

CHALLENGES AND IMPLICATIONS OF A SYSTEMIC SOCIAL EFFECT THEORY

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This is a companion piece to an article appearing in the Georgetown Law Journal in November 2005, which sets forth a new theory for distinguishing civil measures from criminal measures for constitutional purposes. This article discusses the most controversial implications of the Systemic Social Effect Theory and defends it against alternative theories for distinguishing the two sanctions. By preserving the strengths of the alternative theories while avoiding their weaknesses, the Systemic Social Effect Theory integrates constitutional policy and self-consistent jurisprudence with a viable legal theory.

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I. INTRODUCTION

The guarantee of several important constitutional procedural rights to persons threatened with state sanctions depends on whether the sanction at issue is considered criminal or civil.¹ How courts distinguish between “civil” and “criminal” is, consequently, much more than a logomachy. A sanction’s characterization as civil or criminal may dictate whether a defendant is afforded a legitimate opportunity to vindicate his presumed innocence. Doctrinally, the question of how to differentiate civil and criminal sanctions is part of a fundamental juristic debate over where to draw the line between state conduct that threatens the core civil rights that these constitutional provisions protect, and those in which such protection is deemed unnecessary.

In view of the subject’s importance and longevity, one might reasonably expect that the Supreme Court would have long ago propounded a model for differentiating civil and criminal sanctions consonant with the public policies considered necessary to the political prosperity of a liberal democracy. As I explained in a previous article, *Civil and Criminal Sanctions in the Constitution and Courts* (hereinafter, *Civil and Criminal Sanctions*),² the Court instead has contradicted itself recurrently over the past two and a quarter centuries, culminating in its most recent series of decisions. Under this new approach, most clearly applied in *Hudson v. United States*,³ the Court defers to legislative determinations

1. Some of these guarantees explicitly apply only in criminal cases. *E.g.*, U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous *crime*, unless on a presentment or indictment of a Grand Jury . . . ; nor shall be compelled in any *criminal* case to be a witness against himself . . .”) (emphasis added); U.S. CONST. amend. VI (“In all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”) (emphasis added). Others do not clearly specify, but have been interpreted by courts to apply only in criminal or punitive contexts. *Compare, e.g.*, U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”), and U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”), with *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 260 (1989) (holding that the Eighth Amendment’s “Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties”), *Collins v. Youngblood*, 497 U.S. 37, 41–49 (1990) (interpreting the ex post facto law clause to apply only in criminal cases), and *Miller v. Florida*, 482 U.S. 423, 429 (1987) (noting Justice Chase’s criminal characterization of the ex post facto clause in *Calder v. Bull*, 3 U.S. 386 (1798)). See generally THE FEDERALIST NO. 84, at 629 (Alexander Hamilton) (John C. Hamilton ed., 1864) (“The creation of *crimes* after the commission of the fact, or, in other words, the subjecting of men to *punishment* for things which, when they were done, were breaches of no law; and the practice of arbitrary imprisonments have been, in all ages, the favourite and most formidable instruments of tyranny.”) (emphasis added).

2. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 9–14 (2005).

3. 522 U.S. 93, 99–100 (1997); see also *Kansas v. Hendricks*, 521 U.S. 346, 360–66 (1997) (using a similar methodology to support its decision that the indefinite detention of an allegedly mentally ill offender who had already served a full prison sentence for the same offense is not a “criminal” punishment subject to double jeopardy protections).

of whether such civil rights should be protected, except when the defendant can shoulder the heavy burden of showing, under a multifactor analysis, that a nominally civil law is actually criminal in nature.⁴

In *Civil and Criminal Sanctions*, I critiqued and ultimately rejected the suitability of the Court's multifactor analysis to the public policies that these constitutional protections should advance. I proposed a new and radically different test for distinguishing civil and criminal sanctions based on the type of threats posed to the rights protected by these enhanced procedural protections, or "EPP." The approach, called the "Systemic Social Effect Theory," or "SSET," was founded on the conclusion that, where the state authorizes or enforces sanctions having either a systematically deterrent or systematically retributive social effect, the potential threat posed to civil rights always justifies affording EPP to suspects or defendants. Such sanctions should be considered "criminal" sanctions for constitutional purposes. In contrast, where the state authorizes or enforces sanctions having a merely remedial effect, the arguments for EPP are more qualified and less forceful. Such sanctions are considered "civil" sanctions under the SSET.⁵

Civil and Criminal Sanctions left two subjects for future consideration. First, the centrality of the subject to a panoply of important jurisprudential questions has motivated several authors to offer proposals for distinguishing between civil and criminal sanctions either generally or for specific purposes.⁶ Some of these proposals, although published before the Supreme Court issued its decision in *Hudson*, offer interesting alternatives to the Court's current approach. As many of these various proposals are thoughtfully written and appear promising, they deserve the careful critique that has so far been denied them. Moreover, several of the proposals treat the civil-criminal distinction in a manner inconsistent with the SSET, including one that might be described as diametrically opposed to the SSET, which raises the question of whether these proposals offer a superior alternative to the SSET. The fact that the Supreme

4. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167-69 (1963).

5. The definitions of "remediation," "retribution," "deterrence," and "punishment" set forth in the article are critical to the cogency of the argument. See Fellmeth, *supra* note 2, at 14-34.

6. See, e.g., Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 480-83 (1974); 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, 1348-69 (1991); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 381-85 (1976); 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 (1992); Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 45 (1996); Laura J. Kerrigan et al., *Project: The Decriminalization of Administrative Law Penalties, Civil Remedies, Alternatives, Policy and Constitutional Implications*, 45 ADMIN. L. REV. 367, 370-74 (1993); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 210-13 (1996); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 797-819 (1997).

Court has incorporated several of them into its multifactor approach to the civil-criminal distinction also argues for analyzing them carefully to determine whether they might be useful for advancing the public policies identified earlier. These alternatives are considered in Part II.

Once it has been shown that the SSET offers the best basis for distinguishing between civil and criminal sanctions for all potential and actual defendants, the second subject assumes paramount importance. The Court's current distinction between civil and criminal sanctions, as well as several approaches proposed by other authors, permit a variety of punitive measures to fall within the definition "civil" sanctions that do not necessitate EPP in the treatment of the suspect or defendant. The most widely used sanctions of this kind are punitive civil forfeitures (addressed in Part III), regulatory "civil penalties" (Part IV.A), adjudications of debarment (Part IV.B), and, most obviously, civil punitive damages awards (Part V). Commentators have often identified these fields as posing growing dangers to civil rights because they impose what are essentially criminal punishments on defendants without the benefit of the Constitution's EPP.⁷ Parts III, IV and V will demonstrate how the SSET would require a fundamental reframing of sanction questions in each of these fields of law and justify the alterations as necessary to actualize the constitutional policies underlying grant of the EPP.

II. ALTERNATIVES TO A SSET

As a matter of positive law, the characteristics of criminal measures have tended, albeit unevenly and decreasingly, to differ from those of civil measures. As a purely descriptive matter, there are four general differences that both historically and currently distinguish civil sanctions from criminal ones. First, to better effect retribution and deterrence, criminal sanctions tend to impose more severe and prolonged suffering on violators than do civil sanctions. The most extreme criminal sanctions include imprisonment, forced labor, and execution. Among these, only some kinds of imprisonment are used in the civil law, and even then only in unusual, specific circumstances. In both civil and criminal law, monetary penalties are common; however, "criminal" monetary penalties are not necessarily more severe than civil penalties and, as will be discussed below, may be less severe than civil penalties for a similar or identical act.

7. See, e.g., Charney, *supra* note 6, at 480 (commenting on civil penalties); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1613-17 (2005) (examining the growing problem of multiple punitive damage awards); Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461 (exploring punitive civil forfeitures); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 698-99 (1999) (commenting on debarment adjudications).

