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### ***REPLY***

THE BOUNDARIES ARE DEAD, LONG LIVE THE BOUNDARIES!

*Issachar Rosen-Zvi\** & *Talia Fisher\*\**

**I**N our article *Overcoming Procedural Boundaries*,<sup>1</sup> we set out to dispense with the anachronistic and dysfunctional distinction between civil and criminal procedure and to offer in its stead an alternative procedural divide that is better suited to the goals and purposes of the original dichotomy. The article is comprised of two parts, the first deconstructive and the second reconstructive. The deconstructive part seeks to show that the existing procedural taxonomy is inherently flawed both conceptually and practically. It highlights a fundamental shortcoming of our present procedural system in failing to provide adequate protections to individuals who are sued by the government or by large organizational entities and who face severe civil sanctions, while ensuring sweeping procedural safeguards for people and institutions facing only trivial criminal sanctions. We survey the many justifications for the civil-criminal rift in procedure, which include utilitarian, egalitarian, expressive, and liberal rationales, and challenge each one, showing them to be “obsolete if not completely unfounded.”<sup>2</sup>

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<sup>1</sup> Issachar Rosen-Zvi and Talia Fisher, *Overcoming Procedural Boundaries*, 94 Va. L. Rev. 79 (2008).

<sup>2</sup> *Id.* at 84.

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The second, reconstructive part of the article proposes cutting the Gordian knot binding substance to procedure and replacing the current bifurcated civil-criminal procedural regime with a model running along two axes: the balance of power between the litigating parties and the severity of the potential sanction (or remedy).<sup>3</sup> The balance of power component of the model refers to its two sets of procedural rules and is aimed at remedying the asymmetry problems inherent to litigation. According to the proposed model, one set of rules would govern symmetrical litigation, that is, where both parties are either institutional entities (IE), including both governmental bodies and large organizational entities such as big corporations and financial institutions, or else individuals (IND), which would include small businesses. A second set of rules would govern asymmetric litigation, involving an individual on one side and an institutional entity on the other. The second trajectory in the model is the degree of harm that would be generated by an adverse ruling for the litigating parties, irrespective of whether the substantive legal regime governing the dispute is civil or criminal. In focusing on these two parameters, our proposed procedural regime maps out the entire procedural landscape. The article shows that the proposed model better realizes the objectives underlying the rationales for the current procedural regime.

In his thought-provoking response, Mr. Blenkinsopp raises several important points of criticism against our reconstructive move, arguing that our “attempt to erase boundaries ends up erecting new ones, which are perhaps equally arbitrary and dysfunctional.”<sup>4</sup> In this brief response, we would like to address this criticism and use his arguments as a framework for clarifying some points of possible confusion.

#### THE NATURE OF LEGAL TAXONOMIES

A central theme in Blenkinsopp’s objection to our alternative model relates to the under- and over-inclusiveness of the proposed

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<sup>3</sup> Id.

<sup>4</sup> Alexander Blenkinsopp, *The Persistence of Boundaries: A Reply to Rosen-Zvi and Fisher*, 94 Va. L. Rev. In Brief 75, 76 (2008), <http://www.virginialawreview.org/inbrief/2008/11/10/blenkinsopp.pdf>.

taxonomy. We do not contest the fact that, in particular circumstances, our proposed classifications may fall short of optimal results. For instance, when two individuals engaged in litigation are represented by attorneys who have differential skills and capacities, the outcome of the trial might be skewed in favor of the better-represented party.<sup>5</sup> Fully capturing power asymmetry is impossible. But this imperfection, in and of itself, does not undermine our proposal. The fact that a certain classification does not work in each and every case does not necessarily negate its usefulness in the aggregate. The mere existence of a certain margin of error does not render the taxonomy invalid or undesirable. By their very nature, legal categories are over- and under-inclusive. It is conceivably impossible to devise a procedural taxonomy immune from failure in a certain percentage of cases. The question, therefore, is not whether our proposal attains perfect results, but whether it offers a better overall solution than do alternative, dichotomous approaches.

