperscript{43} See his remarks at eg ibid, p 130.
The foundation of Rawls’s conception of justice is based on the contractarian insights of the liberal tradition. Rawls views the social contract as a thought experiment to determine those social principles which would be selected by rational persons who have been placed under conditions which precluded them from bargaining (or reasoning) to their peculiar advantage. The Kantian (and thus anti-utilitarian) presupposition of Rawls’s position is apparent: these conditions preclude individuals from bargaining to a self-exception to a general social rule (eg ‘everyone – except myself – should do/refrain from doing X’).

Rawls’s reasoning begins by considering a hypothetical, pre-moral situation. In this original position (his analogue of the traditional state of nature) human beings are taken as roughly equal, rational, self-interested, risk-averse, with differing conceptions of the good in life. The original position is characterised by conditions of moderate scarcity, and in it those reasoning to moral principles are deprived (or placed behind a metaphorical ‘veil of ignorance’) of any knowledge which may lead them to seek a particular preference based upon their own characteristics. Rawls points out, ‘[t]his explains the propriety of the name “justice as fairness”: it conveys the idea that the principles of justice are agreed to in an initial situation that is fair.’ In addition to ignorance of our own peculiar circumstances, the veil of ignorance shields one from knowledge of the economic and political circumstances of their society and the generation to which one belongs.

From this original position, Rawls argues that two principles of justice would be agreed upon and ranked in order (so as to avoid conflicts between competing applications of the principles) with priority given to the first principle. These principles are:

First Principle
Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberties for all.

Second Principle
Social and economic liberties are to be arranged so that they are both:
(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
(b) attached to offices and positions open to all under conditions of fair equality of opportunity.

We are primarily concerned with the first principle.

We make two interpretive points: first, Rawls notes that there are two priority rules (to which those in the original position would agree) which govern the application of the principles. The first such rule states:

44. Ibid, pp 157, 221–227. See also I Kant *Groundwork of the Metaphysics of Morals* (1785) Book I, ch 2 (the first and third formulations of the Categorical Imperative).
47. Ibid, pp 118–120, 131–132.
49. Ibid, p 11, see also pp 118–123.
50. Ibid, p 118.
51. Ibid, p 266.
'The principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty. There are two cases:

(a) a less extensive liberty must strengthen the total system of liberties shared by all;

(b) a less equal liberty must be acceptable to those with lesser liberty'.

The second rule puts priority on justice over considerations of welfare and efficiency, and is not germane to the present discussion.

Our second point concerns the so-called ‘basic liberties’, described in the first principle. These interests closely correlate with Feinberg’s welfare interests. Rawls describes them:

‘Now it is essential to observe that the basic liberties are given by a list of such liberties. Important among them are political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are to be equal by the first principle.’

Basic liberties are viewed as essential to a rational being’s ability to order their interests so that they can achieve their own conception of the good in life (or in Feinberg’s term a ‘focal aim’). And given that in the circumstances of the original position one has no concept of what their own good is, Rawls suggests that those in the original position would agree to the greatest possible set of liberties in order for those in the original position to facilitate their own pursuit of the good.

Rawls argues that (1) rationality; (2) self-interest; (3) ignorance of contingent information about ourselves; and (4) knowledge of the existence of ultimate goals (though given the veil of ignorance there is unawareness of their content and how they coincide with ultimate goals of others) of those in the original position compel them to select the two principles of justice.

He argues in the original position, stripped of all knowledge of irrelevant contingencies of oneself and others, one would immediately recognise that one could not secure any special advantages for oneself. Accordingly, the initial agreement would be one in which liberties, incomes, wealth and opportunities are equally distributed. This initial equality need not be a permanent situation. If inequalities can make all people better off (including those least advantaged by the inequalities), then those in the initial position would agree to permit such inequalities. Accordingly, Rawls concludes, the two principles of justice would be agreed upon.

Two complementary considerations lead to the ranking of the principles. As a rational person in the original position one knows one will have focal aims in life, but one is ignorant of what these may be and how they relate to the focal ends of one’s

52. Ibid.
53. Ibid, p 53.
54. Ibid, p 160, see also pp 131–132.
55. Ibid, p 130.
fellow citizens. Hence, by giving priority to liberty one guarantees the ability to pursue these aims, possibly over the objections of one’s fellow citizens.57

The second consideration is a slightly more formal approach to the first. Under the veil of ignorance, the limited knowledge which an individual possesses requires that – save for the most basic choices – any choices would be made under conditions of extreme uncertainty. The maximum rule of choice under uncertainty58 provides an effective guide to choice. Since the relatively unfettered pursuit (ie subject only to like fetters imposed on others) of one’s own focal aims is of paramount importance to us, that unfettered ability to pursue one’s concept of the good serves as a minimum acceptable beginning position for moral society. As those in the original position would be unwilling to gamble with liberty (given the dire consequences of its loss) and that the veil of ignorance also precludes knowledge of the factual basis of any probabilities on which an expected gain/utility calculation could be based,59 the first principle of justice would be chosen and given priority.

Once these principles are selected, those in the original position can begin the creation of a moral society, through the construction of just social, economic and political institutions. This is accomplished through a metaphorical ‘lifting’ of the veil of ignorance in a gradual manner, so that institutions are designed to take into account the actual circumstances in which individuals as members of a society find themselves. In accord with the conception of justice as fairness, the institutions are designed prior to the revelation to the designers of any particular (morally irrelevant) information which could be used by a particular designer to construct an institution to that designer’s advantage.

Although the details of Rawls’s project60 are well beyond the scope of this paper, we must identify two general features which would be contained in any social and political structure designed by those under the veil of ignorance. These are: first, the rule of law (in particular how liberty limiting laws can be justified, given the first principle of justice) in such a society. And, secondly, the social and political institutions of distributive justice (which may have a tendency to inequalities which may be contrary to a prima facie application of the second principle of justice) in such a society.

