

OVERCOMING PROCEDURAL BOUNDARIES

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“[T]he idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every American lawyer and to most citizens.”¹

INTRODUCTION

THE Blackstone Ratio famously holds that it is “better that ten guilty persons escape, than that one innocent suffer.”² But consider the following propositions: it is better that ten taxpayers avoid paying their taxes than one overcharged taxpayer go bankrupt. Or better that ten defaulting mortgage holders avoid paying their debt than one wrongly charged debtor be evicted from her place of residence. Or even, it is better that ten dangerous mentally ill persons roam the streets than one harmless mentally ill person be involuntarily committed to a mental institution. While many consider Blackstone’s maxim a truism, the other statements would surely be dismissed by most as ludicrous. The divergence in reactions is the result of the widely accepted, albeit oversimplified, distinction between the civil and criminal spheres. The civil-criminal

¹ *United States v. United Mine Workers of Am.*, 330 U.S. 258, 364 (1947) (Rutledge, J., dissenting).

² William Blackstone, 4 *Commentaries* *352. Numerous variations of this axiom exist, the main variation being the ratio of n guilty men who ought to be acquitted in order to spare one innocent man. See Alexander Volokh, *n* Guilty Men, 146 *U. Pa. L. Rev.* 173, 174–77 (1997).

divide is inherent in our legal thinking³ and has been a hallmark of English and American jurisprudence for hundreds of years.⁴ This fundamental taxonomy is manifested in, among other places, our bifurcated procedural system, which offers generous protections to people and institutions accused of crimes and misdemeanors⁵ but is tightfisted with regard to similar guarantees for civil defendants. This Article will challenge the civil-criminal rift in the realm of procedure.⁶ It will highlight a fundamental shortcoming of our legal system that stems from its failure to provide adequate procedural protections to individuals who are sued by the government or large organizational entities and face severe civil sanctions, combined with its sweeping procedural safeguards for people and institutions facing only trivial criminal sanctions. The Article will also point to the absurdity of granting identical procedural protections to big corporations and individuals involved in similar civil lawsuits or facing similar criminal charges, in the name of abstract and uncritically accepted notions of fairness and due process.

Until recently the distinction between civil and criminal law and procedure was widely accepted and was largely free from scrutiny.

³ See Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 *J. Contemp. Legal Issues* 43, 44 (1996) (“Indeed, today, this two-part legal system is largely taken for granted, and the distinction between criminal and civil viewed as fundamental.”); Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 *Cardozo L. Rev.* 1585, 1587 (1998) (“Few would think of combining civil and criminal procedure into one code because of the many policy differences inherent in the two justice systems.”); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 *B.U. L. Rev.* 201, 201–02 (1996) (“Apparently every society sufficiently developed to have a formal legal system uses the criminal-civil distinction as an organizing principle.”).

⁴ For instance, Lord Mansfield remarked in 1775, “Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions.” *Atcheson v. Everitt*, (1775) 98 *Eng. Rep.* 1142, 1147 (K.B.); see also Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 *Geo. L.J.* 1, 2 (2005) (“There are few distinctions in Anglo-American jurisprudence more fundamental and consequential than that between the civil law and the criminal law.”).

⁵ This includes the beyond a reasonable doubt standard of proof, assistance of counsel, the enhanced discovery duties borne by the government, double jeopardy protection, and numerous other safeguards.

⁶ As used in this Article, “civil law” refers to all law that is not criminal and includes also administrative proceedings. Also, for the purposes of this Article, the term “procedure” includes the rules of evidence.

In the last few decades, however, this distinction has been frequently questioned, and its general acceptance has begun to erode.⁷ Two complementary processes brought about the significant blurring of lines between the two spheres. First, the criminal law has gradually encroached on areas previously considered purely civil, with the appendage of a multitude of regulatory crimes to the federal criminal code.⁸ Additionally, civil law has similarly encroached on the criminal law, marked by an increase in punitive sanctions applied in civil proceedings.⁹ This conceptual smudging has prompted significant normative concerns requiring a rethinking of the very justification for the distinction between civil and criminal law and procedure; a sound normative rationale for this distinction is vital for maintaining a system that distinguishes civil from criminal cases and assigns appropriate procedures to each. This is crucial for both efficiency and due process reasons: applying criminal procedure, with its cumbersome arsenal of constitutional protections, to civil matters is a very costly prospect that would result in a great waste of public resources; at the same time, applying civil procedure to matters of a criminal nature might result in a serious miscarriage of justice due to the absence of procedural safeguards against wrongful conviction.

⁷ The erosion of the civil-criminal procedure distinction is a result of both legislative action and larger developments in intellectual discourse. The developments in intellectual discourse affecting the criminal-civil distinction will not be discussed in this paper. For an analysis of the two biggest intellectual challenges to the criminal-civil distinction—the advent of the law and economic analysis of law and the decline of rehabilitation as the goal of criminal punishment—see Carol S. Steiker, Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 *Geo. L.J.* 775, 784–91 (1997).

⁸ A recent study estimates the number of offenses in the United States Code that carry criminal penalty at more than 4000. John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation* 8 (2004), http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf. If regulations are included, the number of “crimes” rises significantly. One estimate placed the number of federal regulations that may be enforced criminally at over 300,000. Thomas B. Leary, Commentary, The Commission’s New Option that Favors Judicial Discretion in Corporate Sentencing, 3 *Fed. Sent’g Rep.* 142, 144 n.10 (1990) (citing Stanley S. Arkin, Comments at the George Mason Conference on Sentencing of the Corporation (Oct. 25, 1990)).

⁹ The federal government and the states are actively and consciously using civil law techniques to curb criminal behavior. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *Hastings L.J.* 1325, 1326–27 (1991).

Blurring the civil-criminal divide has an additional negative aspect: it distorts the legislative decisionmaking process by giving the government an incentive to make bad substantive law as a way to exploit procedural advantages and evade procedural obstacles.¹⁰ First, legislatures may have the incentive to expand the scope of criminal liability in order to take advantage of procedural devices that are otherwise unavailable, such as breaking into a house and making an arrest¹¹ or seizing property based on an *ex parte* warrant.¹² At the same time, legislatures may also try to avoid the extensive rights granted to defendants in criminal proceedings. Given the high costs of criminal trials and the difficulty in securing convictions, the government has ample incentives to resort to civil alternatives in order to redress criminal behavior. Forfeiture is one case in point: the government regularly brings civil forfeiture actions alongside criminal prosecution in order to avoid granting defendants criminal procedural protections.¹³

Many solutions have been suggested to address the negative consequences of allowing the legislature to apply civil and criminal procedure selectively. Some have proposed simply ignoring the

¹⁰ See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 *J. Contemp. Legal Issues* 1, 1–2 (1996).

¹¹ See *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (invalidating the arrest of a suspected drunk driver because, under Wisconsin law at the time, a first-time DUI was not a crime, but a civil violation, and thus, without probable cause to believe the defendant had committed a *crime*, the police were forbidden from forcibly entering his house and arresting him).

¹² See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993) (holding the government's seizure of Good's house pursuant to an *ex parte* warrant in a civil action for forfeiture unconstitutional because the proceeding was civil rather than criminal and the Due Process Clause prohibits seizing real property in a civil forfeiture without first giving the owner notice and a hearing).

¹³ See, e.g., Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 *Iowa L. Rev.* 183, 189 (1996) (arguing that the practice of bringing parallel civil in rem and criminal forfeiture actions is intended to reap procedural advantages and is therefore unfair). One prominent procedural advantage of civil forfeiture is that it applies the preponderance of the evidence burden of proof. Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(c)(1) (2000). However, the constitutionality of using the preponderance of the evidence burden of proof in civil forfeiture actions that carry severe penalties has been questioned. See, e.g., Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 *J. Crim. L. & Criminology* 274, 278–79 (1992) (arguing that Comprehensive Drug Abuse Prevention and Control Act § 881 civil forfeiture proceedings violate the Due Process Clause because they invoke only a “minimal” burden of proof (preponderance of the evidence) while severe civil penalties apply).

“civil” or “criminal” label Congress has attached to a particular sanction and to instead grant or deny enhanced procedural protections based on the punitive or nonpunitive nature of the sanction.¹⁴ Others have recommended setting constitutional constraints on making new substantive criminal law¹⁵ or, alternatively, extending some of the constitutional protections currently applied only in criminal proceedings to civil matters as well.¹⁶ Another suggestion has been to expand the intermediate category between the civil and criminal spheres that covers punitive civil sanctions.¹⁷ Prominent scholars such as Professors Bob Cover, Owen Fiss, and Judith Resnik went so far as to question the very distinction between “civil” and “criminal” procedure.¹⁸ Following in their footsteps, we will propose to do away with the civil-criminal divide *in procedure* altogether and to replace it with a different scheme. We will argue that all the rationales provided hitherto for the procedural division along civil-criminal lines are obsolete, if not completely unfounded. We will propose, therefore, to cut the Gordian knot tying substance to procedure and replace the current bifurcated civil-criminal procedural regime with a model that runs along two axes that are more compatible with the actual goals of our justice system: the balance of power between the parties and the severity of the sanction or remedy.

The first axis differentiates between parties the model classifies as “individuals” (which would include small businesses) and “institutional entities” (composed of both governmental bodies and large organizational entities). One set of procedural rules would govern symmetrical litigation—that is, litigation in which the par-

¹⁴ For a comprehensive description of these proposals, see *infra* Part III.

¹⁵ Stuntz, *supra* note 10, at 2.

¹⁶ See John Leubsdorf, *Constitutional Civil Procedure*, 63 *Tex. L. Rev.* 579, 580 (1984).

¹⁷ Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *Yale L.J.* 1795, 1802 (1992).

¹⁸ See Judith Resnik, *The Domain of Courts*, 137 *U. Pa. L. Rev.* 2219, 2222 (1989) (“I (and my colleagues Robert Cover and Owen Fiss) believe that the delineation between ‘civil’ and ‘criminal’ procedure is often artificial; much is to be learned from thinking about civil and criminal procedure together. The thesis is not that the rules are or ought to be the same in all instances but that the theoretical questions addressed by the two sets of rules are the same and that different resolutions merit analysis.” (citations omitted)); see also Robert M. Cover & Owen M. Fiss, *The Structure of Procedure*, at iii–iv (1979).

ties are either both institutional entities or both individuals; a second set of rules would govern asymmetric litigation, or litigation involving an individual on one side and an institutional entity on the other.¹⁹ The second axis measures the impact of an adverse decision on the defendant, irrespective of whether the substantive legal regime governing the dispute is civil or criminal. The more severe the sanction or remedy, the greater the procedural protections that are available.

Using these two parameters, our proposed model will map out the entire procedural landscape. The distribution of procedural safeguards yielded by this model will diverge from that prevailing under the existing regime. For example, criminal defendants facing lenient sanctions (such as fines or other monetary criminal sanctions) would enjoy less rigorous procedural protections, and the standard of proof would be lowered from beyond a reasonable doubt, with the degree of change commensurate with the balance of power between the parties. Conversely, the procedural safeguards in asymmetrical civil cases would be augmented according to the severity of the remedy. In cases of monetary remedies, the standard of proof would be raised from preponderance of the evidence to clear and convincing proof, and the standard of proof for civil sanctions entailing a deprivation of liberty, such as civil commitment, might be raised even to beyond a reasonable doubt.

From a theoretical perspective, the propositions raised in this Article are sobering, and their implications extend far beyond the mere construction of a specific procedural model. Indeed, the Article will offer a new conceptual framework for procedural analysis. The civil-criminal divide has dictated not only the path research has taken, but the very way the entire discipline is organized. There are (almost) no general proceduralists, only criminal proceduralists and civil proceduralists who, like the blind men in John Godfrey Saxe's *The Blind Men and the Elephant*, "see" only part of the pic-

¹⁹ The argument that different procedural rules should govern depending on the symmetry of the parties can be analogized to similar arguments made with respect to substantive law. See Hanoch Dagan, *The Law and Ethics of Restitution* 54–63 (2004) (arguing that the rules governing mistakes in private contexts should differ from those governing mistakes in institutional contexts); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *Yale L.J.* 541, 550 (2003) (arguing that rules governing business contracts between firms should differ from rules governing business contracts between individuals and firms).

ture.²⁰ As a general matter, criminal procedure scholars are focused exclusively on civil law's infiltration into criminal law territory and the due process problems this creates. Civil procedure scholars, to the extent that they are at all interested in the civil-criminal divide, tend to focus on the lack of sufficient procedural guarantees in the civil sphere. By approaching the question from a purely proceduralist perspective, we will have overcome the many blind spots in the current literature, thereby facilitating a more comprehensive appreciation of and solution to the problems.

The Article will not challenge (at least not directly) the distinction between substantive criminal law and civil law but rather will focus solely on procedure.²¹ It will argue that to the extent that detaching the two spheres is justified in substance, a parallel split in procedure is not necessarily entailed. We will argue that dissociating substantive civil and criminal law from procedure would better serve the goals of both. From a procedural standpoint, casting off the fetters of the legislature's obsolete categorizations would better realize the underlying objectives of the procedural system. From a substantive perspective, our proposed procedural model would decrease the ability of federal and state legislators to "civilize" some sanctions that belong in the criminal sphere while "criminalizing" other sanctions that belong in the civil sphere in order to reap procedural advantages.

Finally, although we believe our model to be a step forward, it is not as radical as it might appear at first glance. Many of the variants we will identify as essential to the functioning of our procedural model already play a significant role in judicial decisionmaking. Today, however, this process occurs in a rather haphazard and ad hoc manner, in disregard of the bigger picture. Our model will perform the valuable service of crystallizing and systematizing certain intuitions about the role of procedural law that have existed

²⁰ John Godfrey Saxe, *The Blind Men and the Elephant: John Godfrey Saxe's Version of the Famous Indian Legend* (Whittlesey House 1963) (n.d.).

²¹ It is worthwhile to recall that the distinction between the criminal and civil spheres, although definitely age-old, is not inevitable or transhistorical. In fact, the early common law did not make any such distinction. See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 *B.U. L. Rev.* 59, 80-81 (1996).

for more than a century and will take these propositions to their logical conclusion.

The Article proceeds in four parts: Part I will present a survey of the many justifications that have been offered for the existing bifurcated procedural system, so as to provide a complete picture of the existing taxonomy of the system we propose to transform. Part II will critique the prevailing regime, challenging the continued predominance of the civil-criminal dichotomy in our procedural thinking and showing that the arguments used for justifying it are either obsolete or are outright erroneous. Part III will consider the many solutions offered by other legal scholars to the problems of the civil-criminal procedural divide, exposing the weaknesses and difficulties that render each solution impractical. In Part IV, we will put forth our proposed alternative procedural model, arguing and illustrating that it better realizes the rationales that justify the current procedural regime. We will conclude with some remarks about the feasibility of such a reform.

I. JUSTIFICATIONS FOR THE CIVIL-CRIMINAL DIVIDE IN PROCEDURE

Taxonomies play a vital role in the smooth operation of any legal system. Identifying the particular set of legal rules that govern a specific set of facts is contingent on prior classification of such facts into discrete categories.²² Classifications serve as conceptual shortcuts, helpful tools that assist in ordering and organizing the chaotic universe of facts and rules. They are designed to achieve certain goals without having to revert to the logic and values underlying the classification each time the applicable rule must be identified. But important as these categories may be to the working of a legal system, they are equally harmful if reified (or “thingified” to use Felix Cohen’s neologism²³) and, therefore, applied mechanically

²² See Peter Birks, Preface to 1 English Private Law, at xxxi (Peter Birks ed., 2000) (“There is no body of knowable data which can subsist as a jumble of mismatched categories.”).

²³ Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 811 (1935).

without concern for the inherent dynamism of law.²⁴ It is critical, in other words, not to essentialize legal categories or accept them as givens but rather to engage in an ongoing process of reexamination in which the values underlying these categories are identified and taxonomies that best promote these values are sought.²⁵

Legal categories are crude by nature. The “border line” between categories is inevitably blurred and somewhat arbitrary.²⁶ Proving that a certain classification is not working in every case does not negate its usefulness in toto. The mere existence of some margin of error does not render the taxonomy invalid and undesirable. Therefore, in order to substantiate our claim that the civil-criminal taxonomy in procedure should be abolished, it is not enough to simply demonstrate some small degree of failure in realizing its goals in certain cases. Instead, we must show that its overall harmful effects outweigh its benefits and point to an alternative method of classification that is more in line with the objectives of procedure.

Many justifications have been offered for the bifurcation of procedure into criminal procedure and civil procedure. These rationales can be roughly divided into four lines of argument based upon either normative or functional foundations: utilitarian, egalitarian, expressive, and state-centered.

A. The Utilitarian Justification

The first line of argument invoked to justify the civil-criminal procedural dichotomy rests on utilitarian grounds. The civil-criminal split, it is argued, is premised on the distinct functions of civil procedure, on the one hand, and criminal procedure, on the other, with respect to the allocation of risks of error between parties to litigation. In the adversarial system, the court lacks autonomous investigatory authority and must rely upon the parties to

²⁴ See Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law* 7 (Tel Aviv Univ. Law Faculty Papers, Paper No. 38, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1038&context=taulwps>.

²⁵ See *id.* at 12 (associating such a taxonomical practice with the tradition of legal realism).

²⁶ Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 *Yale L.J.* 333, 356 (1933).

gather and present the facts underlying the case.²⁷ The realization of the goals of both criminal and civil litigation is contingent upon accurate fact-finding by the court. Therefore, the rules of procedure are designed to promote the reliability and accuracy of the fact-finding process in both types of proceedings.²⁸ From the criminal perspective, convicting innocent defendants impairs the social goals of deterrence, incapacitation, and rehabilitation. In addition to the pain and suffering inflicted on the person convicted, wrongful convictions waste limited resources and instigate underparticipation in lawful and socially beneficial activity. Moreover, exposure to the risk of wrongful conviction impairs deterrence, since it lowers the marginal cost of choosing to engage in criminal behavior;²⁹ when innocent people are systematically exposed to the risk of criminal sanctions, the price of criminal activity becomes cheaper in relation to noncriminal activity.³⁰ Conviction of the innocent may also allow the real offenders to continue to roam the streets, as well as prevent their rehabilitation.³¹ Like wrongful convictions, wrongful acquittals also impair the ends at which criminal punishment is aimed. False acquittals result in underdeterrence, as prospective offenders learn that “crime pays.” Thus, either way, the criminal verdict must be accurate and rest upon factual truth. Similar arguments can be made regarding the detriments of inaccurate fact-finding in the civil sphere.³² Accuracy and error avoidance in determining liability are crucial both for compensatory purposes and for achieving optimal levels of deterrence.

The notion of *error avoidance*, however, is only one component of accurate adjudication. Since court rulings are necessarily probabilistic in nature and errors can never be completely eliminated,

²⁷ See Bruce L. Hay, *Allocating the Burden of Proof*, 72 *Ind. L.J.* 651, 654 (1997).

²⁸ See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 *J. Legal Stud.* 307, 307–08 (1994) (“Accuracy is a central concern with regard to a wide range of legal rules. One might go so far as to say that a large portion of the rules of civil, criminal, and administrative procedure and rules of evidence involve an effort to strike a balance between accuracy and legal costs.”).

²⁹ See *id.* at 348.

³⁰ See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 *U.C. Davis L. Rev.* 85, 135 (2002) (“If an individual already knows that she will run some chance of being punished regardless of whether or not she engages in the activity, the cost of the sanction decreases.”).

