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NOTES

When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act

MICHAEL W. CARROLL*

[In many cases,] violating the [campaign finance] law[s] has become the cost of doing business. . . . [T]he classic conversation in the campaign room consists of someone asking "We want to do this and this. What are the consequences?" . . . [T]he lawyer responds by saying, "We cannot do that . . . [a]fter the election, the FEC will go after you." To which the questioner asks, "What is the fine?" Even if the penalty is a \$20,000 fine, he is thinking, "But this action will win the election." . . . The next day [the lawyer] get[s] [a] phone call to the effect of, "Listen, we should tell you what we just did," because in a political campaign the reality—winning—often is everything.¹

INTRODUCTION

The 1996 presidential and congressional elections are expected to be the most expensive in history,² and fundraising efforts are well underway. Early success in fundraising has decided advantages, including limiting the pool of challengers and assisting in future fundraising activities. While the incentives for early and aggressive fundraising are many, candidates' efforts are not wholly unregulated. The primary legal constraint on federal candidates' fundraising efforts is the Federal Election Campaign Act (FECA).³ Although the FECA does not regulate all sources of funds that support federal election campaigns,⁴ it imposes

* J.D., Georgetown University Law Center, 1996; A.B., University of Chicago, 1986. I would like to thank Professor Louis Michael Seidman for asking the hard questions and providing insightful comments during the preparation of this note. Thanks also go to Kristy Carroll and William and Roberta Carroll for their patience and support.

1. *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L.J. AM. U. 223, 232 (1994) [hereinafter *FEC Panel Discussion*] (comments of Lawrence Noble, General Counsel, Federal Election Commission).

2. See JOSEPH E. CANTOR, CONGRESSIONAL RESEARCH SERV., CRS ISSUE BRIEF: CAMPAIGN FINANCING 2 (1994) (stating that aggregate costs of House and Senate campaigns nearly sextupled between 1976 and 1992, while the cost of living roughly doubled during that period).

3. 2 U.S.C. §§ 431-455 (1994). For the presidential campaign, there are two additional constraints: the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 (1994) (limiting campaign expenditures during primary elections of presidential candidates who accept federal funds), and the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9012 (1994) (limiting presidential campaign expenditures and acceptance of most private contributions during general election for presidential candidates who accept federal funds).

4. The First Amendment limits the ability of Congress to regulate campaign finance. Dollar limitations on "independent expenditures" are prohibited because such limitations tend to exclude all citizens and groups except candidates, political parties, and the press from "any significant use of the most effective modes of communication." *Buckley v. Valeo*, 424 U.S. 1, 19-21 (1976) (per curiam). Dollar limitations on campaign contributions are permissible because such limits place only a "marginal

limits on who can contribute, how one can contribute, and how much one can contribute.⁵ Congress passed the FECA in 1971 in response to scandal and growing public cynicism about the influence that campaign contributions have on the conduct of elected federal officials. The goal of the FECA is to reduce public cynicism and bolster confidence in our elected representatives. This note generally assumes that reducing public cynicism through regulation of campaign finance is an achievable goal.

However laudable the goal, we may assume with near certainty that violations of the FECA will occur during the 1996 presidential and congressional campaigns, if they have not already.⁶ The question is, are we as a society content with the number and severity of the violations likely to occur? Put another way, given our choices for enforcing the FECA, have we chosen a scheme of enforcement and punishment that will yield the optimal number of FECA violations? This note argues that we have not. An application of the principles for achieving optimal deterrence set out in recent scholarship suggests that both the current level of sanctions for FECA violations and the probability that these sanctions will be imposed are too low to provide optimal deterrence against FECA violations. This note uses the term "optimal" in its economic sense of weighing the cost of added enforcement ("the marginal cost") against the benefit of added enforcement ("the marginal benefit"). Optimal enforcement is the point at which the marginal cost equals the marginal benefit.⁷ However, as with many economic formulations applied to law, optimality analysis tends to disguise the normative component involved in assigning a value to the marginal cost and the marginal benefit. This normative component becomes more apparent when optimality analysis is applied to the enforcement of the FECA because the marginal cost of enforcement, by and large, can be measured in dollars and cents, whereas the value of the marginal benefit—increased public confidence in the electoral process and in representative democracy—is particularly difficult to measure.

Part I of this note describes the enforcement scheme for the FECA, in which the Federal Election Commission (FEC) has exclusive jurisdiction over civil FECA violations and the Department of Justice has concurrent jurisdiction with the FEC over criminal violations. Part II examines current scholarship on deterrence theory and the proper scope of the civil and criminal law, and it describes the principles for determining when civil or criminal sanctions will produce optimal deterrence. Part II also analyzes the statutorily divided civil/criminal FECA enforcement scheme in light

restriction" on the contributor's ability to communicate freely. *Id.* The FECA does not cover so-called "soft money"—contributions for "independent expenditures" and certain types of political party funds.

5. See 2 U.S.C. §§ 441a-441g (1994).

6. See *infra* text accompanying note 111 for the proposition that when an actor perceives the private benefits of an action to outweigh the sanction for that action, she will take the action. See *infra* Part IIb for the proposition that the private benefits of a FECA violation substantially outweigh the sanction in most cases. Historical data also support the assertion. See *infra* note 104 (table detailing number of Federal Election Commission enforcement actions for FECA violations).

7. To spend additional money on enforcement over the optimal level is inefficient because such spending yields a benefit worth less than the cost of the additional enforcement.

of the scholarship discussed. At first glance, the analysis suggests that increasing the use of and threat of a criminal, nonmonetary sanction like imprisonment would optimize deterrence for FECA violations. Further examination, however, reveals that the use of the criminal sanction might be counterproductive.⁸ Thus, Part II argues that the cost of FECA violations must be raised through increases in the magnitude of monetary sanctions and increases in the probability that such sanctions will be imposed. Part III suggests reforms to the FECA enforcement scheme, including, among other things, a proposed statutory amendment to the FECA authorizing enforcement through *qui tam*⁹ actions.

I. THE FEDERAL ELECTION CAMPAIGN ACT

The Federal Election Campaign Act (FECA)¹⁰ was enacted in 1972. Its purpose is to reduce political corruption by eliminating the purchase of influence by campaign contributors.¹¹ It codifies most of the federal laws covering federal campaign financing and public reporting by campaign committees.¹² With few exceptions, the FECA applies only to financial activity intended to influence the nomination or election of candidates running for federal office.¹³

The FECA contains two functionally different types of provisions: campaign financing statutes¹⁴ and campaign reporting statutes.¹⁵ Campaign financing statutes regulate, limit, and, in some cases, prohibit financial transactions in connection with the federal electoral process.¹⁶ Campaign reporting statutes require that candidates and political committees publicly disclose the sources and, in the case of committees, the recipients of their funds.¹⁷

Subsequent to its enactment in 1972, the FECA was amended in 1974,¹⁸ 1976,¹⁹ and 1979.²⁰ Prior to the 1976 amendments, all violations of the

8. See *infra* Part II A2.

9. *Qui tam* is shorthand for *qui tam pro domino rege, quam pro se ipso in hac parte sequitur* ("Who as well for the King as for himself sues in this matter"). 3 WILLIAM BLACKSTONE, COMMENTARIES *162 & n. 41 (W. Lewis ed., 1898) (cited in *Marra v. Burgdorf Realtors, Inc.*, 726 F. Supp. 1000, 1012 (E.D. Pa. 1989)). "The purpose of [a *qui tam*] action is to give citizens a right to bring civil suits to help in the enforcement of the federal criminal law." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175 (1992).

10. 2 U.S.C. §§ 431-455 (1994).

11. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam); see also *United States v. Goland*, 977 F.2d 1359, 1359 (9th Cir. 1992) (Pregerson, J., dissenting from denial of rehearing en banc), cert. denied, 507 U.S. 960 (1993).

12. PUBLIC INTEGRITY SECTION, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 93 (6th ed. 1995) [hereinafter ELECTION LAW MANUAL (6th ed.)].

13. *Id.* at 93-94.

14. 2 U.S.C. §§ 441a-441g, 442 (1994) (regulating campaign contributions and expenditures).

15. 2 U.S.C. §§ 432-437 (1994) (regulating reporting of campaign and convention financing).

16. ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 94.

17. See 2 U.S.C. §§ 431-432, 434 (1994).

18. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455 (1994)).

19. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

20. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

Act were treated as misdemeanors.²¹ There was no mens rea requirement; strict criminal liability attached regardless of the motive, degree of criminal intent, or amount of funds involved.²² Recognizing that First Amendment concerns are present in nearly all FECA violations, courts interpreted the FECA as requiring "general intent"²³ to support a criminal conviction.²⁴ The Department of Justice then chose to limit enforcement of the FECA to cases in which the defendants knew that their acts were illegal and the amount of money involved in the case was more than "de minimus."²⁵

Congress substantially changed the enforcement landscape with the passage of the 1976 FECA amendments.²⁶ The 1976 amendments codified the civil/criminal distinction for campaign finance violations. It created the Federal Election Commission (FEC) and conferred on it exclusive jurisdiction for enforcing civil²⁷ violations.²⁸ The FEC's power to sanction such violations is limited to administrative conciliation and civil enforcement.²⁹ The Justice Department prosecutes criminal FECA violations. Congress limited the imposition of criminal sanctions for FECA violations to only "knowing and willful" violations in which relatively large sums of money are involved.³⁰ Under the FECA, criminal violations are misdemeanors,³¹ but in most FECA prosecutions the Justice Department uses other statutes to charge the conduct as a felony.³²

A. IMPLEMENTING THE CIVIL/CRIMINAL DISTINCTION: ENFORCEMENT OF FECA OFFENSES

1. Investigations

The Department of Justice and the Federal Election Commission have signed a Memorandum of Understanding to provide generally when and how potential violations detected by one agency will be referred to the other. Because the FECA separates enforcement jurisdiction along the civil/criminal divide, both

21. 2 U.S.C. § 441 (1972 Supp.), *repealed by* Pub. L. No. 94-283, sec. 112, 90 Stat. 475, 486 (1976); *see also* ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 107.

22. ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 107.

23. General intent here rests on whether a reasonable person would have had knowledge of the operable facts.

24. *See, e.g.*, *United States v. Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1197-98 (D.C. Cir. 1974) (holding that when election committee knew that it had duty under FECA to report contribution but failed to do so, it was guilty of violating the Act, and error, if any, in trial court's application of scienter requirement was harmless).

25. PUBLIC INTEGRITY SECTION, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 72 (5th ed. 1988) [hereinafter ELECTION LAW MANUAL (5th ed.)].

26. Pub. L. No. 94-283, 90 Stat. 475 (1976).

27. That is, nonfeasant and quantitatively de minimus violations.

28. Pub. L. No. 94-283, 90 Stat. at 482.

29. *See* 2 U.S.C. § 437g(a)(4)-(6) (1994).

30. Codified initially at 2 U.S.C. § 441j, this provision was moved to 2 U.S.C. § 437g(d) in 1979. *See* 2 U.S.C. § 437g(d) (1994).

31. *Id.* In 1979, Congress refined the FECA, Pub. L. No. 96-187, 93 Stat. 1339 (1979), reorganizing some sections without major substantive change.

32. The Department's use of alternative prosecutorial theories is discussed *infra* notes 53-57 and accompanying text.

agencies have recognized that it is important to determine early in the investigative process which label should be attached to a matter.³³

The FEC is given broader investigative power than the Department of Justice. When, in the course of an investigation, the Department of Justice determines that the criminal label is inappropriate, it must promptly refer the case to the FEC.³⁴ By contrast, the FEC may conduct a parallel administrative inquiry even when there is an active criminal investigation involving the same matter.³⁵ Courts, however, have rejected interpretations of the FECA that limit the Justice Department's ability to initiate a criminal prosecution for a FECA violation prior to or in the absence of an FEC referral.³⁶

Under the Memorandum of Understanding, both agencies strive to cooperate during the investigative stage. Statutory and procedural rules, however, prohibit the sharing of some information between the two agencies. FEC employees are specifically prohibited from sharing the product of their investigations with anyone, including prosecutors or federal criminal investigators.³⁷ During the course of a criminal investigation, the Department of Justice will share information with the FEC subject to certain legal restrictions.³⁸

2. Criminal Prosecutions

Within the already limited scope for labelling a FECA violation "criminal,"³⁹ the Department of Justice has further limited the scope of potential criminal enforcement to those violations that are "significant and substantial."⁴⁰ The factors that the Department considers in determining whether a violation is "significant and substantial" are the dollar amount involved in the illegal activity and the level of criminal intent involved in carrying out the activity.⁴¹ This policy limits criminal prosecutions to certain situations.⁴² The most com-

33. See Memorandum of Understanding between U.S. Dep't of Justice and Federal Election Comm'n (1977), reprinted in ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 120 [hereinafter Memorandum of Understanding].