The second commonly observed difference between civil and criminal sanctions is that, whatever the severity of a criminal sanction may be, it is never tailored precisely and solely to match the harm caused by the forbidden act. Instead, the sanction authorized is typically either fixed and inflexible, or based on a combination of factors largely unrelated to remediation, including the threat to public safety and opinion caused by similar acts (for example, where there is a wave of certain types of crimes, such as hate crimes or terrorism), the perceived moral culpability of the act, and the degree of deterrence sought through the sanction. The sanction actually imposed may further vary according to other factors, such as the perceived culpability and contrition of the offender himself or the public outrage caused by the act. Consequently, on a quantitative level, criminal sanctions tend to harm the offender incommensurately with the harm caused by the offending act. This is not to say that criminal sanctions always impose a quantitatively greater harm on the offender than on his victim. The point is merely that they are incommensurate; a criminal sanction may impose a greater or lesser harm on the offender than the harm caused by the crime. However, given the tendency for criminal sanctions to be more severe than civil sanctions, and further given that almost all crimes also create a civil cause of action by the victim against the offender, whatever the severity of the criminal sanction may be, in combination with the civil remedy, it tends to exceed the harm caused, except on purely pragmatic grounds, such as when the offender cannot be reached by a civil remedy because the state lacks the means to compel remediation,⁸ or when a civil jury or judge underestimates the damages caused by the criminal act.

Third, criminal convictions tend to result in widespread stigma. Violations of criminal laws generally result in the imposition of a social stigma upon the convicted violator, whereas violations of most civil duties, as a rule, do not result in such stigma. As discussed in Part II.E, there are certainly some violations of civil duties that do not rise to the level of a crime but that nonetheless occasion public stigma. And there are crimes whose violations do not generally entail public stigma at all. Nonetheless, as a general rule, crimes tend to convey an aura of reprobation not usually attributable to violations of civil duties.

Finally, criminal laws are usually prosecuted by the state rather than private individuals, as this facilitates communicating official condemnation of the forbidden act and ensures that enforcement occurs at the state's discretion. This has never been a uniform practice; as discussed in Part II.D, some criminal laws have historically been enforced by private individuals, and even today, the state delegates what are arguably criminal prosecutions to private individuals. It is also a common historical

8. For example, the defendant might be so poor as to be judgment-proof (which is usually the case with street crimes) and the state might decline for various reasons to compel the defendant to remediate directly or indirectly through forced labor or similar coercive measures.

practice for the state to bring civil actions on its own behalf. As a rule, however, criminal actions are prosecuted by the state and not private individuals.

Based on one or more of these properties of civil and criminal sanctions, various commentators and Supreme Court majorities have attempted to justify a distinction between civil and criminal measures for purposes of creating a rule as to when the constitutional EPP should apply. The *Mendoza-Martinez* test,⁹ for example, really amounts to an attempt to synthesize *a priori* or descriptive characteristics of “criminality,” including some of those enumerated above, into a descriptive test. Policy arguments also sometimes appear superficially to justify basing the distinction on one of these characteristics. However, as this Part will demonstrate, under close examination, even those characteristics with some rational policy justification fail in their task of providing a self-consistent and viable test for EPP. Other efforts to distinguish the two will be discussed in this Part as well. Still, these theories have also failed to formulate a cogent basis for the distinction because they offer insufficient policy justifications for applying EPP in some cases and not in others. As will be explained, the fundamental reason for this failure is that the four characteristics discussed above are mainly side effects of the different policies motivating civil and criminal approaches to solving social problems.

A. *The Packer Test and the Dominant Purpose of Punishment Theory*

Herbert Packer, in his 1968 work *The Limits of the Criminal Sanction*, enumerated six characteristics that, when all present, form in his view a plausible definition of a “criminal sanction” as that term has been traditionally used. These characteristics are, in paraphrase:

- (1) The sanction involves consequences normally considered unpleasant;
- (2) The sanction is imposed as a result of a violation of a legal rule;
- (3) The sanction must be intentionally administered by individuals other than the offender;
- (4) The sanction is imposed on the offender for the offense;
- (5) The sanction must be imposed and administered by an authority constituted by a legal system against which the offense is committed;
- (6) The sanction’s dominant purpose is to prevent offenses against legal rules or to exact retribution against offenders, or both.¹⁰

In his defense, Professor Packer was not attempting to define criminal sanctions as a matter of constitutional policy, or even to argue that there is some desirable policy that such a definition will promote. He made

9. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

10. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 21, 31 (1968).

sparse effort to justify or elaborate his chosen criteria, as they were merely intended to set up what he considered a workable definition of criminal sanctions for purposes of his treatise on the limits of such sanctions. Nonetheless, Packer was attempting to restate the positive law in a more coherent formula than is typically applied. As such, and considering his long experience and expertise in the criminal law, his proposal merits consideration as a possible alternative test for determining what sanctions are criminal so that EPP should apply. Packer's proposed criteria also raise issues that overlap with other authors' distinctions.

At the outset, it is important to identify and discard any properties allegedly belonging to criminal sanctions that are also generally present in civil sanctions. On this basis, Packer's first four characteristics can safely be ignored. His first factor is not helpful in distinguishing between civil and criminal sanctions; the payment of compensation for a civil injury is unpleasant to anyone who enjoys money, which includes virtually everyone. As for the second, civil remedies as well as criminal sanctions are imposed due to the violation of some legal rule. The third is equally unhelpful for our purposes because civil compensation is often imposed by persons other than the offender. Otherwise, the compensation results from a settlement and not a court judgment. Finally, assuming that by "offense" Packer meant an action that gives rise to liability under a prescribed legal rule, all positive civil laws as well as criminal laws seem to qualify. If, in the alternative, we define offense to mean the violation of criminal law, we find ourselves engaged in a circular argument.

This leaves two possibly germane criteria. The first of these (Packer's fifth) is that the offense must be against the authority that imposes the sanctions, which in most regulatory law, such as tax law, trade regulatory law, banking law, or securities law, is the state. In other words, the sanction is imposed for a wrong committed against the government or society as a whole and not against a private individual. Several considerations undermine the usefulness and cogency of this criterion as a proposed basis for deciding when to apply EPP. Most obviously, criminal acts are typically committed directly against private individuals, not the state per se. Armed robbery, murder, securities fraud, embezzlement, and private computer system hacking injure the state only indirectly, through harm inflicted on the immediate victims, individuals, and entities within the state.¹¹ Reading the fifth criterion

11. The expected objections to this point are unconvincing. The first is that the state maintains a monopoly on force and that the use of private force against private individuals without state approval offends the state. This argument falters because many acts widely considered criminal (for example, embezzlement or securities fraud) do not involve the use of force. Another objection is that, where the state has decided that such acts offend it, it has designated these acts as criminal and, therefore, the commission of such acts offends the state as much as the victim. *See generally* LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 3 (1993); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 165, 165-66 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988) [hereinafter *AMERICAN LAW AND THE CONSTITUTIONAL ORDER*]. This argument is, of

more broadly, we might say that, by offending laws adopted on behalf of and for the benefit of society *as a whole*, the offender might be said to “offend against” the legal system. This appears to be another way of saying protecting society as a whole, rather than merely protecting or compensating a specific victim, is a characteristic of criminal sanctions. But criminal sanctions that protect society as a whole do so by deterring and punishing such violations. When only the victim’s interest is to be protected, remediation is the typical remedy. So, this aspect of the test appears to fold into the question of whether the sanction deters and punishes the offender.