³¹ See Rinat Kitai, *Protecting the Guilty*, 6 *Buff. Crim. L. Rev.* 1163, 1181 (2003).

³² See Kaplow, *supra* note 28, at 362.

another variable that must be taken into consideration is *error allocation*.³³ The criminal procedure and civil procedure systems diverge with regard to the allocation of risk of error between the litigating parties. The premise underlying criminal procedure is that wrongful convictions entail significantly higher costs than do wrongful acquittals, both for the defendants and for society at large. In light of this calculus, the criminal rules of procedure are aimed at reducing the likelihood of erroneous convictions³⁴ by compromising on the certainty of the innocence of the acquitted.³⁵ The rules allocate the risk of error between the defense and prosecution in a way that promotes errors in favor of the defendant (considered less costly) at the expense of errors in favor of the prosecution (which entail more substantial costs).³⁶

Likewise, in the civil sphere, the procedural rules and standard of proof affect the comparative frequency of each type of error (that is, errors in favor of the plaintiff and errors in favor of the defendant) and reflect the system's assessment of the social costs as-

³³ Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 *Colum. L. Rev.* 1369, 1406–07 (1991) (“[B]ecause no set of procedures can eliminate all erroneous outcomes, any conception of accuracy must also address how errors should be allocated as between erroneous convictions and acquittals.” (citation omitted)).

³⁴ See Lillquist, *supra* note 30, at 89.

³⁵ See David M. Appel, Note, *Attorney Disbarment Proceedings and the Standard of Proof*, 24 *Hofstra L. Rev.* 275, 277 (1995).

³⁶ See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. Legal Stud.* 399, 410–15 (1973); Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 *J. Legal Stud.* 27, 34 (1996). Assuming that the beyond a reasonable doubt standard of proof is set at a certainty level of 90 percent (probability of 0.9), the social damage inflicted by erroneously convicting an innocent defendant is considered to be about nine times costlier than the social cost of wrongful acquittal. See Lillquist, *supra* note 30, at 90. For further discussion on the desirability of quantifying the reasonable-doubt standard, see generally Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 *Colum. L. Rev.* 1716 (1990) (arguing that jury instructions defining reasonable doubt should always be given). But see Peter Tillers & Jonathan Gottfried, *United States v. Copeland*: 369 *F. Supp. 2d* 275 (E.D.N.Y. 2005): A Collateral Attack on the Legal Maxim that Proof Beyond a Reasonable Doubt Is Unquantifiable?, 5 *L. Probability & Risk* 135, 140–41 (2006) (arguing that the usual reasons given for the unquantifiability of reasonable doubt are unsatisfactory, with the recent case of *United States v. Copeland* serving as a reminder that there are strong considerations in favor of quantification of at least some standards of persuasion).

sociated with each type of error.³⁷ Unlike in the criminal context, however, the underlying assumption of civil procedure is that the two types of error entail equal costs. Undeserved losses are “equally regrettable,” whether incurred by the plaintiff or by the defendant.³⁸ This is what justifies and even necessitates that civil procedure be aimed at allocating the risk of error between plaintiff and defendant in a roughly equal manner.³⁹

B. The Egalitarian Justification

A second line of argument raised to justify the civil-criminal divide in procedure is based on egalitarian considerations. In our adjudicatory system, both civil and criminal disputes are resolved by a neutral umpire following an adversarial display of collected facts and the presentation of legal arguments by each of the parties. This system is lauded by many as the best way to arrive at an accurate and just resolution of legal disputes.⁴⁰ But the adversarial system has its Achilles’ heel: its inability to satisfactorily remedy potential inequalities between the parties.⁴¹ Because the adversarial system relies upon the parties to produce the facts, examine and cross-examine witnesses, and present legal arguments on their own behalf, the parties must be at least somewhat equally capable of making their cases for the system to function properly. If, due to a lack of resources, one party is unable to uncover evidence or is less skilled in developing legal arguments, the outcome might be skewed in favor of her better-equipped adversary.⁴²

³⁷ See Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 *Colum. L. Rev.* 1048, 1052 (1985) (citing *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)).

³⁸ Alex Stein, *Foundations of Evidence Law* 219 (2005).

³⁹ See Alex Stein, *The Refoundation of Evidence Law*, 9 *Can. J. L. & Jurisprudence* 279, 333–35 (1996). The slight tilt in favor of the defendant can be attributed to the fact that “‘taking’ is perceivable as being generally more harmful than ‘not giving.’” *Id.* at 335.

⁴⁰ See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 382–84 (1978).

⁴¹ See, e.g., Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 121–25 (2001); John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823, 843 (1985); see also Alan Wertheimer, *The Equalization of Legal Resources*, 17 *Phil. & Pub. Aff.* 303, 303–04 (1988).

⁴² See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1873–74 (2002).

Here, it is argued, lies a major difference between criminal and civil litigation. One of the defining aspects of the criminal process is that the government is invariably the plaintiff.⁴³ There are several features that distinguish litigating against the government from litigating against a private party. One is the asymmetry of power and resources between the parties. The government has at its disposal vast resources, trained police detectives and officers, and highly skilled counsel. It is able bring an enormous amount of pressure, formal and informal, to bear on the defendant. The government also sets the basic rules of the game for the entire citizenry. The defendant, in contrast, is an individual “unfamiliar with the practice of the courts, unacquainted with their officers or attorneys, often without means, and frequently too terrified to make a defense if he had one.”⁴⁴

Another facet distinguishing the government as plaintiff from private parties is that the former has a monopoly over the legitimate use of force.⁴⁵ It can exercise its policing authority to investigate the suspect, search and seize his property, and, in some cases, put him behind bars. This power, alongside other powers, is a mighty tool for securing information necessary for a successful prosecution. Therefore, procedural safeguards for the accused are required in criminal litigation in order to level the playing field and restore the balance of power (or, at a minimum, ameliorate the excessive inequality) between the government plaintiff and the defendant and, thus, to produce more accurate and just legal outcomes.

The civil process, by contrast, is typically presumed to be a dispute between two private parties who have roughly comparable capabilities. The civil paradigm assumes a context of fairly matched adversarial encounters.⁴⁶ Obviously, this assumption is not always

⁴³ See Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 *Cornell L. Rev.* 478, 505 (1974); Stuntz, *supra* note 10, at 27.

⁴⁴ *United States v. Shapleigh*, 54 F. 126, 129 (8th Cir. 1893).

⁴⁵ Stuntz, *supra* note 10, at 28.

⁴⁶ Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Chi. L. Rev.* 494, 513–15 (1986). The preponderance of the evidence standard in civil litigation reflects this assumption. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 *Geo. L.J.* 1743, 1761 (2005) (“By allowing the party with the better proof to prevail, [the preponderance of the evidence standard] treats the plaintiff and the defendant as equals. That makes it fair.”); Stein, *supra* note 39, at 333–38 (demon-

true. Frequently one party has an economic advantage over her adversary. Nevertheless, there is no systematic or structural bias in favor of either one of the parties. Unlike in the criminal process, in which the government is always at an advantage, in civil litigation, the potential imbalance of power is divided (more or less) equally between plaintiffs and defendants. In some cases, the plaintiff is better off, while in others, it is the defendant who has the upper hand. Accordingly, procedural fairness mandates that no special procedural safeguards and advantages be provided to either the plaintiff or the defendant. On the contrary, such procedural advantages and safeguards to one party at the expense of the other would constitute a serious breach of the equality principle and thus undermine due process.

C. The Expressive Justification

The third line of reasoning for the separation of civil and criminal procedure involves the expressive function of law. Expressive theories of law are concerned with the expression of collective attitudes through legal action.⁴⁷ The expressive function of criminal law is particularly potent. Criminal law embodies a central intersection between the individual and the state. It serves as a natural arena for clarification of, and reflection on, social values. Given that criminal law is the source of momentous social norms, its violation elicits strong collective disapproval. Criminal conviction

strating that the preponderance of the evidence standard, along with the general burden-of-proof doctrine, places equal risks of error on the plaintiff and the defendant and thereby promotes fairness).

⁴⁷ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1510 (2000). As a social practice, law has a significant expressive function. Law's expressivity can be understood in two distinct fashions. One is purely symbolic and nonconsequential. Many people support or object to law not for any consequential reasons (such as the law's deterrent effect), but due to its symbolic content, namely, the declaration it makes about the community's morals and values. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2022–23 (1996). The other facet to law's expressivity is consequential and relates to its power to shape, change, and reinforce social norms. Law's expressive function is manifested, in this sense, in its ability to influence normative behavior by making statements that create and sustain shared social norms, rather than controlling behavior directly. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 471 (1997). In this Article, we deal only with the consequential element of the expressive theory.

sends a message of condemnation of the offender on the part of the community in whose name the conviction is secured. The punishment imposed on the offender does not serve only retributive and deterrent purposes. Rather, it also operates expressively in its capacity as a device for communicating attitudes of resentment and indignation toward the convicted person and condemning his or her wrongdoing.⁴⁸ This expressive element is what distinguishes, according to philosopher Joel Feinberg, mere “penalties” or “price tags” from true “punishment.”⁴⁹ Indeed, punishment expresses collective disapproval of the offense and lays moral blame on the offender, which has a significant negative impact on his or her social status and reputation.

A significant distinction between civil and criminal law arises in this context. Civil liability and sanctions usually relate to conduct devoid of, or at least bearing low, moral culpability and, as such, are untainted by moral condemnation and stigma.⁵⁰ Criminal liability, in contrast, carries with it a powerful stigma, which is painful in and of itself, regardless of whether it is accompanied by deprivation of liberty or property.⁵¹ This stigma persists long after the sentence has been served and tends to spread from the stigmatized individual to his close relations.⁵² Indeed, from a purely instrumental perspective, the material or physical loss suffered by a party to a civil action can be as harsh as that incurred in the criminal process. One may lose more money in civil litigation or on the stock market than the amount of a fine imposed in criminal proceedings. The in-

⁴⁸ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 593 (1996).

⁴⁹ See Joel Feinberg, *The Expressive Function of Punishment*, in 4 *Philosophy of Law: Crimes and Punishments* 87, 88–89 (Jules L. Coleman ed., 1994).

⁵⁰ See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”); see also J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 Minn. L. Rev. 379, 406–07 (1976) (“One might conceptualize the difference between civilly and criminally labeled penalties by stating that most people see in civil penalties an element of deterrence, but not a very strong element of retribution or moral condemnation”); Steiker, *supra* note 7, at 805 (discussing the distinctive blaming function of criminal punishment).

⁵¹ Feinberg, *supra* note 49, at 400.

⁵² Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 30 (Jason Aronson 1974) (1963).

carceration of a defaulting debtor or the confinement of a witness in protective custody has physical aspects similar to the imprisonment of a convict.⁵³ The eviction of a tenant, the foreclosure of a home, the forfeiture of an asset, and certainly the removal of a child from parental custody are all severe sanctions imposed in the framework of civil proceedings. But there is a fundamental element that distinguishes all of these sanctions from criminal punishment: the blame and community condemnation associated with the infliction of criminal punishment.⁵⁴ Therefore, even if civil law could generate deterrence similar to that produced by criminal law, “it may not be able to perform as successfully the socializing and educative roles” because it would not provide the same moral directive that is associated with criminal law.⁵⁵

Based on this notion of criminal law as the locus of blame and stigma, Professor Carol Steiker offers a two-pronged rationale for the need to maintain a separate and more demanding procedural regime for the imposition of criminal liability and punishment.⁵⁶ First, she emphasizes that criminal punishment reinforces and even creates attitudes of moral condemnation toward the offender within her own community. Even more profoundly, criminal punishment has the capacity to reach inside the self and alter one’s self-perception, to persuade a person to accept and make one’s own the condemnation expressed by one’s conviction and punishment.⁵⁷ These features of criminal punishment are so detrimental to the individual and her autonomy that we must make sure they are not “inflicted erroneously.”⁵⁸ Thus, the rationale for placing substantial procedural barriers on the imposition of criminal liability is

⁵³ See George K. Gardner, *Bailey v. Richardson* and the Constitution of the United States, 33 B.U. L. Rev. 176, 193 (1953).

⁵⁴ See Feinberg, *supra* note 49, at 400.

⁵⁵ 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 (1992).

⁵⁶ Steiker, *supra* note 7, at 806–08. Steiker offers a third rationale that relates to the political threat to liberty inherent in criminal liability and punishment. *Id.* at 806. We address this third rationale in the following Section.

⁵⁷ See R. A. Duff, *Trials and Punishments* 233 (1986); see also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659, 1694 (1992) (arguing that punishment has the capacity to deliver a “profoundly humbling message” to wrongdoers).

⁵⁸ Steiker, *supra* note 7, at 807.

the crucial need to protect the individual from the harmful aspects of blame and stigma.

Second, Steiker argues that the blaming function of criminal law, despite its evident risk, is also what makes criminal law so valuable, for it enables the state to generate feelings of moral indignation toward the offense and the offender and convey them to the relevant community. For criminal punishment to be able to carry out its blaming and stigmatizing functions, it must be distinguishable from all the other sanctions that the government may impose on its citizens. Special procedures therefore protect criminal law from dilution, making it “more, rather than less, powerful.”⁵⁹

D. State-Centered Justifications

The fourth and final type of justification for the civil-criminal distinction focuses on the government that inflicts the punishment, rather than on the governed who incur it. State-centered justifications can be subdivided into two central arguments: the political oppression argument and the liberal state argument.

1. The Political Oppression Argument

The political oppression argument maintains that the imposition of criminal punishment *by the state* presents a particularly daunting political threat to liberty and therefore special procedural safeguards are required to prevent the state from abusing this power. Under this argument, criminal law offers special temptations for abusive political regimes as well as rent-seeking law enforcement officials,⁶⁰ which stems, in part, from the harsh penalties at the state’s disposal in criminal proceedings, including severe monetary sanctions, physical restraint, and occasionally capital punishment.⁶¹ The appeal of criminal law for a bad government, however, goes

⁵⁹ *Id.* at 808.

⁶⁰ Keith N. Hylton & Vikramaditya Khanna, A Public Choice Theory of Criminal Procedure, 15 *Sup. Ct. Econ. Rev.* 61, 72 (2007) (claiming that an additional justification for the pro-defendant bias in criminal procedure stems from the need to raise the costs for self-interested actors, whether individuals or government agents, to use the criminal process in order to enhance their own utilities).

⁶¹ Donald Dripps, The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction, 7 *J. Contemp. Legal Issues* 199, 204 (1996).

beyond the availability of such sanctions: the criminal justice system links the power to inflict pain with the authority of moral judgment, thus enabling the government not only to impose suffering but to do so with “a self-conscious attitude of moral superiority.”⁶² Penal sanctions have the capacity to enlist the community’s moral sense, holding the convicted person up to hatred, scorn, and moral condemnation. It is no wonder, therefore, that governments are tempted to abuse the criminal justice system. The administration of criminal punishment enjoys almost unanimous support in every society, providing the government with a powerful and legitimate instrument of coercive social control. If abused, criminal administration enables governments to eliminate political opposition in a way that is regarded as legitimate by the relevant political community.⁶³ Throughout history, the argument suggests, governments have exploited the criminal law apparatus to disable political opposition and unleash malice on members of identifiable groups, and substantive and procedural limitations on the criminal process emerged to respond to these temptations.⁶⁴

2. The Liberal State Argument

The second state-centered argument that a separate procedural regime is justified for the criminal law is to legitimize the exercise of state power. Any version of liberalism will insist on the individual’s moral standing and rights as an autonomous agent who is capable of deciding on her actions in light of her own conception of good. Such autonomous agents should be allowed to pursue their goals uninhibited by uninvited state interference.⁶⁵ The liberal state, for its part, is committed to ideological neutrality toward the different conceptions of good. Criminal law and criminal punishment constitute a significant exception to this principle and raise

⁶² Id.

⁶³ Id. Dripps argues that this explains why dictators with the power to make their opponents simply disappear prefer instead to use criminal trials to eliminate their adversaries. Examples include Hitler, who “exploited the Reichstag fire,” and Stalin, who “insisted on show-trials” for many of his victims. Id. at 205.

⁶⁴ Id. at 205–06.

⁶⁵ R. A. Duff, *Punishment, Communication, and Community* 36 (2001).

issues of political legitimacy.⁶⁶ By punishing a person, the state not only strips him of property and liberty or otherwise inflicts pain and humiliation, but it also brands him as morally culpable. In so doing, it acts in a way that exceeds its ordinary role and authority in a liberal democracy; it interferes with the autonomy of its citizens and engages in moral condemnation, a function regarded as alien to the liberal state. Professor Antony Duff argues that the state has a legitimate interest in preventing conduct that harms individuals and infringes on their rights, and it may use criminal law for that purpose, “[b]ut it has no such proper interest in its citizens’ moral character—in the condition of their souls; it should not use the coercive power of the criminal law as a means of moral reform to make its citizens morally better.”⁶⁷ Criminal procedure plays a vital role in legitimizing the state’s intervention in defendants’ autonomy and its infliction of moral condemnation. This *political* function of criminal procedure distinguishes it from civil procedure. Unlike its civil counterpart, the aim of the criminal process is not to settle a dispute between a plaintiff and defendant. Rather, criminal proceedings are intended to determine the right of the state to step outside of its ordinary role and ascribe moral culpability to citizens. Thus, a special and more rigorous procedural regime is required in order to legitimize the exercise of such extraordinary powers by the liberal state.⁶⁸

II. MODERN PROCEDURE AND ITS DISCONTENTS

Part I presented a survey of the four central lines of argument used to justify the dichotomy between civil and criminal procedure.

⁶⁶ See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buff. Crim. L. Rev.* 307, 310 (2004); see also Duff, *supra* note 65, at 35 (“A normative theory of punishment must include a conception of crime as that which is to be punished. Such a conception of crime presupposes a conception of the criminal law—of its proper aims and content, of its claims on the citizen. Such a conception of the criminal law presupposes a conception of the state—of its proper role and functions, of its relation to its citizens. Such a conception of the state must also include a conception of society and of the relation between state and society.”).

⁶⁷ Duff, *supra* note 65, at 36–37.

⁶⁸ See George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *Yale L.J.* 880, 888–90 (1968) (explaining that the heightened burden of persuasion in criminal trials is attributable to the need to justify the use of criminal sanctions as a means of moral condemnation).

This Part further explores these justifications, seeking to expose their limitations and to illustrate that the differences between the civil and criminal paradigms are in *degree* rather than in *kind*. As a result, these justifications fail to adequately account for the existing dichotomy in procedure.

A. The Utilitarian Justification Reconsidered

The traditional justification for the pro-defendant procedural bias in criminal trials, we claimed above, is rooted in the utilitarian calculus, according to which it is significantly more costly for society to erroneously convict an innocent person than to erroneously acquit a guilty defendant, with the disutility ratio traditionally set at about 9:1.⁶⁹ The beyond a reasonable doubt standard of proof reflects this calculus. In civil proceedings, by contrast, the disutility ratio is considered approximately 1:1, the assumption being that the costs of error in favor of the plaintiff are roughly equal to the costs of error in favor of the defendant.⁷⁰ Accordingly, in the civil context, a pro-defendant procedural bias cannot be justified, and the required certitude is appropriately set at the level of a preponderance of the evidence. Upon closer scrutiny, however, the assumptions underlying these disutility ratios emerge as incorrect with respect to a broad category of cases. These assumptions can be contested in relation both to the severity attributed to the criminal sanction and to the supposed leniency of the civil sanction. We shall start with the criminal side of the divide.