34. *Id.*

35. See 2 U.S.C. § 437d (1994).

36. See, e.g., *United States v. International Union of Operating Eng'rs, Local 701*, 638 F.2d 1161 (9th Cir.), *cert. denied*, 444 U.S. 1077 (1980); *United States v. Jackson*, 433 F. Supp. 239 (W.D.N.Y. 1977), *aff'd*, 586 F.2d 832 (2d Cir.), *cert. denied*, 440 U.S. 977 (1979); *United States v. Tonry*, 433 F. Supp. 620 (E.D. La. 1977).

37. 2 U.S.C. § 437g(a)(12) (1994).

38. See Memorandum of Understanding, *supra* note 33, at 121. In the course of a criminal investigation, any information given before a grand jury cannot be shared with the Commission. *Id.* (citing FED. R. CRIM. P. 6).

39. 2 U.S.C. § 437g(d) (1994) (requiring knowing and willful violation).

40. Memorandum of Understanding, *supra* note 33, at 120-21. Factors that will affect the determination of referrals include the "repetitive nature of the acts, the existence of a practice or pattern, prior notice, and the extent of the conduct in terms of geographic area, persons, and monetary amounts among many other proper considerations." *Id.*

41. ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 114.

42. When a prosecution results in a FECA conviction, the violator may be punished with a prison sentence not to exceed one year and a fine the greater of \$25,000 or three times the amount of the

mon is cases in which a violator uses surreptitious means such as cash, conduits,⁴³ or false documentation to conceal conduct that violates a substantive FECA requirement, such as using conduits to conceal corporate funding of political campaigns in violation of 2 U.S.C. § 441b.

The common practice of "bundling" contributions potentially provides another example of conduct that the Department of Justice is likely to prosecute.⁴⁴ A bundler is typically a political action committee or political party committee that has already given the maximum allowed for the committee under the FECA. The committee requests that members send personal checks for the candidate to the committee and then sends the bundled personal checks to the candidate.⁴⁵ The practice has the appearance and the intended effect of circumventing the FECA's contribution limits and prohibitions.⁴⁶ The practice has been challenged in court,⁴⁷ but currently bundling is not illegal per se provided the underlying contributions are within the FECA limits. A bundling scheme that involves instructions to the contributors to avoid one of the other FECA provisions, however, such as the requirement that contributors of more than \$200 identify their employer to the campaign committee, is illegal.⁴⁸

Even when an offense fits within the limited scope set out by the Department of Justice, four features of the FECA enforcement scheme make criminal prosecutions under section 437g(d) difficult:

- (1) it purports to reach only *malum in se* activity, but provides only misdemeanor sanctions;⁴⁹

contribution or expenditure involved in the violation. 2 U.S.C. § 437g(d)(1)(A). Under the Federal Sentencing Guidelines, punishment may be increased to a one-year prison sentence and a fine the greatest of \$100,000; three times the contribution or expenditure involved in the violation; or twice the gross pecuniary gain or loss resulting from the offense. *See* 18 U.S.C. § 3571(b), (d) (1994).

43. A conduit is a person who makes a contribution in her own name using funds supplied by another. ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 117.

44. "'Bundling' is a term applied to the practice of collecting numerous contributions from individuals to a particular federal candidate and then delivering these checks *en masse* to the candidate." *Id.* at 113.

45. *FEC Panel Discussion*, *supra* note 1, at 245-46 (comments of Elizabeth Hedlund, Director, FEC Watch, Center for Responsive Politics).

46. ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 113-14.

47. The public interest group Common Cause challenged the practice of bundling, arguing that bundled contributions should be counted against the bundler's contribution limits. *See* *Common Cause v. Federal Election Comm'n*, 489 F. Supp. 738 (D.D.C. 1980). If the committee exercises "direction and control" over the contributions, the contributions will be counted against the committee's limit. But the FEC's attempt in a 1989 rulemaking to delineate situations in which direction and control exist was held to be too imprecise to outweigh the burden the regulation placed on First Amendment associational interests. *Federal Election Comm'n v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1477 (D.C. Cir. 1992). The practice is considered legal because there are no standards in place to define "direction and control" such that enforcement actions might be taken against bundlers.

48. ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 114.

49. Presumably, the difficulty here is that careerist concerns for prosecutors and allocation of prosecutorial resources make securing a misdemeanor conviction an insufficient incentive for the effort required in proving a *malum in se* activity.

- (2) it is governed by a special three-year statute of limitations, which often expires before an investigation is complete;
- (3) it is subject to complex and confusing venue rules; and
- (4) it requires that a monetary jurisdictional floor be satisfied regardless of the criminal culpability of potential defendants.⁵⁰

In response to the statutory obstacles to criminal FECA prosecutions, the Department of Justice suggests that prosecutors seek alternative theories to prosecute FECA offenses.⁵¹ The use of alternative prosecutive theories for prosecuting FECA offenses, however, is potentially problematic. Arguably, Congress intended the ineffective criminal enforcement structure under the FECA to be the exclusive method for prosecuting FECA violations. The courts, though, have rejected this argument.⁵²

There are three common alternative theories that may be used for prosecuting criminal FECA violations as felonies. The first is the federal false statements statute.⁵³ This theory would be available in cases in which a violator disguises an excessive contribution, through the use of conduits, for example, and thereby willfully causes the recipient political committee to file a false report with the FEC. The offense could be characterized as a false statement because the violator has impeded the FEC from exercising its enforcement jurisdiction and its public disclosure responsibilities.⁵⁴ Second, a criminal FECA violation could be a conspiracy to defraud the United States.⁵⁵ By causing political committees to misrepresent the true source of campaign contributions, causing their illegal nature to be concealed from the FEC, the violator has disrupted and impeded the FEC from carrying out its statutory duties. Finally, when funds that cannot be used as political contributions⁵⁶ are diverted for that purpose, the offense could constitute embezzlement.⁵⁷

Most criminal prosecutions for FECA violations are brought only when the

50. ELECTION LAW MANUAL (5th ed.), *supra* note 25, at 73-75.

51. See ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 108-09 (discussing strategic advantages of prosecuting campaign finance violations as felonies under Title 18).

52. See *United States v. Curran*, 20 F.3d 560, 565 (3d Cir. 1994). In *Curran*, the defendant argued that because the FECA targets specific conduct, it supersedes the more general criminal provisions of Title 18. The court conceded that the argument "has a certain logic and sense of fairness to it," but found it to be "not persuasive and . . . not supported by decisional law." *Id.*; see also *United States v. Hopkins*, 916 F.2d 207, 219 (5th Cir. 1990) ("The offenses under Title 18 . . . stand wholly apart and separate from any violation of the federal election laws.").

53. 18 U.S.C. § 1001 (1994).

54. ELECTION LAW MANUAL (5th ed.), *supra* note 25, at 76 (citing *Haas v. Henkel*, 216 U.S. 462 (1910)).

55. 18 U.S.C. § 371 (1994).

56. See 2 U.S.C. § 441b (1994) (prohibiting banks, corporations, and labor organizations from making direct political contributions).

57. ELECTION LAW MANUAL (5th ed.), *supra* note 25, at 76. For example, if the funds are from a union treasury, the offense could be embezzlement under 29 U.S.C. § 501 (1988). If the funds are improperly diverted bank funds, the offense could be embezzlement under 18 U.S.C. § 656 (1994).

conduct can be charged under one of the three alternative felony theories, with a FECA misdemeanor count included for good measure.⁵⁸ Relatively few criminal FECA prosecutions have gone to trial, and relatively few criminal convictions have been obtained through plea bargains,⁵⁹ however, thus reflecting the difficulties in imposing a criminal sanction on campaign finance violators under the alternative felony theories. The only two reported cases, *United States v. Goland*⁶⁰ and *United States v. Curran*,⁶¹ reflect the mixed reception that these theories have received in court.

In *Goland*, the defendant engaged in a complicated scheme to support the 1986 senatorial campaign of Alan Cranston. To improve Senator Cranston's odds in his close race with Republican challenger Ed Zschau, the defendant, Goland, decided he could draw votes away from Zschau by scripting and financing a televised political advertisement for the independent candidate in the race, Ed Vallen.⁶² The tag line at the end of the advertisement read, "Paid for by the Committee to Elect Ed Vallen to the U.S. Senate," instead of "Paid for by Michael Goland," as required for an independent expenditure.⁶³ To keep the ad on the air, Goland collected checks from "contributors," whom Goland reimbursed with cash, to give the appearance that the ad had been paid for by Vallen's campaign committee.⁶⁴

At trial, the government charged Goland under the alternative theories of conspiracy to defraud the United States and causing false statements to be filed,⁶⁵ as well as with a FECA violation.⁶⁶ The jury rejected the felony counts and convicted only on the FECA violation.⁶⁷ The Ninth Circuit upheld the conviction.⁶⁸

The Ninth Circuit rejected Goland's argument that the trial court erred in instructing the jury on how to consider the requisite specific intent for the FECA violation.⁶⁹ The dissent, however, found the scope of "contribution" in sections

58. Telephone Interview with Craig C. Donsanto, Director, Election Crimes Branch, Public Integrity Section, U.S. Dep't of Justice (Apr. 19, 1995) [hereinafter Donsanto Interview].

59. Since 1988, the Justice Department has obtained approximately 200 criminal convictions through plea bargains. *Id.* In the vast majority of these cases, the indictments included felony counts under the alternative theories. *Id.*

60. 959 F.2d 1449 (9th Cir. 1992).

61. 20 F.3d 560 (3d Cir. 1994).

62. *Goland*, 959 F.2d at 1451. Goland had run a similar campaign against Senator Charles Percy of Illinois in 1984. *Id.*

63. *Id.* (citing 11 C.F.R. § 110.11(a)(1)(iii) (1990)).

64. *Id.*

65. *Id.* For a description of how these theories would apply, see *supra* notes 53-57 and accompanying text.

66. *Goland*, 959 F.2d at 1451. The FECA violation was making excessive contributions to a political campaign in violation of 2 U.S.C. §§ 441a(a)(1)(A), 437g(d) (1994).

67. *Goland*, 959 F.2d at 1451.

68. *Id.* at 1452.

69. Goland objected to the district court's jury instruction: "'[V]iolations of regulations or civil statutes without more are not crimes, and such violations if any occurred, are not necessarily violations of criminal law [Y]ou may consider [violations of civil statutes] as you would any other evidence

441a(a)(1)(A) and 437g(d) to be vague, arguing that because a criminal violation requires specific intent, and Goland's ultimate goal was to make an "independent expenditure" on behalf of Senator Cranston, the funds he supplied for the independent candidate's advertisement should not be illegal "contributions."⁷⁰

Jury instructions on the requisite mens rea also constituted the central issue for the court in *Curran*. In *Curran*, the defendant, a practicing attorney and chief executive officer of an anthracite coal company, used his employees as conduits in a number of federal elections in order to contribute in excess of the \$1000 limit on individual contributions per federal election.⁷¹ Curran explained to his employees that the candidates he supported would favor the interests of the anthracite industry.⁷²

At trial, the government successfully won a felony conviction on the alternative theories of causing campaign committees to file false statements⁷³ and conspiracy to defraud the United States.⁷⁴ The Third Circuit vacated the conviction and remanded because the jury had been erroneously instructed about the degree of intent that the government had to prove.⁷⁵ The court stated that the government could not show a direct violation of 18 U.S.C. § 1001⁷⁶ because the FECA imposed no duty on Curran to disclose his contributions to the FEC.⁷⁷ The court determined that when reading section 2(b)⁷⁸ together with section 1001 in the federal election law context, the government must prove that the "defendant kn[ew] of the [campaign committee] treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful."⁷⁹

To reach this conclusion, the court relied on the Supreme Court's holding in *Ratzlaf v. United States*.⁸⁰ In *Ratzlaf*, the defendant was accused of structuring

in determining whether or not Mr. Goland had the required specific intent to violate the law charged in this indictment." *Id.* at 1454.

70. *Id.* at 1455-56 (Pregerson, J., dissenting).

71. *United States v. Curran*, 20 F.3d 560, 563 (3d Cir. 1994).

72. *Id.* The candidates were both Republican and Democratic.

73. The jury convicted Curran on three counts under 18 U.S.C. §§ 2(b) and 1001. *Id.*

74. The jury convicted the defendant on one count under 18 U.S.C. § 371. *Id.* at 571.

75. *Id.* at 569.

76. Section 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1994).

77. *Curran*, 20 F.3d at 567.

78. Section 2(b) prohibits "willfully caus[ing] an act to be done which if directly performed by . . . another would be an offense against the United States." 18 U.S.C. § 2(b) (1994).

79. *Curran*, 20 F.3d at 569.