The second remaining aspect of the test, which is that the state must impose and administer the sanction, is considered closely in Part II.D.2. It suffices here to note that the state imposes civil as well as criminal sanctions, and “administers” both in the sense that neither type of sanction would be systemically administrable without the state law enforcement apparatus. If we were to amend Packer’s definition slightly and say that the key criterion is whether the state retains *ultimate* control over the sanction’s administration, we still gain no ground. The state ultimately administers all civil as well as criminal sanctions. Civil defendants may only be counted upon to pay adverse judgments because of the threat of state intervention and enforcement by, for example, mandatory garnishment of wages by the court; lien, repossession or impoundment by the county sheriff; or other state-administered sanctions. So, unless the identity of the state as complainant explains the distinction, Packer’s fifth criterion offers little help.

In contrast to the first five characteristics, I have previously argued that the retribution for, and prevention of, forbidden acts are meaningful, objective, and pragmatic characteristics for distinguishing civil remedies from criminal sanctions for constitutional purposes.¹² There remains, however, one more pitfall in Packer’s approach. Packer defined the relevant criterion as being whether the sanction’s dominant purpose is deterrence (prevention, in his terms) or retribution.¹³ This qualification deserves careful consideration, particularly because it forms the primary basis for another commentator’s proposal.

Well before the Supreme Court decided *Mendoza-Martinez* or *Hudson*, J. Morris Clark published an article in the *Minnesota Law Review* in which he sought to distinguish civil law from criminal law.¹⁴ Clark did not characterize his purpose as an attempt to draw a line between civil and criminal laws to advance constitutional policy per se. Instead, he claimed to “explain and order the [Supreme] Court’s holdings” on the

course, tautological in contending that, by designating a prohibited act a crime, the state makes the resulting punishment a “criminal sanction.”

12. See Fellmeth, *supra* note 2, at 14–34.

13. PACKER, *supra* note 10, at 31.

14. Clark, *supra* note 6.

subject as a descriptive project.¹⁵ In so attempting, Clark identified what he believed to be the main but inconsistent trend of the Court's constitutional jurisprudence on criminal procedures. Clark interpreted the Supreme Court jurisprudence as of 1976 as establishing that the EPP apply in cases involving an intent to punish, regardless of whether the law was properly considered criminal.¹⁶ Clark claimed that, regardless of the use of the term "crime" and "criminal" in the Fifth and Sixth Amendments, the Court should avoid interpreting these terms and instead focus on whether the law at issue has a purpose that is primarily punitive.¹⁷ He defined "punishment" as a sanction imposed to accomplish the purposes of retribution and deterrence.¹⁸ In his theory, if a sanction has retribution or deterrence as its dominant goal, the constitutional protections afforded in criminal cases should be applied.¹⁹

In short, Clark implicitly sifted out Packer's first five criteria and relied exclusively upon the sixth without alteration. Although Clark claimed to be interpreting Supreme Court precedent,²⁰ his theory hardly reflected the reality of the Court's approach at that time. In the Court's more recent holdings, its approach has come to resemble Clark's purported description even less than it did in 1976.²¹ Nonetheless, if we accept Clark's theory as based, as it appears to be, on the concern that persons should not be subjected to punishment without the EPP guaranteed by the Constitution, then it is a refinement of and improvement on the Packer test. Both Clark and Packer, then, believed in the relevance of deterrence and retribution to the characterization of a sanction as criminal. Clark's theory opens itself to several objections not strictly relevant here,²² of which the main one is that he failed to justify his theory as a matter of constitutional policy. A more serious problem with the test,

15. *Id.* at 382.

16. *See id.* at 421.

17. *Id.* at 433.

18. *Id.*

19. Clark never articulated a policy justification for his claim that deterrence and retribution should give rise to the need for additional procedural protections. This results primarily from Clark's purpose of harmonizing and explaining Supreme Court doctrine in this area, but it is traditional in constitutional exegesis to match an interpretation of the Constitution with the public policy purposes that the Constitution seeks to advance.

20. Clark, *supra* note 6, at 382.

21. *See Hudson v. United States*, 522 U.S. 93, 101 (1997); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 259-76 (1989).

22. One objection is that, on a literal level, the test does not mesh with the language of the Constitution. Clark insists that the inquiry into whether a law is criminal or civil should be separate from whether the law is punitive and that only the latter inquiry is relevant to constitutional analysis. Yet, the Fifth and Sixth Amendments are phrased in terms of "crime" and "criminal," not "punitive" and "nonpunitive." Unless the terms "criminal" and "punitive" are interpreted synonymously—an interpretation Clark expressly repudiates—his theory opens itself to an important objection on positive grounds. If a proponent of Clark's theory were to attribute a constitutional meaning to the word "criminal," however, and attach the same meaning to "criminal" that Clark attaches to "punitive," this objection would be overcome. However, Clark did not propose this.

though, is the one it shares with Packer's sixth factor—its reliance on legislative goals or intent.²³

There is a common human tendency, possibly based on the forgiving gift-recipient's perception that "it's the thought that counts," to consider the *purpose* of the sanction to be more relevant than its actual effect. Justice Holmes famously wrote along these lines that "even a dog distinguishes between being stumbled over and being kicked."²⁴ There are, however, both pragmatic and doctrinal disadvantages to appealing to a forgiving spirit or canine ethics as a basis for public policy. The pragmatic disadvantage is that legislative intent is often difficult to discern. A legislature is composed of numerous individuals serving diverse interests. The practical reality is that legislators sometimes do not understand or inquire into the legislation upon which they vote and, when they do, there may be no consensus on a single goal to be achieved. A number of canons of statutory interpretation have developed to aid courts in divining legislative intent,²⁵ but their success is open to question.²⁶ They really operate more as convenient judicial fictions than devices for divining the thoughts of the legislature. For this reason, the entire project of deciphering legislative intent has periodically been criticized.²⁷ Thus, hanging important civil rights on a concept as elusive as legislative intent is fraught with peril.

The doctrinal fault is that, even assuming that the legislature speaks with a single clear voice, the state's purpose in adopting a sanction has no necessary effect on either the defendant or the state itself. What goes on in the collective mind of a legislature is, simply put, epiphenomenal. Certainly, by attempting to achieve a specific goal, the legislature has a greater chance of achieving that goal than if it were adopting legislation randomly. But one designing a constitutional policy to protect citizens against state coercion is properly concerned with minimizing the number of blameless persons subjected to punishment for purposes of retribution or deterrence. As one commentator has written, "[t]he defendant's claim to constitutional protections should not depend solely on the motivation of the legislature, but rather on the concerns of the individual threatened with the sanction. The state's motivation in enacting the statute is not

23. Clark, *supra* note 6, at 438.

24. OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (1881).

25. See generally, e.g., WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* (1999); THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* (Fred B. Rothman & Co. ed., 2d ed. 1980) (1874); NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* (5th ed. 2002).

26. See *Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003) ("General principles of statutory construction are notoriously unreliable.").

27. See, e.g., Antonin Scalia, *Common Law Courts in a Civil Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 9–18 (Amy Gutmann ed., 1997); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

one of those concerns, but the gravity of the sanction is.”²⁸ If the legislature *intends* to adopt a punishment and succeeds only in adopting a law that achieves remediation, there is no need for EPP for the defendant.²⁹ In the reverse scenario, where the legislature intends remediation and adopts punishment, constitutional policy is properly more concerned with ensuring that an innocent defendant is not subjected to retribution or deterrence than with deferring to the legislature’s intent as a matter of form, as such deference may wreak unwarranted misfortune on the defendant. The legislature can amend the law to achieve its desired goal more easily than an innocent person wrongly convicted can win back lost liberty or insulted dignity. It is fair to assume that a law drafted with the intent of achieving remediation rather than deterrence has a systemic social effect of remediation. However, that presumption must be rebuttable by the defendant if the constitutional procedural guarantees against arbitrary punishment are to be consistently honored.