For the error-cost rationale to apply for the existing procedural regime, a false conviction must universally generate an exceedingly great social cost in all criminal case contexts. When criminal sanctions involve the denial of liberty, significant harm is justifiably ascribed to a false conviction, and the error-cost premise holds. However, many criminal convictions lead to the imposition of relatively lenient sanctions, such as fines or other forms of symbolic punishment.⁷¹ In this type of case, the disutility ratio of erroneous

⁶⁹ Lillquist, *supra* note 30, at 90.

⁷⁰ See Schauer & Zeckhauser, *supra* note 36, at 34.

⁷¹ See, e.g., Charles B. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 *Yale L.J.* 590, 591–93 (1977) (describing an example of imposing fines rather than incarceration for violations of antitrust laws).

convictions to erroneous acquittals is lower than in cases involving imprisonment. Based on the interaction between the standard of proof and the pro-plaintiff-error to pro-defendant-error calculus, in cases in which the potential sanction is a fine, a lower standard of proof would achieve optimal allocation of the risks and costs of error between the litigating parties. In other words, the utilitarian rationale does not offer adequate justification for applying enhanced procedural safeguards to cases in which the potential sanction is categorically lenient. Rather, such safeguards are appropriate under the utilitarian argument only in cases of a severe potential sanction, such as the deprivation of liberty.⁷²

The constancy of the disutility ratio between pro-defendant errors and pro-plaintiff errors attributed to the civil proceeding can also be disputed. Some categories of civil cases implicate interests that are as significant to one of the parties as those involved in criminal trials, while categorically less significant to the opposing party. Take, for instance, civil sanctions that lead to various forms of deprivation of liberty, such as civil contempt, civil commitment, and confinement under sexual predator laws.⁷³ In this category of cases, the disutility ratio is undoubtedly higher than 1:1. The expected harm to the individual facing, for example, confinement from an erroneous ruling against her is significantly greater than the expected harm to society at large from the reverse error. According to the utilitarian calculus suggested above, the structure of civil procedure should be based on an algorithm that weighs the costs of a mistaken ruling in favor of one party against the costs of a mistaken ruling in favor of the other party. A unitary civil procedure that allocates the risk of error equally between the parties is problematic because it does not allow for an optimal allocation of the risks and costs of error between the parties in a wide variety of civil cases.

⁷² For an alternative argument, that the sanction should depend on the certainty of guilt, see Henrik Lando, *The Size of the Sanction Should Depend on the Weight of the Evidence*, 1 *Rev. L. & Econ.* 277 (2005), available at <http://www.bepress.com/rle/vol1/iss2/art4>.

⁷³ See Mann, *supra* note 17, at 1798 (finding “rapidly expanding” punitive civil sanctions to be “sometimes more severely punitive than the parallel criminal sanctions for the same conduct”).

The categorical claim that the disutility ratio in civil cases is, by definition, more balanced than the disutility ratio in criminal cases is, therefore, a crude oversimplification. Determining the procedural regime according to the error-cost calculus does not conform to the boundaries of the current civil-criminal divide. As Kenneth Mann has asserted, “The criminal and civil paradigms attempt to abstract a set of traits from the complex and multifaceted nature of sanctions, in which substantial areas of overlap exist between civil and criminal law. Almost every attribute associated with one paradigm appears in the other.”⁷⁴ The utilitarian rationale cannot sustain the procedural divide because it fails to account for categories of civil cases where the disutility ratio is systematically higher than 1:1 and for categories of criminal cases in which the disutility ratio is lower than 9:1. The allocation of the risk of error, if it is to be based upon the severity and costliness of an erroneous outcome for each of the parties, must be fine-tuned and determined according to a different set of criteria.

B. The Egalitarian Justification Reconsidered

The second type of justification focuses on the parties to the litigation and their respective power and resources. It is argued that, in the criminal context, the asymmetry in power and resources between the government and the individual mandates special procedural safeguards to restore equality—or at least to ameliorate the inequality—between the parties. These safeguards are seen as important to attaining accurate and just legal outcomes. In contrast, all civil litigants are presumed to be more or less equally equipped. A procedural regime that guarantees equal allocation of the risk of error between the parties is therefore justified.

A closer look at the adversarial system of civil justice reveals, however, that the prevailing assumptions are not factually based. At all levels, the government is no stranger to civil litigation. In fact, the government files more civil claims than any other entity and is an equally frequent civil defendant.⁷⁵ Therefore, to the ex-

⁷⁴ Id. at 1804.

⁷⁵ In 1983, the United States was either plaintiff or defendant in 39.6% of the civil cases first brought in federal district courts. See Admin. Office of the U.S. Courts, 1983 Annual Report of the Director 5 tbl.5 (1984). In 1990, the United States was a

tent that we believe that the imbalance of power between the government and the individual justifies special procedural safeguards, these safeguards should apply not only to criminal litigation but also to the many civil actions in which the government is a party.⁷⁶

But the problem with the egalitarian justification runs much deeper. A procedural regime based on whether the government is a litigant makes sense only if we can identify certain characteristics, bearing significantly and systematically on the litigation, that distinguish the government qualitatively from all other types of litigants. What, then, makes litigating against the government uniquely different from litigating against a private party? The usual answer is that the government possesses numerous qualities that enable it to fare considerably better than any other party to litigation: it has vast resources and ample experience, and it is also the entity that sets the basic rules of the game. There is, however, growing reason to doubt the uniqueness of the government as a litigant. The argument is not that the government enjoys no advantage in litigation—it most certainly does—but that there are other classes of litigants besides the government who also enjoy such an advantage.

In his seminal work, “Why the ‘Haves’ Come Out Ahead,” Professor Marc Galanter famously set forth an analysis of the basic architecture of the American legal system and its structural limitations.⁷⁷ Galanter began by dividing the litigant world into two types: one-shotters (“OSs”) and repeat players (“RPs”). One-shotters are those who have only occasional recourse to the courts—in an automobile accident, divorce proceedings, or a quarrel with a neighbor. OSs are usually individuals; they tend to have fewer resources, and they litigate for immediate outcomes. Repeat players,

party in 25.8% of the civil litigation before federal district courts. See Admin. Office of the U.S. Courts, 1990 Annual Report of the Director 8 tbl.6 (1991). In 2000, the number was 27.4%, but, in 2005, it fell to 20.7%. See Admin. Office of the U.S. Courts, 2000 Annual Report of the Director 22 tbl.5 (2001); Admin. Office of the U.S. Courts, 2005 Annual Report of the Director 20 tbl.4 (2006).

⁷⁶ This is all the more true due to the special privileges enjoyed by the government in civil proceedings, such as the extended period of time for serving an answer. Fed. R. Civ. P. 12(a)(3).

⁷⁷ See Marc Galanter, Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change, 9 *Law & Soc’y Rev.* 95 (1974).

by contrast, are litigants involved in similar litigation over time.⁷⁸ Generally speaking, they differ from OSs in important respects. They are usually institutions, tend to be relatively wealthy, and, due to their size and resources, are able to pursue long-run interests. Consequently, RPs are less concerned with the outcome of a particular case.⁷⁹ Accordingly, Galanter claims, “[w]e should expect an RP to play the litigation game differently from an OS.”⁸⁰ This ability to play differently affords RPs substantial advantages that enable them to fare better in litigation. First, having been through many similar litigations, RPs are able to structure their next transactions and build a record. Second, because of their long-term involvement in litigation, RPs become skilled in the process, helped along, in no small part, by their ability to access specialists. Third, RPs have at their disposal economies of scale and enjoy low start-up costs for any case. Fourth, as they frequently make use of the system, RPs are able to develop helpful informal relationships with insiders and establish “bargaining reputation” within the system. Fifth, RPs can “play the odds.” Given their size and resources, the stakes at risk for RPs in any given litigation are likely to be relatively small. Therefore, they can adopt strategies calculated to maximize gains over a long series of cases, even when this involves the risk of maximum loss in some cases. Sixth, RPs are well positioned to play not just for immediate gains, but also for the very rules of the game in both the legislative arena (through lobbying efforts) and within the litigation framework itself.⁸¹ In short, according to Galanter, the exceptional advantages that give a significant edge to a particular party are not unique to the government and are enjoyed by other RPs as well. Many private entities, including financial institutions, insurance companies, and large corporations, can operate in the courtroom much the way the government does.

Subsequent empirical studies of trial and appellate courts have confirmed Galanter’s basic findings.⁸² Generally, these studies indi-

⁷⁸ Id. at 97–98.

⁷⁹ Id. at 98.

⁸⁰ Id.

⁸¹ Id. at 98–101.

⁸² Since the publication of Galanter’s analysis, his theoretical insights have spawned numerous studies examining the advantages of RPs over OSs in a wide variety of trial

cate that classes of litigants with the greatest resources and the lowest relative stakes at risk in litigation have the highest rates of success in both trial and appellate courts. Accordingly, all RPs fare substantially better than individuals, whose chances of winning a case against an RP both at trial and on appeal are quite slim.⁸³ A

and appellate courts. Generally speaking, these studies have confirmed Galanter's insights. A study of federal civil cases between the years 1971 and 1991 revealed that big business ("Fortune 2000" companies) had a success rate of 71% as plaintiff and 61% as defendant when facing all types of litigants in court, whereas nonbusiness litigants won only 64% of the time as plaintiff and a mere 28% of the time as defendant. See Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 *Law & Soc. Inquiry* 497, 558 (1996). Similarly, a study of diversity cases in federal courts found that in instances where litigants are of the same type (individual versus individual or corporate versus corporate), the plaintiff prevails 72% to 75% of the time; however, when corporate plaintiffs sue individuals, they win 91% of the time, and when individuals sue corporate plaintiffs, they win only 50% of the time. Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 *RAND J. Econ. (Special Issue)* S92, S103 (1997). More recent empirical work assessing Galanter's theory has focused on appellate courts at the state and federal levels. See Paul Brace & Melinda Gann Hall, "Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases, 35 *Law & Soc'y Rev.* 393 (2001); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 *U. Ill. L. Rev.* 947; Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 *J. Empirical Legal Stud.* 659 (2004). A recently published book was devoted to exploring the continued validity of Galanter's theory in contemporary civil litigation. See generally *In Litigation: Do the "Haves" Still Come out Ahead?* (Herbert M. Kritzer & Susan S. Silbey eds., 2003) [hereinafter *In Litigation*].

⁸³ See Donald R. Songer et al., *Do the "Haves" Come out Ahead over Time: Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, *in In Litigation*, supra note 82, at 93 (describing a study of decisions from all circuits in the U.S. Courts of Appeals for a sixty-four-year period between 1925 and 1988 and finding that the federal government had a net advantage of 25.6%, state and local governments had a net advantage of 15.6%, businesses had a net advantage of negative 2.8%, and, at the bottom, individuals, with a net advantage of negative 12.6%); see also Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Uppercourts and Underdogs in the United States Courts of Appeals*, 36 *Am. J. Pol. Sci.* 235, 241 (1992) (analyzing both the published and unpublished decisions of the U.S. Courts of Appeals and finding that the overall success rate of the government was roughly four times higher than the success rate of individuals and two and a half times the success rate of businesses). Several studies applying Galanter's theory to court decisions in other common law countries have generated similar findings. See, e.g., Burton M. Atkins, *Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal*, 35 *Am. J. Pol. Sci.* 881, 894-95 (1991) (surveying the English Court of Appeal and finding that the government enjoyed a 25% advantage over corporate litigants and corporations enjoyed a 14% advantage over individuals); Peter

recent study examining the differences between individual and organizational litigants in the disposition of federal civil cases (the rates of trial, settlement, and nontrial adjudication) revealed that the gap in relative success rates between OSs and RPs has not diminished over the years—in fact, the difference has increased.⁸⁴ Individual-plaintiff cases litigated against organizational entities are considerably more likely to end in a nonfinal termination (including voluntary dismissal, transfer, and remand). Individuals are also more likely to abandon their cases and substantially less likely to obtain default judgments.⁸⁵ Finally, individual-plaintiff cases are less likely to survive pretrial motions to dismiss or for summary judgment.⁸⁶ The OSs' unimpressive rates of success in litigation reflect also on their ability to succeed in out-of-court negotiations with RPs, for lack of a credible a priori threat to initiate litigation. To convince the RP of the sincerity of its intention to go to trial, an OS must invest large sums of money from the outset. As a result, cases brought by individuals are costlier to settle and thus more likely to be adjudicated than organizational-plaintiff cases.⁸⁷

This last point leads us to our final observation in this context. Although trials are becoming an endangered species,⁸⁸ we should still care a great deal about the rules of procedure governing in-court litigation. These rules affect not only court proceedings but also the bargaining process that occurs outside the courtroom.

McCormick, *Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992*, 26 *Can. J. Pol. Sci.* 523, 532 (1993) (describing a study of the Canadian Supreme Court revealing that government's net advantage was approximately 5% higher than that enjoyed by big business, 26% higher than the net advantage found for other businesses, and 30% higher than the success rate for individuals).

⁸⁴ Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 *Stan. L. Rev.* 1275, 1322 (2005).

⁸⁵ *Id.* at 1314–15.

⁸⁶ *Id.*

⁸⁷ See *id.* at 1317.

⁸⁸ See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. Empirical Legal Stud.* 459 (2004) (discussing declining trial frequencies). But see Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 *J. Empirical Legal Stud.* 705 (2004) (arguing that the primary shift in litigation over the past three decades has not been from trial to settlements but from bench trials to nontrial adjudications (that is, motions to dismiss and summary judgments)).

Bargaining does not transpire in a vacuum; it takes place “in the shadow of the law.”⁸⁹ Legal rules and procedures structure the bargain, governing what each party can expect to gain in litigation and giving each party certain bargaining chips—an endowment of sorts.⁹⁰ A simple example may be illustrative. Assume that in a dispute between an individual plaintiff and Microsoft, the rules of civil procedure give the defendant massive leverage in deposition and discovery, enabling it to conduct endless pretrial interrogations.⁹¹ Assume also that the grounds for summary judgment are extensive and that, under the relevant rules, the loser must pay for his oppo-

⁸⁹ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950 (1979); see also Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 *J. Legal Stud.* 575, 607 (1997) (arguing that the social utility of trials is to “provide victims with the threat necessary to induce settlements”).

⁹⁰ See Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, in *Sexy Dressing Etc.* 83, 87–89 (1993).

⁹¹ Unfortunately, this is not a figment of our imagination but the reality of our adversary system. In a well-known article, Robert Rabin looked at the adversarial techniques employed by the tobacco industry in suits brought against it by individuals who had contracted smoke-related illnesses and their families (a paradigmatic case of OS versus RP). The tobacco industry has never offered to settle in a single case. Instead, tobacco companies retain counsel from the most prestigious law firms and spare no cost in their attempt to exhaust their adversaries’ resources short of the courthouse doors. They take good advantage of the large arsenal of easily manipulated procedural mechanisms that our adversarial system offers:

They have done this by resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by getting confidentiality orders attached to the discovery materials they finally produce, thus preventing plaintiffs’ counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering, through written deposition, every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs’ counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.

William E. Townsley & Dale K. Hanks, *The Trial Court’s Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 *Cal. W. L. Rev.* 275, 277 (1989). It is therefore not surprising that, over roughly thirty-five years, plaintiffs “failed to gain a single clear-cut victory.” Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan. L. Rev.* 853, 854 (1992).

ment's attorneys' fees.⁹² In negotiations, the individual plaintiff subject to this regime would be willing to settle for much less than he actually deserves because the cost of litigation would be insurmountable and the stakes at risk in the event of defeat extremely high. Microsoft, for its part, would be either unwilling to settle at all or else willing to accept only a small settlement in the plaintiff's favor. Changing any of these legal rules would yield a significant effect on the bargaining outcomes by shifting the bargaining power from one party to the other. Thus, it is clear that to the extent that the inequality in power and resources between parties distorts the outcome of litigation, this distortion is not confined to the realm of litigation but, rather, spills over into the domain of settlement and other out-of-court agreements.⁹³ The advantages some classes of litigants enjoy in legal proceedings impact their ability to secure favorable settlements outside of the courtroom. Therefore, fair and just settlements are to a large extent dependent on fair and just rules of procedure.

In sum, any effort to construct an alternative to the traditional procedural regime must take into consideration not merely the types of cases (that is, civil versus criminal) but also *who* is bringing these cases and *who* is defending them. It is erroneous, however, to craft the rules of procedure based on a dichotomy between the government and private parties that fails to appreciate the complexity of the world of litigation. This world is comprised of different classes of litigants—individuals, small businesses, big businesses, and various branches of government—some of whom are OSs (and, therefore, “like individuals”) and others RPs (and, therefore, “like government”). The public-private dichotomy should, accordingly, be replaced with a regime that is sensitive to

⁹² As is the English rule.

⁹³ Owen Fiss argues that the disparity in resources between the parties influences the settlement process in three ways:

First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment . . . Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation . . . The indigent plaintiff is a victim of the costs of litigation even if he settles.

Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1076 (1984).

the significant differences between classes of litigants and their effects on litigation. Such a procedural regime would mould different sets of rules to govern the interactions between the various classes of litigants.

C. The Expressive Justification Reconsidered

The third line of argument for the civil-criminal divide in procedure relates to the expressive dimension of criminal law. The central distinctive aspect of criminal liability, it is argued, is the moral condemnation it engenders, which leads to the stigmatization of those found culpable. As civil law, however, generally deals with conduct devoid of fault, civil liability and sanctions do not communicate a similar message of blame, stigma, and moral condemnation.

The communicative function of criminal law has both negative and positive implications. On the negative side, the blame and stigma that accompany a criminal sanction are as much a threat to the liberty and autonomy of the individual as any deprivation of liberty or property. On the positive side, the condemnation of the offense and the offender expressed by criminal liability and punishment is a valuable function of criminal law and worthy of protection. Both of these aspects lead to the same conclusion: a special procedural regime is necessary to protect defendants from unjustified infliction of culpability and stigma and, at the same time, to prevent the dilution of criminal law's blaming function and maintain criminal punishment as an effective and powerful mechanism of social control.

This expressive justification, though very appealing, is equally misleading. In order to understand its erroneousness, two aspects of the argument, hitherto collapsed in the literature, should be distinguished: the expressivity of substantive law and its effect on the stigmatization of the offender, and the expressivity of the process itself. Accordingly, we divide our criticism into two parts. The first part argues that stigma, which epitomizes the communicative power of the law, is inconsistent with the civil-criminal divide and therefore expressive theories cannot descriptively account for the existing bifurcation. The second part points to the tautology inherent in the expressive justification, which emanates from the expressive power of procedure. These two lines of criticism, taken to-

gether, lead to the inevitable conclusion that the expressive argument fails to justify the civil-criminal divide in procedure.

1. The Expressivity of Substantive Law and Its Effect on Procedure

It is commonly held by criminal law theorists that the substantive civil-criminal distinction is fuzzy and “muddled” and became increasingly so over the final decades of the twentieth century.⁹⁴ Two complementary developments have contributed to this phenomenon: the “criminalization” of civil law, reflected in the increased use of punitive damages as well as other previously criminal sanctions, and the “civilization” of criminal law, reflected in the propensity to criminalize behavior previously regarded as civil or regulatory in character.⁹⁵ Criminal law is no longer (if it ever was) unique in terms of what behavior it punishes, nor in terms of the types of deprivations it imposes on offenders.⁹⁶ Numerous types of conduct are violations of both criminal law and civil law, and deprivation of liberty and property characterizes both civil and criminal sanctions.⁹⁷ Thus, it became much more difficult to justify the distinction between the civil and criminal spheres. It should come as no surprise, given this background, that the expressive theory made such a big splash within legal academia, especially among criminalists, for it offered the only means of distinguishing criminal liability and sanctions from civil ones, when all other ways had proven unsuccessful.⁹⁸

⁹⁴ Robinson & Darley, *supra* note 47, at 479.