Those developing a social system must develop certain sets of public rules to guide social conduct. When these rules construct a coercive system to regulate conduct, they become a legal system. What distinguishes legal systems from other social institutions is their monopoly on certain forms of coercion, and that law ‘defines the basic structure within which the pursuit of all other activities takes place’.61 As such, legal systems incorporate the precepts of the rule of law to varying degrees, and to the extent that a particular system better incorporates these precepts, it can be regarded as more just.62

The precepts impose a structure upon a legal system to permit rational individuals an opportunity to formulate reasonable expectations as to their and others’

57. Ibid, p 131.
58. See M Dresher Games of Strategy: Theory and Applications (Engelwood Cliffs, NJ: Prentice-Hall, 1961) pp 21–35. This is a rule of choice when those choosing have no information about the probabilities of future events. It tells one to rank all possible outcomes, and select the least worst of them, ie ‘maximise the minimum’.
59. Rawls, above n 17, pp 148–153 (particularly p 149) and p 160.
60. His argument occupies Part Two (pp 171–343) of A Theory of Justice.
61. Ibid, p 207.
conduct. They are quite minimal, and based upon Fuller’s insights. Because of this minimalism, their relationship which the precepts have to the first principle of justice (priority of liberty) is immediately apparent: the precepts ensure that the bounds of one’s liberty are clearly demarcated so one can exercise one’s liberties to the fullest with confidence and without fear.

Related to the principle of liberty is the need for the existence (and occasional use) of coercive governmental power to ensure the stability of social institutions. Although we recognise the advantages of adhering to a common conception of justice and reaping the resulting benefits, under certain circumstances there may be an incentive to cheat. Though we do our part, we may have suspicions that others do not, which can in turn lead to the erosion of these institutions. Rawls uses the example of income taxation:

‘...even under reasonably ideal conditions, it is hard to imagine, for example, a successful income tax scheme on a voluntary basis. Such an arrangement is unstable. The role of an authorised public interpretation of rules supported by collective sanctions is precisely to overcome this instability. By enforcing a public system of penalties government removes the ground for thinking that others are not complying with the rules. For this reason, alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed. Rather, the existence of effective penal machinery serves as men’s security to one another. This proposition and the reasoning behind it we may think of as Hobbes’s thesis.’

The coercive power of the state (the Hobbesian thesis) is thus our guarantee that political and economic structures set up according to the first principle of justice are maintained. Indeed, in Kantian terms, the use of this social coercion prevents (and punishes) self-exceptions to general social rules.

It is evident that there can be no universal recipe for the Hobbesian thesis. The extent of the need for, and the precise forms taken by state coercion, are dependent upon a number of social and developmental factors most of which will only be revealed as the veil of ignorance is lifted and society’s social and economic circumstance become known. For instance, ceteris paribus, conditions of moderate prosperity will call for a different regime of property protection than will conditions of even moderate scarcity. Accordingly, the design of the coercive apparatus of the state is a balancing act performed by its architects.

Rawls’s second principle of justice is ultimately a principle of distributive justice: in short, an equal distribution is to be preferred, unless an unequal distribution is to the greatest benefit of the least preferred. To extend the principles of justice to the basic structure of society a system of social institutions must be developed to tease out the content of the principles. As was the case with the chosen system of legal coercion, the

63. Ibid, p 207.
65. Ibid, pp 210–211.
66. This is the social version of the prisoners’ dilemma.
67. Rawls, above n 17, p 211.
68. Ibid, Rawls’s footnote omitted.
69. On Kant’s views of the necessity of punishment, see I Kant The Metaphysics of Morals (1797) ‘On the right to punish and grant clemency’ (The doctrine of right, part five).
social principles of justice will be dependent upon the particular economic, social and
developmental circumstances of the society for which the institutions are designed.
Again, these are revealed as the veil of ignorance is lifted, but again – in accord with
the maxim of justice is fairness – the institutions must be designed prior to the
revelation of any special information which those designing the institutions can use to
their own advantage.

Although the precise details of the broad-ranging system of distributive justice are
contingent upon the particular circumstances of society, Rawls suggests that two
elements must necessarily be found in any system of distributive justice. These are (1)
a means for the distribution of goods (and services); and (2) an institutional structure
to ensure that resulting distributions continue to be just, correcting injustices if and
when necessary. The market (of one form or another) is the appropriate means for
distribution, and appropriately designed governmental institutions are the appropriate
means for ensuring the continuation of distributive justice.

Rawls’s preference in the choice of the former is that of a market-based system of
distribution which allows private ownership of capital and natural resources. 70 Given
the evaluative purpose (comparing an existing with an ideal system for evaluation) that
his theory has, Rawls’s emphasis on capitalism makes sense. Further, this emphasis is
also appropriate for our task, the examination of the legitimacy of the criminalisation
of hard core cartel conduct, since that conduct occurs primarily in a market-based
system characteristic of a private-property regime.

A market-based system of distribution has such clear advantages over its alterna-
tive, a command-based system, that it – in some form or another – would be an
obvious choice. The most significant advantage of the market system is its tendency
to further liberty interests. Rawls observes:

‘A further and more significant advantage of the market system is that, given
the requisite background institutions, it is consistent with equal liberties and fair
equality of opportunity. Citizens have a free choice of careers and occupations.
There is no reason at all for the forced and central direction of labor . . . There is no
necessity for comprehensive direct planning. Individual households and firms are
free to make their decisions independently, subject to the general conditions of the
economy’.71

In preference to a command system, a market-based system of allocation has the
additional virtues of efficiency and administrative simplicity.72

However, in spite of the liberty-enhancing features of market-based distribution
systems, actual markets will fall short of the ideal. Hence they call for correction to
restore both equality, and particularly the very liberty which justifies the institution of
the market. Rawls remarks that market failure, in the sense of ‘monopolistic restric-
tions, lack of information, external economies and diseconomies, and the like must be
recognised and corrected’.73 He continues, ‘[a]nd the market fails altogether in the
case of public goods’.74 We examine the implications of this for a system of distribu-
tive justice below.