Another doctrinal objection to relying on the “dominant purpose of punishment” in describing legislation as criminal is reliance on the qualifier “dominant.”³⁰ Putting aside sanctions intended to end an ongoing violation of law, the determination that a sanction with dominantly remedial purposes but a significant element of punishment should not require EPP will allow or encourage the legislature to fold punishment into remedial legislation to avoid the necessity of providing EPP. In other words, if the procedural point of whether compensation is sought separately or in the same proceeding dictates the extent of the defendant’s rights, then those rights are at the mercy of the law’s drafters, who may be prepared to seize an opportunity to achieve more effective deterrence or widespread punishment at the cost of increasing punishment of innocent persons. Even optimistically assuming that a legislature is devoid of such inclinations, if the purpose of the constitutional EPP is to protect defendants from erroneous punishment, then the presence of a dominant nonpunitive purpose is irrelevant to advancing that policy. Punishment is punishment to both the defendant and the state, regardless of whether the sanction has other purposes as well.

The SSET avoids these unnecessary dangers by applying EPP regardless of the legislature’s intent if it can be shown that the law has a systemic social effect of retribution or deterrence. Although a law intended to achieve remediation may be presumed to do just that in prac-

28. George Fletcher, *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); see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1311–13 & n.324 (1970) (arguing that legislative motivation to punish should not be relevant to whether criminal procedural protections apply). *But see* Clark, *supra* note 6, at 438 (taking the position that considerations of legislative motivation in such cases are appropriate).

29. That said, such an intent might reveal itself in the form of a criminal or penal label, which, as discussed above, creates a presumption under the SSET that the law is a criminal one. By default, in such cases, EPP apply absent a showing that the law is remedial in effect.

30. Clark, *supra* note 6, at 436.

tice, the SSET recognizes the fallibility of, and potential for strategic behavior on the part of, the legislature and compensates by interposing an objective phenomenon—the systemic social effect of the measure—as the ultimate test of the dangers that any given legislation poses to the civil rights of the accused. It further holds that the defendant’s right to protection of his dignity and liberty should not be denied merely because the sanction achieves remediation mixed with punishment. Whenever legislation poses a significant threat of punishment, the SSET applies EPP, regardless of whether the punitive purpose is dominant or subordinate, and regardless of the presence of other objectives.

B. *The Legislative Label Principle*

As discussed above,³¹ over the past half-century, federal and state governments in the United States have increasingly blurred the distinction between civil remedies and criminal sanctions. At least one commentator and, for most practical purposes, the Supreme Court since *Ward*, have concluded that, as a consequence, the proper distinction between civil and criminal is largely whatever Congress says it is.³² I will refer to this approach of deferring to legislative intent as the primary means of distinguishing criminal from civil measures as the “legislative label principle.” The legislative label principle is what has been aptly called “a quintessentially positivist view of sanctions.”³³ In contrast, some commentators, such as Mann, attempt to draw an objective distinction between “civil remedies” and “criminal sanctions” and apply constitutional EPP to the latter regardless of how they are labeled.³⁴ This article will refer to this approach as the “objective difference principle.”

The Supreme Court has alternately adopted and rejected the legislative label principle repeatedly over the past century and a half, sometimes holding that the legislature is entitled to a nearly irrefutable presumption of legitimacy in deciding whether a law is civil or criminal, and at others making a more or less independent assessment. In *Stockwell v. United States*, the Court adopted the former approach, holding that, because the language of the statute in question manifested a clear congressional intent to confer a right to civil recovery on the government, the statute must be civil in nature.³⁵ Only nine years later, in *United States v. Chouteau*, Justice Field disapproved that reasoning:

The term ‘penalty’ involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a

31. See sources cited *supra* note 6 and accompanying text.

32. *E.g.*, Choh, *supra* note 6, at 1330, 1353.

33. Mann, *supra* note 6, at 1820.

34. *E.g.*, *id. passim*.

35. 80 U.S. (13 Wall.) 531, 543 (1871).

civil action or a criminal prosecution. . . . To hold otherwise would be to sacrifice a great principle to the mere form of procedure.³⁶

In 1909, the Court resorted to the legislative label principle again in *Hepner v. United States*,³⁷ but by 1931, the Court had repudiated the *Stockwell* deference a second time.³⁸ There, the Court differentiated a “tax” from a criminal sanction in terms that clearly implicated its reliance on an objective difference principle:

A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.³⁹

Seven years later, in *Helvering v. Mitchell*, the Court reverted to the *Stockwell* reasoning yet again, claiming that whether a law is criminal or civil is a question of statutory construction.⁴⁰ The subsequent history of the Court’s definitions of civil and criminal echoes its earlier oscillation.⁴¹

36. 102 U.S. 603, 611 (1880).

37. 213 U.S. 103, 108–09 (1909). In *Hepner*, the defendant was accused, in a civil suit, of suborning illegal immigration in violation of federal law. The government sought a penalty that could equally have been collected as a criminal fine under the applicable statute. The trial court directed a verdict in the government’s favor, causing the defendant to appeal, claiming that the fine was a criminal punishment and that, consequently, it was an unconstitutional deprivation of due process to direct a verdict against him. The Court disagreed, adopting the *Stockwell* reasoning that a fixed fine is a civil “debt” that can be recovered in a civil case, even though it may constitute a punishment for “the commission of a public offense,” *id.* at 111, so long as “the words of the statute . . . embrace . . . a civil action to recover the prescribed penalty,” *id.* at 109. Contrary to *Chouteau*, the *Hepner* Court again held that the Constitution’s procedural protections subserved Congress’s choice of trial procedures.

38. *United States v. La Franca*, 282 U.S. 568, 572 (1931). In *La Franca*, the Court was required to determine the nature of penalties imposed under laws requiring liquor dealers to file a special tax return and prohibiting the failure to pay a liquor dealer’s tax. Two of the laws at issue clearly designated penalties for violation, while the other two imposed special “taxes” for violations of the law. The defendant, who had previously been convicted and fined under the National Prohibition Act, argued that he was being subjected to double jeopardy. The government denied that double jeopardy was implicated, as it sought to impose a “tax,” not a criminal punishment.

39. *Id.* at 572.

40. 303 U.S. 391, 399, 402 (1938). Justice Brandeis, writing for the Court, relied upon what can only be labeled a masterstroke of circular reasoning: “That Congress provided a distinctly civil procedure for the [law at issue] indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply.” *Id.* at 402. Brandeis used the term “remedial” in the same sense as the *Stockwell* court, to describe sanctions imposed to achieve deterrence.

41. In the 1958 case of *Trop v. Dulles*, the Court again disapproved the legislative label principle, finding that the form of a statute could not dispose of a constitutional right. 356 U.S. 86, 94–95 (1958). In 1972, the Court reversed course again, holding that the question of whether a “civil” forfeiture required criminal procedural protections “is one of statutory construction,” rather than constitutional interpretation. *One Lot of Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972). The Court even went so far as to base its characterization of the statute at issue as civil largely on Congress’ decision to put it in a different section of the criminal code. According to the Court:

If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. . . . For-

The Court's current approach reflects its decision in *United States v. Ward*, where it held that "only the clearest proof" would satisfy the Court that EPP should apply when Congress chose to frame a statute as civil.⁴² Although the Court later attacked this view in *United States v. Halper*,⁴³ it changed positions yet again soon thereafter. Only a few years after *Ward*, the Court wrote in *United States v. One Assortment of 89 Firearms* that, to determine whether a forfeiture was a criminal punishment, the Court would examine whether Congress "designed" forfeiture "as a remedial civil sanction."⁴⁴ Reverting to a tautological analysis, the Court concluded that, because Congress provided "distinctly civil procedures for forfeitures" under the statute at issue, the forfeiture was a civil, not a criminal, sanction under the Constitution.⁴⁵ Most recently, in *United States v. Hudson* and *Kansas v. Hendricks*, the Court reapproved this analysis.⁴⁶ Yet, in *Apprendi v. New Jersey*, decided in 2000, the Court tacked back yet again, holding in a 5-4 decision that the mere fact that a state legislature used the label "sentence enhancement" to describe a basis for imposing additional punishment on a separate element of an offense, without proving that element, could not overcome the Fifth Amendment's guarantee of due process to the defendant.⁴⁷ Such a label "surely does not provide a principled basis" for foregoing such procedural protections.⁴⁸ Strangely, the majority opinion never cited *Ward* or *Hudson*, or related cases, which makes it unlikely that the *Apprendi* majority intended to overrule the practice of deferring to legislative labels.