⁹⁵ *Id.*; see also John C. Coffee, Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 216 (1991).

⁹⁶ See, e.g., Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1394 (1993) (arguing that the conventional wisdom that civil law provides victims with compensation while criminal law inflicts punishments on wrongdoers is simply erroneous and that there are many “forms of legally recognized noncriminal or ‘civil style’ punishments that are as basic to social and legal life as criminal punishment”).

⁹⁷ Paul H. Robinson, The Criminal-Civil Distinction and Dangerous Blameless Offenders, 83 J. Crim. L. & Criminology 693, 693–94 (1993).

⁹⁸ See, e.g., Sanford Kadish, The Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423 (1963), *reprinted in* Blame and Punishment: Essays in the Criminal Law 40, 51 (1987) (“The central distinguishing aspect of the criminal sanction appears to be the stigmatization of the morally culpable.”).

Unfortunately, the expressive theory does not succeed at carrying its heavy load. Explaining the procedural divide as based on the stigmatizing aspect of criminal liability as opposed to the nonstigmatizing effect of civil liability is untenable. Not all conduct defined in the books as a crime in fact bears stigma, certainly not to the same extent. Similarly, numerous behaviors not defined as crimes by the legislature do carry stigma, sometimes quite acute. Consequently, we cannot count on stigma per se as a tool to distinguish civil from criminal law.

The interrelation between crime and stigma is complex and convoluted because the two concepts are of a distinctly different kind. Crime is a legal concept. Legislators have absolute discretion to decide which behaviors are classified as crimes and which are not.⁹⁹ Stigma, in contrast, is a sociological phenomenon. It emanates from social norms and involves the messy routines of social intercourse, which are much harder to anticipate, let alone control or manipulate.¹⁰⁰ Nevertheless, there is significant interaction between crime and stigma. Law has the power to influence tastes and alter preferences,¹⁰¹ and criminal law plays a particularly important role in shaping and altering social norms. It is a source of moral authority, the forum where the community expresses its shared values and

⁹⁹ Professor Bill Stuntz suggests constitutionally restricting the legislature's authority to define new crimes. Stuntz, *supra* note 10, at 2.

¹⁰⁰ The best exposé of stigma to date has been offered by sociologist Erving Goffman in his well-known book, *Stigma: Notes on the Management of Spoiled Identity*. Goffman, *supra* note 52. Goffman defines stigma as "an attribute that is deeply discrediting," but does not envision it as a stable and fixed attribute. *Id.* at 3. Rather, for him, stigmatization is contextual and relational, arising out of a particular configuration of attributes and social expectations. It is possible, therefore, that a characteristic would be stigmatizing in one context or to a certain group but not in a different context or to a different group. Goffman provides the following example: "the shoulder patches that prison officials require escape-prone prisoners to wear can come to mean one thing to guards, in general negative, while being a mark of pride for the wearer relative to his fellow prisoners." *Id.* at 46. Moreover, the capacity of a certain attribute to stigmatize fluctuates over time. Being an upper-middle-class divorcee in nineteenth-century America carried a stigma at the time, whereas today the same status is a benign social fact. *Id.* at 32.

¹⁰¹ Tracey L. Mears et al., *Updating the Study of Punishment*, 56 *Stan. L. Rev.* 1171, 1179 (2004); see also Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *Duke L.J.* 1, 1 (arguing that the criminal law assists in reducing crime by "shaping the individual's preferences by increasing her taste for desired behavior"); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. Chi. L. Rev.* 1129, 1146 (1986).

beliefs as to what is condemnable.¹⁰² Hence, the criminalization of a certain conduct signals to the relevant community that the conduct deserves moral condemnation and can set in motion a process that leads to the stigmatization of that conduct. Similarly, increasing the sanction imposed on a criminal activity (say, changing the sanction for air pollution from a fine to imprisonment) sends a message to the public that the conduct in question is morally condemnable to a higher degree than most people had thought until then.

This is, however, only half the story. The other side, arguably the more important one, is that social norms dictate, to an extent, criminal law and policy.¹⁰³ Criminal law rules do not, indeed cannot, create social norms out of thin air; they can do little more than contribute to existing normative forces. The government can generate a change in social norms only when society is in part open to that change.¹⁰⁴ Thus, “[p]assing a statute that criminalizes new conduct does not itself cause that conduct to be perceived as immoral” by the relevant community.¹⁰⁵ In fact, if the law “strays too far” from prevailing social norms, it will become self-defeating because the public will lose its respect for the law and those violating it will not be stigmatized.¹⁰⁶ Many understand the predicament of modern criminal law in this context. The rise of the administrative state and the strong trend toward criminalizing regulatory offenses has led to

¹⁰² Robinson & Darley, *supra* note 47, at 474.

¹⁰³ Paul Robinson has stressed this point in many of his books and articles. See, e.g., Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (1995); Robinson & Darley, *supra* note 47, at 473–74; Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 *Va. L. Rev.* 1839, 1839 (2000).

¹⁰⁴ Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943, 1030 (1995).

¹⁰⁵ Robinson & Darley, *supra* note 47, at 481; see also Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 *Buff. Crim. L. Rev.* 679, 718 (1999) (“Some criminal punishments, such as the Texas misdemeanor of driving with an open beer bottle, are considered petty by most people and are thus not particularly stigmatizing.”); Stuntz, *supra* note 10, at 26 (“In a state that criminalizes the riding of bell-less bicycles, the criminal label will soon lose its punch.”).

¹⁰⁶ William J. Stuntz, *Self-Defeating Crimes*, 86 *Va. L. Rev.* 1871, 1872–73 (2000). Stuntz offers examples of three kinds of crimes that might prove self-defeating. The first is vice crimes such as prostitution, gambling, and drug use, with Prohibition the most notable instance. The second example is contemporary white-collar crimes. The third example is abortion. *Id.*

the astonishing legislation of more than 4,000 federal crimes.¹⁰⁷ The problem with such overcriminalization from an expressive point of view is that the conducts defined as criminal have extended far beyond society's understanding of what is condemnable. As a result, "the meaning of 'criminal liability' becomes incrementally less tied to blameworthiness and incrementally less able to evoke condemnation."¹⁰⁸ In sum, there are two interrelated, yet distinguishable, layers to this predicament: First, certain conducts labeled as criminal do not in fact carry stigma since they are not perceived by the community as morally condemnable. Second, as a result of the addition of many such "crimes" to the criminal code, the meaning of criminal liability in general has been diluted.

Just as passing a statute criminalizing certain conduct does not create a social norm that stigmatizes the conduct, so failing to pass a law prohibiting a conduct that is morally repugnant to the community cannot make that conduct morally acceptable.¹⁰⁹ Abortion and adultery are conducts that many Americans find morally wrong despite the fact that criminal law does not prohibit them.¹¹⁰

¹⁰⁷ Baker, *supra* note 8, at 3; see also Coffee, *supra* note 95, at 216 (citing a study by Stanley Arkin according to which there are over 300,000 federal regulations that may be enforced criminally).

¹⁰⁸ Robinson & Darley, *supra* note 47, at 481; see also John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 *Am. Crim. L. Rev.* 111, 112-13 (1996) (arguing that contemporary criminal law cannot be fairly characterized as a moral system that condemns blameworthy choices, but, rather, to a substantial degree, as punishing transgressions without reference to personal culpability); Renfrew, *supra* note 71, at 603-04. Judge Charles Renfrew interviewed a group of business people and asked them to reply to several questions regarding violation of antitrust laws, including whether antitrust violators should be imprisoned. Representative answers included the following: "They broke the law but they are not 'criminals' in the true sense of that word;" "I think the laws and the judges should concentrate more on putting criminals in prison and keeping them there, than sending taxpayers to prison;" and "[Imprisoning antitrust violators would be a] gross miscarriage of justice." *Id.* But see Coffee, *supra* note 55, at 1889 ("[T]he limited empirical evidence on public attitudes toward white-collar crimes suggests that the public learns what is criminal from what is punished, not vice versa.").

¹⁰⁹ Robinson & Darley, *supra* note 47, at 473.

¹¹⁰ It is possible that passing a law criminalizing these types of conduct would contribute to their increased repugnancy in the eyes of the community. If we take Stuntz's argument about self-defeating crimes seriously, however, criminalizing these conducts could have the countereffect of galvanizing opposition to such crimes and thus would dilute their stigmatizing force. "Sometimes," Stuntz argues, "the best way for the legal system to advance or reinforce norms may be to ignore them." Stuntz, *supra* note 106, at 1873.

Accordingly, the civil process is fraught with behaviors that impose stigma on the actors. One example is the termination of parental rights: parents whose rights are terminated by the state are subject to a severe stigma that “reflects the judgment of blame that universally underlies a decision to terminate parental rights.”¹¹¹ Civil commitment and confinement under sexual predator laws are another example. Not only do the civilly committed “lose their right to be free from state-imposed confinement[,] but [they] also are stigmatized as mentally ill,” which is no less damaging to them as individuals and to their autonomy than being labeled as a criminal.¹¹² Likewise, a lawyer’s debarment or a physician’s loss of license has a detrimental effect on his respective social status and reputation. The civil forfeiture of an individual’s residence or other assets is obviously quite stigmatizing.¹¹³ Lastly, losing one’s residence due to bankruptcy is also a stigmatizing event. In a society in which the assessment of personal worth is grounded in the belief that “bad things happen to bad people” and in which being poor is

¹¹¹ David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 *Ariz. L. Rev.* 753, 782–83 (1999); see also Rachel Mallory Leitzé, *In re: Samantha C.: Civilizing Civil Proceedings Through Full Incorporation of the Fifth Amendment Privilege Against Self-Incrimination*, 19 *Quinnipiac Prob. L.J.* 111, 125 (2005) (“[A] hearing to terminate parental rights, while classified as a ‘civil proceeding,’ carries stigma akin to that of a criminal conviction[.]”); Colleen McMahon, *Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings*, 39 *Cath. Law.* 153, 160 (1999) (“[P]arents facing loss of custody based on sexual abuse accusations face similar risks, particularly with respect to the stigma which immediately attaches.”). The Supreme Court acknowledged the heavy stigma visited upon parents in termination of parental rights cases and therefore enhanced the procedural safeguards in such cases. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 118, 124 (1996) (acknowledging the stigmatizing effect of termination of parental rights in holding that due process requires a waiver of fees if necessary to enable an indigent parent to appeal); *Santosky v. Kramer*, 455 U.S. 745, 756, 768–70 (1982) (acknowledging the stigmatizing effect in holding that due process requires that grounds be proved by clear and convincing evidence); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (acknowledging the stigmatizing effect in holding that due process may require appointment of counsel in some cases).

¹¹² Brian J. Pollock, Note, *Kansas v. Hendricks: A Workable Standard for “Mental Illness” or a Push down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 *Ariz. L. Rev.* 319, 320 (1998); see also Dripps, *supra* note 61, at 215 (“[T]he stigma associated with lunacy is comparable to that associated with criminality.”). The Supreme Court has recognized the severe stigma that attaches to civil commitment. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (noting that the stigma imposed by civil commitment can have “a very significant impact on the individual”).

¹¹³ Klein, *supra* note 105, at 718.

considered morally dubious, the emotional and social consequences of bankruptcy cannot be overstated. Bankruptcy is viewed by most as a signal of failure and irresponsibility, which brings with it a significant loss of esteem.¹¹⁴

Moreover, with the legislature's increasing use of civil penalties to augment social control, the public comes to associate these civil penalties with conduct that is morally wrong.¹¹⁵ Punitive damages, sometimes awarded to the plaintiff in civil actions, are one case in point. Such damages are an overt way of deterring and condemning the injurer.¹¹⁶ As argued by Joel Feinberg, "What more dramatic way of vindicating his violated right can be imagined than to have a court thus forcibly condemn its violation through the symbolic machinery of punishment?"¹¹⁷

Since the expressive justification for the civil-criminal procedural separation rests on the power of criminal law to condemn offenders, the more crimes on the books that fail to stigmatize their violators and the greater the incidence of stigmatization in the context of civil proceedings, the less compelling the expressive justification.

2. *The Expressivity of Procedure*

The expressive justification asserts a need for two separate sets of procedure not only to protect people from the wrongful infliction of stigma, but also to sustain the blaming function of a criminal

¹¹⁴ See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 *Theoretical Inquiries L.* 365, 377–80 (2006) (citing studies from the late 1990s and early 2000s suggesting that stigma remains an important factor in preventing many individuals from filing for bankruptcy). Probably the most dramatic manifestation of the severe stigma that bankruptcy carries can be gleaned from one of the findings of a series of surveys conducted during the last thirty years of the twentieth century that a significant number of respondents (8%) believed that bankruptcy is a valid reason for committing suicide. Library Index, *Public Opinion About Life and Death—Suicide*, <http://www.libraryindex.com/pages/610/Public-Opinion-About-Life-Death-SUICIDE.html> (last visited Jan. 21, 2008) (citing 2002 National Opinion Research Center survey). Respondents were asked to respond to the following question: "Do you think a person has the right to end his or her own life if this person has gone bankrupt?"

¹¹⁵ Clark, *supra* note 50, at 408.

¹¹⁶ *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 426 (2003) (noting that a central role of punitive damages is to condemn conduct leading to outrage and humiliation).

¹¹⁷ Feinberg, *supra* note 49, at 408; see also Galanter & Luban, *supra* note 96, at 1428 ("[Punitive damages are] the most important instrument in the legal repertoire for pronouncing moral disapproval of economically formidable offenders.").

conviction. A procedural regime that treats civil and criminal cases alike would risk diluting the expressive value of the criminal conviction and impairing the state's ability to use criminal law as a mechanism to condemn the culpable. Criminal conviction, so the argument goes, constitutes a valuable social label precisely because a unique procedural regime sets it off as a special site at which criminal law's blaming function can be executed.¹¹⁸

The expressive justification, however, is undermined by circular reasoning. Beyond its role in determining criminal liability, the criminal process has a communicative function. Criminal procedure reflects society's normative ideals as to what is a fair and just process for the conviction of a criminal. The application of heightened procedural standards assists in the realization of criminal law's expressive objectives in two distinct ways: At the outset, the very application of these standards reflects the social preference for undeserved acquittals over wrongful convictions.¹¹⁹ More importantly, criminal procedure preserves the stigmatizing effect of the criminal conviction; it guarantees maximal exactitude in conviction as reflecting *de facto* guilt and thus preserves the ability of the criminal trial mechanism to communicate moral blame and generate indignation toward a person and behavior defined as criminal. The expressive argument must, therefore, be reformulated as follows: a criminal conviction constitutes a valuable sign of social condemnation not only because it is set off by a *separate* procedure, but also because the procedure by which conviction is secured is *more demanding* and renders criminal branding more accurate.¹²⁰ The heightened standards of criminal procedure guarantee a high level of certitude in convictions, which is a prerequisite for the effective functioning of criminal law as the locus of blame and moral condemnation. The elimination of the civil-criminal divide would adversely affect the value of the institution of criminal convictions due to the lowering of the procedural bar.

¹¹⁸ Steiker, *supra* note 7, at 808.

¹¹⁹ See generally Barbara A. Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 *Stan. L. Rev.* 1133, 1140 (1982) (claiming that criminal trial symbolizes community values).

¹²⁰ In fact, Carol Steiker agrees that it is not enough that the civil and criminal procedural regimes would be separated but also that criminal procedure should be *more demanding* than civil procedure. Steiker, *supra* note 7, at 808.

This would necessarily entail a loss of legitimacy and, thus, diminish the expressive function of a criminal conviction.

This reformulation of the expressive argument exposes its circular nature: in order to protect the blaming function of criminal law and sustain the stigmatizing power of criminal conviction, a more demanding procedure is required, but, at the same time, the more demanding procedure is itself the basis for the heavier stigma costs embodied in the criminal branding. In other words, this line of argument seeks to justify the bifurcation of procedure into civil and criminal by referring to the expressive value of criminal conviction, while that very value is, in fact, contingent upon the level of accuracy (namely, the probability of wrongful convictions), which is derived from the type of procedure in use.¹²¹

D. The State-Centered Justifications Reconsidered

The final type of rationale for the civil-criminal distinction focuses on the state and its unique powers and obligations. As we saw, state-centered justifications can be divided into two basic types of arguments: the one revolves around the exceptional dangerousness of the state if left unchecked and the other around the need to legitimize the liberal state's extraordinary actions in the criminal sphere.

1. The Political Oppression Argument

The political oppression argument, advocated most powerfully by Professor Donald Dripps, asserts that the fact that *the state* has the sole authority to impose criminal punishment constitutes a tremendous political threat to liberty. Since governments have, in the past, tended to exploit their vast criminal law powers to disable opposition and target certain identifiable groups,¹²² special procedural safeguards are necessary to curb these powers and prevent their abuse.

¹²¹ See Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 *J. Crim. L. & Criminology* (forthcoming 2008).

¹²² Dripps, *supra* note 61, at 204–05; see also Galanter & Luban, *supra* note 96, at 1457–58.

The fallacy of this claim, along with the analogous public choice argument,¹²³ lies in the fact that the criminal apparatus is not the sole mechanism that can be used for rent-seeking purposes or in order to oppress and disable political adversaries. A regime that seeks to squash opposition or express malice toward a given group can just as easily resort to civil sanctions that are materially indistinguishable from, and sometimes even more onerous than, criminal sanctions. Moral condemnation and stigma accompany not only criminal sanctions but civil sanctions as well. Deportation, commitment to a mental institution, administrative detention, and termination of parental rights are all civil sanctions that are both painful and stigmatizing.¹²⁴ It is the ability to apply these mechanisms easily through the civil system, and thus stay below the public radar, that makes them attractive to bad governments. The claim that some governments are sadistic and would therefore find satisfaction only in inflicting pain through the criminal process¹²⁵ is unconvincing and unsupported by historical evidence. To the contrary, as Dripps himself admits, totalitarian regimes have often resorted to civil mechanisms to silence their political adversaries, confining them to mental institutions or placing them in administrative detention.¹²⁶ Indeed, a government interested in removing opposition would likely use any tool at its disposal, civil or criminal.

Dripps's argument, after some of the rhetoric has been peeled away, is no more than a combination of the utilitarian and expressive arguments. It is the severity of the sanction accompanied by the power of blaming that makes criminal sanctions tempting to the bad government and hence Dripps himself concedes that "if a great many examples of civil proceedings that would tempt a bad government can be identified, the civil-criminal distinction may have to be surrendered."¹²⁷ Since governments make use of both the criminal and civil apparatuses for political oppression, procedural protections need to be applied not only in the criminal sphere

¹²³ See generally Hylton & Khanna, *supra* note 60.

¹²⁴ See *supra* text accompanying notes 109–17.

¹²⁵ Dripps, *supra* note 61, at 209.

¹²⁶ *Id.* at 215–16.

¹²⁷ *Id.* at 215. Dripps's argument could provide a justification for a distinction between litigation to which the government is a party and litigation to which it is not, but not for the civil-criminal divide.

but also in civil proceedings to which the state is a party and that may cause severe harm to the individual.