70. Ibid, p 243.
72. Ibid, p 239.
73. Ibid, p 240. By ‘monopolistic restrictions’, Rawls appears to mean ‘abuse of a dominant
position’. See eg his remarks on competition in ibid, pp 241 and 244.
74. Ibid, p 240.
2. AN OUTLINE OF A LIBERAL THEORY OF THE LIMITS TO CRIMINAL LAW

The starting point for any replication of Rawls’s thought experiment aimed at eliciting the legitimate frontiers of criminal law in an ideal state lies with individuals under the veil of ignorance. For the reasons provided by Rawls, those so positioned will adopt the two principles of justice and their priority rules. They will see that the precepts of the rule of law are an essential means of protecting the network of liberties advanced by the first principle of justice. Additionally, those in the original position will also recognise the superiority of a market-based system of distributive justice over a command-based system of distribution, insofar as a market-based system is more conducive to permitting individuals to realise those ends for which they strive.

Likewise, as the veil is raised, the initial parameters of the criminal law can be established. In this state of affairs, although one is ignorant of the social conditions in which one will ultimately live, one is nonetheless aware of some of one’s features. In particular, those in the original position know two aspects of their psychological makeup: they have a set of interests of varying types – though they are unaware of what precisely they may be; and they are risk-averse, so they are unwilling to gamble in an effort to improve their situation. This risk aversion is particularly influential in their choice of a network of liberties. This network will accordingly be designed in order that they may pursue their focal aims in as unfettered as possible a manner.

From this awareness of their psychological makeup, and upon reflection on the types of desires they have, they would recognise that these desires would fall into a continuum (or perhaps into a number of different sets of desires), identified by the type of interest underlying a particular desire. While they would not know what they desire, they would know the sorts of desires which they are capable of having. Whether or not those in the original position would choose to organise these interests into Feinberg’s four-fold classification, they would nevertheless recognise that not all interests can be protected by legal institutions in a manner which is consistent with like liberty for all.

Those in the original position would also have some other general knowledge of interests and their protection. They would know that protecting one interest entails preferring that interest at the expense of another (or another’s) interest. They would also know that given the nature of focal aims, they are not susceptible of protection without infringing on the liberties of other parties, and such infringements could not be justified by parties in the original position. Thus, in the original position, the parties would know that they have focal aims, but not what these were. Since protecting one aim or one sort of aims can exclude others, and those in the original position will not be aware of their own aims (and indeed they would be unwilling to gamble with any structure which may inhibit their own attainment of these aims), they would reason that it would be irrational to protect focal aims. It would be similarly irrational to protect fleeting interests or wants. Even if these could be protected in a manner consistent with like liberty for all, such wants are too trivial to merit protection. To protect interests has a cost, not only financially and administratively, but also to liberty. Protecting such wants hinders a programme of extensive liberty.

The sorts of interests that would be protected are those fundamental interests which are essential to social life. These were termed ‘basic liberties’ by Rawls, \(^{75}\) and – as noted above – correlate well with Feinberg’s welfare interests. However, when these interests are considered carefully, not all are amenable to the protection through

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\(^{75}\) See above n 53, text.
criminal sanctions. While those interests surrounding bodily integrity (eg freedom from assault) and protection of property (eg freedom from theft) are well suited to such protection, other interests (eg freedom from arbitrary arrest and detention) are better suited to protection by appropriate design of legal institutions (with the precepts of law in mind), and most political and social interests (eg freedom of expression and conscience) are ill-suited to protection through the criminal law.

Those in the original position would also chose to protect the institutions which have as their mandate the promotion of distributive justice through regulatory or redistributive means. We make three observations about these institutions. First, these measures are primarily regulatory, but backed up with a threat of coercion to ensure compliance and resolve the instability associated with the perception that others may be cheating. This is the immediate implication of the Hobbesian thesis mentioned by Rawls in his example of income taxation. The threat (and use) of coercion solves many of the prisoner’s dilemma-like problems associated with cooperation in social organisations. We explore this in further detail below.

Secondly, the exact content of the regulations underlying the institutions of distributive justice is contingent upon the economic circumstances of the society. These will become known to the parties during the metaphorical ‘lifting’ of the veil. Generalities will be known first, prior to individuals knowing their place and lot within society. At the stage of awareness of generalities the parties will agree upon the design and content of the regulatory institutions, so they are unable to use any specific (or morally arbitrary) information to their advantage.

Thirdly, the completion of the content of regulatory institutions of distributive justice will parallel the completion of the coercive apparatus necessary to guarantee the general application of the first principle of justice. As noted above, protection of our interests of bodily integrity and property are most amenable to protection by the criminal law. The protection of most of the key interests in bodily integrity as well as the rudiments of the protection of property can begin under the full covering of the veil. One only requires the most minimum knowledge (ie the sort possessed under the full covering of the veil) to recognise that network of liberty is enhanced when coercive mechanisms to prevent eg murder, assault and theft are in place.

Beyond this, however, the veil must be lifted in order that information regarding the society’s state of development can be obtained. This information is essential to an assessment of the nature and scope of the property regime to be put in place, as well as to the less minimal (but nevertheless important) rights surrounding bodily integrity. Two examples illustrate this point: those drafting the Statute of Anne had no conception of digital media; and the crime of insider trading takes place only in reasonably well-developed economic circumstances. In both cases, the level of economic wealth and technological development of a society in which a particular legal system is found drives the nature and extent of the rights protected by that legal system.