Chief Justice Earl Warren once remarked with tongue firmly planted in cheek: "[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!"⁴⁹ That the highest legal authority of the land has repeatedly taken this ironical statement seriously and subjected what it has called civil rights of "surpassing importance"⁵⁰ to

feiture under § 1497 is a civil sanction. . . . The fact that the sanctions were separate and distinct and were contained in different parts of the statutory scheme is relevant in determining the character of the forfeiture.

Id. at 235-36.

42. *United States v. Ward*, 448 U.S. 242, 249 (1980).

43. *United States v. Halper*, 490 U.S. 435, 447 (1989).

44. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984).

45. *Id.*

46. In *Hudson*, the Court repeated *Ward*'s stringent "clearest proof" standard for rejecting the legislature's choice of procedures, and reversed *Halper*'s attempt to assess whether the Constitution's EPP should apply without great deference to the legislative branch's opinion. *Hudson v. United States*, 522 U.S. 93, 99-101 (1997). In *Hendricks*, the Court relied on the perception that "[n]othing on the face of the [civil commitment] statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm," and, under such circumstances, determined that nominally civil state laws should benefit from a nearly irrefutable presumption that they are civil in character. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

47. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

48. *Id.*

49. *Trop v. Dulles*, 356 U.S. 86, 94 (1958).

50. *Apprendi*, 530 U.S. at 476.

the nearly unbridled discretion of the legislature is surprising and disturbing. Earlier, in the one hundred years before *Hudson*, the Supreme Court periodically recognized that a “penalty” is quintessentially a “punishment for infraction of the law,” and its punitive character is unaffected by the nomenclature used by the legislature or the procedures the legislature seeks to impose.⁵¹

The most obvious problem inherent in the legislative label principle, and the one that forces courts relying on that principle to resort to tautology in support of their chosen definitions, is the strong deference to the legislature’s opinions regarding whether the EPP required by the Constitution should apply.⁵² The acceleration began with the increasing role of the federal government in commercial regulation during the New Deal.⁵³ Then, in 1948, Congress enacted a law providing that nominally civil fines, penalties, and pecuniary forfeitures prescribed for the violation of an Act of Congress (and, by extension, regulations issued pursuant to such Acts) may be recovered in a civil action unless otherwise provided.⁵⁴ Civil penalties are now common in most areas of federal regulation. The available evidence seems to indicate that achieving deterrence, even at the expense of civil rights, is the primary motivation behind the increasingly common practice of providing for “civil penalties” in most regulatory cases.⁵⁵ Yet, somehow the dangers of deterrence to civil liberties have not provoked the Court to question Congress’ interest in preserving the civil rights guaranteed by the Constitution’s EPP.

The Court has, in addition, been overlooking a deeper inconsistency in its reliance on Congress’ choice of nomenclature. If the federal or a state legislature’s decision on the constitutionality of a civil penalty is entitled to extreme deference by the Court, it could only be because the Court considers the legislature’s interpretation of the Constitution on this point to be more authoritative than the Court’s own. The *Ward* and *Hudson* decisions, for example, begin from the assumption that Congress’ opinion should not be disturbed except after a showing of the “clearest proof” that the law is not what Congress intended it to be. In so elevating the standard of proof required to show that Congress’ deci-

51. *O’Sullivan v. Felix*, 233 U.S. 318, 324 (1914); *see also* *Huntington v. Attrill*, 146 U.S. 657, 667 (1892); *United States v. Chouteau*, 102 U.S. 603, 611 (1880).

52. This point was made in passing, but in strong terms, by Jonathan Charney in 1974: “This deference to legislative history in determining whether a sanction or a statute is criminal or civil is a gross abdication of the judicial role.” Charney, *supra* note 6, at 494.

53. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 485–89 (1997) (arguing states, too, received many benefits from the New Deal Supreme Court’s revolution in Constitutionalism).

54. Act of June 25, 1948, ch. 646, 62 Stat. 974 (codified as amended at 28 U.S.C. § 2461(a) (2001)).

55. *See* Steiker, *supra* note 6, at 780; *see also* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 2, 104 Stat. 890 (“The Congress finds that—(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations . . .”).

sion (i.e., on whether the Constitution's EPP apply to a given state measure) was incorrect, the Court necessarily admits inferior competence to the legislative branch in the matter. A court does not defer to another branch of government, as the Supreme Court did to Congress in *Ward and Hudson*, and to the Kansas state legislature in *Hendricks*, unless it believes that its own judgment on the matter is less authoritative. Yet, if the Court's judgment on the constitutionality of a "civil penalty" is less authoritative than that of the federal or a state legislature, there is little justification for the Court to review the constitutionality of legislation in the first place. Only a court that is more authoritative than the legislature on a point of law can overturn the latter's decisions.

We now witness the spectacle of the Supreme Court—erstwhile self-proclaimed dominant interpreter of the laws, including the supreme law itself, the federal Constitution⁵⁶—inexplicably deferring to the state and federal legislatures on a fundamental question of constitutional interpretation. This deference is inexplicable because the Framers ensconced these protections in the Constitution precisely to preempt the temptation to weaken procedural protections for political reasons.⁵⁷

A tautology provides a very poor substitute for a reasoned analysis of constitutional policy, though it is common in the Court's decisions on this issue. It is difficult to understand why the Court would exalt the importance of the form of a law over its substance, because such formalism poses a threat to potential defendants' constitutional entitlements. If the

56. See *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (“[I]t is ‘the province and duty of the judicial department to say what the law is.’” (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))).

57. As every first-year law student knows, it was this very necessity that prompted Chief Justice Marshall to espouse the position that judicial review is supreme in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). It is equally this necessity that caused Alexander Hamilton to declare in *The Federalist No. 78* that it is the duty of the “courts of justice . . . to declare all acts contrary to the manifest tenor of the constitution void,” THE FEDERALIST NO. 78 (Alexander Hamilton), and prompted Thomas Jefferson to remind James Madison, who had expressed skepticism about the enforceability of the proposed Bill of Rights, that the Bill put a “legal check” on the behavior of the majority “into the hands of the judiciary.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 586, 587 (James Morton Smith ed., 1995). Madison, in turn, announced to Congress that, if his proposed Bill of Rights were adopted:

independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution.

LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 36 (1999).

This doctrine has suffered no official desuetude in the decisions of the Supreme Court, which reaffirmed recently that “the constitutional power of Congress . . . is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” *United States v. Morrison*, 529 U.S. 598, 614 (2000) (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)); see also *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O'Connor, J., concurring) (“As far as I know, the applicability of a provision of the Constitution has never depended on the vagaries of the state or federal law . . .”). Yet, with respect to the distinction between civil and criminal sanctions, the Court currently views the interpretation of the procedural protections guaranteed by the Constitution in criminal cases to be a matter better suited to legislative than judicial discretion, with exceptions only for extreme departures from the Court's very loose a priori definition of “criminal” as espoused in *Mendoza-Martinez*.

framers of the Constitution and Bill of Rights intended that Congress should be able to withdraw the EPP at its discretion, there would have been no need to include these guarantees in the Constitution in the first place. Yet, in effect, the Court now insists that a defendant carry a heavy burden of proof to vindicate, for example, his right to protection against double jeopardy whenever Congress chooses to apply the term “civil” to a sanction that might threaten the person’s liberties as much as, or even more than, a similar criminal sanction. In deferring to legislative intent in extremis, the Supreme Court has effectively undermined constitutional restrictions on criminal punishment, allowing the legislature to circumvent these restrictions through nothing more than an advantageous choice of words.