80. 114 S. Ct. 655 (1994).

cash bank deposits to evade regulations requiring banks to report amounts deposited in excess of \$10,000. The bank has a statutory duty to file a report, but the statute also prohibits a *customer* from breaking a single transaction into two or more segments to evade having reports filed. The Court rejected the argument that wilfulness could be shown by the restructuring itself, commenting that it was “unpersuaded . . . that structuring is so obviously ‘evil’ or inherently ‘bad’ that the ‘willfulness’ requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring.”⁸¹

The *Curran* court found three similarities to *Ratzlaf*: (1) both the FECA and the currency reporting statute require a third party to disclose information to a government agency; (2) the underlying conduct was not “obviously ‘evil’ or inherently ‘bad’ ” because there is “little difference between breaking a cash transaction into segments of less than \$10,000 and making a contribution in the name of another; and (3) the underlying conduct in both cases “was made illegal by a regulatory statute.”⁸²

In sum, the scope of criminal prosecution for FECA violations appears to be quite narrow. The Justice Department has creatively developed alternative theories to prosecute FECA violations, and the courts have found these theories to be consistent with congressional intent.⁸³ Nevertheless, in the two cases in which these theories have been tested in court, the Justice Department has met resistance. In *Goland*, the jury was not convinced by the government’s proof as to the felony counts, and in *Curran*, the court of appeals placed a heightened requirement on the government’s proof as to criminal intent. Thus, twenty years after Congress added civil enforcement to the criminal enforcement scheme for FECA violations, the primacy of civil enforcement is unquestionable.

3. Civil Enforcement

The Federal Election Commission conducts the majority of FECA enforcement actions. An FEC enforcement proceeding, called a Matter Under Review (MUR), is initiated either by a complaint filed with the FEC,⁸⁴ usually by an opposing candidate or political party, or by the FEC itself in the course of its review of political committee reports.⁸⁵ Once initiated, the Commission’s Office of General Counsel (OGC) evaluates the matter and provides a recommendation to the six-member Commission indicating whether there is “reason to believe”

81. *Id.* at 662. In 1994, Congress reversed the Court’s requirement in *Ratzlaf* that a defendant know that her conduct was illegal and that her illegal conduct would cause the bank to fail in its reporting obligations. Violent Crime Control Act, Pub. L. No. 103-322, sec. 330017, § 5324(a), 108 Stat. 1796, 2149 (1994) (amending 31 U.S.C. § 5324(a)).

82. *Curran*, 20 F.3d at 569.

83. *See supra* note 52.

84. 2 U.S.C. § 437g(a)(1) (1994). For the FEC to proceed on the basis of a complaint, the identity of the complainant must be disclosed to the Commission. *Id.* After receipt of a complaint, the FEC notifies person(s) alleged to have committed a violation and gives them an opportunity to explain in writing why the FEC should not proceed. *Id.*

85. § 437g(a)(2).

a violation has occurred or is about to occur. The Commission votes on the OGC evaluation in closed session, and if four Commissioners concur with the OGC finding, the Commission initiates an investigation.⁸⁶

The Commission has broad investigative powers, including the authority to take depositions,⁸⁷ subpoena documents,⁸⁸ compel submission of reports and answers to questions,⁸⁹ and enforce these orders in a federal district court.⁹⁰ When an investigation is complete, the OGC makes its recommendation to the Commission and serves notice on the person(s) under investigation.⁹¹ The respondent may only respond with a reply brief.⁹² The FEC then attempts to reach a conciliation agreement through informal negotiation.⁹³ A conciliation attempt may not be made public absent written permission of the respondent and the Commission.⁹⁴ Once a negotiation is resolved, however, either by a conciliation agreement or a determination that no violation occurred, the Commission must make the result public.⁹⁵

If a case is not resolved through conciliation, the Commission usually files suit in a federal district court, seeking the statutory maximum penalty: the greater of \$5000 or 100% of the amount in violation.⁹⁶ If the suit alleges a knowing and willful violation, the court may impose a penalty the greater of \$10,000 or 200% of the amount in violation.⁹⁷ Most respondents have significant incentives to enter into conciliation agreements, such as avoiding the costs of litigation, the publicity of a trial, and the possibility that a court will impose a penalty significantly higher than the Commission's conciliation offer.⁹⁸

Although the statutory description of the conciliation process makes it appear to be a rapid process, critics have complained that in practice enforcement is too slow.⁹⁹ To respond to criticisms of slow enforcement and the potential irrel-

86. *Id.*

87. 2 U.S.C. § 437d(a)(4) (1994).

88. § 437d(a)(3).

89. § 437d(a)(1).

90. § 437d(b).

91. § 437g(a)(3). The OGC serves the respondent with a brief detailing the OGC's position on the legal and factual issues of the case. *Id.*

92. *Id.*

93. § 437g(a)(4)(A)(i). As a result of the 1979 FECA amendment, the Commission began to use an expedited procedure, preprobable cause conciliation, to reach early agreements with respondents. 11 C.F.R. § 111.18(d) (1991). Under the expedited procedure, the Commission offers the respondent a draft settlement at the close of the OGC's investigation. The procedure saves legal costs and time for both sides.

94. § 437g(a)(4)(B)(i).

95. § 437g(a)(4)(B)(ii).

96. § 437g(a)(6)(A).

97. § 437g(a)(6)(C).

98. At the end of 1994, the FEC only had 47 matters in litigation before federal district and appellate courts. Federal Election Commission, Press Release, *Commission's Enforcement Priority System Proving Effective After 20 Months in Operation* (Dec. 30, 1994) [hereinafter Dec. 30, 1994 FEC Press Release].

99. *See, e.g.,* COMMON CAUSE, STALLED FROM THE START 52 (1981) (explaining that FEC's insistence upon obtaining admission of wrongdoing slows conciliation process); Kenneth A. Gross, *The Enforce-*

evance of the FEC,¹⁰⁰ in 1993 the Commission prioritized its caseload according to factors that include whether there was a willful intent to violate the FECA, the impact the violation had on an election, and the amount of money involved.¹⁰¹ Although prioritization seems a logical step, given the politically partisan posture of the Commissioners, establishing enforcement priorities was not an easy task.¹⁰²

Under the new priority system, FEC investigations focus on violations of the \$25,000 annual limitation on contributions by individuals, the prohibition on contributions by foreign nationals, and the forty-eight-hour reporting rule.¹⁰³ As a result, the number of MURs has dropped, but the aggregate amount of penalties assessed has increased significantly.¹⁰⁴

Civil sanctions, then, are the primary threat that a potential FECA violator has to consider. For campaign contributions above the statutory maximum, the cost of potential sanctions is tied to the amount illegally given. Even if detected, the potential violator knows that she has some control over the likelihood that a civil sanction will be imposed on her. She can engage the FEC in a lengthy conciliation process, and if conditions are right, she can then choose to cooper-

ment of Campaign Finance Rules: A System in Search of Reform, 9 YALE L. & POL'Y REV. 279, 286 (1991) (former Associate General Counsel, Federal Election Commission) (arguing that "many matters are not resolved in a timely manner").

100. See Charles Babcock, *Real Campaign Reform Will Give the Watchdog Agency New Teeth*, WASH. POST, Dec. 6, 1992, at A2 (describing FEC's history of ineffectiveness and offering suggestions to remedy ineffectiveness).

101. *FEC Panel Discussion*, *supra* note 1, at 258 (Professor Thomas O. Sargentich citing Federal Election Commission, Press Release (Dec. 13, 1994)).

102. "[Prioritization] is a good idea. But it is very hard. We really cannot do it because we have six Commissioners with six different ideas of what is a priority." *Federal Election Commission Authorization for Fiscal Year 1993: Hearings on H.R. 4116 Before the Subcomm. on Elections of the House Comm. on House Administration*, 102d Cong., 2d Sess. 54 (1992) (response of Vice Chairman of Federal Election Commission); see also *FEC Panel Discussion*, *supra* note 1, at 259-60 (comments of Elizabeth Hedlund, Director of FEC Watch, Center for Responsive Politics) (suggesting that prioritization allowed FEC's legal staff to develop enforcement criteria).

103. *FEC Panel Discussion*, *supra* note 1, at 259-60.

104. *Id.* In 1994, civil penalties contained in 107 conciliation agreements totaled \$1,692,854. This total includes the largest penalty assessed in the FEC's history: \$550,000 against Prudential Securities, Inc.

Calendar Year	Conciliation Agmts.	Civil Penalties (\$)
1986	174	289,485
1987	171	249,710
1988	142	332,383
1989	177	362,746
1990	138	274,752
1991	262	534,110
1992	99	255,128
1993	86	596,099
1994	107	1,692,854

Dec. 30, 1994 FEC Press Release, *supra* note 98.

ate no further, forcing the FEC either to prove its case de novo in a federal district court or drop the case.

One might think that an enforcement scheme is not particularly effective when it is very unlikely that a criminal sanction will be applied to a violator and when a violator has considerable leverage over the agency that might apply a civil sanction. But before we endorse this intuition, it is useful to examine whether allocating additional resources to FECA enforcement would provide greater deterrence to potential FECA violators. To that end, Part II describes the principles of optimal deterrence developed in recent scholarship and then applies these principles to the FECA enforcement scheme.

II. DETERRENCE THEORY AND THE FECA ENFORCEMENT SCHEME

A. THE PRINCIPLES FOR DETERMINING OPTIMAL SANCTIONS

This Part considers the principles for determining optimal sanctions and applies those principles to FECA enforcement. Much of the scholarship devoted to deterrence and the role of the criminal law begins with a description of the historically paradigmatic spheres of civil and criminal law, and it usually emphasizes that a civil remedy is imposed to compensate while a criminal remedy is imposed to punish.¹⁰⁵ A utilitarian view of these paradigms recognizes that both are forms of social control, in which the remedy imposes a “cost” on the actors. The difference is in the nature of the cost imposed.

In general terms, the cost is calculated by the “amount” of the sanction discounted by the likelihood that it will be imposed.¹⁰⁶ The view that both the civil and criminal law are engaged in social control through the imposition of costs led law-and-economics scholars to an inquiry about what the “optimal” costs ought to be to achieve the desired level of social control.¹⁰⁷ From this perspective, the challenge has been to articulate a theory that explains the existence of criminal and civil sanctions, the appropriate mix between them, and the principles for their use.

Approaching the distribution of sanctions from a deterrence-only perspective can be problematic, particularly when the sanctions are criminal. For purposes of this discussion, however, a focus on deterrence is appropriate because the express goal of the FECA is to increase public confidence in the federal electoral process by deterring certain forms of direct and indirect financial expenditures in support of federal elections.

Because deterrence helps achieve the goal of the FECA, the question arises how that deterrence can be achieved most efficiently. Recent law-and-

105. See, e.g., Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795, 1796 (1992).

106. *Id.* at 1845.

107. *Id.* at 1846.

economics scholarship offers a two-step analysis for answering that question. The first step is to choose the optimal amount of deterrence sought. The optimal level of deterrence is the point at which the cost of additional enforcement equals the benefit produced by that added enforcement.¹⁰⁸ The second step of the analysis is to choose the type of sanction, the magnitude of the sanction, and the rate of imposition of the sanction that will produce the optimal level of deterrence.

Three factors help to determine the optimal amount of deterrence:¹⁰⁹ (1) the private benefits a violator will derive from the violation; (2) the probability that an act will be a violation and that it will cause harm; and (3) the magnitude of the harm.¹¹⁰ The incentive to deter depends on the magnitude of the harm to the public, making it an essential factor in determining the optimal level of deterrence. The private benefits enjoyed by violators also influence the optimal level of deterrence because the greater the private benefits, the greater the potential sanction required to achieve a certain level of deterrence.¹¹¹

There are two sets of choices involved in producing the optimal deterrence level: the choice of the appropriate mix of the sanction's magnitude and its probability of imposition and the choice between using monetary and nonmonetary sanctions. The magnitude/probability choice is based on an assumption that potential violators are risk-neutral. When this assumption is made, the relationship between the magnitude of the sanction and the probability of imposition is inversely proportional.¹¹²

The optimal magnitude/probability mix depends on whether the cost savings from a high-penalty-low-enforcement scheme are greater than the savings produced by a low-penalty-high-enforcement scheme. On the surface, it would appear that a high-penalty-low-enforcement scheme would be preferable because it would produce equivalent deterrence but would be less costly to maintain than a low-penalty-high-enforcement scheme.¹¹³ This option causes

108. See *supra* note 7 (explaining why this is so).

109. See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236-37 (1985) (examining five factors to determine whether monetary sanctions can adequately deter undesirable acts).

110. *Id.*

111. See *supra* note 7.

112. For example, a sanction of 500 units with a 20% chance of imposition will produce an amount of deterrence equivalent to a sanction of 1000 units with a 10% chance of imposition. If the pool of potential violators is not risk-neutral, however, these sanctioning options will not be equivalent. For risk-averse individuals, the second option will produce more deterrence than the first because risk-averse actors will overestimate the probability of imposition. Conversely, for risk-preferring individuals, the first option will produce more deterrence because risk-preferrers will underestimate the probability of imposition.