This application of the Rawlsian thought experiment to the development of an ideal criminal law shows five features of interest to our task. Those designing the institutions which protect and promote the two principles of justice will design the institutions in a manner which gives priority to liberty. This entails that liberty can only be restricted for the sake of extending or promoting liberty. The immediate implication of this is first, that the set of interests protected by criminal law will be small, covering

76. See above n 68, text.
a subset of so-called welfare interests, limited to the integrity of the person and property, and the institutions which protect those interests. A harm to others principle, perhaps extended only by an offence to others principle (if the offensive behaviour is sufficiently severe) would be the sole justification for criminal sanctions. Any other justification, eg moralism, paternalism, and prevention of harm to self, severely restricts a subject’s liberty. Given the fundamentally risk-averse nature of those in the original position, it would be irrational for them to consent to such justifications, as by so doing, they may restrict their own liberty, and ultimately frustrate the pursuit of their own focal ends.

Secondly, to provide an additional guarantee of liberty, those designing legal prohibitions and sanctions will design them in accord with the precepts of the rule of law, as these provide a measure of certainty upon which members of society can rely in organising their lives. They provide a structural means of protecting the subject’s liberty.

Thirdly, it is clear that institutions (and in particular those legal structures designed to advance the principles of justice) are protected by the legal system. The interests protected by protecting institutions ultimately belong to individuals, as Feinberg correctly argues. Since the principles of justice are foundational, in the sense that all other institutions and practices are built upon and justified by them, the interests protected by the institutions of distributive justice belong to all. Indeed, in as much as the two principles of justice are formulated immediately at the start of the thought experiment, those institutions later designed to advance those principles are entitled increased protection.

Fourthly, the institutions which are developed in accord with the two principles of justice will be designed to prevent and correct imbalances of liberty and equality among people. The goal of those institutions which stem from the first principle is to ensure that the web of liberty is as extensive as possible, or in other words, that the liberties of some are not compromised to advance the interests of others. Likewise, the goals of the second principle’s institutions are to ensure fair equality of opportunity for all, and not better opportunities for some at the expense of others.

Fifthly, and fundamentally for our purposes, is that the institutions developed on the two principles of justice which would be agreed upon are contingent in their makeup. The degree of social, economic and technological development of a given society will determine the appropriate institutions for that society. In terms of the institutions of distributive justice, a market-based system is preferred, given its liberty-enhancing effects. However, the market can take any forms. As a result, the forms of impairment of the market (and its related institutions of distributive justice) will be dependent upon the particular institutions chosen, and the particular goals underlying that choice of institution. This serves to draw to our attention that the remedies viewed to be appropriate to correct (or prevent) failure in one institutional structure, may be inappropriate for use in another structure.

In the end, however, Rawls’s thought experiment is just that: a thought experiment. It is neither an account of how societies develop nor a plan for a utopia. Rather, its purpose is to illustrate an ideal, just society, based on a refined notion of fairness, to which actual and proposed social institutions can be compared in order to determine how well those institutions approximate the ideal. It is with this in mind that in the next section we examine the contentions made about hard core cartel conduct, to determine whether and how criminal sanctions can be justified from this perspective.
3. CARTEL HARMS: AN ANALYSIS

The economic harms caused by hard core cartel activity have been previously enumerated. Although each of these consequences of monopolies (and cartels) is harmful, not all harms to others are of the sorts which require prevention through criminal sanctions. In what follows, we argue that none of the above enumerated harms caused by cartels justify intervention by the criminal law.

(a) Raising the price of goods as a prohibited harm

That cartelists charge more than what otherwise would be the market price for their goods is an indisputable fact of elementary microeconomics. The prospect of earning a super-normal profit is a prime consideration in cartel formation and membership. The result of this behaviour is that the consumer pays more than what they would have otherwise paid for their good and they have less money to spend on other goods. The crux of this objection to cartel activity rests in two related notions: (1) that this behaviour involves the appropriation of consumer surplus to the producers (ie creating additional producer surplus) which is tantamount to theft; and (2) as market prices are fair, departure from them (to the detriment of the consumer) must therefore be unfair. This objection must be met with scepticism.

The main difficulty with this objection is that it relies upon the market to define property rights. This is a reverse from the norm. In the normal course of events, property rights are well defined prior to individuals engaging in market transactions to augment their existing holdings. This prior definition of the property right is a legal process. In place of legal concepts defining property rights, the objection relies on market concepts to define those rights. This is evident in the concepts of producer and consumer surplus which rely on market price for their definition. Consumer surplus is defined as the difference between an individual’s reservation price (ie the maximum they would pay for a good) and the (competitive) market price; producer surplus is the difference between (marginal) cost of production and the market price. To suggest that in a monopoly a producer is appropriating consumer surplus in a manner which resembles theft presupposes an inappropriate (or inapplicable) property rights regime. This presupposition is magnified by the terms ‘consumer’ and ‘producer surplus’, which connote ownership. From this connotation it is an easy, but fallacious, inference to an accusation of theft.

This inference is also bolstered by the underlying assumption that market prices are always fair, in some normative sense. That assumption is also dubious. Though market prices may be fair in the sense that they are the outcome of a fair process of production and exchange, two examples serve to illustrate that the mantra ‘market prices are fair prices’ is not a universal principle of justice. First, some goods impose externalities which are not reflected in their market price. Alcohol, tobacco and handguns come to mind as examples of such goods.

Secondly, consider goods (particularly essential goods and staples) sold shortly before an anticipated (or just after a) natural disaster. The prices of these goods rise

77. See above n 14, text.
78. See above n 18, and PJ Cook and J Ludwig ‘The social costs of gun ownership’ (2006) 90 J Pub Econ 379 who estimate that in the USA the average marginal social cost of handgun ownership per handgun-owning household is in the range of $600–1800.
significantly. In the world of the basic microeconomics text, the reason for this is clear. If a market price were always viewed as fair, discussion would immediately end. However, those selling at ‘inflated’ prices are viewed as ‘profiteers’, who unscrupulously take advantage of the victims of these natural disasters by charging an unfair price for basic goods. Irrespective of the economic effect, our sense of fairness demands a downward adjustment of the market price to result in a ‘fair’ price.