2. *The Liberal State Argument*

Under the liberal state argument, the state's use of its criminal apparatus to mete out punishment is something that does not sit well with the concept of a liberal democracy. According to conventional wisdom, criminal liability is unique in that it "reflect[s] moral blameworthiness deserving condemnation and punishment," something that civil liability does not necessarily convey.¹²⁸ By engaging in moral condemnation, the state encroaches on the autonomy of its subjects and tries to reform them, a task that the liberal state, with its ideological commitment to value neutrality, is not supposed to do. Since blaming is an essential element of criminal law and doing away with it would, therefore, be not only impossible but also undesirable,¹²⁹ more rigorous and exacting procedure is necessary to legitimize instances of the exercise of these extraordinary powers. It is noteworthy that, unlike the other rationales presented, the liberal state argument for the civil-criminal divide is nonconsequential. Indeed, it does not focus on—is not even interested in—the harm caused to the individual by criminal conviction or punishment (which could be trivial or nonexistent) but, rather, focuses only on the need to justify the state's actions.

There is, however, a deep sense in which the liberal state argument fails: the idea that the state uses its coercive power to impose certain values and promote a specific conception of good only in criminal law, and not in civil law, is simply and plainly wrong. The origins of this erroneous conception lie in the liberal ideology's deep commitment to the notion of value subjectivity. Value subjectivity understands values (beliefs as to what goals are worthy of pursuit) to be no more than arbitrary tastes and preferences.¹³⁰ A

¹²⁸ Robinson, *supra* note 97, at 694.

¹²⁹ For discussion of the expressive justification, see *supra* text accompanying notes 47–59; see also Robinson, *supra* note 97, at 697–98 (arguing that the Supreme Court's tendency to impose constitutional limitations on civil commitment reflected in *Foucha v. Louisiana*, 504 U.S. 71 (1992), is dangerous because allowing the conviction of blameless persons undercuts the criminal law's moral credibility, and without moral credibility, criminal law would lose much of its power as a mechanism of compliance).

¹³⁰ See Mark Kelman, *A Guide to Critical Legal Studies* 64–65 (1987).

commitment to value subjectivity implies a “facilitative” end-neutral state that does not seek to promote any particular vision of the good life but simply facilitates people in pursuing their preferences and desires.¹³¹ The fundamental problem with such a political theory is that it places at odds two crucial components of any democratic regime: freedom and order. If freedom allows all individuals to strive for their subjectively chosen ends, it must permit the pursuit of unconstrained selfish desires, which inevitably conflict with those of others. One person’s desire to rape necessarily clashes with another’s preference not to be raped. In a world in which values are regarded as nothing more than subjective preferences, there would be no ground rule favoring one preference over another. Such a regime would yield, of course, a “Hobbesian war of all against all.”¹³²

The compromise liberals reach is to divide the world into two spheres, the public and the private. They do not deny state coercion a place in this world entirely but claim that it is limited to the public sphere, which can be clearly distinguished from the private sphere. In the public sphere, the state can legitimately place certain constraints on the individual’s conduct. Criminal law is, of course, a prime example. The state has a legitimate interest in preventing conduct that harms other individuals and infringes on their rights, and it may use criminal law for that purpose.¹³³ The private sphere, in contrast, is where the commitment to value subjectivity and the idea of the state’s end-neutrality is most pronounced. The state must refrain from passing value judgments or otherwise interfering in the affairs of the private sphere. It is essential, therefore, for liberals to maintain a strict boundary between the public and the private.¹³⁴

Ever since the formulation of legal realism, critical scholars as well as contemporary liberal scholars have argued against the tenability of such a separation.¹³⁵ The state, they posit, most certainly

¹³¹ *Id.* at 66.

¹³² *Id.*

¹³³ Duff, *supra* note 65, at 36–37.

¹³⁴ See Kelman, *supra* note 130, at 102–03.

¹³⁵ We refer here to such scholars as Joseph Raz, Willam Galston, and Stephen Macedo. See Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 263–65 (1990); Joseph Raz, *The Morality of Freedom*

uses its coercive powers to impose certain values and promote specific conceptions of good not only in the public sphere but also in the private sphere.¹³⁶ In fact, coercive state action in the private realm is inevitable. Even contract law, in which the liberal commitment to the idea of freedom and subjective end-seeking is most pronounced, is not immune to such criticism. The belief that there is a private domain, dominated by consensual contracts, is contingent on ignoring the extent to which the state regulates the ground rules that hinder one's ability to induce others to contract. Express contracts become "express" only when a court (an agent of the state) has made a political and moral decision to treat certain parties' expressions of intention as binding.¹³⁷ A decision by the state to give public force to promises made by unmarried cohabiters transforms legally empty words of commitment into binding contracts. It is, thus, a political decision imbued with collective values. There is no way to conceive such a decision other than as a coercive state action informed by collective attitudes about the proper nature of the particular relationship.¹³⁸

The reason that the role of values and morality in the private sphere is obfuscated is that we are used to perceiving only rules of prohibition, and not rules of permission, as ground rules.¹³⁹ In reality, private law sets the rules of the game by which people seek their goals. It influences behavior not by telling people what to do and what to refrain from doing, as criminal law does, but by providing the background for the realm of possibility—that is, prescribing what people can and cannot get away with in their dealings with others. Thus, the ostensibly nondirective rules of property,

(1986); William Galston, *Defending Liberalism*, 76 *Am. Pol. Sci. Rev.* 621, 627–29 (1982).

¹³⁶ See, e.g., Macedo, *supra* note 135, at 50–65. Macedo criticizes Rawls's argument that the greatest moral question can be ignored in politics and that liberals can avoid assessing the truth and falsity of deeply held personal views. He argues instead that

[t]he personal moral convictions of citizens and other political actors should be engaged, as features of our public moral framework are worked out. Public justification involves not a rigid segmentation of public and private spaces of value, but a process of negotiation between shared public values and each person's entire set of values.

Id. at 63.

¹³⁷ See Cohen, *supra* note 23, at 839–40.

¹³⁸ Kelman, *supra* note 130, at 105.

¹³⁹ Kennedy, *supra* note 90, at 90.

tort, and contract impact the social order even though they neither compel nor forbid.¹⁴⁰ Consequently, the coercive role of the state in private law and its intervention in individual autonomy undercut the liberal state argument for the civil-criminal divide.

E. Summary

None of the four types of justifications for the civil-criminal divide in procedure can withstand the criticism directed at it. The conclusion that arises from our analysis in this Part is that the differences between the civil and the criminal paradigms are of degree rather than kind: there are *more* criminal cases that impose high costs and stigma on the defendant than civil cases that do so. In criminal trials, the state is *invariably* the moving party, while, in civil litigation, this is only sometimes the case. A bad government will find *more* criminal mechanisms to serve its malicious ends than civil mechanisms, and so on. The number of civil cases that fit into the criminal paradigm, and vice versa, is, however, large enough to give rise to significant doubts about the dichotomous approach.¹⁴¹ Therefore, if we are to remain true to the goals of equality, due process, and efficiency, we must either find new ways to justify the civil-criminal divide or, alternatively, abandon it altogether and seek new analytical foundations for procedure that are more in line with its goals and values.

III. THE CIVIL-CRIMINAL PUZZLE: COMMENTS ON THE LITERATURE

The conceptual and normative pitfalls inherent in the existing bifurcated procedural regime have not gone unnoticed in the literature. To maintain this dichotomous system, it is essential to be able to clearly distinguish the civil from the criminal. Over the years, however, as the number of civil statutes imposing sanctions traditionally thought of as criminal has risen and the regulatory function of criminal law has expanded, this has become an increasingly difficult, if not impossible, task. Litigation over the application of

¹⁴⁰ Id. at 119.

¹⁴¹ See Mann, *supra* note 17, at 1804 (“[P]unitive sanctions . . . are paradigmatically associated with the criminal law, but now characterize so much of the civil law that punishment no longer seems a distinctive attribute of the criminal law.”).

criminal procedural protections to actions labeled by Congress as civil began to intensify in the mid-twentieth century and further accelerated toward the end of the century. The Supreme Court was called upon time and time again to determine the appropriate procedure for such diverse matters as deportation, loss of citizenship, loss of license, debarment, termination of parental custody, juvenile delinquency, civil commitment, pretrial detention, forfeiture, civil fines, increased tax assessment, and civil contempt.¹⁴² With the breakdown of the civil-criminal boundaries, growing normative concerns have arisen regarding both efficiency and deprivation of due process. If, on the one hand, the parameters of the criminal sphere are too broad, then the costly and time-consuming criminal procedure will be brought into a wide range of proceedings, placing an impossible burden on the state budget and impairing the state's ability to bring wrongdoers to justice. If, on the other hand, it is defined too narrowly, then the important values underlying criminal procedural protections will be sacrificed and, again, justice will be obstructed.¹⁴³ Many attempts have been made, by both jurists and legal scholars, to offer a fair, efficient, and workable test for distinguishing civil from criminal cases that would clearly indicate when it is appropriate to apply enhanced procedural safeguards. In what follows, we describe in brief the laudable, yet largely unsuccessful, attempts at resolving this civil-criminal puzzle.

A. Identifying Punitiveness: An Exercise in Futility

The solution most frequently raised for the civil-criminal procedural challenge is to reframe the question: instead of asking whether a given law or sanction has been formally labeled "criminal" or "civil," many suggest examining its purpose. Conventional wisdom tells us that the purpose of the civil system is compensatory or remedial (that is, to redress concrete losses), whereas the purpose of the criminal system is to punish past wrongdoings.¹⁴⁴ Under this approach, sanctions that serve remedial purposes are civil in nature and thus warrant no special procedural protections, whereas those aimed at punishing are criminal in nature and therefore merit

¹⁴² Steiker, *supra* note 7, at 779.

¹⁴³ Cheh, *supra* note 9, at 1330.

¹⁴⁴ See, e.g., *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 416 (2003).

heightened procedural safeguards, regardless of how Congress chooses to label them.¹⁴⁵ Had the legislature indeed shaped substantive criminal law in line with its punitive purpose, we would not have had any problem to contend with. Under such a scenario, criminal substantive law would have dealt only with conduct and people deserving of punishment, and criminal procedure could have been applied mechanically to all cases labeled criminal.

Difficulties do arise, however, because prevailing substantive criminal law does not hold exclusive reign over the realm of punishment. Due to the state's propensity for civil avenues to address criminal conduct and tendency to use criminal law to regulate (rather than punish) behavior, it is impossible to rely on a sanction's legislatively assigned label to determine the appropriate procedure to apply. The Supreme Court had already reached this conclusion by the late-nineteenth century.¹⁴⁶ In the 1886 case of *Boyd v. United States*,¹⁴⁷ the government had subpoenaed personal papers and business records of a merchant who had been found liable for fraudulently importing certain goods in violation of the custom laws, seeking to subject the goods to forfeiture.¹⁴⁸ The Court rejected the government's petition, holding that seizing books in order to facilitate forfeiture serves the same purpose as forcing a defendant to testify against himself in a criminal trial.¹⁴⁹ To the claim that the proceedings were civil and therefore the protection against self-incrimination did not apply, the Court responded that "[w]e are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."¹⁵⁰ In a number of cases since *Boyd*, the Court has held that the label chosen by Congress is not a definitive indicator of the real nature of the proceedings. Accordingly, a leg-

¹⁴⁵ See Fellmeth, *supra* note 4, at 17–19.

¹⁴⁶ The first case to question the legislative label was probably *United States v. Chouteau*, 102 U.S. 603 (1880). There, the Court asserted that "[t]he term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . To hold otherwise would be to sacrifice a great principle to the mere form of procedure . . ." *Id.* at 611.

¹⁴⁷ 116 U.S. 616 (1886).

¹⁴⁸ *Id.* at 617–19.

¹⁴⁹ *Id.* at 634.

¹⁵⁰ *Id.* at 633–34.

islative decision to label a certain sanction “civil” does not automatically entail denial of constitutionally guaranteed criminal procedural protections. Such protections are triggered, instead, by the “punitive purpose” of the sanction, a concept that captures the sanction’s function rather than its form.¹⁵¹

1. Practical Obstacles

Ever since *Boyd*, the Supreme Court, assisted by leading scholars, has been trying to formulate a clear notion of the meaning of “punishment” that would make the bifurcated procedural system workable. These efforts to distinguish criminal sanctions from civil ones by referring to their punitive purpose have been unavailing. The reason for this failure derives from the methods by which courts isolate the purpose served by a given law or sanction and the factors that must be weighed in deciding what makes them punitive. There are basically two methods courts can and do employ in order to determine the purpose of a sanction. One method is to inquire into its legislative history in an attempt to uncover the legislature’s intention. The other method is to infer the nature of the sanction from its effects, namely, by probing into whether it demonstrates certain or all of the indicia of punishment.

Many academic commentators have rejected examining the legislative history to uncover the purpose of a given law or sanction as “inconclusive” and “unseemly.”¹⁵² As Professor John Hart Ely has argued, inquiries into the legislature’s motives is a hazardous enterprise that gives rise to issues of “[a]scertainability, [f]utility and [d]isutility.”¹⁵³ Applied to our case, the Court’s inquiries into the legislature’s intent in instituting a sanction have been anything but consistent and conclusive. These inquiries often produce contradictory conclusions, as the Court remains uncertain about which test

¹⁵¹ See, e.g., Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. Contemp. Legal Issues 69, 79 (1996) (“The Supreme Court’s juvenile court jurisprudence illustrates the possibilities for this sort of a functional approach, in which the civil and criminal labels ultimately play no role in determining doctrinal outcomes.”).

¹⁵² Clark, *supra* note 50, at 438.

¹⁵³ John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1212–17 (1970).

should be used to determine motivation.¹⁵⁴ It is therefore difficult, if not impossible, to ascertain the purpose of a sanction through the legislative history, and it is certainly normatively dubious.

Furthermore, the impact of the sanction is identical regardless of the legislature's motivation in legislating it into law. Accordingly, if enhanced procedural protections are designed to protect individuals from being subjected to state-sponsored coercion without due process, the legislature's motivation should not be of concern.¹⁵⁵ In addition, the legislative motivation is open to the negative incentives that the Court pointed to in *Boyd* as preventing it from blindly accepting its label. Therefore, relying on the legislature's intent is not only useless but can also be dangerous.

The second method for determining the nature of a sanction, namely, based on its punitive effects, is equally imprecise. Any attempt to identify "criminal" by defining "punitive" does nothing more than substitute one obscure term (criminal) with another (punitive). For the punitive-purpose method to work, a prior determination as to the definition of "punishment" is required; this turns out to be a daunting task. The Court's most elaborate endeavor to grapple with the meaning of punishment was in its 1962 decision in *Kennedy v. Mendoza-Martinez*.¹⁵⁶ This case dealt with the question of whether expatriation for draft evasion constitutes punishment and therefore requires "a prior criminal trial and all its incidents."¹⁵⁷ Rather than deferring to the labels assigned by Congress, the Court adopted a multifaceted test to distinguish between civil sanctions that are punitive and thus criminal in nature and those that are not. The seven factors identified by the Court were as follows:

- [1] Whether the sanction involves an affirmative disability or restraint,
- [2] whether it has historically been regarded as a punishment
- [3] whether it comes into play only on a finding of *scienter*,
- [4] whether its operation will promote the traditional aims of

¹⁵⁴ Clark, *supra* note 50, at 438. Despite these difficulties, Clark still posits that inquiries into the punitive motivation of the legislature are appropriate. *Id.*

¹⁵⁵ George Fletcher, Comment, The Concept of Punitive Legislation and the Sixth Amendment: A New Look at *Kennedy v. Mendoza-Martinez*, 32 U. Chi. L. Rev. 290, 299 (1965).

¹⁵⁶ 372 U.S. 144 (1963).

¹⁵⁷ *Id.* at 167.

punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned¹⁵⁸

Although the multifaceted test has been invoked frequently,¹⁵⁹ it has likely never determined an outcome, not even in the *Mendoza-Martinez* case itself,¹⁶⁰ and for good reason: the *Mendoza-Martinez* test is unable to yield a principled and predictable answer. In every case of its application, the judge ends up with a mixture of yes and no answers to each of the seven factors and must ultimately determine whether the sanction at hand is civil or criminal based upon her own valuation of each factor and its relative weight.¹⁶¹ Inevitably, the Court resorts to tautological reasoning: it purports to define as criminal, and thus order heightened procedural safeguards for sanctions that serve primarily to punish, when, as a matter of fact, the punitive purpose ascribed to the sanction rests upon some intuition regarding the procedural safeguards that the sanction merits. In other words, the purported test does no more than restate the underlying issue, rather than lead to the answer.¹⁶² It

¹⁵⁸ Id. at 168–69.

¹⁵⁹ See, e.g., *Smith v. Doe*, 538 U.S. 84, 97 (2003); *Seling v. Young*, 531 U.S. 250, 268 (2001); *Hudson v. United States*, 522 U.S. 93, 99–100 (1997); *Allen v. Illinois*, 478 U.S. 364, 370 (1986).

¹⁶⁰ After listing these factors, the Court declined to apply them, and, instead, its determination that the loss of citizenship is a punishment that may not be imposed without all of the criminal procedural safeguards was based on the “conclusive evidence of congressional intent as to the penal nature of the statute.” *Mendoza-Martinez*, 372 U.S. at 169.

¹⁶¹ Klein, *supra* note 105, at 719. For elaborate and insightful criticism of the *Mendoza-Martinez* test, see Fellmeth, *supra* note 4, at 36–41.

¹⁶² Attempts by legal scholars to define “punitive” sanctions have proven to be equally unsuccessful. One example is the test proposed by Carol Steiker for determining when an action is sufficiently punitive to merit criminal procedural safeguards. Based on her notion of punishment as blaming, Steiker

defines “punishment” using a four part test: (1) state intent to cause unpleasantness in an individual, that is not merely incidental to another goal; (2) the sanction is for a past offense; (3) the sanction is imposed by the state; and (4) the sanction expresses blame by the community. The fourth part of this test has a three-part subtest: blame occurs when (1) society resents the bad act; (2) the sanction is designed to tell the offender he misbehaved; and (3) the victim and society feels [sic] vindicated. Once it is decided that sanction constitutes punishment, the Court must answer three additional questions: (1) does the state

therefore comes as no surprise that the Court's application of the punitive purpose test in specific cases "has proved to be highly unpredictable and confusing."¹⁶³

Efforts to classify legal actions as civil and criminal according to whether or not they have a punitive purpose are doomed to failure for yet another reason: many of these actions are a hybrid in the sense that they serve more than one purpose. The regulatory state we live in is built on a complex system of rewards and penalties, and many of the measures developed in this system combine features from both the civil and the criminal sides of the divide. For instance, does the state revoke a physician's license in order to punish and deter her or to ensure the provision of adequate medical services?¹⁶⁴ Is the imposition of double tax assessment on a person found guilty of tax evasion an additional punishment or a way to compensate the government for its efforts and expenses?¹⁶⁵ Does the forfeiture of an asset to the government serve solely remedial purposes or retributive and deterrent purposes as well?¹⁶⁶ Is the in-

intend to punish; (2) what is the effect of the state action on the defendant; and (3) how does the community view the state action?

Klein, *supra* note 105, at 719. However, as Klein convincingly argues, Steiker's test is indeterminate, overly complex, and replete with all the shortcomings of the *Mendoza-Martinez* test. See *id.* at 719–20. For another perspective on the sanction distinction, see Fellmeth, *supra* note 4.

¹⁶³ Clark, *supra* note 50, at 384; see also Fellmeth, *supra* note 4, at 5 ("[T]he current position of the Supreme Court on the distinction between civil and criminal law is a hodgepodge of multifactor tests and genuflection to federal and state legislatures on questions of constitutional interpretation.").