Moreover, it should also be recalled that any taxonomy must balance accuracy with administrative costs and workability. It is possible, of course, to fine-tune our proposed categories. The institutional entities (IE) could be divided into larger and smaller firms. Likewise, the IND category proposed in the article, comprised of individuals and small businesses, could be sorted into subcategories according to relative wealth. Such subcategories could perhaps capture subtle differences between cases, but this tweaking would come at high administrative cost. In addition, the benefits in terms of accuracy may be quite marginal and not as significant as Blenkinsopp implies. This is essentially an empirical question. But the vast literature on the matter, beginning with Marc Galanter's seminal article *Why the "Haves" Come Out Ahead*, substantiates the premise underlying our division, namely, that the great bulk of litigation<sup>6</sup> and the most significant disparities

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<sup>5</sup> For an attempt to solve power disparities within categories, see Issachar Rosen-Zvi, Procedure and Distributive Justice (working paper, on file with authors).

<sup>6</sup> According to a recent study, the estimated incidence of federal civil cases involving individuals versus individuals is 9.3%; cases involving individuals and organizations amount to 68.4% of the total number of cases. 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, 1298 (2004).

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between litigants arise in proceedings involving Repeat Players and One-Shotters as adversaries (RP v. OS), as opposed to One-Shotter adversaries of different types (OS v. OS) or Repeat Player litigants (RP v. RP).<sup>7</sup> Finally, as we demonstrated in the article, our proposed distinctions (especially those between severe and lenient sanctions) have compelling explanatory force and align with both recent doctrinal developments as well as the underlying intuition of courts.

#### WHAT ARE “SANCTIONS”?

Blenkinsopp criticizes our use of the term “sanction,” arguing that the distinction between sanction and non-sanction is as dubious as the distinctions we challenge in the article—“punitive” versus “non-punitive” and “civil” versus “criminal.” We are grateful for this opportunity to reemphasize a central theme of our article that is overlooked in the critique. First and foremost, the term “sanction” is not used as a legal category and we in no way seek to set a dichotomy between ““sanction” and “non-sanction.”” Such a distinction would, indeed, be as questionable as claimed by Blenkinsopp. Rather, for the purpose of the article, the term “sanction,” as we define it, refers to any cost imposed upon a litigant following an adverse ruling. In this respect, the term “remedy” could have served just as well. The very essence of our project is the dismantlement of the distinction between sanction and remedy, which corresponds to the criminal-civil divide. Our central claim is that deprivation of liberty imposes the same significant costs in both the civil and criminal spheres. Likewise, a \$500 loss has the same effect whether resulting from a fine or a tort claim.

We are aware of the fact that the term “sanction” is loaded with *a priori* connotations (just as the parallel term “remedy” is) that may be difficult to neutralize, as the proper understanding of our model requires, and that this may lead to some of the confusion. Such confusion regarding the nature of our proposal, is further reflected in the examples raised by Blenkinsopp. He challenges us by asking whether a public health quarantine would count as a

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<sup>7</sup> Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95, 108–11 (1974).

“sanction,” the underlying premise of this question being that sanctions are defined by their purpose and ultimate object. Our model, on the other hand, rejects teleological distinctions grounded upon a final object. It disregards the motivation behind the imposition of the sanction or remedy. Rather, our (sole) criterion refers to the effect of the adverse ruling on the litigant. The model is indifferent to the question of whether the purpose of imposing a \$500 fine on a corporation is punitive or remedial. In a similar vein, the model would be indifferent to the question of whether or not a quarantine imposed upon an individual is based on health considerations. The effect of the quarantine is the deprivation of the individual’s liberty, regardless of the initial purpose it was intended to achieve. And since liberty deprivation is considered a severe sanction and in light of the power asymmetry existing between the litigating parties (government versus individual), the result, under our model, would be that the government would bear the “beyond reasonable doubt” standard of proof. Blenkinsopp raises the concern that such a legal result would be intolerable in terms of risk to public health. To this we respond that such fears are not essentially different from the risks to the public posed by serial rapists or dangerous assassins. It is unthinkable for the “beyond reasonable doubt” standard to be compromised in the latter cases, despite the significant threat to the public were the suspect or defendant to be released if in fact guilty. Moreover, in addition to being justifiable as the optimal allocation of risk between litigating parties, our proposed classification is also preferable to the “punitive versus non-punitive” distinction, in that it provides concise and clear guidelines to the courts, thus ensuring a greater degree of certainty.