113. This is because the cost of supporting the enforcement scheme necessary to impose sanctions can be held down. The threat of a sanction being imposed causes the deterrence. Provided that the probability of imposition is sufficient to make the threat credible, society deters certain violations without maintaining 100% enforcement. The credibility of the threat varies with the potential violator's attitude toward risk. Risk-averse individuals exaggerate the threat of sanction and are overdeterred while risk-preferring individuals underestimate the threat of the sanction and are underdeterred. See

greater losses in marginal deterrence,¹¹⁴ however, which, if taken too far, could result in loss of the legitimacy and the effectiveness of the sanction.¹¹⁵

Because the probability-of-imposition variable in the deterrence formula is measured by the perceptions of potential violators, if they know nullification will be the likely result of judicial enforcement, that knowledge will reduce the threat of and the deterrence value of the high-penalty-low-enforcement scheme. One approach that might reduce this effect would be to disguise nullification through “acoustic separation,” which distinguishes “conduct rules” (it is wrong to steal) from “decision rules” (but in this case the theft is excused or the act was not actually theft because . . .).¹¹⁶ It is unclear, however, that nullification can be successfully disguised.¹¹⁷ In addition, consciously pursuing acoustic separation to optimize a high-penalty-low-enforcement scheme raises moral concerns that might also indicate the disutility of this strategy.¹¹⁸ Thus, an extreme high-penalty-low-enforcement scheme is likely to produce suboptimal deterrence. The other extreme, low-penalty-high-enforcement, might not be feasible because it would be impossible to gather information to detect sufficient violations. Alternatively, it would be feasible, but not cost-effective, to invest in a high rate of enforcement because enforcement costs would be greater than the costs imposed if no violations were punished. There also are additional costs at either extreme.¹¹⁹ Therefore, an intermediate magnitude/probability choice will produce optimal deterrence. The intermediate mix chosen will be

Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 326 & n.27 (1984).

114. Marginal deterrence is the amount of deterrence related to the marginal increases in the magnitude of the fine. Marginal deterrence decreases as fines increase because each dollar taken from the violator is not equivalent; that is, the risk of losing the first dollar is more damaging and produces more deterrence than the risk of losing the last.

115. Nullification is likely to occur when the rate of enforcement drops to the point at which the selection of those for enforcement actions appears arbitrary and when the magnitude of the sanction is popularly considered to be out of proportion with the underlying conduct. See Seidman, *supra* note 113, at 332 (arguing that in situations in which the utilitarian model requires very harsh penalties that seem unjust, result would almost certainly be nullification).

116. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984); see also Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 731 (1990) (explaining that rules of conduct give population ex ante direction about what they may and may not lawfully do and principles of adjudication give decisionmakers guidance in assessing ex post blameworthiness of individual's violation).

117. The analysis depends on potential violators measuring the threat of imposition by what society says through its conduct rules rather than by what society does through its decision rules. Actions are generally considered to speak louder than words, and, news coverage being what it is, reverberations from the application of decision rules when the number of enforcement actions is low enough to appear arbitrary and the sanction is high enough to appear cruel are likely to drown out what is said in the rules of conduct.

118. See Seidman, *supra* note 113, at 326 n.30 (arguing that giving government officials power to impose secret decision rules may not satisfy utilitarian criteria).

119. In either world—the one with draconian penalties for minor offenses or the one with a cop on every corner and Big Brother in the house—psychic costs are imposed by “creating an environment in which all are safe but none is free.” HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 65 (1968).

influenced by the second sanctioning decision, the choice between monetary and nonmonetary sanctions.

1. The Preference for Monetary Sanctions

Deterrence theory assumes that monetary and nonmonetary sanctions can produce equivalent deterrence.¹²⁰ Deterrence theorists, however, suggest that monetary sanctions have greater deterrence value than nonmonetary sanctions. According to deterrence theory, the general ranking of the deterrence value for sanctions from greatest to least is: (1) monetary sanctions only; (2) monetary sanctions combined with nonmonetary sanctions; and (3) nonmonetary sanctions only.¹²¹ Deterrence theorists justify this ranking because generally enforcement costs for monetary sanctions are lower. Procedures for imposing a monetary sanction are less expensive, particularly when an administrative agency imposes it, and the revenues gained from the sanction either directly or indirectly offset the expenditures of enforcement.¹²² A monetary sanction alone will produce optimal deterrence when probable violators have sufficient available assets to be deterred by the magnitude of the sanction. Therefore, nonmonetary sanctions should be applied only when a monetary sanction alone cannot adequately deter violations.¹²³

The preference for monetary sanctions will affect the magnitude/probability choice. Within the intermediate range of enforcement level set out above, a "cheaper" high-penalty-low-enforcement scheme conflicts with the preference for monetary sanctions because the pool of violators deterrable by a high monetary sanction is smaller than that deterrable by the low-penalty-high-enforcement scheme. The "collectability boundary" for high monetary sanctions imposes a second limit on the high-penalty-low-enforcement scheme.¹²⁴ Thus, the optimal magnitude/probability mix will depend on whether the cost savings from the high-penalty-low-enforcement scheme are greater than the savings produced by the broader scope for monetary sanctions with a low-penalty-high-enforcement scheme.

120. See, e.g., Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 413-15 (1980).

121. See *id.* at 413-15, and Shavell, *supra* note 109, at 1236-37, for the proposition that a monetary sanction should be used whenever it produces deterrence equivalent to a nonmonetary sanction.

122. See Shavell, *supra* note 109, at 1236; see also Posner, *supra* note 120, at 410 (arguing that fines, unlike prison sentences, "show up on the benefit side of the social ledger").

123. See Shavell, *supra* note 109, at 1236 & n.16 (citing Becker, Bentham, and Montesquieu as supporting choice of least costly sanction available); see also Posner, *supra* note 120, at 413 (arguing that "fines are preferable to imprisonment where the fines are collectable").

124. The "collectability boundary" exists because wealthy violators can "hide assets, divert expected income, overstate expenses or hire superior legal talent to resist collection efforts." John C. Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 437 (1980) [hereinafter Coffee, *Corporate Crime and Punishment*]. The result is that the deterrent effect of a monetary sanction is reduced such that the legal threat only extends to the collectability boundary. *Id.*

2. An Exception: Blameworthy Conduct and the Criminal Sanction

Although normally the deterrence analysis favors monetary sanctions, such is not the case when society desires morally to blame the violator through a criminal sanction. Because satisfying this societal desire to blame has value, a deterrence-only approach to blameworthy conduct—that is, monetary sanctions only—would not produce the most social utility.¹²⁵ Instead, when both society and the community of potential violators consider the conduct being regulated blameworthy, use of the nonmonetary sanction of blame/stigma as well as the monetary sanction will provide optimal deterrence.¹²⁶

When an actor considers conduct to be blameworthy, society obtains some deterrence at no cost. For example, imagine that Sheila is alone in a room in which someone has left behind a wallet, and protruding from the wallet is a one-hundred-dollar bill. Sheila has not eaten in two days and could put the money to immediate use. Assume that Sheila is risk-neutral and that she is 100% confident that she could take the money without being caught. Assume further that she is 100% confident that at no time in the future will she feel compelled to reveal her theft or that her theft will be discovered. Thus, there are no external threats present to deter Sheila from taking the money. Nevertheless, Sheila may be deterred from taking the money because she has internalized a moral code that would label the taking of the money as blameworthy. It would offend her pride, her conscience, and her self-conception to steal the money. Society has obtained an increment of deterrence without investing the resources to make Sheila perceive the threat of an external sanction present in that situation.

Because society can obtain this kind of incremental deterrence at no cost beyond the initial investment in teaching Sheila that theft is blameworthy, it would make sense to criminalize—that is to label as blameworthy—all of the conduct that society seeks to deter. A common response to this line of thought is that such an expansive use of blaming through the criminal law produces overdeterrence unless the definition of the blameworthy conduct is restricted to

125. A deterrence-only rationale does not always motivate the distribution of criminal sanctions. In settings in which society considers the conduct blameworthy or factors are present that mitigate blameworthiness, to adopt a single-purpose distributive principle for sanctions, such as deterrence, would “justify consideration of factors that, in the Anglo-American . . . tradition, are considered illegitimate bases for distributing . . . liability.” Paul H. Robinson, *Hybrid Principals* [sic] for the *Distribution of Criminal Sanctions*, 82 Nw. U. L. REV. 19, 22 & n.15 (1987). Nevertheless, some scholars have argued that use of the criminal sanction is nonetheless consistent with a deterrence-only rationale. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1214 (1985) (arguing that substantive doctrines of criminal law can be given economic meaning and can be shown to promote efficiency); Shavell, *supra* note 109, at 1247-59 (arguing that optimal deterrence plays important part in explaining criminal law).

126. “Control through moral inhibitions will often impose a smaller social cost per unit of prevention. If people can be persuaded to abstain from some crime even when criminal conduct is in their self-interest, we can avoid the social cost of structuring incentives that discourage crime.” Seidman, *supra* note 113, at 335.

conduct for which the “optimal” amount is zero.¹²⁷

This response, however, does not fully comprehend the issue.¹²⁸ What limits the utility of expanding the criminal sanction is a paradox: blaming remains effective only when those blamed consider blame to be motivated by a nonconsequentialist morality.¹²⁹ Thus, it is not possible to “set out deliberately to change the way people blame so as to maximize utility.”¹³⁰ Imagine that Sheila is told by criminal statute that driving above the speed limit is morally blameworthy conduct.¹³¹ Imagine further that Sheila perceives that the only reason society has criminalized speeding is to make enforcement less expensive by causing people to internalize the belief that speeding is blameworthy rather than because speeding violates a set of norms composed of values other than maximizing efficiency. Sheila, then, is unlikely to internalize the belief that speeding is blameworthy because society has offered no reason for why speeding is inherently wrong other than that if she chooses to believe that speeding is wrong, society will save money. If Sheila does not internalize the belief that speeding is morally wrong, then she can only be deterred from speeding by the threat of an external sanction. Society will have failed to achieve its objective by criminalizing speeding. As a result, this exception to the preference for civil monetary penalties should apply only when the social desire to blame already exists; blame is ineffective if extended only to optimize deterrence.

But if the content of blameworthy conduct cannot be consciously changed for utilitarian purposes, it is nonetheless true that as society develops and changes, the content of blameworthy conduct changes. Some scholars accept the adver-

127. The view relies on a distinction between “pricing” conduct and “sanctioning” conduct. Blame should not be used to deter “priced” conduct because some level of the activity is desirable, but actors should be made to internalize the costs of their actions. Blame is appropriate to “sanction” conduct when, assuming zero enforcement costs, the socially desired amount of the activity would be zero. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1876-77 & nn.5-7 [hereinafter Coffee, *Paradigms Lost*] (distinguishing between civil penalties used to “price” misconduct when regulated activity has positive social utility but imposes externalities on others, and criminal law used to “sanction” conduct that society believes lacks any social utility).

128. First, those who espouse this view recognize that for the optimal amount of the action to be zero, the actors’ utility must be disregarded. But they offer no satisfactory explanation for why this should be. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 12 (relying on anecdotal observations that people are shocked by idea of recognizing criminal benefits); Shavell, *supra* note 109, at 1234 (assuming away benefits to criminal). The reasoning is circular; crimes are those activities for which society disregards the criminal’s utility, and we can disregard the criminal’s utility because the regulated conduct is a crime.

Second, the price/sanction distinction relies on an assumption of zero enforcement costs. Because this assumption is purely theoretical, we still must decide how much deterrence we want to buy whether the conduct is priced or sanctioned.

129. Seidman, *supra* note 113, at 340.

130. *Id.*

131. Although speeding currently is punishable by a monetary fine as a criminal misdemeanor, I assert that the vast majority of Americans would not consider a person driving 60 miles per hour in a 55-mile-per-hour zone to be morally blameworthy. Thus, the sanction is monetary only because those caught for speeding are not stigmatized.

tised deontological rationale for blaming and ascribe these changes to society's "moral" decisions, which are outside the purview of designing optimal sanctions for enforcing these moral choices.¹³² Others have suggested methods for recognizing new blameworthy conduct.¹³³ These views presume that assigning blame through the criminal law is appropriate when there is social consensus that the conduct is blameworthy. These views recognize that social consensus about blameworthy conduct is expressed through the political process, but they appear to regard the goal of the process to be the attainment of a consensus about how shared deontological norms should be applied to specific conduct.

A more persuasive view is that the political process of criminalizing conduct is a struggle over cost allocation, in which the result is announced with declarations of blameworthiness.¹³⁴ Regulation of conduct is sought when mutually incompatible activities come into conflict.¹³⁵ It often is possible to resolve the conflict to the same degree whether the cost is assigned to incompatible activity *A* or *B*.¹³⁶ The groups that dominate the political process therefore are not simply concerned with the total cost of crime, but also with how that cost is distributed. Acting in their perceived self-interest, these groups will exercise their influence to shift the costs away from the activities in which they engage and onto the incompatible activities of others.¹³⁷ This distribution is

132. Dau-Schmidt argues:

[S]ociety will make an activity a crime whenever the social benefits of changing individual preferences through criminal punishment outweigh the social costs. However, since this weighing . . . is conducted through a political process on the basis of ethical and moral standards, . . . I conclude that other disciplines can usefully inform the economic model of criminal law.

Dau-Schmidt, *supra* note 128, at 3. Similarly, Alvin Klevorick maintains:

What moral judgments of the society make some acts criminal? These are the questions that . . . economic analysis . . . [does not have] a comparative advantage in answering . . .

. . . .
The law-and-economics explanation of the criminal sanction presupposes the existence of a transaction structure.