For this reason, the SSET (unlike the Dominant Purpose of Punishment test) is articulated as a test uniformly applicable independent of any particular legislative or executive policy. Enhanced procedural protections apply whenever punishment is threatened, regardless of whether the legislative or executive branch favors the application of these protections. To guarantee less would subject the civil rights of those threatened with state coercion to an unacceptable risk of succumbing to political expediency.⁵⁸

C. *Severity and Typology of Sanctions*

Another common proposal, and perhaps the most intuitively appealing, is that the distinction between civil law and criminal law should be based upon the severity of the sanction for failure to comply with the law at issue.⁵⁹ Beccaria expressed one formulation of this view in his treatise on criminal law and punishment; he recommended that the burden of proof and procedural protections may be lowered when the ordeal of imprisonment becomes less seamy and severe: “When punishments have become more moderate, when squalor and hunger have been removed from prisons, when pity and mercy have forced a way through barred doors, overmastering the inexorable and obdurate ministers of justice, then may the laws be content with slighter evidences as grounds for imprisonment.”⁶⁰ In the modern and arguably more cogent version of

58. If the Supreme Court’s deference to legislative intent on this subject is not reversed in the near future, it may serve as a beachhead from which to attack judicial supremacy at large. The reasoning underlying such a move would be straightforward. If the Court defers to Congress on *any* question of constitutional interpretation, there is no necessary reason why it should claim supremacy at all. Of course, if there is a provision of the Constitution that explicitly or implicitly calls for legislative judgment, the Court would merely give effect to the terms of the Constitution by genuflecting to the legislative will. However, the provisions under discussion in no way implicitly refer to legislative discretion—at least, no more than the rest of the document.

59. See Fletcher, *supra* note 28, at 292; see also Donald Dripps, *The Exclusivity of Criminal Law: Toward a “Regulatory Model” of, or “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 207–08 (1996).

60. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 19 (Henry Paolucci trans., Macmillan 1963) (1764).

this theory, the possibility of the most severe sanctions, such as incarceration or execution, should trigger constitutional rights applicable in criminal trials. There are two formulations of this approach: one narrow and one broad.

Esposued by the Supreme Court in *Argersinger v. Hamlin* and elsewhere, but presumably moribund after *Hudson*, the narrow approach would require at least some EPP (such as requiring appointed counsel) whenever imprisonment or capital punishment is at stake, but when probation, fines or forfeitures are at issue, it would only require these protections where a “deprivation of property rights and interests is of sufficient consequence.”⁶¹ The standard of “sufficient consequence,” including the critical questions of where to draw the line of “sufficiency” and whether the measure of consequences should be relative to the characteristics of the defendant,⁶² remain undefined in the case law. Jonathan Charney has capably summarized the subjectivity and rigidity of this approach;⁶³ there is no need to elaborate his criticism at length. But beyond the problems with *Argersinger*’s approach identified by Charney, a “severity of sanctions” analysis applied to incremental sanctions such as fines would result in “an extremely involved analysis to determine the gravity of a particular sanction on a particular defendant” that would impose impractical costs on the legal system beyond those necessary to draw an adequate distinction between civil and criminal sanctions.⁶⁴

The broader formulation of the severity approach would also apply EPP where imprisonment or death were threatened, but would refuse to invoke them at all where only a fine or property forfeiture (of any magnitude) was threatened. This approach rejects, either explicitly or implicitly, the equation of deprivations of liberty with deprivations of property as a measure of the state’s interest in providing a high standard of procedural rights to defendants. To some degree, this approach may be based on the perception that wrongfully deprived property can be restored, but wrongful incarceration can never be compensated, much less undone. Time, Spenser observed, is “the treasure of mans day; / Whose smallest minute lost, no riches render may.”⁶⁵

It is important to clarify that the narrow severity of sanctions test is no more descriptive of positive law than the SSET. As an historical mat-

61. See *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring); see also *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972) (A forfeiture is a criminal sanction where the amount sought “is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.”).

62. The measure might be relative due, for example, to the decreasing marginal utility of money. In other words, because depriving an impecunious defendant of one hundred dollars may be more consequential than depriving a wealthy one of a thousand, the consequences of a given monetary sanction may vary according to the means of the defendant.

63. See Charney, *supra* note 6, at 504–05.

64. Kerrigan et al., *supra* note 6, at 371.

65. EDMUND SPENSER, *THE FAERIE QUEENE* bk. IV, canto X, verse 14 (Penguin Books 1987) (1596).

ter, the distinction between civil and criminal measures has never hinged upon the threat of incarceration. Criminal fines were provided for in England and the colonies⁶⁶ long before the founding of the United States. The Supreme Court recognized in the 1880s that actions seeking monetary penalties or forfeitures of property could be criminal for constitutional purposes, even though no imprisonment was threatened.⁶⁷ If fines can be both criminal and civil, the absence of a provision for imprisonment (or some comparable sanction) should not logically weigh against a finding that a law is criminal in nature. A provision for imposing such “affirmative disability or restraint”⁶⁸ (in the Supreme Court’s words in *Mendoza-Martinez*) may well indicate that a law is criminal in character, but the opposite has not proved true by any means.

Putting aside the situations in which property wrongfully taken from an innocent defendant will never be restored because, due to the lack of EPP in the trial at issue, it is never discovered that the judgment against the defendant was mistaken, the broad “severity of sanctions” approach is perhaps the strongest alternative to the SSET that is based on constitutional policy and that presents something approaching a workable test. It has several advantages over the Supreme Court’s current approach. Its application is exceptionally clear; a deprivation of property can always be easily distinguished from incarceration or other extreme deprivation of freedoms. It responds to the most obvious dangers to liberty—imprisonment or execution—and ensures that EPP are always applied in such cases. Finally, like the SSET, this approach does not rely on legislative or executive discretion or intent in ensuring that constitutional protections apply. Whatever else may be said about drawing the line at affirmative disability or restraint, it excels the *Hudson* approach on each of these levels.

However, there are several problems with a distinction based solely or primarily upon the threat of incarceration or death. The structure of the U.S. legal, political, and economic system is anathema to attacks on the premise that a deprivation of property is something less than a deprivation of a valued freedom. No one argues that capital punishment can be a civil sanction or should be possible after a trial without EPP. But the broad “severity of punishment” approach overstates the policy effects of a distinction between incarceration and deprivation of property in a society structured in a capitalist mode. To Spenser, we might oppose Shaw:

BARBARA [bewildered]. The seven deadly sins!

66. See 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 300 (Samuel E. Thorne trans., George E. Woodbine ed., Harvard Univ. Press 1968) (ca. 1240) (discussing the use of criminal fines in Medieval England).

67. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 299 (1888) (fine); *Boyd v. United States*, 116 U.S. 616, 633–34 (1886) (forfeiture).

68. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

UNDERSHAFT. Yes, the deadly seven. [Counting on his fingers]
Food, clothing, firing, rent, taxes, respectability, and children.
Nothing can lift those seven millstones from Man's neck but money;
and the spirit cannot soar until the millstones are lifted.

. . . .