An additional, and very important, concern with the objection is that unlike in the case of theft, buying products from a cartelist is (in most cases) a voluntary exchange. The transaction occurs because the consumer wants the good and it is offered at a price below the consumer’s reservation price. It is in virtue of this voluntary nature that some commentators regard cartel ‘overcharges’ to be less morally reprehensible than other consequences of cartel activity.

With these comments in mind, we turn to an evaluation of the objection in order to determine the extent to which it serves to justify the criminalisation of this sort of cartel practice. In doing so, we must consider three – related – issues. First, we must determine whether cartel overcharges are harms; secondly, if so, whether these harms are of the sort (ie of sufficient importance) to merit the intervention of the criminal law in their prevention; and thirdly, how a society based upon the maxim ‘justice is fairness’ would regard this practice.

Consumers who over-pay are harmed. They have less money after the transaction than they would have, had the transaction been conducted in a more competitive market. However, it is far from clear that merely because someone has less money ‘left over’ after a transaction that they should properly be viewed as being a victim of crime. As noted above, the transaction is in a very real sense voluntary. The harm done, however, is less like being a victim of theft, than the feeling of walking out of an estate agent’s office or a car dealership thinking that one could have done better in the pre-purchase bargaining process. The harm is more of a feeling of ‘I didn’t get as good of a bargain as I probably could have’, than the feeling (perhaps including a very real feeling of violation) which one has after being a victim of theft.

These intuitions correlate well with the vague nature of our interests in retaining our consumer surplus. As noted above, the competitive market price sets one bound for consumer surplus, our willingness to pay sets the other. This description of our intuitions towards consumer surplus shows that a consumer’s interest in retaining as much of it as possible is perhaps too fleeting of an interest to be an appropriate candidate for protection via the criminal law. Its boundaries are vague, one rising and

80. Admittedly, some transactions may not be voluntary: the purchase of essential medicines (for which there may be no substitute) comes immediately to mind. As we briefly suggest in the conclusion of this paper, it may be the case that some forms of extracting consumer surplus in these circumstances could merit criminalisation due to, inter alia, the involuntary nature of the transaction. However, a discussion of the issues involved in the balancing of intellectual property rights (and the need to reward risk-taking in the development of new medications) and the allocation of medical resources in a liberal society are well beyond the scope of this present paper.
falling with the market, the other dependent on our immediate wants and wealth. The harm-based analysis suggests that scepticism is an appropriate response to the claims that criminal sanctions should be used to protect our interest in maximising our consumer surplus. The vague and instrumental nature of the interests tells against such protection.

(b) Creating deadweight loss as a prohibited harm

The harm created by a deadweight loss is very similar to the harm occasioned by overcharges. Consumers are unable to purchase a wanted good because the price charged by the cartelist exceeds their reservation price. Rather than paying more for the good, the good is simply too expensive to buy. Although the difference in the harm occasioned to the over-charged consumer and frustrated non-consumer of the good may be relevant for the determination of damages in a civil antitrust action (where this category of damages is allowed), these differences are irrelevant for our present purpose.

The notion of deadweight loss, like consumer surplus, relies upon the relationship of market price and willingness to pay for its definition. As argued in the above section, the protection of consumer surplus is (on a harm to others basis) not the sort of interest which merits protection through criminal sanctions. It is simply too vague a concept to qualify as the sort of harm which merits criminal protection. This conclusion applies not just to cases where the consumer ‘overpays’ but must also apply to cases where consumption is frustrated because the price for the good exceeds the consumer’s reservation price (or, otherwise put, willingness to pay). Accordingly, this objection merely reduces to the previous objection.

(c) Creation of social waste as a prohibited harm

This objection is based upon Posner’s argument that it is not only rational for monopolists (and cartelists) to expend any sum up and equal to their expected return from their activity, but that they in fact so do in an attempt to gain and preserve their position. The assumptions on which Posner develops his model are questionable. However, though the contentious nature of the assumptions may lead us to reject that the entire gain from a cartel or monopoly is dissipated in the enterprise of obtaining and maintaining that market position, it is safe to assume that there is some cost to the acquisition and preservation of a monopoly position, and similar costs are incurred by members of cartels.

In the case of a monopoly, these costs include the expenditures to acquire licences, lobbying costs to establish and preserve trade barriers, expenditures in advertising in an effort to maintain customer loyalty, and perhaps out and out bribes. There is some empirical evidence which indicates that wages in industries which enjoy a cartel are

82. Posner, above n 13, at 821.
above what would otherwise be expected. In the case of cartels, there may be the additional expenditures of policing the agreement and avoiding detection; but due to the nature of the cartel agreement, members may not incur those costs associated with licencing and promoting trade barriers to the extent incurred by the monopolist.

However, these expenditures need not be viewed as waste, rather they can be (and by some are) viewed as something of the nature of wealth transfers. Lobbying costs are transfers to the political class; payment of higher than expected wages is a wealth transfer to management and workers; costs of acquiring a licence are a transfer to those dealing with regulation (eg lawyers); and advertising expenditures are wealth transfers to other industries. Viewed in this manner, it is difficult to characterise this objection to cartel activity as either causing the sort of harm which calls out for criminalisation; or be of the sorts of side effects of the means of distributive justice that those under a veil of ignorance would seek to control (particularly through prior legal prohibitions of the most liberty-limiting sort). Further, given that those under the veil of ignorance would be unaware of their social role once the veil is lifted, it would not be rational for them to exclude the opportunity for being the beneficiaries of such wealth transfers.