Alvin K. Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905, 908 (1985).

133. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 200 [hereinafter Coffee, *Does "Unlawful" Mean "Criminal"?*] (citing criminalization of "white collar" offenses such as price-fixing, tax fraud, and securities fraud as examples). The argument suggests that to restrict the criminal law to its proper sphere of regulating blameworthy conduct, new criminal offenses should be limited to formerly civil norms that have "hardened" within the industry or professional community such that the violations have become recognized as "blameworthy." *Id.* at 201.

134. Seidman, *supra* note 113, at 346.

135. For example, a car stereo can only be in one car at any one time whether the car be that of the purchaser of the stereo or that of the person who took the stereo from the purchaser.

136. Car stereo thefts can be equally deterred by penalizing the purchaser of the stereo, who will then have greater incentive to invest in private prevention, or penalizing the taker of the stereo.

137. See Seidman, *supra* note 113, at 343-44 (arguing that even in situations in which victims are least cost avoiders, our political institutions could not be persuaded to tell potential victims of crime that they must cower so that criminals can avoid cost of punishment). *But see generally* Omri

justified by a "free will" theory that those who engage in the losing incompatible activity choose to do so and are worthy of blame.¹³⁸

The efficacy of using blaming as a deterrent depends on the cooperation of the condemned; those likely to be punished must believe the rhetoric of blame and accept the legitimacy of punishment.¹³⁹ The recent trend toward extending the criminal law to conduct not considered blameworthy has led to concerns about overcriminalization.¹⁴⁰ Thus, when the criminal sanction is used to punish conduct that is not considered blameworthy, the deterrent effect of stigma will not be present and the criminal sanction will produce suboptimal deterrence.

In sum, a monetary sanction should be used whenever it will produce equivalent deterrence to a nonmonetary sanction. Whether a monetary sanction can produce equivalent deterrence will depend on whether the probable violators have sufficient available assets to be deterred by the magnitude of the monetary sanction. The magnitude of a sanction can be adjusted in inverse proportion to the probability that a sanction will be imposed to produce equivalent deterrence for risk-neutral actors. For risk-preferring actors, a low-penalty-high-enforcement scheme is likely to produce more deterrence as the risk of imposition approaches certainty of imposition. A low-penalty-high-enforcement scheme also allows for greater use of monetary sanctions because the pool of deterrable violators will be greater. Therefore, a low-penalty-high-enforcement scheme is preferable unless the cost savings from a high-penalty-low-enforcement scheme are greater than the losses caused by the smaller effective scope for monetary sanctions.

While monetary sanctions are preferable, there are two limits on their use. One is pragmatic. If the costs of enforcement, such as information costs to detect and sanction violations, are high, then the low-penalty-high-enforcement option may not be available. This will restrict the use of monetary sanctions to the smaller pool for which the optimal level of deterrence is produced by a high-penalty-low-enforcement scheme.

A second limitation arises when the underlying conduct is considered blameworthy. For blameworthy conduct, a criminal sanction might be preferable. The reasons may be expressed under a deterrence rationale or a retributivist rationale. The deterrence rationale is either that a monetary sanction does not

Ben-Shahar & Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions Against Crime*, 11 J.L. ECON. & ORG. 434 (1995) (offering model to align private incentives for crime prevention with public incentives for criminal law enforcement).

138. *Id.* at 343.

139. *Id.* at 347; see also PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 201 (1995) (providing empirical research to support proposition that "discrepancies between the criminal code and the community tend to undercut the condemnation of conviction and thereby lessen the effectiveness of condemnation as a deterrent threat").

140. See Coffee, *Does "Unlawful" Mean "Criminal," supra* note 133, at 197-98 (defining overcriminalization to be when criminal law departs from basic method of "advance legislative specification of the conduct proscribed . . . an emphasis on the defendant's state of mind . . . and a close linkage between the criminal law and behavior deemed morally culpable by the general community").

produce equivalent deterrence or that the assumption that a monetary sanction is less costly to impose does not hold true for blameworthy conduct, because the act of blaming through sanctioning produces a sense of moral wrong that is internalized throughout the community. When this sense of morality has been internalized, it acts as a deterrent even when the magnitude of the sanction and the probability of imposition on their own would not. Thus, for blameworthy conduct when the probable violator and the community in which she lives have internalized the dominant moral code, a nonmonetary, criminal sanction will be more efficient than a monetary sanction at producing the optimal level of deterrence.

The scope of conduct that meets this definition is limited. The process of assigning blame, while making reference to deontological norms, appears to be a process of assigning costs through the political process and then announcing the result in the language of morality. As political minorities, the communities on the receiving end of this assignment of blame will in many cases refuse to internalize the blame that has been assigned to them. In those cases, use of the criminal, nonmonetary sanction will be less efficient, because the internal deterrence will not be present. Conversely, conduct that the general populace considers blameworthy may not get treated as blameworthy in the political process because the interests that dominate that process do not share the views of the general populace on that issue.

B. OPTIMAL ENFORCEMENT OF THE FECA

This Section will apply the principles of deterrence theory outlined above to assess whether the FECA is underenforced. This assessment reveals that current enforcement of the FECA is suboptimal. One of the underlying premises of the FECA is that deterring certain direct and indirect financial expenditures in support of federal elections will reduce public cynicism and increase public confidence in the electoral process and in representative democracy.¹⁴¹ Assuming that this relation exists, an application of optimality analysis considers the marginal cost of increased deterrence compared to the marginal benefit of reduced cynicism and increased public confidence.

The current level of deterrence for FECA violations appears to be quite low. Twenty-four years of FECA enforcement has done little to reduce public cynicism.¹⁴² Perhaps factors outside FECA enforcement are responsible for this trend, but if regulation of campaign finance was thought to be a means to reduce public cynicism, an assessment of the benefits gained by FECA violations, the harm caused by FECA violations, the probability that a violation will be sanctioned, and the magnitude of the sanction if it is imposed indicates that potential violators have much to gain and little to lose by violating the law. A

141. See cases cited *supra* note 11.

142. See generally Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467 (1994).

number of low-cost options presented in Part III are available to the government to increase deterrence for FECA violations. As difficult as it may be to determine precisely the optimal level of deterrence for FECA violations,¹⁴³ this note argues that adoption of these options will optimize FECA enforcement because, by the terms of the FECA itself, deterring FECA violations in order to increase public confidence in the electoral process is an important social benefit. At the current level of FECA deterrence, there has been no increase in public confidence. Therefore, to reap any of the social benefits of increased public confidence, FECA deterrence must be increased.¹⁴⁴

To analyze the optimality of FECA enforcement, it is necessary to attempt to define the private benefits enjoyed by FECA violators, the harm caused by FECA violations, the magnitude of current sanctions, and the probability that sanctions will be imposed.¹⁴⁵ While most of these definitions will necessarily be somewhat imprecise, because of the difficulties in obtaining any exact measures, it appears that the scheme of sanctions and enforcement is suboptimal.

The timing of violations and punishment is a peculiarly important variable in the FECA context. The deterrent effect on a campaign of all but felony sanctions is discounted because sanctions are imposed *after* an election, thereby skewing the time value of money. For example, the value of \$10,000 two weeks before an election might make the crucial difference in the outcome. If it does, that \$10,000 "investment" in a candidate would likely be worth far more to the contributor than a \$20,000 civil penalty assessed after the election. Similarly, the negative publicity of pre-election enforcement is a significant deterrent regardless of the magnitude of the sanctions.¹⁴⁶

1. Private Benefits

The private benefit to a contributor¹⁴⁷ of any campaign contribution, legal or illegal, is difficult to measure. The benefit that flows to the campaign contributor could be either the benefit that the candidate who shares her views is more likely to win an election or, as is more common, that the increased chance of winning means that there is an increased chance that the contributor will

143. The difficulty arises because the costs are measured in dollars and cents while the benefits are largely intangible. Nevertheless, the time and effort spent by Congress in passing the FECA and funding the FEC indicate a fairly substantial value placed on marginal increases in public confidence.

144. This assertion is based on an assumption that other factors influencing public confidence are held constant.

145. The use of felony prosecutions by the Justice Department is integrated into this analysis. Not only do the provisions of the FECA itself provide for suboptimal enforcement, but even attempts to supplement enforcement through alternative means yield suboptimal enforcement.

146. I have anecdotal evidence to this effect, but my source would prefer to remain unnamed. Negative publicity not only hurts the campaign in the instant race, but it also impairs future fundraising because contributors are wary of having their names associated with campaigns that have been the subject of negative publicity.

147. For simplicity's sake, I used "contributor" to stand both for individual contributors and political action committees (PACs). As to PACs, I will limit the assessment of the benefit and harm to the PAC as a corporate entity, though additional benefits may flow to the PAC's individual supporters.

materially benefit from legislation supported by that candidate.¹⁴⁸ If a contributor contributes to both main candidates in an election, the benefit from the contributions will not be in helping either candidate to win, assuming proportional effects of contribution, but in being counted among the winner's supporters and gaining whatever legislative benefits may flow from that status.¹⁴⁹

In an individual contest, the private benefit is likely to be greatest when a candidate, if elected, would be in a position to confer discrete legislative benefits on the illegal contributor. If, for instance, the contributor sought a particular subsidy or allocation that could be attached by the candidate as a rider to legislation, then that contributor would have a large incentive to violate the campaign finance law.

Absent a situation in which the contributor essentially seeks a *quid pro quo*, the benefit of any contribution in particular elections might be quite limited. In this analysis, the relevant benefit is the marginal benefit derived from the illegal contribution.¹⁵⁰ The marginal benefit of an illegal contribution depends on the context in which it is made: it may either be a benefit that arises when the outcome of an election is in doubt and the contributor has reason to prefer one candidate over the others (an "intercandidate" benefit) or a benefit that arises when the outcome of the election is nearly certain but the contributor is competing with others to influence the candidate's position on certain issues (an "intracandidate" benefit). In a hotly contested race, sophisticated and well-endowed contributors may seek to reap both intercandidate and intracandidate benefits by contributing to more than one candidate, with a greater contribution going to the most favored candidate. For a material benefit to flow from the illegal contribution, then, it first must have an impact on the candidate's chances of winning and her actions if she does win. Even if the illegal contribution might have an impact, it could be offset either by an illegal contribution to the opposing candidate or from the contributor's opponent's contribution to the same candidate. Moreover, if the contribution had an impact and the candidate won, that impact must also cause her to take positions that she would not already have taken absent the contribution. If she takes that position, it has to have an effect the contributor desires on legislation that gets enacted.

But if this were the only possible benefit from campaign contributions, it would not make sense for anyone but the person seeking a *quid pro quo* to

148. This is true, provided the benefit has not been offset by donations from the contributor's opponents.

149. Profiles of legal contributions indicate that contributors tend to target candidates in the best position, usually by committee assignment, to aid them. See LARRY MAKINSON & JOSHUA GOLDSTEIN, CENTER FOR RESPONSIVE POLITICS, *OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL MONEY AND POLITICS* 36 (1992) ("One of the first patterns that becomes apparent when reviewing the political contributions to incumbents in Congress is that the member's profile of contributors tends to parallel his or her committee assignments.").

150. An illegal contribution may be made in cash or in kind. Thus, an illegal contribution not only would be a \$5000 contribution made by an individual, but also could be a fundraising event held on corporate premises, supplied by corporate resources, for which the corporation is never reimbursed.

contribute. There are, however, two other important considerations when measuring the private benefit in particular elections. First, as federal elections become increasingly expensive, potential contributors may have a special incentive to violate the law because the benefit from legal contributions may be nil, as they are too small to make a difference. If that is the case, a potential contributor will have an incentive to make only illegal contributions. Then only illegal contributors receive a benefit from their contributions, though that benefit may still be rather small.

Second, even when the outcome of the election is not in doubt, illegal contributions might still benefit illegal contributors vis-à-vis other contributors. In theory, contributors should not benefit when the candidate does not need the contribution to win.¹⁵¹ Until recently, however, that contribution was at the candidate's disposal for even personal use,¹⁵² and by putting these funds at the candidate's disposal, the contributor could receive special legislative benefits from the candidate. Despite the recent ban on personal use of surplus campaign funds, however, a candidate still enjoys benefits from surplus funds such that she might be inclined to confer a benefit on the contributor.

Most important, even if the magnitude of the benefit in particular elections is not that great, when the contributor has substantial wealth and a legislative agenda, the marginal benefits from individual illegal contributions can be aggregated. This ability to aggregate the benefits from illegal contributions provides a special incentive for wealthy contributors to make illegal contributions.¹⁵³ When the benefits are aggregated, the seemingly remote chance that an illegal contribution may result in some form of legislation increases dramatically.¹⁵⁴ In addition, alliances can be formed between groups of contributors

151. If one accepts a relation between campaign contributions and influence, there is no reason for the candidate to "sell" influence to contributors if the candidate is certain to win.