Only fools fear crime: we all fear poverty. . . . I hate poverty and slavery worse than any other crimes whatsoever.⁶⁹

Shaw implies what Hegel⁷⁰ and Locke⁷¹ proclaim: that the deprivation of property may be a serious affront to the victim's dignity, liberty, and happiness.

In weighing the relative threats to dignity and liberty imposed by incarceration versus property deprivations, two interrelated facts should be considered. On one hand, incarceration is not a complete loss of time for the convict; it is a deprivation of most of his valued freedoms. A complete loss of time would be enforced unconsciousness—a fate presumably even less desirable than imprisonment.⁷² Confined persons may still enjoy life to some degree—they may learn, entertain themselves or be entertained, communicate, think, make plans, exercise, and experience the full range of emotions, from exaltation to misery. Clearly, they do so within narrower confines (as it were) than they would if not imprisoned. But, at least theoretically, it is important not to overstate the case for the extremity of imprisonment. It is a deprivation of important liberties, but not all of them.

On the other hand, money purchases valued freedoms (and, Shaw would add, dignity) as well. To the extent that one labors in exchange for property (money being a form of property), it is accurate to equate property with labor over time.⁷³ To the extent that lost property is roughly equivalent to lost time and labor, a deprivation of such property is, therefore, in a sense equivalent to forcing the penalized person to have labored without pay—in effect, retroactive forced labor.⁷⁴ It is not

69. GEORGE BERNARD SHAW, *MAJOR BARBARA* act III (1905). The expressions of Undershaft reflect Shaw's view that "the greatest of evils and the worst of crimes is poverty, and that our first duty—a duty to which every other consideration should be sacrificed—is not to be poor." *Id.* at preface.

70. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 119–20 (Allen W. Wood ed., Cambridge Univ. Press 1991) (1821).

71. See JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT AND END OF CIVIL GOVERNMENT* ch. V, in *LOCKE: TWO TREATISES OF GOVERNMENT* 303–20 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

72. This approach to punishment is represented chillingly in the motion picture *Minority Report* (Twentieth Century Fox 2002).

73. Hence the uniquely capitalistic apothegm: "Time is money."

74. We do not conventionally say that a deprivation of property is equivalent to forced labor for two reasons. First, the deprivation of property may not always be accurately equated to a deprivation of time and labor (especially among those persons who are very wealthy by good fortune or inheritance). But these cases are exceptional and constitute no serious objection. Second, at the time the labor was performed, it was willingly undertaken. One could, however, postulate that this is actually a *worse* punishment than forced labor. At least a person sentenced to forced labor knows what to expect and adjusts his expectations and efforts accordingly. A person who labored willingly, legitimately

difficult to imagine a person who might prefer, given a choice, a term of imprisonment to losing his or her life's savings.⁷⁵ In some cases, the deprivation of liberty resulting from incarceration, with its attendant provision of housing, nourishment and medical care, may not constitute as severe a deprivation of liberty as a fine that leaves the defendant unable to provide these basic necessities of existence for herself and her family. This is not to whitewash the horror of imprisonment in the United States by any means; it is merely to say that we should not whitewash the harm inflicted by deprivations of property either.⁷⁶

In short, while all imprisonment but the briefest is almost certainly a more severe punishment than fines and forfeitures that fall short of seriously interfering with the defendant's ability to subsist and enjoy significant freedom, deprivations of property are adequately serious threats to personal liberty and dignity to render suspect the contention that a fine or forfeiture should never give rise to the same kinds of procedural protections that are considered necessary in cases involving potential affirmative disability or restraint. The severity of the sanctions does not entirely hinge on the threat of imprisonment, but even to the extent that it does, we would be indulging in a *non sequitur* to argue that, as a consequence, threatened deprivations of property need not give rise to EPP.

A severity of sanctions test does not, then, compare favorably to the alternatives as a constitutional basis for the distinction between criminal and civil sanctions, which partly explains why it never has stood for long as a proxy for criminality. The SSET avoids the problem attendant upon relying on the severity of sanctions by resting the guarantee of EPP not on the quantitative measure of the sanction itself but rather on the effect of the sanction more broadly. While granting that imprisonment almost always has a punitive systemic social effect, the SSET also allows courts to weigh the effect of a deprivation of property. Before we can opine that a specific deprivation is a "substantial" one, as the *Argersinger* majority suggested,⁷⁷ there must be a theory defining substantiality (or se-

expecting to harvest the fruits of that labor, on the other hand, suffers a double disappointment when the property earned thereby is deprived. First, as in the forced labor scenario, he loses the time, liberty, and effort whereby the property was obtained or created. In addition, he suffers the psychological blow of being deprived of something he quite reasonably believed he owned. Another exception is the person who labors for the sake of the labor and with no expectation of, or interest in, monetary gain (although such persons appear to be a rare breed). In short, a fine is a refutation of the marshaling of the fined person's abilities, energy, and his pursuit of his ambitions; his plans, ideas, and efforts are, in effect, seized from him.

75. An interesting example of this phenomenon is presented by Laura Nader in recounting her interview with the *presidente* of a Zapotec village in Oaxaca. The *presidente* emphasized that theft was punished as severely as murder, because the loss of sufficient amounts of money "is like killing the people. You leave them without clothes." LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE 104 (1990). Needless to say, personal preferences will differ on the question of whether and how much a fine can be equated with imprisonment in terms of severity.

76. See *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring) ("Serious consequences also may result from convictions not punishable by imprisonment.").

77. See *id.* at 36-40 (majority opinion).

verity). The SSET benefits from the dual advantages of feasibility and theoretical consistency that the severity of sanctions test lacks because it draws a bright line of “severity” (that is, criminality) at sanctions incommensurate with the harm caused by the sanctioned act.

D. *Identity of the Enforcer of the Sanction*

Another approach sometimes proposed by courts and commentators (including Packer, as discussed above⁷⁸) is to distinguish civil and criminal sanctions based on the identity of the enforcer of the law. Under this approach, an action is “civil” when brought by a private party and “criminal” when brought by a public authority.⁷⁹ In 1863, John Austin proposed a test of this kind as one of two bases for distinguishing civil from criminal measures. In tort, according to Austin, “the sanction is enforced at the discretion of the party whose right has been violated,” while in crime, “the sanction is enforced at the discretion of the sovereign.”⁸⁰ This approach may be called the “identity test,” as it considers the identity of the enforcer of the sanction as a necessary or the sole element for determining whether the sanction is criminal.

As a purely descriptive matter, Austin’s contention was at best incomplete even at the time he proposed it. Criminal offenses had long been prosecuted by individuals on behalf of the sovereign in England.⁸¹ Nonetheless, some modern courts have attempted to justify denying EPP to defendants against whom nominally civil penalties have been awarded based on the identity of the enforcer.⁸² The Supreme Court has relied on the identity test in several cases. For example, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, the Court held that, although punitive damages serve the same purposes as criminal punishment, the Excessive Fines Clause does not apply to the former because “the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”⁸³

1. *Right to Collect Damages Awarded*

The Court’s reference in *Browning-Ferris* to the state’s “right to receive a share of the damages awarded”⁸⁴ as part or all of a litmus test for judging the criminality *vel non* of a sanction is ill considered, being both descriptively incorrect in the case before it and, in any case, an irrelevant

78. See *supra* text accompanying note 10.

79. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 518 (Robert Campbell ed., 4th ed. 1879).

80. *Id.*; see also Steiker, *supra* note 6, at 806–07 (arguing that the identity of the state as the entity associating blame with an act is key to its character as criminal).

81. See Jerome Hall, *Interrelations of Criminal Law and Torts* (pt. 2), 43 COLUM. L. REV. 967, 996 (1943).

82. See, e.g., *United States v. Shapleigh*, 54 F. 126, 129 (8th Cir. 1893).

83. 492 U.S. 257, 264 (1989).