¹⁶⁴ See, e.g., *Hawker v. New York*, 170 U.S. 189 (1898) (holding that a statute preventing previously convicted felons from practicing medicine is regulatory, not punitive).

¹⁶⁵ Compare *Helvering v. Mitchell*, 303 U.S. 391 (1938) (holding that the imposition of an increased tax assessment, amounting to fifty percent of the alleged deficiency, after criminal prosecution for tax evasion does not trigger the double jeopardy clause because it was not punitive), with *Lipke v. Lederer*, 259 U.S. 557 (1922) (holding that a double tax assessment, payable by anyone who manufactured illegal beverages without paying taxes, cannot be enforced in civil proceedings because it constitutes punishment).

¹⁶⁶ Compare *United States v. Halper*, 490 U.S. 435 (1989) (holding that a civil fine for Medicaid fraud that was 220 times the government's actual loss was punitive because it served retributive and deterrent, rather than solely remedial, purposes), with *Hudson v. United States*, 522 U.S. 93 (1997) (holding that the double jeopardy clause does not prevent the federal government from bringing parallel criminal and civil forfeiture proceedings based on the same underlying events, because it only protects against the imposition of multiple criminal punishments, and civil forfeiture does not

definite detention of dangerous people not convicted of any crime a punishment or simply a way of ensuring public safety?¹⁶⁷ These measures, like many others, are neither wholly criminal nor entirely civil, but rather, as Professor Susan Klein has aptly observed, they are “more like an old style Chinese menu, where the patron selects one entrée from column A and two from column B.”¹⁶⁸ An

constitute a punishment), and *United States v. Ursery*, 518 U.S. 267 (1996) (holding that in rem civil forfeitures were neither punitive nor criminal for the purposes of the Double Jeopardy Clause). For a useful analysis of civil forfeiture, see Kevin Cole, *Civilizing Civil Forfeiture*, 7 *J. Contemp. Legal Issues* 249 (1996).

¹⁶⁷ See *infra* notes 171–72.

¹⁶⁸ Klein, *supra* note 105, at 680. An insightful solution to the civil-criminal puzzle, resting on the understanding that many sanctions in the regulatory state are hybrid, has been put forth by Kenneth Mann in his influential article, “Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law.” Mann, *supra* note 17. Mann proposes introducing middleground jurisprudence for the intermediate category of punitive civil sanctions, which could be either privately invoked or imposed by the state. *Id.* at 1799. Middleground jurisprudence draws on the paradigms of both civil and criminal law to form a hybrid jurisprudence, mixing the characteristics of both paradigms in new and innovative ways. This jurisprudence has a functional orientation, deriving from the punitive approach—an approach that seeks out the punitive aspects of any sanction and considers their necessary procedural implications. The courts should therefore develop tests and measures for “punitiveness” that would uncover the punitive purpose of a sanction and determine at what point heightened procedural protections are required. That is, the procedure warranted depends not just on whether a sanction is punitive, but also on the degree of its punitiveness. *Id.* at 1837–38. According to Mann, the Supreme Court’s analysis in *United States v. Halper*, in which it concluded that a civil in personam fine for Medicaid fraud that was 220 times the government’s actual loss served punitive rather than solely remedial purposes, is an example of a good functional analysis that “properly focus[es] on the fundamental jurisprudential issue: what is the degree of punitiveness required for state-invoked punitive civil sanctions to trigger heightened due process, and what are the indicators of such punitiveness?” Mann, *supra* note 17, at 1842–43 (construing *Halper*, 490 U.S. 435).

Much criticism has been leveled at the middleground approach, most of which is, in our opinion, without merit. John Coffee argues that middleground jurisprudence exacerbates the blurring of the line between civil and criminal law and contributes to a further encroachment of criminal law on civil law, which he considers the curse of modern criminal jurisprudence. See Coffee, *supra* note 55, at 1879–80. From a very different angle, Carol Steiker argues that middleground jurisprudence is more dangerous than advantageous for two reasons: first, it allows blaming individuals subject to only some (and it is hardly clear which) of the constraints that traditionally have accompanied criminal punishment; second, it undermines the usefulness of having a separate process as a forum of blaming. See Steiker, *supra* note 7, at 815–16. We take issue with both critiques for reasons elaborated upon earlier and discussed further in the final Part of this Article. There is, however, one line of criticism that successfully undermines the middleground approach. As Franklin Zimring insightfully observes, a

approach that classifies all proceedings that include some so-called punitive component as criminal, no matter how slight, would compel the state to afford the cumbersome procedural protections to a vast array of measures, thereby burdening the legal system with additional expense and resulting in a decrease in efficiency.¹⁶⁹ It is therefore hardly surprising that by the late 1970s, the Supreme Court had abandoned all attempts to identify punishment independently and in all but the most extreme cases it “docilely accepted at face value the ‘civil’ label attached to a proceeding: if the legislature said the sanction had a non-punitive purpose, the Court agreed.”¹⁷⁰

2. Normative Obstacles

Let us now assume that we could miraculously formulate a universally acceptable theory of punishment that unambiguously classifies every sanction as either punitive or nonpunitive and clearly demarcates the boundaries between proceedings that are “criminal in nature” and those that are not. The procedural issues would still not be resolved, for the rationales for the punitive/nonpunitive distinction diverge in many important respects from the justifications for the criminal/civil procedural divide. There is no necessary cor-

number of key terms in Mann’s article, including its most central term, “punitive civil sanction,” are left undefined. As a result, the due process calculus offered by Mann as a substitute for the current civil-criminal jurisprudence is unspecified and, therefore, not workable. See Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 *Yale L.J.* 1901, 1901–03 (1992). In particular, Mann’s failure (or, rather, inability) to define the term “punitive” exposes his argument to the entire arsenal of criticisms discussed above.

¹⁶⁹ See *Ursery*, 518 U.S. at 285 n.2 (“It is hard to imagine a sanction that has no punitive aspect whatsoever. . . . [Such an] interpretation of *Halper* is both contrary to the decision itself and would create an unworkable rule inconsistent with well-established precedent.”); see also Cheh, *supra* note 9, at 1356.

¹⁷⁰ Klein, *supra* note 105, at 681. See also *Hudson*, 522 U.S. at 95–96, 98, where the Court addressed the question of whether a criminal trial that followed debarment proceedings placed the defendant in double jeopardy. In concluding that it did not, the Court dismissed the notion that the constitutional protections apply independent of Congress’s intent, unless the Court determines that the *Mendoza-Martinez* tests strongly and clearly dictate otherwise (which rarely, if ever, happens). *Id.* at 99–100, 104. Professor Mary Cheh endorses the Court’s attitude, arguing that “a matter can only be criminal if formally intended to be and denominated as such: following the form of a criminal trial and calling a person to account for action clearly labeled as criminal by the legislature.” Cheh, *supra* note 9, at 1360.

relation between the logic underlying the classification of a certain sanction as punitive (that is, criminal) or nonpunitive (that is, civil) and the rationale for the use of the more restrictive criminal procedure or the less restrictive civil procedure.

Suppose, for example, we were to agree with the Supreme Court in *Kansas v. Hendricks* that civil commitment of “sexually violent predators” (“SVPs”) is not “punishment” because it is intended to prevent future harms rather than punish past deeds.¹⁷¹ It does not necessarily follow that applying the less demanding civil procedure to such commitments is also justified. On the contrary, even though the detention of SVPs is justifiably defined (under a certain definition of punishment) as nonpunitive and, hence, civil, we would still argue that, in light of the goals and values of procedure, it is crucial that stringent procedures (currently labeled “criminal”) be applied to such cases. This fundamental intuition of justice led the Court in *Addington v. Texas* to reject the argument that the government can civilly commit people applying the preponderance of the evidence standard used in civil litigation and to hold that the Due Process Clause requires the government to prove by clear and convincing evidence that the individual was both mentally ill and dangerous.¹⁷² Similarly, in *Schneiderman v. United States*¹⁷³ and *Woodby v. INS*,¹⁷⁴ the Court held that although denaturalization and deportation proceedings are civil in nature, they still require proof by clear, unequivocal, and convincing evidence. The Court has never developed, however, a principled explanation for why these cases should trigger certain criminal procedural safeguards while others should not. This is hardly surprising—the civil-criminal conceptual dichotomy that the Court is committed to (or rather trapped in) prevents it from developing a coherent and reasoned jurisprudence for procedure that is detached from the substantive law’s civil-criminal divide. And since the substantive civil-criminal divide is, as we have

¹⁷¹ 521 U.S. 346, 360–62 (1997). But see *Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding that the state cannot continue to detain an insanity acquittee on grounds of dangerousness after he has recovered from his mental illness, because he was not granted the procedural protections the state must provide when punishing an individual).

¹⁷² 441 U.S. 418, 427, 432–33 (1979).

¹⁷³ 320 U.S. 118, 135 (1943).

¹⁷⁴ 385 U.S. 276, 285 (1966).

discussed, fuzzy and muddled, the inevitable result is unpredictability, inconsistency, and confusion in procedure as well.

This also holds true for cases that originate on the criminal side of the divide. Sanctions that can be clearly identified as punitive and therefore criminal, such as a \$10,000 criminal fine imposed on a corporation for polluting the water, do not necessarily merit the enhanced safeguards guaranteed by criminal procedure. We shall argue below that in criminal cases in which the offender is a large corporation (so that no imbalance of power exists between the litigants), the sanction imposed is trivial, and no significant stigma attaches to the wrongdoer, it is not justified to apply the stringent and costly criminal procedure. Despite the indubitably punitive nature of the sanction, less demanding procedure is called for. We therefore concur with the Supreme Court's conclusion in *United States v. Ward*,¹⁷⁵ although we reject its reasoning. The \$500 fine imposed on L.O. Ward Oil & Gas Operation for polluting the Arkansas River might very well have been punitive in nature, but punitiveness alone does not justify applying the more demanding criminal procedure in such a case.

To sum up, it is nearly impossible to identify whether or not the purpose of a sanction is punitive; even if a sanction can be identified as having a punitive purpose, this alone is not sufficient to justify the more rigorous protections of criminal procedure. If we aspire to craft an efficient procedural regime that fulfills the imperatives of justice, we must abandon the civil-criminal dichotomy in procedure altogether. Our procedural regime should be reconstructed based on factors such as the severity of the sanction or remedy, the nature of the parties, and the accompanying stigma, and the regime should apply indiscriminately to all legal measures, whether purportedly civil or criminal. We lay out just such an alternative procedural model in Part IV.

¹⁷⁵ 448 U.S. 242 (1980). The Court concluded that the Fifth Amendment prohibition against self-incrimination did not apply in proceedings brought by the government to impose a \$500 penalty on the defendant, L.O. Ward Oil & Gas Operation, for discharging oil into the Arkansas River. The defendant claimed that the government required it, under pain of criminal-like penalties, to report the spillage. Therefore, the defendant argued, this "coerced" statement could not be used against it in the penalty proceedings. The Court concluded that the purpose of the proceedings was remedial and not punitive in nature and therefore the Self-Incrimination Clause did not apply. *Id.* at 249–51, 254–55.

B. Heightened Constitutional Protections in Civil Procedure

Coming from the civil realm, Professor John Leubsdorf argues that the Supreme Court has unjustifiably ignored civil procedure by neglecting to regulate the activities and procedures that the government may institute in civil actions. While the Court has been the dominant force in shaping modern criminal procedure by providing extensive constitutional protections to criminal suspects and defendants, it has been rather indifferent toward civil procedure.¹⁷⁶ Unlike criminal procedure, in which fairness to individuals has always been a major concern, instances of procedural unfairness in civil litigation have failed to trigger Court intervention.¹⁷⁷ There are no valid justifications, Leubsdorf asserts, for this discrepancy in approach,¹⁷⁸ and the “constitutional role in fashioning civil procedure should be expanded” to “guarantee equally to plaintiffs and defendants fair and accessible procedures” for resolving their disputes.¹⁷⁹ Possible applications of a constitutional civil procedure include constitutionalizing the right to bring class actions,¹⁸⁰ developing a constitutional right to preliminary relief,¹⁸¹ placing constitutional restraints on judges in contempt and disqualification proceedings,¹⁸² recognizing a constitutional right to appeal,¹⁸³ and constitutionally mandating a waiver of court fees for indigent parties as well as the right to counsel in some cases.¹⁸⁴

Like his criminal proceduralist counterparts, Leubsdorf is influenced by the powerful divide. We have no quarrel with Leubsdorf’s basic insights that the rift between the civil and criminal spheres is overstated and that, as far as constitutional jurisprudence is concerned, civil procedure has been unjustly overlooked. We do not,

¹⁷⁶ Leubsdorf, *supra* note 16, at 579–81.

¹⁷⁷ *Id.* at 584–85.

¹⁷⁸ Leubsdorf claims that the Court’s inactivity in the area of civil procedure cannot be justified by arguing that the consequences in civil proceedings are less grave than in criminal proceedings or that the party initiating criminal proceedings is the government whereas civil proceedings are initiated by private parties. *Id.* at 602–03. Since we have discussed these arguments at length in Sections II.A–B, we will not elaborate here any further.

¹⁷⁹ *Id.* at 580.

¹⁸⁰ *Id.* at 616–20.

¹⁸¹ *Id.* at 620–24.

¹⁸² *Id.* at 624–28.

¹⁸³ *Id.* at 628–31.

¹⁸⁴ *Id.* at 631–33.

however, share his conclusion, which is simultaneously over- and underbroad. Enhancing constitutional protections in civil proceedings en masse would dump an insurmountable load on our system of justice, making litigation substantially more costly and complex. Leubsdorf is well aware of this impediment,¹⁸⁵ and therefore his list of demands to the Court is rather modest and nonexhaustive, calling for a “broad yet balanced constitutional law of civil procedure.”¹⁸⁶ Such a procedural regime, however, is not enough in some cases and too much in others. When a defendant is threatened with severe civil sanctions from the government qua plaintiff, it is not enough that her court fees are waived (if she is indigent) or that judicial disqualification proceedings are more liberal. Rather, elevated procedural protections such as a higher standard of proof or Eighth Amendment protection against excessive fines are needed. Conversely, a constitutional right to bring a class action may turn out to be a bane rather than a boon, significantly elevating the risk of frivolous class action suits.¹⁸⁷ A procedural model, such as the one we propose below, that differentiates among *types* of civil (as well as criminal) cases will impose cumbersome constitutional procedures only in cases that warrant them in accordance with the goals and values of procedure.

IV. CROSSING THE CIVIL-CRIMINAL DIVIDE: AN ALTERNATIVE MODEL FOR PROCEDURE

The model proposed in this Article rests on the observation that the civil-criminal procedural dichotomy is inappropriate for the realities of the twenty-first century. Even assuming that the civil-criminal divide corresponded to the values underlying procedure when it was set—that is, when criminal law was much “thinner” and institutional actors as well as the government were less involved in civil litigation—this is no longer the case. The current reality is one in which the administrative state has taken root, the government is a habitual player in civil litigation, the criminal

¹⁸⁵ Id. at 612.

¹⁸⁶ Id. at 637.

¹⁸⁷ Such a constitutional right might have impeded the enactment of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, as well as the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, which sought to curb the negligent and manipulative use of class actions in certain courts.

sphere has been extended beyond what anyone could imagine, and criminal charges are regularly being brought against institutional actors. As a result, the civil-criminal dichotomy has come to breed significant anomalies that can no longer be tolerated. The substantive classification of a case as either civil or criminal can no longer assist in determining the appropriate level of procedural safeguards. It is essential, therefore, to detach procedure from the substantive civil-criminal dichotomy.

We have sought to devise an initial blueprint for a workable procedural regime that is independent of the civil-criminal split in substantive law but that nonetheless conforms to its underlying normative premises. In our opinion, the dissociation of substantive law from procedure will enhance both the substantive law and procedure. It will generate a system that is more fine-tuned and that better serves the goals of procedure, while simultaneously eliminating the adverse incentives that currently drive Congress toward both over- and undercriminalization. Accordingly, we propose a new regime that runs along two main axes: the balance of power between the parties and the severity of the sanction. As we will demonstrate below, these two criteria play instrumental roles in the realization of utilitarian, egalitarian, and expressive goals, the very same goals that the current procedural regime attempts, but fails, to achieve. Our aim in this paper is not to provide a complete, all-encompassing procedural regime but, rather, to map out an alternative procedural model in broad strokes. We leave the details for a future project.

A. Balance of Power

In an adversarial system of justice, the outcome of any case depends to a great extent on the balance of power between the litigating parties.¹⁸⁸ Under this type of system, the parties are responsible for defining the contours of their dispute and laying the factual and legal foundations for their case before the court. The adversarial model is based on the premise that competition between opposing parties leads to the triumph of truth.¹⁸⁹ For such a system to work, however, a fundamental prerequisite is that the

¹⁸⁸ For a detailed description, see *supra* Section II.B.

¹⁸⁹ See Fuller, *supra* note 40, at 382–85.

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competition takes place between *fairly matched* adversaries,¹⁹⁰ who are equally capable of collecting evidence, examining witnesses, summoning experts, and the like. The accuracy of the judicial outcome is contingent on the absence of an a priori structural propensity in favor of one party over the other.¹⁹¹

The existing procedural regime attempts to respond to the reality of unequal adversaries and the problems created thereby by using the civil-criminal dichotomy as a proxy for the existence or nonexistence of a balance of power between the respective parties. The pro-defendant bias inherent in the rules of criminal procedure is intended to remedy the system's built-in imbalance of power in favor of the prosecution, which stems from the government's greater access to resources, its ability to gather evidence even before the suspect knows that an investigation is under way, and its sophisticated investigative and prosecutorial apparatuses. The enhanced criminal procedural safeguards, including the beyond a reasonable doubt standard of proof, are designed to restore the balance of power between the parties and to place them on equal footing. In the civil sphere, on the other hand, there is an assumption of structural equality in power and resources between the parties. This is reflected in the supposed neutrality of civil procedure, including its preponderance of the evidence standard of proof, which favors neither defendant nor plaintiff.

However, the civil-criminal divide is a poor and inadequate proxy for this balance of power; it is insensitive to the immense structural imbalances of power inherent in the civil sphere as well as the many instances of power symmetry inherent in the criminal sphere. The existing civil procedural regime overlooks the structural power disparities between different categories of litigants. It applies similar rules to litigation in which the government or a large organizational entity sues, or is sued by, an individual and to litigation in which one individual sues another individual. The failure on the part of the existing regime to neutralize structural power imbalances between RPs (such as the government and large organization entities) and private litigants has an adverse impact on

¹⁹⁰ Resnik, *supra* note 46, at 513.