152. The uses for surplus federal campaign funds are regulated by 2 U.S.C. § 439a (1994). In 1980, Congress amended § 439a to prohibit new Members from using surplus funds for personal use. Pub. L. No. 96-197, sec 113, § 313, 93 Stat. 1339, 1366 (1980). Because of a grandfather clause, this provision only became applicable to the rest of the Congress in January 1993. Pub. L. No. 101-194, sec. 504(a), § 313(b), 103 Stat. 1716, 1755 (1989).

153. The counterargument is that these wealthy contributors achieve the same result legally through "soft money." It is not clear, however, that the candidates feel as accountable to soft money donors as they do to their direct contributors. See, e.g., HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS*, 257 (1988) (quoting then-Senate Minority Leader Robert Dole: "When these political action committees give money [as direct contributions], they expect something in return other than good government."). Not only is the influence of soft money mediated through the political parties, but there are certain constraints on the use of soft money for the biggest need in a campaign—media advertising. See MAKINSON & GOLDSTEIN, *supra* note 149, at 16. Therefore, the incentive to contribute directly remains. If legal contributions are too small to make a difference, then the incentive is to contribute illegally.

154. This observation is supported by the profile of legal contributions. Since 1976, with occasional exceptions, the trend increasingly is for campaign contributors to channel their contributions through PACs rather than to contribute as individuals. MAKINSON & GOLDSTEIN, *supra* note 149, at 6. In the 1992 House elections, for example, winning candidates received 42% of their contributions from PACs, up from 26% in 1976. *Id.*

such that certain benefits may be aggregated even further.¹⁵⁵ Thus, the private benefit of individual illegal contributions will be high when a specific legislative benefit analogous to a quid pro quo is sought, but it will otherwise be of a moderate magnitude.

2. Social Harms

Although illegal contributions confer private benefits, they cause social harms. There are two types of harm caused by FECA violations: (1) the harm that relates to particular elections and (2) the harm that relates to public perceptions about the legitimacy of the entire electoral process. The first is more particularized: in certain elections, FECA violations could result in the “wrong” candidate being elected.¹⁵⁶ Although it may be argued that general underenforcement would mean that illegal contributions could be offsetting, if illegal contributions track legal contributions, those with an incentive to violate the law will be fairly lopsided in their giving.¹⁵⁷ Even if the FECA violation were not outcome-determinant, the violator may enjoy additional leverage vis-à-vis other constituents,¹⁵⁸ provided the candidate is aware of the violation. FECA violations upset the balance, struck by the Supreme Court in *Buckley v. Valeo*¹⁵⁹ and by Congress in the FECA, on the proper scope for the use of money in federal

155. For an example of how special-interest PACs successfully aggregate the benefits of legal contributions by blocking reform legislation, see Jezer & Miller, *supra* note 142, at 481 & nn.38-40 (suggesting that for investment of \$1.1 million, given to members of the 1992 Congress by the 36 PACs that represent hard-rock mining, mining industry pocketed approximately \$4 billion in royalties that would have gone to U.S. Treasury had a particular Senate bill become law).

156. This assertion raises the troubling notion that a candidate increases her chances of winning if she can obtain funds to get more of her message out rather than through the quality of the message itself. Examination of the relation of money and message in winning an election, however, is beyond the scope of this note. Nevertheless, campaign professionals perceive that the money makes the difference in the outcome. While gathering reliable proof that campaign funds collected in violation of the FECA can make the difference in the result of an election is not possible, anecdotal evidence supports this assertion. See *supra* text accompanying note 1.

If one were to be completely cynical, the candidate elected with the help of FECA violators may not be the “wrong” candidate, if the candidate more able to attract illegal campaign contributions might also be better able to obtain rents for her district. Under this view, perhaps the FECA serves only as a test for resourcefulness.

157. For instance, in the 1992 elections PACs contributed to incumbents approximately 10 times as much as to challengers. FEDERAL ELECTION COMM’N, ANNUAL REPORT 1 (1993) [hereinafter 1993 FEC ANNUAL REPORT].

158. That is, assuming the violator is even a constituent. The harm may not be the marginal additional influence of a constituent, but the marginal additional influence of an individual or group that, in theory, the candidate has no duty to represent. To accept the concept of “marginal additional influence,” one has to accept a correlation between the amount of money donated to a campaign and the amount of influence that the contributor has with the representative. Influence is, by its nature, not susceptible to quantifiable measure, but evidence suggests that contributions correlate strongly with influence. See WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 249, 253 (1992) (quoting Thomas Ashley, a 25-year veteran in the House of Representatives and currently a lobbyist: “‘You put the money out and you collect at the other end. . . . Access is really a cowardly word because legislation is the bottom line. Believe me, the money is not directed at access. It’s directed at the bottom line.’ ”).

159. 424 U.S. 1 (1976) (per curiam).

elections. The particular harm is not only in the support that the candidate gives to political positions because of FECA violations, but also the lost support that constituents who did not violate the FECA may have received but for the FECA violation. In theory, like the benefits of FECA violations, the tangible harms caused by particular FECA violations appear to be very remote. Take a congressional election, for example. For an actual harm to result from a FECA violation, it must first result in a maldistribution of influence with a particular candidate. Second, the influence that is attributed to the FECA violation must result in support or nonsupport for specific legislation. Third, that support or nonsupport must make the difference in whether the legislation passes. Fourth, even if the legislation passes one house, it must pass the other house and be signed into law. Some might argue that even passage of "tainted" legislation alone is not a tangible harm and action as a result of the legislation is required. In practice, however, the harm of a FECA violation is much more immediate.

Without opening up the entire public choice/public interest debate about how the legislative process works, it is fair to assert that in practice the difficulties of meeting all the steps necessary for harm to result from FECA violations often are minimal. It is not very difficult to focus the influence yielded by a FECA violation into specific legislation. Interest groups that have influence often draft the actual language of legislation.¹⁶⁰ The difficulties are even fewer in the typical "pork" setting, in which influence is focused to add a rider to legislation that already is likely to pass.

Finally, the particular harms can be aggregated. Whatever limits can be placed on the scope of harm done by influence gained through FECA violations with a particular candidate can be overcome by gaining similar influence with a significant number of representatives.¹⁶¹

The second social harm—the general harm of public cynicism—is the evil against which the FECA is specifically directed.¹⁶² While a rough measure of the general harm can be accomplished through public opinion polls,¹⁶³ there is

160. See Stephen Engelberg, *Wood Products Company Helps Write a Law to Derail an E.P.A. Inquiry*, N.Y. TIMES, Apr. 26, 1995, at A18 (describing how group of "Washington's top lawyer-lobbyists" met with Republican staff members to rework language in bill that would limit E.P.A.'s regulatory power).

161. This appears to have been the strategy pursued by the defendant in the *Curran* case. See *supra* note 72 and accompanying text.

162. See *Buckley*, 424 U.S. at 26 (citing Act's primary purpose: "to limit the actuality and appearance of corruption resulting from large individual financial contributions").

163. Public opinion polls can provide a rough measure of the harm because the harm is defined as the perception of public corruption in the financing of federal elections rather than the actual amount of corruption, however defined, in campaign financing. Public opinion polls have shown that steadily declining voter confidence in the election process is part of a broader decline in confidence in government. See, e.g., *Jezer & Miller, supra* note 142, at 467 (stating that most major polling organizations have documented sharp downturn in voter confidence in government institutions dating back more than 15 years); Richard Morin & Dan Balz, *Americans Losing Trust in Each Other and Institutions: Suspicion of Strangers Breeds Widespread Cynicism*, WASH. POST, Jan. 28, 1996, at A1 (describing survey results that show loss of public confidence in government).

no means for directly correlating FECA violations with public cynicism about campaign finance. Nevertheless, they cause serious harm if excessive because the perception of corruption in the election process undercuts the legitimacy of congressional legislation in general.

3. Magnitude

The particular sanction for a FECA violation depends on the level of intent that the government can show and the amount of money involved in the violation.¹⁶⁴ The maximum sanction for FECA violations is available in the rare case in which the government can show that a large amount of money was involved and the violator knew that her actions were unlawful.¹⁶⁵ In that case, the Department of Justice could prosecute not only under the FECA, but under an alternative felony theory.¹⁶⁶ The maximum penalty would be five years in prison. Even when the government succeeds in securing a felony conviction, however, violators rarely receive the maximum penalty.¹⁶⁷ Under the FECA, a knowing and willful violation is punishable by up to one year in prison and a fine the greater of \$25,000 or 300% of the value of the contribution.¹⁶⁸ For a knowing and willful violation, the maximum civil penalty is the greater of \$10,000 or 200% of the value of the contribution.¹⁶⁹ Theoretically, this civil penalty could be imposed in addition to the maximum criminal penalty, but this would rarely occur because conciliation with the FEC is so common and evidence of a conciliation agreement must be used to mitigate the criminal penalty.¹⁷⁰ Finally, the maximum civil penalty that could be imposed by a federal court in a *de novo* trial, in which the violation is not knowing and willful, is the greater of \$5000 or the amount of the contribution.¹⁷¹ The FEC, however, can and does settle for a lower civil penalty in conciliation agreements. The vast majority of FECA sanctions are imposed through conciliation agreements,¹⁷² and thus the effective magnitude of FECA sanctions is fairly low.

4. Probability of Imposition

The fourth factor to consider in determining the effectiveness of FECA

164. *See supra* notes 39-41, 97-98 (describing standards for criminal sanctions).

165. *See supra* notes 39-41 and accompanying text (describing Justice Department's requirements for seeking to impose criminal sanction on FECA violator).

166. *See supra* notes 53-57 and accompanying text.

167. Most felony convictions are the result of plea bargains, with sentences averaging closer to one year rather than five. Donsanto Interview, *supra* note 58.

168. 2 U.S.C. § 437g(d)(1)(A) (1994).

169. *See* § 437g(a)(6)(C).

170. *See* § 437g(d)(3) (stating that in criminal action, "the court . . . shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed" whether the violation was the subject of a conciliation agreement, and if so, whether the defendant is complying with the agreement).

171. § 437g(a)(6)(A).

172. *See supra* note 104.

enforcement is the probability of imposition, which, in this context, requires a two-step analysis. First, one must determine the probability that a violation will be detected. Second, if a violation is detected, one must determine the probability that a sanction will be imposed.

The probability of detection depends largely on private parties with information voluntarily filing a complaint with the FEC or the Department of Justice because the FEC, the primary agency for tracking campaign finance information, has limited tools for detecting a violation on its own. Until 1979, the FEC had authority to audit congressional campaigns randomly.¹⁷³ After 1979, however, it lost this power. Thus, because it can no longer conduct random audits, it can only detect a violation if it is obvious from the reports filed by campaign committees, which is unlikely to be the case.¹⁷⁴ Violations, then, are likely to go undetected when a violator's opponents do not invest resources in detecting the violation.

Even after a violation is detected, the enforcement process can be very slow.¹⁷⁵ A respondent¹⁷⁶ has little incentive to cooperate with the FEC.¹⁷⁷ Respondents can and do use their ability to prolong settlement negotiations either to force the FEC to drop the case or to reduce the magnitude of the penalty.¹⁷⁸

An additional, though less prevalent, constraint on imposition of a sanction is the decisionmaking apparatus of the FEC itself. The Commission must approve all enforcement actions, and in certain high-profile cases, the Commission has deadlocked, thus preventing imposition.¹⁷⁹ Moreover, it appears as if the FEC will have fewer resources to devote to enforcement.¹⁸⁰ Given the budget-cutting mood in Congress, it seems likely that future, as well as present, appropriations for the FEC will decline.

Not only is there a low probability that a civil sanction will be imposed, there is even a lower probability that a criminal sanction will be imposed. Most

173. The FEC is required to audit all presidential campaigns. *See* 26 U.S.C. §§ 9007, 9038 (1994).

174. *See* ELIZABETH HEDLUND, CENTER FOR RESPONSIVE POLITICS, JUSTICE DELAYED, JUSTICE DENIED: THE FEDERAL ELECTION COMMISSION'S ENFORCEMENT RECORD 12 (1992) ("Experienced, sophisticated candidates and committees know how to make sure their reports are completely in order, even if their campaign activities are not.").

175. "The lack of deterrent force of the FECA can be traced in great part to its cumbersome multistage enforcement process, under which many matters are not resolved in a timely manner." Gross, *supra* note 99, at 286.

176. Potential violators being investigated by the FEC are referred to as respondents. *See* 2 U.S.C. § 437g (1994).

177. *FEC Panel Discussion*, *supra* note 1, at 260 (suggesting that FEC is subjected to protracted negotiations by "well-seasoned Washington lawyers who just want to drag a case out." The FEC will wait for a settlement because it is expensive to go to court, but the FEC has little leverage to force a settlement.) (comments of Elizabeth Hedlund, Director, FEC Watch, Center for Responsive Politics). The General Counsel of the FEC concurs. *Id.* at 249 (comments of Lawrence Noble).

178. *See* HEDLUND, *supra* note 174, at 14.

179. *Id.* at 11.