(d) Stunting the development of new products and processes as a prohibited harm

As illustrated above, neither the monopolist nor cartelist have any incentive to produce new products, or develop new processes to produce existing products in a more cost-effective manner. The economic consequence of inefficient production is that the price for the good is higher than it would otherwise be, so there is a consequent capture of consumer surplus by producers along with a creation of additional deadweight loss. These purported harms caused by inefficient production reduce to the cases of the harms occasioned by cartel overcharges and creation of deadweight losses. As the latter would not be the concern of the criminal law, the same conclusion follows for harms occasioned by productive inefficiency.

The objection regarding failure to develop new products is likely incoherent. In its final analysis, the complaint that one is harmed by one’s inability to obtain a good which has yet to be developed appears nonsensical. One may be harmed by having a desire which is unfulfilled. But the harm one suffers rests in the unfulfilled nature of

85. Viscusi et al, above n 83, pp 88–90.
86. Note, however, the dividing line between a ‘lobbying cost’ and a bribe may not be entirely clear. It is unlikely that precise distinctions among (legitimate) corporate hospitality, (illegal) ‘facilitation payments’ and outright bribes can be drawn. (See eg M Raphael Blackstone’s Guide to the Bribery Act 2010 (Oxford: Oxford University Press, 2010) pp 71–76.) Nevertheless, bribery is correctly viewed as wrong (hence criminalised) precisely because it involves ‘playing outside’ the ostensive institutional (and market) rules and thus casting the institution or market (and their fairness) into disrepute. This is identical to our analysis of the wrong done by the cartelist, see s 4, below. Likewise, the harm done by most so-called ‘white collar crime’ (eg insider trading, securities disclosure offences) is identical.
87. The leading article is G Tullock ‘The welfare costs of tariffs, monopolies, and theft’ (1967) 5 Westn Econ J 224.
that desire. The harm does not rest in the desire’s inability be fulfilled by a non-existent good, which is what the objection asserts. Further, even if the objection can be coherently rephrased, these harms caused by the failure to produce novel goods are hardly the sort to be of the business of criminal law.

Even if, by some stretch, the claim could be made to be coherent, the sorts of interests advanced by obtaining a particular good seem to be our more immediate interests, and not our welfare interests. It is these welfare interests which are the proper subjects of protection through criminal sanction. Given these features, those under the veil of ignorance would not pay heed to that claim. If any claim merited the response of de minimis non curat lex, it would be this claim.

(e) Exacerbation of X-inefficiency as a prohibited harm

X-inefficiency is managerial (or productive) slack. By insulating themselves from the pressures of competition, those running cartels can live the quiet life and their divisions (or companies) can enjoy a secure return, at the expense of increased costs (but not necessarily diminished return) to the company. The harm occasioned) of X-inefficiency can be viewed as being of two sorts. First, it can be viewed as a restatement of the ‘inefficiencies’ (ie costs of the creation of economic deadweight) of certain productive processes. Indeed, Leibenstein’s own discussion at times focuses on the relationship of this sort of inefficiency to factory workers’ output.88 So to the extent that X-inefficiency is enhanced (or another word for) productive inefficiency, it reduces to that case.

Alternatively, the harm done by X-inefficiency can be viewed as a decrease in return to owners, by virtue of increased costs. A compromised return on investment harms an owner. But preventing such losses is certainly not within the proper ambit of criminal law. To attempt to correct it through the means of criminal law entails a significant cost to liberty. In effect, and to use the vernacular, ‘slacking off’ would otherwise become criminalised. As the problem of X-inefficiency arises from the divergent interests of ownership and management, its solution lies in attempting to better align those interests. As a realignment of interests is the least liberty-limiting option which rectifies the problem, we suggest it would be along these lines that those under the veil of ignorance would seek a solution.

4. HARM TO THE INSTITUTION OF DISTRIBUTIVE JUSTICE AS THE JUSTIFICATION FOR CRIMINALISING CARTEL ACTIVITY

To examine each of the harms which hard core cartel activity causes and show them to be inappropriate subjects of protection through the criminal law, and then to conclude that therefore hard core cartel activity ought not to be criminalised is a fallacious inference. It is some species of the so-called fallacy of composition, a fallacy in which it is (falsely) inferred that what is characteristic of the whole must also be characteristic of its parts (or vice versa).

The harm done by hard core cartel activity is to institutions, not to individuals. The cartelist’s primary harm is the effect it has on the market as an institution used

88. Leibenstein, above n 14, at 398–403.
by society to distribute goods and services, i.e. as its means of distributive justice. The cartelist’s harm is therefore not the harm it occasions to any participant in the market. As Feinberg shows, it is perfectly coherent to speak of institutional harms in this way, as in the last analysis the interests developed and protected by the institutions belong to individuals. This is particularly so when we speak of harms to the market, as the market is that institution by which individuals distribute and acquire those goods used in their pursuit of the goals which are the focal ends in people’s lives.

The above Rawlsian analysis demonstrated the fundamental role played by the market in a liberal society. The market is the institution of distributive justice. Rawls’s thought experiment shows that the market would be chosen by those placed under conditions of fairness (i.e. the veil of ignorance), precisely because it protects and promotes the liberty of those participating in it. Those under the veil of ignorance will reason that no alternative ordering of the means of distribution can be achieved without significant interference in citizens’ lives.

However, those under the veil will realise that there is a parallel between justice in the legal system and justice in the means of distribution. As seen above, the legal system incorporates precepts of the rule of law to permit people to formulate reasonable expectations as to (their and others’) conduct. Likewise, society’s means of distributive justice, the market, will possess similar content so that individuals participating in the market can have reasonable expectations of how transactions will occur: at minimum we expect them to occur in a fair manner.

The substantial harm done by cartel activity to the market and to those active in the market is that it erodes confidence in the fairness of the market as a system of transfer and distribution. We, as participants in the market, have expectations of how market transactions will be conducted. These expectations are of two sorts: we have expectations of how particular exchanges should take place, and expectations of how exchanges generally should take place. We expect that particular exchanges will occur, inter alia, voluntarily, with relevant information being disclosed, with reasonable certainty about the object of exchange, and the like. These principles serve to establish rules or principles for fairness in an exchange. This regulation of particular exchanges is a fundamental part of contract law and related fields.