¹⁹¹ See Ellen Kreitzberg, *Death Without Justice*, 35 Santa Clara L. Rev. 485, 485-87 (1995) (claiming that insufficient funding contributes to wrongful convictions).

the goals of procedure, such as accuracy and fairness.¹⁹² Likewise, the existing model of criminal procedure ignores the many cases in which a structural symmetry exists between the prosecution and the defense. When the state prosecutes Microsoft or Citigroup, there is a good basis for contesting any claim of a power disparity between the parties. In these situations, granting defendants sweeping procedural safeguards could actually tilt the scales in their favor and upset the balance required for obtaining accurate results, thus distorting justice to the detriment of the government (and to the detriment of the public at large). The probable result would be that powerful organizations would be let off the hook, with all that this implies in terms of optimal deterrence, incapacitation, and retribution.¹⁹³

Our model seeks to correct these inherent systemic biases. In situations in which a structural power gap between litigants exists, the party currently enjoying a built-in advantage in litigation (along with any out-of-court negotiations) would see its power diluted in order to restore the balance of power. The crucial point is that our model is responsive to inherent power disparities between *types* of

¹⁹² In a recent article, Gillian Hadfield criticizes decisionmakers for paying too much attention to the nature of the suit and not enough attention to the nature of the litigants. Most of our economic and democratic theories of litigation, she argues, predict litigation behavior and outcomes more by the nature of the latter than by that of the former. Therefore, in crafting alternatives to traditional civil litigation, we must differentiate between different types of litigants. Hadfield, *supra* note 84, at 1292, 1318–19. Nonetheless, Hadfield confines her critique to the civil sphere and accepts without reservation—indeed, endorses—the civil-criminal divide. *Id.* at 1276; see also Peter Charles Choharis, A Comprehensive Market Strategy for Tort Reform, 12 *Yale J. on Reg.* 435, 442 (1995) (arguing that, of the total pool of lawsuits, a small number are overcompensated, with the overwhelming majority suffering unmerited defeat or undercompensation).

¹⁹³ Such a result may also be problematic from the distributive standpoint, due to the fact that both institutions and the wealthy face a lower likelihood of conviction than do ordinary defendants. See Donald H. Zeigler, Federal Court Reform of State Criminal Justice Systems: A Reassessment of the *Younger* Doctrine from a Modern Perspective, 19 *U.C. Davis L. Rev.* 31, 40–41 (1985); Editorial, Paying for Justice, *Chi. Trib.*, Jan. 16, 2000, at 18 (stating that failure to give the poor adequate representation results in unfairness and higher conviction rates for poor defendants). Such a phenomenon would appear to be a regressive distribution of justice. An attempt to justify this phenomenon has been made by Professor John R. Lott. According to Lott, a regime that reduces the probability of conviction for wealthy defendants is desirable because they incur higher opportunity costs deriving from a prison sentence. John R. Lott, Jr., Should the Wealthy Be Able to “Buy Justice”?, 95 *J. Pol. Econ.* 1307, 1307–08 (1987).

parties: when such disparities are identified, whether in the criminal or the civil framework, the model restores the balance of power by offering enhanced procedural safeguards to the disadvantaged party. The model classifies the parties into two types: Institutional Entities (“IE”) and Individuals (“IND”). IE comprises all RPs, both government and government-like entities,¹⁹⁴ such as large corporations and financial institutions—banks, insurance companies, credit companies, et cetera. IND captures all OSs, not only people but all entities that do not fall under the IE category. One set of procedural rules would govern “symmetrical litigation,” namely, litigation where both parties are either IEs or INDs; another set of rules would govern “asymmetrical litigation,” namely, trials involving an IND on one side and an IE on the other.

Treating governmental “public” entities and large institutional “private” entities identically can be justified both empirically and theoretically. From an empirical perspective, it has been established that the appropriate distinction to be made is between RPs and OSs, rather than public versus private litigants. As shown earlier,¹⁹⁵ the features that give a litigating party a relative advantage at trial are not unique to the government and are shared by other RPs as well. Economies of scale are characteristic of financial institutions and large corporations; they can build a record, are able to “play the odds,” and are well positioned to play for the rules of the game and to forgo immediate gains. It should, therefore, come as no shock that their success rate in litigation is comparable to that of governmental bodies. From a theoretical perspective, the dichotomy between private and public entities, which organizes legal doctrine, has been heavily criticized.¹⁹⁶ Government agencies and corporations are both bureaucratic entities and share many com-

¹⁹⁴ Government-like entities are private entities that have vast economic and political powers as well as a very frequent presence in courts, which makes them equal to the government in all relevant factors that guarantee success in litigation. The test that should apply for identifying such government-like entities should, therefore, comprise two indicia: one should be an economic indicator, such as the value of the corporation, and the other should measure the number of litigations the entity is involved in at any given moment in time. (This second test is used, on a much smaller scale, to prevent nonindividuals from filing suits in small claims courts.) See, e.g., Colo. Rev. Stat. § 13-6-411 (2006).

¹⁹⁵ See *supra* text accompanying notes 77–87.

¹⁹⁶ See *supra* text accompanying notes 130–40.

mon features.¹⁹⁷ Therefore, argue critics,¹⁹⁸ using the public/private distinction to favor certain organizations (private) over others (public) is unmerited and untenable.¹⁹⁹

B. Severity of the Sanction

An important justification for the bifurcation of procedure is related to the allotment of the risk of error between the parties, which is based, *inter alia*, on the severity of the potential sanction.²⁰⁰ The cost of an erroneous imposition of a sanction is a variable that influences the extent of procedural protection to be granted to the defendant. However, the existing procedural regime assumes that the civil-criminal dichotomy is a good proxy for the severity of the sanction or, put more accurately, of the disutility ratio between errors in favor of the plaintiff and errors in favor of the

¹⁹⁷ See generally Charles Perrow, *Complex Organizations: A Critical Essay* (3d ed. 1986) (exploring the organizational behavior of private and public bureaucratic organizations and showing their similarities).

¹⁹⁸ For a brilliant analogy between corporate law and administrative law as two bodies of legal doctrine devoted to justifying bureaucracy, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276 (1984). For an excellent critique of the private/public distinction, see Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057, 1128–49 (1980).

¹⁹⁹ An alternative classification, which our model accommodates, draws a clear distinction between governmental entities, on the one hand, and all nongovernmental entities, whether individuals or corporations, on the other. There are those who maintain that the government is a unique type of litigant, qualitatively different from all nongovernmental RPs, because the government makes the rules that the courts enforce and courts are, after all, a government agency. See, e.g., Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, in *Litigation*, supra note 82, at 343. Notwithstanding the norm of judicial independence, some opine that judges feel loyalty toward the government of which they are a part. *Id.* One possible ramification of this is that in relatively close cases, judges tend to give the edge to the government party or to be more sympathetic to the government's case. See, e.g., Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 14–15 (Benjamin I. Page ed., 1991). Thus, under the alternative classification, the procedural rules governing asymmetrical litigation would be limited to instances in which the government is a party to the proceedings, *whether civil or criminal*, and the other party is a private entity (whether OS or RP). All other litigation involving only nongovernmental entities would be governed by symmetrical litigation procedural rules. In the continuation of our discussion below, we focus on the former classification (that which does not distinguish between private and public entities), but it should be kept in mind that our model is also workable with regard to the latter.

²⁰⁰ “Sanction” refers here to both criminal sanctions and civil remedies.

defendant. Unfortunately, as we discussed above at length, this assumption is wide of the mark. Under our proposed model, procedural distinctions will be made based on neither the formal label (“civil” versus “criminal”) nor the supposedly punitive nature of a sanction but, rather, on the severity of the sanction that could potentially be imposed on the defendant.²⁰¹ The *ex ante* possibility of imposing a severe sanction in a particular case will require applying enhanced procedural safeguards, irrespective of the civil or criminal substantive nature of the case or the actual sanction imposed *ex post*. It should be emphasized that when calculating the severity of a penalty, all *formal* legal sanctions deriving from the court ruling will be taken into account. Thus, if a defendant convicted of a petty offense is prevented from practicing law for the rest of her life, the penalty will be assessed above the \$1000 prescribed in the penal code.

Defining severe sanctions is not a trivial task. In fact, the most frequent criticism of the idea of having the level of procedural protections correspond to the severity of the sanction is its impracticability.²⁰² We believe, however, that it is not only a workable option,

²⁰¹ For similar claims, see Klein, *supra* note 105, at 721 (arguing that the extent of procedural protections should reflect the severity of the sanction); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1081, 1095 (1993) (proposing to abandon the civil-criminal distinction in contempt cases and instead provide more or less rigorous procedural protections based on the severity of the sanction).

²⁰² See Clark, *supra* note 50, at 405–06, 409 (arguing that “it would be very difficult to determine the precise measure of severity embodied in a particular civil punishment on a particular occasion. . . . Distinguishing ‘severe’ from ‘nonsevere’ penalties on a case-by-case basis, therefore, would seem to involve the Court in a most difficult decision-making process, one which the Court might understandingly want to avoid. . . . The Court’s continued treatment of the criminal label, and the stigma it conveys, as controlling of constitutional applications may well reflect the prudential consideration that there exists no other manageable yardstick by which to measure the type of sanction deserving the safeguards of ‘criminal’ procedure.”). Similarly, Mary Cheh rejects the severity approach on the historical ground that the Supreme Court has never adopted it, and adds,

[W]e also should reject the sanction equivalency [i.e., severity] approach because of practical, common sense concerns. The criminal procedural protections set out in the Constitution are extremely costly and time consuming. In fact, they may add nothing to and even frustrate the goals of fairness, accuracy, and truth-finding. . . .

Moreover, if the Court were to follow an equivalency approach, it would necessitate the development of an entirely new jurisprudence in order to identify sanctions that count—those that are not petty or *de minimis*. While this task

but also easier to administer than any of the taxonomies employed by the courts to date. It is imperative to note from the outset that sanctions would not be classified as either severe or lenient on a case-by-case basis but, rather, categorically. And while it is possible that, for a given defendant, imprisonment could be preferable to a fine,²⁰³ since the former involves a denial of liberty, it would nevertheless generally be considered a harsher sanction with higher costs for both the individual and society.

Where the exact boundary line between severe and lenient sanctions will run is a political decision with significant distributive ramifications, and it can therefore vary from one society to another and from time to time. Yet it is safe to assume that, in most democratic societies, the fundamental distinction will be between monetary sanctions, on the one hand, and deprivation of liberty, on the other. Proceedings in which the court has authority to deny a person her liberty, such as criminal imprisonment or civil commitment, shall be governed by more stringent procedure, whereas proceedings in which the relief is monetary, whether in the form of a criminal fine or civil remedy, shall be governed by more lenient procedure. Denying a person her job (delicensing or debarment), her place of residence (extradition), or her parental rights would also be considered by many to be severe sanctions and thus likely candidates for the application of more stringent procedure.²⁰⁴ It is also possible to distinguish between different types of monetary sanctions, with forfeiture of assets in general on the lenient side of the

would not be impossible—after all, the Court has drawn a bright line separating petty from serious criminal offenses with regard to the sixth amendment right to trial by jury—it would be daunting.

Cheh, *supra* note 9, at 1351.

²⁰³ E.g., O. Henry, *The Cop and the Anthem*, in *The Best Short Stories of O. Henry* 19 (Modern Library 1994). The story revolves around a New York City indigent named Lemuel T. Thwackbusher, who sets out to get arrested so he can spend the cold winter as a guest of the city jail. Despite attempts at petty theft, vandalism, disorderly conduct, and “mashing,” Lemuel fails to draw the attention of the police. Disconsolate, he pauses in front of a church, where an organ anthem inspires him to clean up his life, whereupon he is promptly arrested for loitering.

²⁰⁴ It should be noted that the Supreme Court has held that in extradition and termination of parental rights proceedings, despite their “civil” nature and due to the severity of the sanctions, the government has to prove its case with clear and convincing evidence. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (extradition).

divide and forfeiture of one's primary residence constituting a severe sanction.²⁰⁵ Likewise, it is possible to conceive of a regime that considers monetary sanctions, whether civil or criminal, to be severe if they have the potential to place a litigant on the brink of bankruptcy.²⁰⁶ Yet, again, it is immaterial to our model where the line dividing severe and lenient sanctions runs. This notwithstanding, for the purpose of presenting a robust and clear model, we shall hereinafter focus on the most straightforward distinction: that between monetary sanctions and deprivation of liberty.

C. The Proposed Procedural Model—An Illustration

To clarify our argument, let us sketch a rough outline of our proposed procedural model. For simplicity's sake, we will focus solely on the standard of proof, ignoring the many other procedural features separating civil and criminal procedure, such as double jeopardy, the right to counsel, and the right to trial by jury. Since our discussion treats procedure as a bundle, rather than relating to each feature independently, it is possible to derive the approximate state of affairs with regard to each of the other procedural features.²⁰⁷

²⁰⁵ See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) (concluding that the ex parte seizure of one's homestead produces a significant deprivation, unjustified by any governmental exigency, and is therefore in violation of the Due Process Clause). The Civil Asset Forfeiture Reform Act of 2000 makes an identical distinction with respect to the right to attorney representation. 18 U.S.C. § 983(b)(2)(A) (2000).

²⁰⁶ This last proposal might encounter efficiency problems if the government bears the burden of proving that the defendant will not be placed at risk of bankruptcy as a result of the litigation. It is, therefore, suggested that this burden of proof be placed on the defendant and that only if the court is convinced will the procedure governing the litigation become more rigorous.

²⁰⁷ We are well aware of the fact that the standard of proof that we chose to apply in the framework of our model, due to its unparalleled importance, is a procedural safeguard that is continuous in nature, whereas some procedural safeguards, such as trial by jury or "no claim to answer," are binary. With regard to the latter safeguards, hard choices inevitably would have to be made and additional considerations would have to be taken into account. For example, while it is clear that Category D defendants would be entitled to trial by jury and Category A defendants would not be thus entitled, we might want to provide such entitlement to Category C defendants, but not to Category B defendants, due to budgetary constraints. Nevertheless, as demonstrated below, our model still sets a better allocation of procedural safeguards than currently offered under the prevailing regime. It is also noteworthy that some procedural safe-

Using our two axes—the balance of power between the parties and the severity of the sanction—we map out below four categories into which the procedural regime is divided:

	Balance of Power	Imbalance of Power (in favor of the plaintiff)
Lenient Sanction	Category A preponderance of the evidence	Category B clear and convincing evidence
Severe Sanction	Category C clear and convincing evidence	Category D beyond a reasonable doubt

Category A applies to situations in which the two parties are of equal power and the potential sanction is lenient. The paradigmatic case would be where two INDs engage in a civil dispute involving a monetary remedy. Another possibility would be a civil suit between two IEs (that is, the government versus Citigroup) where the sanction is monetary. Less typical, but more innovative, would be criminal cases involving an offense punishable by a fine where the defendant is an IE (for example, a multinational corporation such as Microsoft or IBM). In such instances, both power symmetry between the parties and a lenient sanction are present. Under our model, despite the so-called criminal nature of the proceedings, the government would be able to secure a conviction by a preponderance of the evidence. This represents a serious departure from the current regime, under which the government must prove its case beyond a reasonable doubt.

Category B applies to situations in which there is power asymmetry between the parties, but the potential sanction is lenient. An example is criminal offenses punishable by a fine where the defendant is an IND. Under our model, in order to secure a conviction in such cases, the prosecution would have to bring clear and convincing evidence.²⁰⁸ This is contrary to the situation under the current

guards that are supposedly binary in nature, such as assistance of counsel and discovery, can be easily conceived as continuous by translating them into monetary terms.

²⁰⁸ For further discussion of the clear and convincing standard of evidence, see 2 McCormick on Evidence 441–45 (John W. Strong ed., 4th ed. 1992).

regime, in which the government must prove its case beyond a reasonable doubt in all criminal cases. Another typical instance falling under this category would be a civil dispute between an IE (such as a bank) as plaintiff and an IND as defendant, over a sum of money. In such cases, our proposed model would respond to the power asymmetry by elevating the standard of proof from the current preponderance of the evidence to the clear and convincing standard.

It would be nice if we could stop here, but the situation is a bit more complex. The above table represents an imbalance of power in favor of the plaintiff. What happens when there is a power asymmetry in favor of the defendant? What standard of proof should apply, under our model, when an IND sues an IE—for instance, when an individual sues a bank or a citizen brings a claim against the government? Theoretically, the standard of proof borne by the IND should be lower than preponderance of the evidence (to something equivalent to twenty-five percent), which would be the mirror image of the standard of proof that applies to an IE plaintiff when suing an IND.²⁰⁹ However, we realize that it might seem conceptually implausible for a procedural regime to force a judge to rule against the government or bank as defendant, even when she finds their version to be more convincing than that of the IND plaintiff. Yet leaving the standard of proof borne by the IND at preponderance of the evidence would adversely affect the goals of our proposed model, since it would fail to adequately remedy the power imbalances: it would create a mismatch between situations in which the IND is a plaintiff and those in which she is a defendant, which is both theoretically unjustifiable and practically disastrous. This incongruity would create incentives for IEs to devise mechanisms that would force INDs to initiate legal proceedings against them, rather than the IEs' having to sue the INDs. Since one of the defining characteristics of RPs is their ability to structure their next transaction,²¹⁰ the entire litigation market would likely reorientate in this direction. Thus, for example, banks would require security deposits and would make borrowers sign a

²⁰⁹ This is not as bizarre as it might appear at first sight. An analogy can be drawn to the criminal sphere: acquittal on grounds of "not proven" can be thought of as a twenty-five percent standard of proof.

²¹⁰ Galanter, *supra* note 77, at 98.

standard contract under which the bank would be able to take automatic possession of the security in the event of delay in payment; the borrower would then be forced to sue the bank to recover his money. The likely result would be that the number of cases in which IEs sue INDs would shrink dramatically and the balance of power would again favor IEs. To prevent such an adverse outcome, we propose flipping the burden of proof in IE versus IND cases and placing it on the IE, even when proceedings are initiated by the IND.

But resolving the *burden* of proof issue does not suffice. It is also necessary to decide what the *standard* of proof should be. It is tempting to “compensate” the IEs for making them shoulder the burden of proof by reducing the standard of proof from clear and convincing evidence to preponderance of the evidence. This, however, would take us back to square one by creating incentives for IEs to force INDs to initiate legal proceedings so that the former can enjoy the procedural benefits of being a defendant in the litigation. It is, therefore, crucial that the standard of proof be set at clear and convincing evidence. But then we encounter what seems to be the reverse problem. Such a procedural regime is likely to create incentives for INDs to sue IEs. However, notwithstanding this, given the many barriers faced by OSs when litigating against RPs and given the considerable disincentives for INDs to sue IEs under the current regime, we do not consider the creation of a converse incentive as particularly problematic. Another possibility is to leave the burden of proof on the shoulders of the IND plaintiff, who would then be required to prove her case by a preponderance of the evidence. Should she succeed in proving her case, however, she would be entitled to an increased remedy in an amount that would reflect her initial disadvantaged position. Under this alternative model, the expected utility of the suit would be preserved, since the initial disadvantage would be neutralized by a corresponding increase in the remedy. This would also nullify any negative incentives IEs might have to compel INDs to sue them.

Category C deals with symmetrical litigation in which the potential sanction is severe. The standard of proof in these cases should be set at clear and convincing evidence, rather than beyond a reasonable doubt, to reflect the balance of power between the parties. The practical relevance of this category is not significant. In the

criminal sphere, a power equilibrium between the litigants is achieved when the defendant is an IE, and since it is impossible to imprison an institution, the standard sanction in such cases is a fine. In the civil sphere, symmetry obtains in civil proceedings between two INDs or between two IEs. In such cases, it is hard to imagine a remedy that could be considered severe.²¹¹

Category D is designed to represent situations in which there is an imbalance of power between the parties and the potential sanction, whether civil or criminal, is severe. This category includes paradigmatic criminal cases in which the government prosecutes an individual for an offense punishable by imprisonment. It also includes civil litigation between the government and an individual that could potentially result in a denial of freedom, such as civil commitment, confinement under sexual predator laws, and civil contempt, but also extradition and termination of parental rights. In all such cases, the government would have to prove its case beyond a reasonable doubt. Other cases that could be included in this category (depending on how “severe sanction” is defined) are foreclosure on one’s place of primary residence as well as civil monetary remedies that, if granted to an IE plaintiff, are bound to lead to a defendant IND’s bankruptcy.