180. Telephone Interview with Elizabeth Hedlund, Director, FEC Watch, Center for Responsive Politics (Apr. 20, 1995).

criminal prosecutions occur only if a felony theory can be used.¹⁸¹ Prior to the *Curran* case, the Justice Department had limited cases meeting this criterion to fairly narrow situations.¹⁸² The Department reads the *Curran* case to limit the scope for successful criminal prosecution even further.¹⁸³

Attempts to quantify the rate of enforcement produces inconclusive results. Since 1988, there have been approximately 200 criminal convictions for FECA violations¹⁸⁴ and 1011 conciliation agreements with the FEC.¹⁸⁵ Without knowing how many violations went unpunished,¹⁸⁶ it is difficult to assess the probability of imposition. Judged against the scale of the federal election campaign enterprise, however, this appears to be a low rate of imposition. In 1992, for example, congressional candidates spent a total of \$680 million raised from campaign contributions.¹⁸⁷ Of that amount, \$188.5 million was contributed by PACs.¹⁸⁸ If there were no illegal contributions, the theoretically minimum number of contributions in 1992 would have been 527,200.¹⁸⁹ In the 1991-92 election cycle, there were 361 conciliation agreements reached with the FEC. Thus, in 1992 the theoretically maximum ratio of enforcement was one conciliation agreement for every 1460 contributions discounted by the number of illegal contributions. This ratio, however, may be misleading for three reasons: we still cannot tell how many illegal contributions there were; the number of enforcement actions cannot be directly correlated with the number of campaign contributions because some of the civil enforcement actions were against PACs for violations that spanned more than one campaign; and the conciliation agreements were not all for violations of the contribution limits. While these figures may suggest a high degree of compliance with the law, it is more persuasive, when considered in conjunction with the incentives for violating the law and the anecdotal evidence from the FEC's critics, to view them as representing a low degree of enforcement.

181. Donsanto Interview, *supra* note 58.

182. See ELECTION LAW MANUAL (5th ed.), *supra* note 25, at 73-76 (limiting appropriate scope for criminal prosecutions to violations involving large amounts of money and some form of deceit to disguise violation).

183. See ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 108-10 (stating that prosecution under felony theories requires heightened scienter requirements, and "[t]he *Curran* case demonstrates that satisfying these scienter requirements can prove challenging").

184. If this analysis were restricted to prosecutions brought solely under the FECA, this number would be very close to zero. Donsanto Interview, *supra* note 58. It appears that the use of alternative theories is necessary for any real criminal enforcement of the FECA, but I argue that this supplemental enforcement still is suboptimal.

185. See *supra* note 104.

186. For victimless, white collar crimes, there can be no equivalent to the Justice Department's National Crime Victim Survey, which estimates the number of unreported crimes that occur each year.

187. 1993 FEC ANNUAL REPORT, *supra* note 157.

188. MAKINSON & GOLDSTEIN, *supra* note 149, at 21.

189. Assuming that all PACs gave the \$5000 maximum and all individuals gave the \$1000 maximum, there would be 37,700 PAC contributions and 489,500 individual contributions. The actual number of contributions has to be significantly higher. For example, Barbara Boxer's 1992 campaign raised \$5 million from contributions under \$200. *Id.* at 6.

C. OPTIMALITY ANALYSIS

The above analysis suggests that current enforcement of the FECA is suboptimal; we currently are not buying enough.¹⁹⁰ The goal, then, is to set potential sanctions and levels of enforcement to reduce public cynicism to the point at which the cost of further reductions equals the benefits of those reductions.¹⁹¹

The private benefits from FECA violations depend on the contributor. Violations that involve a virtual quid pro quo yield very high benefits; isolated violations that do not involve a quid pro quo, however, do not appear to provide very large benefits. Nevertheless, because benefits can be aggregated by wealthy violators, there appears to be an exponential increase in the likelihood of receiving legislation sought through multiple FECA violations. The harms caused by FECA violations are of two types: particular and general. In some cases the particular harm can be quite grave—perhaps the “wrong” candidate is elected. In others, the particular harm is fairly ephemeral. As with the benefits, the harms can be aggregated such that violators who enjoy aggregated private benefits cause aggregated social harm. The magnitude of the sanction most often used, a settlement with the FEC, appears to be fairly low. In many cases, violators can drag out the process to reduce the magnitude to an acceptable level.¹⁹² The probability of imposition remains conjectural because the baseline amount of unpunished violations is impossible to determine. Nonetheless, the incentives for violating the FECA, combined with the ability of violators to avoid detection and, if detected, to reduce the penalty, support the argument that the probability of imposition is low.

Deterrence theory suggests that when the private benefits of an action are high and the perceived likelihood that a sanction for that action will be imposed is low, the magnitude of the sanction must be considerably higher than the private benefit of the action to deter a risk-neutral rational actor.¹⁹³ With FECA enforcement, even if the benefits are not great, the analysis suggests that the harm is serious and the likelihood of imposition and the magnitude of the sanctions are so low that we have suboptimal deterrence. Those familiar with FECA enforcement tend to agree.¹⁹⁴

190. FECA violations impose serious social costs, and the current level of enforcement has done little to accomplish the statute's goal of removing a public sense of corruption in the financing of federal elections. While it is possible that the substantive provisions of the FECA, at any level of enforcement, are inadequate for the task, that discussion is beyond the scope of this note. In this analysis, I assume that the provisions of the FECA that place limits on the sources and amounts of federal campaign contributions, if adequately enforced, are capable of reducing public cynicism about campaign finance.

191. For the definition of optimal enforcement, see *supra* note 7 and accompanying text.

192. Presumably the violator pays a cost, such as legal fees, for dragging out the process, but this cost must be less than the penalties sought by the FEC if we assume rational action.

193. See *supra* notes 112-14.

194. “[T]he FECA as currently written does not adequately deter violations of the statute. Many participants in the political process believe that the election laws need not be heeded. The chance is slim that violations will be detected, party-line deadlocks reduce the chance that the Commission will

Considerations for optimizing enforcement, then, start with asking whether it is possible to increase the likelihood of imposition or the magnitude of the sanctions or both. One means of increasing the probability of imposition is reducing the cost of information necessary for learning of and proving FECA violations. Cheaper information allows investigators not only to learn of more violations, but also to make their case against violators more easily.¹⁹⁵

Increasing the magnitude of the sanctions can also optimize enforcement of the FECA. The high-magnitude sanctions available are incarceration¹⁹⁶ and substantial monetary penalties. Imposition of either, however, faces considerable obstacles. While increased criminal enforcement of the campaign finance laws appears to be a tempting option for optimizing deterrence, it is not the most feasible option. Increased use of the criminal sanction, though it would increase the cost of the enforcement scheme, is attractive because potential violators would more likely be deterred by a credible threat of a prison sentence.¹⁹⁷ The cost of the enforcement scheme could be mitigated by keeping prison sentences short because the opportunity cost of a prison sentence (lost time and money) and the stigma effect would be front-loaded.

The criminal sanction, however, would only be optimal if FECA violations were considered blameworthy. FECA violations would then be well suited for increased criminal prosecution as a means of reducing public cynicism about campaign finance.¹⁹⁸ When the FECA was passed in the wake of the Watergate scandal, perhaps there was sufficient public consensus to consider campaign

investigate violations of the law, and any resulting penalty will probably come long after the election." Gross, *supra* note 99, at 286.

195. See Coffee, *Corporate Crime and Punishment*, *supra* note 124, at 466-67. An increased rate of imposition would also respond to the possibility that FECA violators may be risk-preferrers rather than risk-neutral. To be effective, a FECA violation has to involve some group effort such that someone in the campaign is made aware of the violation and knows to whom the campaign owes favors. Some evidence suggests that this necessary group decisionmaking will result in a "risky shift phenomenon" in which those involved will prefer risk to a greater extent than they would acting alone. *Id.*

196. While some evidence suggests that debarment—that is, banning a FECA violator from contributing in future elections—may also be a possible sanction, the Supreme Court would most likely not allow it. Evidence supporting contributor debarment includes the fact that a candidate who fails to file a required report of contributions and expenditures may be debarred for one year from running for federal office. *Buckley v. Valeo*, 424 U.S. 1, 112-13 (1976) (per curiam). Further, even under a "rigorous standard of review," limits on campaign contributions are permissible because the government interest in preventing the appearance of corruption is sufficient to outweigh any effects on First Amendment freedoms. See *id.* at 28-29. Nevertheless, the Court would probably hold that the government interest in a ban on contributions from FECA violators is insufficient to outweigh the effects on First Amendment freedoms of speech and association. Thus, I will limit the discussion of nonmonetary sanctions to incarceration.

197. See generally Kenneth Mann et al., *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479 (1980) (field study of judges on the deterrent effect of incarcerative sentences for white collar offenders).

198. See Coffee, *Does "Unlawful" Mean "Criminal," supra* note 133, at 223 & n.123 (arguing that "empirical evidence is available to support the proposition that the criminal law is very effective at teaching citizens what the contours of the public morality are").

finance violations to be worthy of strict criminal liability. But as the courts read into the statute an intent requirement and as the Department of Justice further limited its enforcement to knowing and willful violations, the FECA became less effective at deterring violations.

Pressure to improve enforcement led to the 1976 amendment that created the FEC and severely limited the scope of the criminal sanction.¹⁹⁹ Rather than invest resources in increased FECA enforcement under a strict criminal liability regime, Congress created the FEC to enforce the FECA through the use of civil sanctions. It seems likely that this switch from enforcement exclusively through a criminal sanction to enforcement primarily through a civil sanction was the result either of a lack of public consensus on the blameworthiness of FECA violations or a desire on the part of those who control the political process to avoid increasing the use of criminal sanctions to appease public pressure for more effective FECA enforcement.

In either case, increases in the use of a criminal sanction will not be effective. If FECA violations are not considered blameworthy by violators or society, those punished would not be stigmatized any more than the recipient of a traffic ticket is stigmatized. When the threat of a criminal sanction does not also carry with it the threat of stigmatization, use of the criminal sanction will be inefficient.²⁰⁰ If there is a social consensus that FECA violations are blameworthy, but if the interests of those who control the political process are adverse to effective use of the criminal sanction, the necessary legislation to increase the availability of the criminal sanction will never be passed.

Because the threat of imposition cannot likely be increased, increases in the magnitude of the monetary sanctions are the only remaining option for increasing deterrence. Theory suggests that deterrence could be optimized by sufficiently high monetary penalties for most individual contributors.²⁰¹ Most individual violators against whom an enforcement action might be taken appear to have sufficient liquid assets to be deterred by a high monetary penalty.²⁰² While the collectibility boundary limits the assets that can be reached in an enforcement action, enough individual violators are likely to have enough at risk to make a high monetary sanction an effective deterrent.

Ironically, the option of higher monetary sanctions is unlikely to be very effective against those who have the greatest incentive to violate the FECA, contributors through PACs. PACs have a legislative agenda and the means to aggregate the benefits of FECA violations. The limited pool of assets held by PACs reduces the deterrence value of a monetary sanction. Absent a showing

199. See *FEC Panel Discussion*, *supra* note 1, at 234.

200. See *supra* Part II A2 for a discussion of the effective use of the criminal sanction.

201. See Shavell, *supra* note 109, at 1236-37 (describing five factors to test whether monetary sanctions will produce desired level of deterrence).

202. See *id.* (explaining why size of violator's assets must be sufficient for threat of monetary sanction to deter).

sufficient for a court to pierce the corporate veil, wealthy individuals who contribute through PACs are liable for FECA violations only up to the amount they have contributed.²⁰³ While substantial sums flow through the PACs' coffers, relatively little remains after an election.²⁰⁴ Therefore, the collectibility boundary for PACs remains fairly low.

Deterrence theory suggests that when there are insufficient assets to produce the desired level of deterrence, a nonmonetary sanction should be imposed.²⁰⁵ But the nonmonetary sanction of incarceration is unavailable against a corporate entity and would be unlikely to be imposed against corporate officers because the conduct is not considered blameworthy by the dominant groups in the political process. Other nonmonetary sanctions have limited deterrent effect. Penalizing a violating PAC out of existence probably would not have the same effect as with a corporate entity committed to remaining a going concern; the PAC could simply be resurrected under a new name with fairly low transaction costs. There would be little loss of "goodwill" from a change in name, because the candidates would still be aware of who was contributing, why they were contributing, and what they expected in return.

In sum, enforcement of the FECA is suboptimal and appears destined to remain that way. The unavailability of the criminal sanction as an effective tool and the collectibility boundary for an important pool of potential violators will keep deterrence at a suboptimal level. Nevertheless, frustration with ineffective enforcement of the FECA can be mitigated by first taking measures to increase the likelihood that sanctions will be imposed. Evidence that FECA violators are likely to be risk-preferrers makes this step even more important because risk-preferrers are more sensitive to changes in the probability of imposition than to changes in the magnitude of the sanction. Second, because the cost of information for detecting FECA violations and gathering sufficient evidence to impose sanctions is likely to remain high, the magnitude of monetary sanctions also should be increased.

III. OPTIMIZING FECA ENFORCEMENT

This Part suggests reforms that flow from the conclusions in Part II. To increase the likelihood that FECA violators will be sanctioned, a number of reforms should be made. In particular, the cost of information necessary to enforce the FECA is too high relative to the deterrent effect of current levels of enforcement.