As expressed in the article, adjusting the level of procedural protection to the severity of the sanction and defining “lenient” versus “severe” sanctions are complicated tasks. Deciding where to draw the line between severe and lenient sanctions is a political decision with significant distributive ramifications, and it will therefore vary from one society to another and across time. However, such a procedural regime is easier to administer than the current taxonomy applied by the courts, for once the line has been drawn it can be applied in a purely mechanical fashion. The courts

would not be called upon to reconsider the purpose of each sanction each time anew, on a case-by-case basis.

#### WHY THE “STANDARD OF PROOF”?

Another concern Blenkinsopp raises is the fact that, ultimately, our proposition focuses on the standard of proof, ignoring the many other procedural features separating civil and criminal procedure, such as the Ex Post Facto clause. We readily admit that, in order to fully implement our proposed taxonomy, it is necessary to flesh out and adjust all the procedural safeguards. However, our aim in the article was not to map out a complete, all-encompassing procedural regime but rather to sketch an initial blueprint for an alternative procedural taxonomy, leaving the details to a future project. Nonetheless, our decision to start out by focusing on the standard of proof was not arbitrary or coincidental. The standard of proof is the central procedural mechanism currently distinguishing between the civil and criminal spheres in the current system. In addition to its unparalleled importance, the standard of proof is a useful tool for illustrating the benefits of our model because it allows the possibility of gradation.

Blenkinsopp also criticizes our choice of evidentiary categories, arguing that the model has taken “the evidentiary standards that exist today, ordered from highest to lowest, and just plugged them into their matrix.”<sup>8</sup> We understand this as implying that, in his opinion, our model must dispose of the existing standard of proof categories, such as “beyond reasonable doubt,” “clear and convincing evidence,” and “preponderance of the evidence,” and adopt an alternative sequential continuum of proof standards from which to choose. We beg to differ. There is undeniable practical significance to the use of existing well-known categories. Ambiguous as it may seem to Blenkinsopp, “beyond reasonable doubt” is a more meaningful and workable evidentiary standard than 95% or 91.6% certainty. Blenkinsopp mentions an empirical study that demonstrates that people treat the “beyond reasonable doubt” standard as amounting to 85% and the “preponderance of the evidence” standard as referring to 75%.<sup>9</sup> Indeed, numerous

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<sup>8</sup> Blenkinsopp, *supra* note 4, at 81.

<sup>9</sup> See *id.*

empirical studies have attempted to quantify the actual implementation in practice of the various standards of proof, by both juries and judges. Some of these studies have shown that the real-life application of various standards of proof diverges from the normative assumptions regarding their measure. For instance, although the “beyond reasonable doubt” standard is ideally set around a certainty level of 95%, in reality, juries ascribe lower probabilistic numbers.<sup>10</sup> This strand of Blenkinsopp’s critique, however, refers to a matter that lies outside the scope of our model. Firstly, this same objection is no less valid with regard to the existing regime as well. Moreover, inserting a permanent intermediate standard of proof of “clear and convincing evidence” between “beyond reasonable doubt” and the “preponderance of the evidence” would likely serve to fine-tune the range and differences between the two existing standards.

We would like to thank Mr. Blenkinsopp for his insightful commentary and the *Virginia Law Review In Brief* for the opportunity to publish in this wonderful forum. We hope that this exchange will mark the beginning of an ongoing dialogue on the development of a viable alternative to the malfunctioning criminal-civil dichotomy.

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<sup>10</sup> For a survey of the empirical data regarding the various quantifications of the reasonable doubt standard see Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. Davis L. Rev. 85, 111 (2002).