Theoretically, Category D raises a parallel problem in the civil context to that raised by Category B, in which the weaker party (the IND) is the plaintiff. Nevertheless, the practical relevance of this type of situation, too, is limited, since in situations in which the sanction involves deprivation of liberty, the government is typically the prosecutor-plaintiff. However, given the possible political extension of the category of severe sanctions to include substantial monetary sanctions (that is, foreclosure on primary residence and bankruptcy), the question of standard of proof could arise analogous to the discussion in the context of Category B. In such an event, the same answer provided there would apply here—namely, that the burden of proof should be shifted onto the IE.

D. The Normative Appeal of the Proposed Model

From a formalistic point of view, the suggested criteria—the imbalance of power and the severity of the sanction—represent a

²¹¹ The reason for this is clarified infra in Section IV.D.

dramatic departure from the existing taxonomy. From a substantive perspective, however, our model is not as radical as it might seem at first. It is noteworthy that the dichotomy between civil and criminal procedure was originally constructed on both structural power disparities and the severity of the sanctions. Today, however, the categories have been reified; they have taken on a life of their own. We propose reexamining the values and principles underlying the current procedural regime and argue that serious concern for these very values and principles inevitably takes us down the path to our proposed model. The procedural model based on the criteria that we have laid out in this Article surpasses the existing regime on each and every one of the goals underlying procedure: utilitarian, egalitarian, and expressive.²¹²

From the utilitarian perspective, the proposed model takes into account the severity of the sanction, which serves as a proxy for the disutility ratio of costs associated with erroneous judgments in favor of the defendant as opposed to those against the defendant, thus furthering the goal of optimal allocation of risks and costs of error between the litigating parties. Clearly, the severity of the sanction criterion, which takes into account only the cost borne by the defendant, reflects only one side of the disutility equation; yet under the standard utilitarian calculus, the structure of procedure should be based on an algorithm that weighs the costs of a mistaken ruling in favor of one party (the defendant) against the costs of a mistaken ruling in favor of the other party (the plaintiff). It could be argued, therefore, that our analysis is inadequate. The underlying assumption of our proposed model, however, is that sanctions involving deprivation of liberty generate exceedingly high costs borne by both the defendant and society at large. These costs tip the balance between pro-plaintiff errors and pro-defendant errors in favor of the former. In such cases, the considerable potential harm to the defendant justifies focusing on pro-plaintiff errors exclusively, irrespective of the costs of erroneous

²¹² We will not reiterate here our critique of the state-centered justifications. The bad government argument is, in fact, a combination of the utilitarian and expressive arguments discussed above, and, therefore, there is no need to devote independent discussion to this argument. The liberal state argument is based on a misapprehension of the role and function of civil law and is, therefore, the illusion of an argument rather than a real argument.

pro-defendant decisions, which are considered categorically less costly. In other words, severe sanctions create a prima facie case for enhanced procedural safeguards for the defendant regardless of the substantive classification of the case.

In fact, as demonstrated above, a similar rationale is at work under the existing procedural regime, using the criminal label as a proxy for severity (that is, the costs borne by the defendant) and thus utilizing the above-described calculus in *all* criminal cases. Our model corrects the flaws of the existing regime by drawing a distinction between different classes of criminal sanctions and civil remedies based on their potential costs. Under our model, in all categories of cases, whether civil or criminal, in which the defendant is at a risk of bearing the high costs associated with liberty deprivation, the risks of error between the defendant and the plaintiff or prosecution are allocated in a way that promotes errors in favor of the former at the expense of errors in favor of the latter.²¹³ In this respect, our model encompasses a functional division that takes the original dichotomy and follows it to its logical conclusion.²¹⁴

It is important to note that there are categories of cases in which the severity of the sanction vis-à-vis the defendant cannot serve as an adequate proxy for the disutility ratio. For example, in custody cases the disutility ratio between the parties (usually the child's parents) is 1:1, despite the severity of the consequences to the losing party, because pro-plaintiff errors are equivalent to pro-defendant errors. In other words, a priori the father's loss is equal to the mother's gain and vice versa. Therefore, in this category of cases, the "sanction" should be considered lenient and the standard

²¹³ Even if we were to implement an alternative boundary line between severe and lenient sanctions, such as one distinguishing between different types of monetary sanctions (forfeiture of general assets as opposed to forfeiture of one's primary residence), one could justify the set of criteria suggested by our model by referring to the decreasing marginal utility of money.

²¹⁴ From the utilitarian point of view, our proposed model is advantageous not only at the ex post stage, but also ex ante. Under the current procedural regime a potential tortfeasor is likely to divert damaging activities toward INDs rather than toward IEs, even when it is less efficient to do so from a social-welfare perspective, because INDs are less likely to sue or succeed in litigation. Our model remedies this distortion by equalizing the tortfeasor's probability of being sued and found liable irrespective of the injured party's type (IND or IE), thus restricting the ex ante choice criterion to the level of harm.

of proof should accordingly be set at preponderance of the evidence.

From an egalitarian point of view, our proposed model is sensitive to power disparities between the parties and assists in eliminating their impact on success in litigation. It therefore guarantees a greater degree of accuracy in legal outcomes as well as a more appropriate distribution of remedies.²¹⁵ The remainder of this Section concentrates on the expressive ramifications of our model. As discussed, beyond its task of accurately determining criminal liability and protecting the innocent from undue punishment, the criminal

²¹⁵ A word of clarification is in order: in referring to power imbalances, we mean structural and categorical imbalances of power as opposed to incidental power disparities that occur frequently between litigating parties. In both the civil and criminal spheres, there will always be situations that deviate from the norm. If, for example, Mr. Bill Gates decides to sue Mr. John Smith, a middle-class American, Mr. Smith will encounter similar, if not identical, difficulties to those he would face if he were sued by Microsoft. Similarly, in the criminal sphere, individual defendants vary in the quality of legal representation that they can obtain, in ability to present their version coherently on the witness stand, and in ability to make rational decisions at the plea bargaining stage. Their relative power against the state is, therefore, not identical, and, as a result, huge disparities may evolve between litigating parties in terms of their ability to make effective use of the available procedural safeguards. Nonetheless, there is no way to avoid making some categorical generalizations. For procedure to function and accomplish its sought-after goals, it is necessary to devise criteria for making distinctions and workable rules for differentiating among the various types of individuals and legal entities. Our model, like the existing procedural regime, is unable to deal with power disparities on a case-by-case basis. Instead, it aims at correcting categorical and structural biases that operate systematically along the entire spectrum of cases. It is necessary to bear in mind that we live in a second-best world. As mentioned, even the existing set of procedures rests on categories that do not completely satisfy the whole range of cases. But in comparing the two procedural regimes, we should consider which is more likely to advance the goals of accurate judicial results (accuracy in the two-dimensional sense discussed above) and to preserve the expressive dimension of judicial decisions. We believe that our model best responds to those needs. In addition, power imbalances should be analyzed and treated categorically not just for practical reasons, but also for normative and theoretical purposes. As we have seen, there are advantages accruing to the government and government-like entities that do not arise simply due to their greater access to resources. Bill Gates, in his capacity as a private individual and not as chairman of Microsoft, does not go to court on a regular basis and is therefore not an RP to the same extent as Microsoft Corporation. Moreover, the chances of private citizens being sued by the Bill Gateses of this world are very slim. It is unusual for people to engage, in their personal lives, with people from an entirely different social stratum. Of course, Bill Gates could be involved in a car accident, and, as a result, a middle-class American could find herself forced to sue or being sued by him, but these events are rare and few and far between and, hence, do not pose a serious challenge to our model.

process also has a communicative function. From an expressive perspective, the enhanced procedural safeguards applied in criminal proceedings both protect the defendant from erroneous imposition of moral blame and stigma as well as preserve the stigmatizing power of criminal liability by assuring maximal accuracy of the criminal conviction as a reflection of de facto guilt.²¹⁶ Possible objections to the proposed model could, therefore, point to the diminished protections for criminal defendants against erroneous, stigmatizing conviction, as well as to the potential dilution of the expressive value of criminal liability. In what follows, we address each of these concerns.

As we saw, the expressive power of criminal law does not stem from the criminality of the conduct per se. The community's disapproval of a certain conduct, as well as the actual extent of that disapproval, does not necessarily correspond with the civil-criminal divide. Two major factors that reflect and produce stigma are the *type* and *severity* of the sanction imposed on the defendant. *Punishment* is the social convention that signifies moral condemnation but, as Professor Dan Kahan rightly observes, not every punishment conveys the same expressive message. Kahan makes a clear distinction between deprivation of liberty and imposition of monetary sanctions such as fines: "The message of condemnation is very clear when society deprives an offender of his liberty. But when it merely fines him for the same act, the message is likely to be different: you may do what you have done, but you must pay for the privilege."²¹⁷ We propose taking Kahan's distinction one step further: the stigmatizing effect of monetary sanctions diverges from that of deprivation of liberty not only in the criminal sphere, but also in the civil sphere. Civil commitment of sexual predators bears just as much stigmatizing weight as the imprisonment of a robber or rapist. Since our model mandates enhanced procedural safeguards as a prerequisite to imposing any form of liberty deprivation, it better ensures that defendants are protected from unmerited stigmatization.

²¹⁶ The Supreme Court has stated that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." In re Winship, 397 U.S. 358, 364 (1970).

²¹⁷ Kahan, *supra* note 48, at 593.

Now to the second concern, namely, the need to preserve the expressive power of a criminal conviction: one possible challenge to our model would be the claim that since a criminal conviction's power to generate social stigma derives from its degree of certitude, lowering the procedural standards may adversely affect its branding power. Our model entails a criminal trial in which liability is determined according to a lowered standard of proof and with less stringent procedural protections. A greater degree of uncertainty with regard to the guilt of the person deemed an offender in some cases will lead to the dilution of a criminal conviction in other cases and will make criminal convictions, in general, less valuable. The result might well be the emergence of public reluctance to impose social sanctions upon wrongdoers in general.²¹⁸

This objection is shaky for two reasons. First, as we have already seen, the stigmatizing power of a criminal conviction is not unitary; rather, it varies in accordance with the type and level of sanction.²¹⁹ Second, divorcing substance from procedure would augment, rather than weaken, the expressive power of criminal liability in that it would enhance and fine-tune the concept of criminal conviction. Our model would facilitate the establishment of various *types* of convictions with different values attached to each (conviction by the beyond a reasonable doubt standard, conviction by clear and convincing evidence, and conviction by the preponderance of the evidence standard). It would thus set in motion the evolution of a hierarchy of social sanctions that correspond to the various levels of accuracy at which a criminal conviction can be secured. With time, the public would match the social sanction to the type of criminal conviction. Mild social sanctions would be imposed on those convicted by a preponderance of the evidence, heavier sanctions on those found guilty by clear and convincing evidence, and maximum sanctions on those convicted beyond a reasonable doubt. Precisely because the value of the criminal label would be linked to the degree of certainty attributed to it, there is nothing to prevent applying that label along a spectrum of different procedures. This

²¹⁸ For a similar claim with regard to turning the standard of proof into a negotiable default rule, see *supra* note 121.

²¹⁹ Kahan, *supra* note 48, at 593.

would make for a far more exact regulation of social sanctions and thereby improve the expressive function of criminal law.²²⁰

E. Constitutional Challenge

Thus far, we have presented the theoretical framework for a procedural regime that can remedy many of the problems that plague our system of civil and criminal justice, albeit sidestepping any doctrinal constitutional issues that may impede our proposal. However, this Article seeks to be more than a thought experiment; indeed, we purport to present a workable solution to a real-life puzzle. We cannot, therefore, ignore the constitutional challenges that may be raised against our model. This Section argues that, based on both historical considerations and current constitutional jurisprudence, any possible challenges to our procedural structure can be refuted.

Constitutional challenges to the proposal to grant more demanding protections to a party to civil litigation facing severe sanctions, especially when the government or an institutional entity is the opponent, carry very little weight. Neither the Due Process Clause nor any other article in the Constitution forbids or constrains the provision of better procedural safeguards in civil proceedings. On the contrary, some commentators have argued that the Constitution can and should be interpreted as mandating that constitutional

²²⁰ One possible objection to our argument is that people are less aware of procedure and therefore are unable to assign the correct social sanction based on the type of conviction, which results in the dilution of the stigmatizing power of the criminal conviction. See Bierschbach & Stein, *supra* note 46, at 1749–50. We disagree. Despite the widely held belief that people are interested in substantive outcomes rather than in procedure, socio-psychological studies suggest that, in reality, people decide how legitimate authorities are primarily based on an assessment of the fairness of their decisionmaking procedures and not by their substantive outcomes. See Tom R. Tyler, *Procedural Justice*, in *The Blackwell Companion to Law and Society* 435, 442 (Austin Sarat ed., 2004); see also E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 1 (Melvin J. Lerner ed., 1988). Moreover, the claim that the public lacks the ability to distinguish between outcomes secured under different types of procedural regimes is a two-edged sword, as it undermines the very basis on which the expressive argument rests. Either the public is sophisticated enough to distinguish between the outcomes of different types of procedure or it is not. If it is, then there is no reason to assume that special difficulties will arise under the proposed model. If, however, the public lacks the degree of sophistication necessary for such distinctions, then the expressive argument fails, since it relies upon the ability of the public to appreciate the message communicated to it by criminal, as opposed to civil, procedure.

rights be applied in civil cases involving serious deprivations.²²¹ Just as the Supreme Court, despite the lack of textual authority, has interpreted the Due Process Clause as requiring the government to ensure due process when withdrawing conferred benefits, it could extend such a reading to other areas of the civil process.²²²

Providing less demanding procedural protections to criminal defendants facing trivial sanctions is more troubling from a constitutional standpoint. It is tempting to dismiss our model legalistically by arguing that the Constitution explicitly grants certain protections to criminal defendants, and it would therefore be impossible to adopt a procedural regime that deprives them of their inalienable constitutional rights. But the temptation to rest solely on the constitutional text should be resisted, as history suggests otherwise. The current structure of criminal procedure is largely a result of the 1960s Warren Court revolution, which dramatically enhanced the protections granted in criminal litigation.²²³ There is nothing sacred about this structure. The Supreme Court has chipped away at the constitutional protections provided to criminal defendants by interpreting the Constitution in ways that correspond to the underlying goals of the constitutional safeguards, as the Court understands them, oftentimes despite clear language indicating to the contrary.²²⁴

For lack of space, we will provide only a few examples of this trend. To begin with, the Sixth Amendment guarantee of the right to a jury trial, as interpreted by the Supreme Court, does not extend to petty offenses (that is, cases involving potential imprison-

²²¹ See Ely, *supra* note 153, at 1311–13 n.324 (arguing that the need to find punishment is not critical to constitutional decisionmaking because the requirement of procedural due process does not disappear if a law is not punitive); Schulhofer, *supra* note 151, at 79 (arguing that the “determinative character of the civil-criminal distinction in constitutional law may be more apparent than real,” for even if the constitutional amendments apply by their terms only to criminal cases, the Due Process Clause could be “pressed into service” to mandate the provision of similar safeguards in civil cases that involve serious deprivation).

²²² See Leubsdorf, *supra* note 16, at 601–02.

²²³ See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *Harv. L. Rev.* 780, 782, 791 (2006).

²²⁴ See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630, 662–63 (1958) (arguing that no word ever has a standard meaning for purposes of statutory interpretation and, therefore, meaning can only be ascribed by reference to statutory purpose in a given context).

ment of less than six months);²²⁵ the constitutional right to appointed counsel does not apply in cases involving only monetary fines.²²⁶ Professor J. Morris Clark provides the following explanation for the Supreme Court's procedural jurisprudence:

The reasons for the "petty offense" exception to these two sixth amendment rights are partly historical and partly functional. Historically, in both English and colonial practice predating adoption of the Constitution, fines and short prison sentences were meted out by judges sitting without juries. The Court has adopted the view that the drafters of the Constitution did not intend to change this practice despite their use of language guaranteeing jury trial of "all crimes" in article III and of "all criminal prosecutions" in the sixth amendment. Functionally, it is clear that the introduction of jury trials and the right to counsel into the most minor cases labeled "criminal" would drastically increase the expense and difficulty of such proceedings.²²⁷

Similarly, the loose standard of proportionality applied under the Eighth Amendment has been interpreted to apply only to a subclass of "punishments." For example, current Supreme Court jurisprudence holds that punitive damages, although clearly intended to punish, do not trigger Eighth Amendment protection against excessive fines.²²⁸ It is also noteworthy that the most important procedural protection—the standard of beyond a reasonable doubt—is not explicitly mentioned in the Constitution. It was the Supreme Court's holding in *In re Winship* that set this standard of proof as constitutionally mandated in criminal cases.²²⁹ And, naturally, it is a matter of interpretation as to whether this standard applies to all criminal cases or only to those defined as "severe."

²²⁵ See, e.g., *Blanton v. N. Las Vegas*, 489 U.S. 538, 539 (1989) (finding no "right to a trial by jury for persons charged under Nevada law with driving under the influence of alcohol"); *Baldwin v. New York*, 399 U.S. 66, 68 (1970) ("[S]o-called 'petty offenses' may be tried without a jury.").

²²⁶ See *Scott v. Illinois*, 440 U.S. 367, 369 (1979) (holding that there is no constitutional right to appointed counsel in misdemeanor cases in which no imprisonment is imposed).

²²⁷ Clark, *supra* note 50, at 399.

²²⁸ See *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 263–64 (1989).

²²⁹ 397 U.S. 358, 368 (1970).

In sum, the Supreme Court has been interpreting the Constitution creatively for quite some time in order to achieve the goals at the core of the procedural protections. Consequently, if we have succeeded in crafting a model that is normatively viable and practically workable, no constitutional challenge should prevent its implementation.

CONCLUSION

The procedural model proposed in this Article challenges our most basic understandings of procedure and its relation to substantive law. The bifurcation of our procedural regime into civil procedure and criminal procedure is so deeply rooted that it is hard to imagine any alternative. Although tradition has indisputable value, it should not stand in the way of so necessary a reform. The above-described social and economic transformations altered the legal landscape. By remaining loyal to the traditional procedural structure, we are betraying its underlying goals of efficiency, fairness, and due process. Procedure must be flexible enough to reinvent itself when legal and social circumstances change. In fact, the history of procedure is no stranger to such revolutions, small and big. For hundreds of years, a party to litigation was excluded from testifying in her own case. As late as the mid-nineteenth century, we could find in the *American Law Register* the following statement: "No rule of evidence is better settled than that which excludes parties from being witnesses in their own suit."²³⁰ Today, the parties to civil litigation almost always testify in their own suits and failing to do so can be held against them.²³¹ The beyond a reasonable doubt standard of proof in criminal trials developed only at the end of the eighteenth century, in conjunction with the maturing adversarial system.²³² And the right to counsel was for many years denied to criminal defendants and provided only in civil cases.²³³ All these

²³⁰ *Of the Disqualification of Parties as Witnesses*, 5 *Am. L. Reg.* 257 (1857); see also John H. Langbein, *The Origins of Adversary Criminal Trial* 37–38 (A. W. Brian Simpson ed., 2003).

²³¹ For an account of the history of the rule and its abolition, see Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 *Ky. L.J.* 91 (1981–1982).

²³² Langbein, *supra* note 230, at 261–66.

²³³ *Id.* at 10.

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changes occurred as a result of political, social, and economic transformations and reflect emergent social values. The time is now ripe for the next procedural revolution.