203. That is, the contributor's donation may go to paying a civil penalty rather than to a particular candidate.

204. A review of recent FEC annual reports indicates that PACs retain about 10% of the amount donated in an election cycle as cash on hand. *See, e.g.*, FEDERAL ELECTION COMM'N, ANNUAL REPORT (1992).

205. *See supra* text accompanying note 123.

A. INCREASE THE PROBABILITY OF IMPOSITION

This note proposes five statutory reforms to increase the likelihood that FECA violators will be detected and sanctioned. Congress should: (1) reauthorize random audits by the FEC; (2) authorize the FEC to impose civil penalties directly rather than prove its case in a federal district court; (3) authorize limited qui tam enforcement, by which persons with knowledge of FECA violations could report these violations and receive a percentage of the fine in return; (4) remove criminal misdemeanor sanctions from the FECA because they are virtually unenforceable; and (5) grant the Justice Department exclusive investigative and prosecutorial jurisdiction over criminal FECA violations.

1. Reauthorize Random Audits

Currently, to detect a FECA violation on its own, the FEC must rely on the reports filed with it. The FEC should be given the authority to conduct audits of randomly selected campaigns in order to determine whether the financial reality behind a campaign report is accurately reflected in the report. Prior to 1979, the FEC was authorized to conduct audits of randomly selected campaigns. Theory suggests that audits are an effective enforcement tool because they increase the possibility of sanction by making possible the discovery of violations that would otherwise have gone undetected.²⁰⁶ The randomness of the scheme limits the ability of a probable violator to confine the risk of discovery. Commentators close to the FEC enforcement process agree that the deterrence produced by random audits outweighs the cost of conducting them.²⁰⁷

It appears, however, as if the very effectiveness of random audits led to Congressional pressure to stop them.²⁰⁸ In the 1992 attempt to reinvigorate campaign finance reform, a provision reauthorizing random audits made it to the conference report,²⁰⁹ but Congress never enacted the legislation. Relying on complaint-generated enforcement alone undermines the FEC's function to protect the public welfare. Absent random audits, violators who do not have opponents willing to complain will impose harm on the public with very little likelihood of detection. The FEC's function is thus frustrated by the Commission's inability to conduct random audits.

206. See Shavell, *supra* note 109, at 1237 (stating that the lower the probability of detection the higher the magnitude of sanction must be).

207. See, e.g., HEDLUND, *supra* note 174, at 12 ("Random audits can serve as a powerful deterrent against violations and would be an effective means for the FEC to monitor compliance with the laws."); Gross, *supra* note 99, at 290 (arguing that conducting random audits "proved useful . . . in monitoring FECA compliance").

208. See Gross, *supra* note 99, at 290 & nn.48-50 (indicating that combination of random audits of powerful members of Congress, including a member of the FEC's congressional oversight committee, and overzealous enforcement of minor violations uncovered by random audits led to congressional decision to remove FEC's authority to audit randomly).

209. H.R. CONF. REP. NO. 479, 102d Cong., 2d Sess. 45 (1992).

2. Authorize the FEC to Assess Civil Penalties

By authorizing the FEC to impose civil sanctions directly, Congress can reduce the ability of FECA violators to avoid sanction. A FECA violator has mixed incentives to enter into a conciliation agreement with the FEC. Apparently many violators, particularly experienced violators, seek to prolong the conciliation agreement process as long as possible.²¹⁰ To overcome this obstacle to imposition, the FEC should have the power to assess civil penalties directly. One of the bargaining chips that experienced violators know they can use is that if the FEC fails to reach a conciliation agreement, it will either have to drop the matter or prove its case *de novo* in federal district court. Allowing the FEC to impose sanctions would shift the bargaining power significantly and increase the likelihood that violations would be sanctioned.²¹¹ Not only would the imposition of civil penalties expedite the sanctioning process and decrease costs, but the FEC would be likely to win more often on the merits before an administrative law judge.²¹²

3. Authorize Limited Qui Tam Enforcement

Congress should take a page from early American history and enlist private assistance in the enforcement of the FECA by authorizing *qui tam*²¹³ actions.²¹⁴ The *qui tam* action is a civil action that requires the underlying conduct to be considered criminal. Therefore, *qui tam* actions under this proposal should be restricted to the narrower scope of criminal sanctions proposed herein.²¹⁵ In a *qui tam* action, the plaintiff pays the litigation costs and shares in any penalties that are awarded. Recent experience with the *qui tam* action to expose fraud by government contractors²¹⁶ indicates that the incentives thereby provided would

210. See HEDLUND, *supra* note 174, at 14 (suggesting that “lawyers who appear before the Federal Election Commission regularly . . . know they have much to gain but little to fear in not cooperating with FEC attorneys”).

211. This proposal has received support in the past. Gross has suggested the use of administrative law judges to adjudicate matters and assess penalties. See Gross, *supra* note 99, at 287-89. The Commission would then act as an appellate tribunal, and the Commission’s judgments would be subject to judicial review under the Administrative Procedure Act. *Id.*

212. “The prosecution obtains a decided advantage when it can try its case in an extrajudicial proceeding before an administrative law judge operating under informal rules of procedure and evidence.” Coffee, *Paradigms Lost*, *supra* note 127, at 1887. For example, the common denominator in administrative law judge decisions for enforcement by the Securities and Exchange Commission is that “the SEC always seems to win before its in-house judges.” *Id.*

213. See *supra* note 9.

214. “[T]he public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American law.” Sunstein, *supra* note 9, at 174 (quoting Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961)).

215. The underlying criminal conduct would be causing false statements to be filed or conspiracy to defraud the United States rather than a misdemeanor FECA offense. See *supra* notes 53-57 and accompanying text.

216. In 1986, Congress amended the False Claims Act. False Claims Act of 1986, 31 U.S.C.

also assist in exposing fraud by campaign contributors.²¹⁷

Overcoming the cost of information in detecting and prosecuting a conduit scheme or an illegal bundling scheme provides the impetus for this proposal. Creating a monetary incentive and “whistleblower” protection for an insider who produces the information necessary to prosecute a criminal violation reduces information costs. The proposal is designed to reach those violations that merit criminal prosecution but would have gone undetected but for the existence of the qui tam action.

Although Congress should create a qui tam action for FECA violations, the statutory authorization for it should be narrowly drawn and strictly construed. To do otherwise would pose two problems. First, the potential for mischief or misallocation of the Department’s scarce prosecutorial resources would likely outweigh the benefits from qui tam enforcement. Prosecutorial resources could be misallocated if qui tam authorization is too broad because a candidate’s political opponents may then have an incentive to bring relatively meritless cases or cases of minor violations to the Justice Department merely to harrass the candidate. By limiting the scope of qui tam enforcement to that for which the incentive is a financial reward but for which there is little harrassment value, Congress will minimize the probability that prosecutorial resources will be misallocated.

Second, in some cases, a violation would have been reported without the financial incentive, and the qui tam action might displace some of this “free” information. Nevertheless, if qui tam authorization is drafted with sufficiently specific language, this cost can be minimized.

4. Remove Criminal Misdemeanor Sanctions from the FECA

The procedural obstacles to prosecuting FECA violations make the criminal provisions practically useless.²¹⁸ In addition, the prosecutorial policy of the Department of Justice has further limited the scope for this sanction to conduct that could be more effectively sanctioned with a civil monetary penalty.²¹⁹

§§ 3729-3731 (1988). The amendments “relaxed the jurisdictional bar against qui tam actions . . . , increased both the damages and penalties recoverable and a successful private plaintiff’s minimum and maximum share thereof, embraced a ‘preponderance of the evidence’ burden of persuasion, and eschewed any requirement of specific intent to defraud.” Evan Caminker, Comment, *The Constitutional-ity of Qui Tam Actions*, 99 YALE L.J. 341, 344 n.13 (1989).

217. Between 1986 and 1993, more than 600 qui tam cases had been filed compared to 20 such cases in the decade preceding the amendments. Richard C. Reuben, *Ferretting Out Fraud*, Cal. Law., Dec. 1993, at 39, 39. The post-1986 actions have restored more than \$440 million to the government in fraud-based recoveries. *Id.*

218. See ELECTION LAW MANUAL (5th ed.), *supra* note 25, at 75.

219. See ELECTION LAW MANUAL (6th ed.), *supra* note 12, at 115 (stating that illegal activity that involves less than \$10,000 should be charged as FECA misdemeanor). While it is possible that conduct involving such small dollar amounts could still be blameworthy enough to merit a criminal sanction, enough large-scale violations take place that sanctioning these low-dollar violations with a stiff civil penalty is probably more efficient.

5. Give the Department of Justice Exclusive Jurisdiction over Criminal Violations

Finally, under this proposal, the Department of Justice should have exclusive jurisdiction over violations that are considered criminal. Parallel administrative proceedings during an investigation of criminal FECA violations can limit marginally the Justice Department's ability to succeed in its prosecution. For instance, currently, the Justice Department cannot immunize from all sanctions a person guilty of a minor violation in exchange for information needed to prosecute a major violator. Even if the the Justice Department refrains from criminal prosecution, the minor violator still is subject to civil sanctions. A minor violator might be more cooperative if she could be completely immunized from sanction. By granting the Justice Department exclusive prosecutorial jurisdiction over criminal offenses, the Department can better succeed at securing convictions.

B. INCREASE THE MAGNITUDE OF THE SANCTION

While the potential benefits of FECA violations appear quite substantial, theory suggests that higher-magnitude sanctions will factor into a potential violator's risk calculus.²²⁰ In situations in which the benefit is more speculative, higher-magnitude sanctions coupled with a greater probability of imposition will produce deterrence that may begin to approach the social cost imposed by FECA violations.

While it is not possible to propose an exact magnitude, the current scheme of making the penalty a function of the amount involved in the violation is inappropriate. First, the penalty appears to be compensatory, with the amount of harm caused being the equivalent of the amount in violation. This, however, is unlikely to be the case. FECA violators expect to gain more than they invest. While their investments will not always pay off, large-scale violators who aggregate the benefits of individual violations are more likely to realize their goal. In many cases their gain will be society's loss. Even when views on important public policy matters between legal and illegal contributors diverge only minimally, the general demoralization about the validity of our electoral process suggests that FECA violations cause serious harm. When the probability of imposition is low, a penalty equal to the amount in violation for those few violations that are sanctioned is unlikely to provide deterrence at a level that will address the harm.

For these reasons, even if the above reforms were implemented to improve the rate of imposition, the magnitude of monetary penalties should be increased. Support for increased penalties is found among the commentators,²²¹ and the

220. *See supra* notes 112-14.

221. *See, e.g.,* Gross, *supra* note 99, at 291 (arguing that "to create an effective deterrent [for FECA violations], an increased likelihood of being caught must be coupled with higher penalties for serious offenses")

FEC apparently has pledged itself to seek penalties closer to the statutory maximum in conciliation agreements.²²²

CONCLUSION

The Federal Election Campaign Act was passed to address growing cynicism in the electorate about the influence of campaign contributions on who gets elected and what decisions they make once elected. That cynicism seems to be as pervasive today as it was twenty-four years ago. Suboptimal enforcement of the campaign finance laws is one cause of the continued cynicism. Campaign finance violators can reap substantial benefits in certain situations, either through quid pro quo understandings with candidates or through aggregated benefits that influence the shape and pace of legislation. The small magnitude of current penalties and the small likelihood that they will be imposed, combined with a violator's ability to maintain some control over the magnitude and probability of sanction through the conciliation process, provide very few disincentives for potential FECA violators.

Deterrence theory offers a useful analysis for suggesting some means to optimize FECA enforcement. This analysis suggests that the harms from FECA violations merit investment in fairly substantial deterrence. To produce that deterrence, the magnitude of the sanction will have to be fairly high because the private benefits are moderately high and information costs will limit the probability of imposing a sanction on any given violation. This analysis further suggests that a monetary sanction should be used unless society and the community of potential violators consider the conduct blameworthy. Blame is a method of announcing cost allocations in the political process, and in this case, those likely to engage in FECA violations dominate the political process. Therefore, FECA violations are unlikely to be considered blameworthy, which means that increased use of the criminal sanction is not a realistic option.

Increases in the likelihood of imposition and the magnitude of monetary sanctions are necessary but not sufficient to produce optimal deterrence. The collectibility boundary for PACs will limit the deterrent effect of monetary sanctions, and there are no suitable nonmonetary sanctions that would produce equivalent deterrence. This limit on our ability to achieve optimal deterrence under the FECA should inform our discussions of campaign finance reform. If we cannot achieve optimal deterrence for the FECA, is it worth maintaining the Federal Election Commission as an enforcement agency? Would some alternative regulatory scheme that is optimally enforceable better advance the FECA's goal of reducing public cynicism about the role of money in politics? This analysis suggests that an enforcement analysis should accompany reform proposals in the ongoing campaign finance debate.

222. *FEC Panel Discussion*, *supra* note 1, at 260 (comments of Elizabeth Hedlund).