But we also expect these individual exchanges to take place in an environment which facilitates these sorts of exchanges, which is one of fairness. At minimum, fairness dictates that we be aware of, and agree to, the rules in advance. Fairness, whether in law, the market, a game or any other aspect of our life, precludes the existence of hidden rules, known only to some yet expected to be adhered to by all. The regulation of the environment of exchange is a fundamental part of those laws which regulate markets, whether they are of wide application (e.g. consumer protection law) or more narrowly focused (e.g. securities law).

The conduct of the hard core cartelist strikes at our expectations for a fair environment for exchange. By agreeing on prices, quantities and markets with illusory ‘competitors’, the cartelists have created hidden rules, known only to themselves, but by which all are expected to play. The presence of such activities in the marketplace undermines our confidence in the fairness of the market. An often heard analogy here is that the cartelist plays ‘with a marked deck’. This may not be the best analogy, as in a fixed card game, the harm is unilaterally caused and is directed at the other participants. Though cartels do direct harm of this sort, their effect is also more diffuse with an impact both on actual and potential participants, calling the very enterprise into question.
A better analogy may be the harm done to a sport when its events are fixed. A spectator observing a sporting event, say, a cricket match or a sumo tournament, expects to see the event determined by the skills of the participants (and perhaps with a little luck of the day). The spectator does not expect the result to be predetermined, and such arrangements bring the credibility and integrity of the sport into question. In a similar manner, by predetermining the market in the way that they do, cartelists bring the credibility and integrity of the market into question. This is their real harm. In Kantian terms, the cartelist carves out a self-exception to the expected rules of market behaviour. These rules presuppose a certain standard of conduct to which everyone is expected to adhere, but to which the cartelist will not.

Thus viewed, our next task is to determine the extent that the Rawlsian idealised society would display concern for these harms. As seen above, those under the veil of ignorance have selected two principles of justice, and ordered them, so that liberty trumps (in)equality. Additionally, they would have chosen a market-based system of distributive justice, with means to correct undesirable features, namely their tendency towards inequality; and their intermittent need for a means to secure compliance. The second feature, involving the problems of isolation and compliance, is an application of the Hobbesian thesis. Institutions which require cooperation for their function are inherently unstable, particularly when it is advantageous for an individual (or a small group of individuals) not to cooperate in the face of everyone else’s cooperation. This is merely a multi-person version of the prisoners’ dilemma.

The dilemma involves two problems: an isolation problem, and an assurance problem. The isolation problem arises when each person’s pursuit of their own preferred strategy results in a state in which everyone is worse off than they would have been had each person pursued their second-best strategy. The solution to the isolation problem is the assurance problem: given that we can agree that the pursuit of the second-best strategy by all results in the optimal outcome for all, we need a means to assure us that everyone complies with the agreement. In the ideal state, where the citizenry is motivated to do the right thing and hence all were confident in their
compatriots’ willingness to do the right thing, the compliance problem would be solved without coercive enforcement.\textsuperscript{95} But in the ‘real world’, things are different.

The provision of public goods is a clear case where the market fails due to the two problems.\textsuperscript{96} By their very nature, public goods are goods which have the features of non-excludability and non-rivalry. That is to say, once provided, no one can be excluded from benefitting from a public good; and the consumption of the good by one person does not affect another’s ability to also consume that good.\textsuperscript{97} National defence and lighthouses\textsuperscript{98} are the two classical examples.

Once citizens come to an understanding of which goods are best provided by (or that they want provided by) the state, they need to realise that they must all pay for these goods (in spite of the fact that freeriding is their preferred option). And they must be assured that all will pay their share for these goods.\textsuperscript{99} To assure compliance with the agreement, some coercive measures must exist. These measures are the application of the Hobbesian thesis. In the ideal state, these measures would be quite nebulous, far in the background, and never used. However, as we move further from a utopia, the measures will out of necessity become more concrete and present in society. And, from time to time, these measures will be used. This is the stuff of the criminal law.

Confidence in the integrity of the marketplace shares some key characteristics of public goods. Indeed it may be a public good, albeit using ‘good’ in a somewhat extended sense.\textsuperscript{100} It is non-excludable and non-rivalous. Though one may self-exclude oneself from a general sense of confidence in the market, one cannot be excluded (by others having the same confidence) from possessing this view. Similarly, on its own, one person’s confidence in the integrity of the market will not prevent another person from adopting the same attitude. Further, and more important for our purposes, we gain confidence in the integrity of the market by conforming to and expecting others to conform to certain standards, patterns of conduct, and other rules of the market which we explicitly or implicitly adopt.

These rules of the market exhibit the same isolation and assurance problems as the prisoners’ dilemma and public goods. The dominant strategy in the marketplace is to engage in opportunistic behaviour, ie to cheat. However, those in the marketplace immediately realise the consequences of all engaging in their dominant strategy. But if everyone ‘plays by the rules’ (ie our second-best strategy), we avoid these consequences. The need for an assurance mechanism is thus necessary to ensure general compliance with these rules: this is the justification for the use of criminal sanctions.

The use of the criminal law to solve the assurance problem in the marketplace is further legitimised by the fundamental role which the market has as an instrument of justice. The market is a liberal society’s main means of distributive justice, chosen precisely because of its liberty-producing effects. The cartelist, by manipulating the market in an opportunistic manner, undermines public confidence in the integrity of this instrument of distributive justice. It is precisely through the existence (and use) of such coercive means that citizens can have the necessary assurance in the proper and

\textsuperscript{95} See Sen, above n 93, at 114–115.
\textsuperscript{96} See Rawls, above n 17, pp 235–239.
\textsuperscript{97} PA Samuelson ‘The pure theory of public expenditure’ (1954) 36 Rev Econ and Stats 387.
\textsuperscript{98} RH Coase ‘The lighthouse in economics’ (1974) 17 J Law and Econ 357.
\textsuperscript{99} See Rawls, above n 17, p 236.
just functioning of the market. Criminal sanctions for hard core cartel activity are thus a normatively legitimate means of ensuring the well-functioning of our society.

CONCLUSION

The argument of this paper has shown a normative justification for the criminalisation of cartel competition offences, on the basis that the cartelist fails to ‘play by the rules’ of the marketplace, or (in Kantian terms) carves out a self-exception to the general social rules governing distributive justice. I suggest that this conclusion could be extended to other non-cartel anti-competitive conduct which also does not play by the rules (or manifests a self-exception).

The phenomenon of ‘pay for delay’ in the pharmaceutical industry could be considered to fall under this rubric of creating a self-exception (and thus not ‘playing by’ the expected rules). Under a ‘pay for delay’ arrangement the holder of a patent which is about to expire pays a generic drug manufacturer not to produce the medicine. The patent holder thereby extends the length of time during which it can charge a monopoly price for the drug, hence earning a super-competitive return beyond that period of time permitted by the relevant legislation.\(^{101}\) In effect, the patent holder ‘buys’ an exemption from the rules. The rules, however, were designed to reward patent holders with an appropriate return for the risks (and costs) associated with pharmaceutical innovation, and the expiration of a patent is designed to serve as a limit to the return.\(^ {102}\)

Unlike the purchase of almost all consumer goods, the purchase of most medicine is not something which can be forgone, or even postponed for a period of time. Depending on the medical concern, a drug purchaser’s reservation price may approach that individual’s wealth. As such, these purchases lack the element of volition characteristic of the vast majority of market transactions in which the consumer is ‘overcharged’. It is precisely this lack of volition which distinguishes the pharmaceutical transactions from other transactions in which the consumer pays a ‘higher’ (yet consented to) price. But, in addition to causing harm to particular consumers by forced transactions at a super-competitive price, ‘pay for delay’ more importantly must be viewed as affecting the institution of limited monopolies. Time-limited monopolies have, as their underlying justification, that upon the expiry of time, an adequate return (for cost and risk involved) has been received. This justification is incorporated into the legal rules which establish the patent system which provide for the time-limited super-competitive return. The ‘payer for delay’ accepts these rules to the extent that they benefit only it; however, when an additional benefit can accrue outside of the system, the ‘payer’ will buy that advantage irrespective of the rules.

Two caveats must be added to the conclusion of this paper. First, our argument is that in as much as cartels inflict harm on an important social institution, namely the

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\(^{101}\) Although ‘pay for delay’ has elements of both cartel and abuse of dominance (involving a horizontal market sharing arrangement and exploitation of a dominant position obtained by a patent), the abuse of dominance is logically prior to the cartel activity: without the monopoly/patent, the agreement could not occur.

market, cartel activity can legitimately (from a normative perspective) be criminalised. In a similar vein, our argument may be able to be extended to other cases in which harm is inflicted upon other means of distributive justice adopted by a society. This is the limit of our argument: it extends only to the market as a means of fair distribution. Our argument does not support the additional inference that harms to all social institutions (or even to every important social institution) can legitimately be made the subject of criminal sanctions. To immediately draw inferences of this latter sort fails to recognise that the market, as the instrument of distributive justice, would be among the first (if not the first) social institutions agreed upon by those completely under the veil.

The second caveat is the fact that criminal sanctions are legitimate methods of controlling hard core cartel activity, says nothing about the nature and extent of those sanctions. To the extent that a society approaches the ideal, such sanctions will be milder and less frequently used. Indeed, the ideal society would not require such sanctions. The precise details of the regime chosen to enforce the rules of the market will not (and cannot) be determined until the social and economic conditions in which the market activity takes place are known. In Rawlsian terms, the veil of ignorance must first be at least partially lifted. Related to this, is that as social and economic conditions may vary so too must the rules and how the rules are enforced. This is not merely related to a difference in levels of economic development, but also relates to other social factors regarded as important by the citizens, which are manifested as part of the market-place rules.

This latter point is of significance to anyone who in seeking a solution to the problem of cartels casts their eyes to other jurisdictions. Though there may be much to be gained from examining others’ experiences, and learning from their mistakes; wholesale transplantation may not be the appropriate solution. The conditions – whether economic, cultural, or social – which give rise to a solution in one jurisdiction may be significantly different elsewhere. This is vividly so when we consider the extent to which a society has adopted the market as a (sole) means of distributive justice. In Rawlsian terms, the veil must be partially lifted before the institutions can be designed, in order that social and economic contingencies can be adequately taken into account.

For example, where there are non-market considerations in distribution (perhaps considerations of readjustment for regional disparity) transplantation of a legal regime from jurisdictions where such considerations are irrelevant may well be inappropriate. Similar considerations may also apply to societies which have recently become ‘liberalised’, in the sense of adopting a market-based means of distribution. Since the institutions we design receive their legitimacy from them being designed for particular conditions, failure to account for relevant differences in these conditions can deprive the institutions of their very normative legitimacy. To claim ‘it worked there, so it should also work here’ may be a very valid point. But it is a pragmatic point, devoid of normative force. But those designing legal (and particularly criminal) institutions need to make a normative point, one which recognises the need for relevant differences to be recognised and be taken into account in the legal response to any problem, including those associated with anti-competitive conduct.

103. The argument here (to which this caveat is directed) would be along the lines espoused by P Devlin The Enforcement of Morals (Oxford: Oxford University Press, 1965) who follows the reasoning of JF Stephen Liberty, Equality, Fraternity (London: Smith Elder, 1874).

104. Brisimi and Ioannidou, above n 9, make a similar point at 173 and 175–176.