84. *Id.*

paralogism. It is descriptively incorrect because punitive damages have long been considered taxable income.⁸⁵ Consequently, both state and federal governments typically receive a very substantial portion of any punitive damages award. Moreover, many states have promulgated statutes allowing them to pocket between 35% and 100% of punitive damages awarded in a civil case (usually after attorney's fees have been subtracted), either for their own treasuries or for public purposes on which they might otherwise expend funds, such as tort or crime victim compensation funds.⁸⁶ Yet, the Court has never required Excessive Fines protection or other EPP under the Constitution in such cases.⁸⁷

As for the relevance of who collects the damages, the Court has more than once acknowledged that the question of who benefits from fines or damages awards makes no difference in their classification. In *Missouri Pacific Railroad Co. v. Humes*, for example, the Court held that, where punitive fines are levied,

it is not a valid objection that the sufferer instead of the State receives them . . . [T]he mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.⁸⁸

Later, Justice O'Connor observed in her dissenting opinion in *Browning-Ferris*:

[a] governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law. . . . *Humes* teaches that the identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty. From the stand-

85. See *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

86. See ALASKA STAT. § 09.17.020 (1998); GA. CODE ANN. § 51-12-5.1(e)(2) (1999); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 1999) (state allows the trial judge to apportion punitive damages between the plaintiff, plaintiff's attorneys, and the state Department of Human Services); IND. CODE ANN. § 34-51-3-6 (Michie 1998); IOWA CODE ANN. § 668A.1.2.b (West 1998) (state takes 75% of punitive damages awarded for acts specifically directed at the plaintiff, after attorney's fees); KAN. STAT. ANN. § 60-3402(e) (1994) (expired); MO. ANN. STAT. § 537.675.2 (West 2000) (state takes 50% of any punitive damages award, and the remainder, less attorney's fees, is paid to a tort victims compensation fund); N.Y. C.P.L.R. 8701(1) (McKinney 1994) (expired); OR. REV. STAT. § 31.735(1)(b) (2001) (state takes 60% of any punitive damages for crime victim compensation trust fund); UTAH CODE ANN. § 78-18-1(3) (1996); UTAH CODE ANN. § 78-18-1(3) (1989) (state takes 50% of any punitive damages for treasury after payment of attorney's fees). Some such statutes have been repealed after being found unconstitutional on either federal or state grounds by state courts. *E.g.*, COLO. REV. STAT. ANN. § 13-21-102(4) (West 1988) (repealed 1995); FLA. STAT. ANN. § 768.73(1)(a) (West. 1992) (repealed 1997).

87. In fact, following *Browning-Ferris*, an Iowa district court explicitly held that, when a portion of punitive damages are diverted by the state into a civil reparations trust fund to be administered by courts, the government interest in such funds does not give rise to an Eighth Amendment issue. See *Burke v. John Deere & Co.*, 780 F. Supp. 1225, 1242 (S.D. Iowa 1991).

It is also relevant that, as discussed below, the government always recovers a large portion of the punitive damages in qui tam cases, and the Court has held that the Excessive Fines Clause specifically does not apply in such cases.

88. 115 U.S. 512, 522-23 (1885).

point of the defendant who has been forced to pay an excessive monetary sanction, it hardly matters what disposition is made of the award.⁸⁹

As Justice O'Connor observed, it makes little difference to the suspect or defendant—the person for whom the Constitution erects protections in the first place—who collects the fines and penalties. The operative fact from the defendant's perspective is that the defendant is deprived of arbitrary amounts of property without the Constitution's strict procedural protections. Whether the beneficiary of any fine is the public treasury or private hands may matter somewhat to the government, but as long as the dangers inherent in retributive or deterrent cases remain constant, the systemic social effect of the identity of the enforcer is unaffected by the destination of the collected property. In short, if we ascribe any sense to the Court's opinion, the Court cannot reasonably be interpreted as intending to hang Excessive Fines protections on the nail of government entitlement to the recovery.

2. *Identity of the Plaintiff*

On the other hand, the claim that, if the government has not *prosecuted* an action, the action does not give rise to EPP merits more careful consideration.⁹⁰ There are two theories under which the identity test may justify denying EPP to a defendant in an action brought by a private plaintiff. The first is that, because criminal sanctions are an expression of societal disapprobation, only when the government prosecutes a case can the censure be considered so egregious as to justify guaranteeing the Constitution's EPP to the suspect or defendant. The second theory is that the government has resources available to it that no private party can muster, and, consequently, a defendant in a government action has greater need of protection than a defendant in a case involving a private plaintiff.

The first theory seems superficially plausible. Cases threatening imprisonment are always prosecuted by a government employee in the United States. When the government prosecutes a case, it is often a clear sign that the weight of government authority accuses and reviles the defendant and his or her alleged acts. Private parties bringing suit do so presumptively for their own recovery or gain. They are not presumed to be impartial law enforcers who represent the public interest. Consequently, according to this argument, EPP are unnecessary in actions brought by private parties.

89. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 298–99 (1989) (O'Connor, J., dissenting).

90. In *Browning-Ferris*, the Court asserted: "The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support" its application to private punitive damages. *Id.* at 275.

For all its appeal, the argument proves both too much and too little. Too little because the government brings actions to enforce contracts, to obtain traditional tort remedies, and for other prototypically civil purposes, but no one contends that criminal procedures should be used in such cases. They would be unnecessary whenever the state seeks only remediation—the mere fact that the state brings the action does not convert it into an expression of societal censure. A civil award of compensation to the government generally can be expected to carry no more stigma than an identical civil award to a private party. Of course, one could rejoin that enforcement by the government should in any case be a necessary but not sufficient condition to the application of EPP because of the attendant stigma. Here the argument proves too much. An award of punitive damages, which is enforced by private parties, is per se an expression of societal disapproval. That is one of the most important functions of punitive awards. Because punitive damages serve the avowedly public functions of deterrence and retribution, the plaintiff who obtains punitive damages has achieved an expression of public disapproval of the defendant in some ways similar to a criminal fine. This is especially so because the plaintiff has no authority or power to seek and collect punitive damages except as explicitly authorized and empowered by the appropriate legislature and courts.⁹¹ If the concern is with stigma, then private actions can carry stigma as well, as will be discussed in the next section, and the identity test fails to provide a cogent basis for arguing that government prosecution should be a precondition for EPP.

The second theory, relying on the government's comparatively vast resources as an explanation for enhanced protections, is based on the observation that the municipal, state, and federal governments maintain full-time investigators, including police forces, detectives, and agencies with fact-finding authorities; full-time public prosecutors; and very large, if limited, budgets to fund expert witnesses and gather evidence.⁹² In short, a government can, and generally does, deploy a powerful arsenal of resources against criminal defendants, an arsenal that the defendants themselves could never hope to match.

The Supreme Court has never explicitly proposed this rationale for distinguishing between civil and criminal. To the contrary, the Court's obiter dicta in *United States ex rel. Marcus v. Hess* seems to be based upon the opposite proposition.⁹³ In that case, the Court opined that, if

91. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court defined state action for constitutional purposes as requiring that, first, "the deprivation [of a constitutional right] must be caused by the exercise of some right or privilege created by the State" and, second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937. These conditions are clearly fulfilled in cases of punitive damages, multiple damages, and fines. The entitlement to such damages necessarily originates in a state-centered right. Regarding the second factor, courts choose which procedures apply in any given case and are, consequently, acting on behalf of the state when choosing to permit or mandate one form of procedure over another.

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

93. 317 U.S. 537 (1943).

private parties could seek compensation in excess of their actual damages in a civil case, the government could collect multiple damages in a civil case as well.⁹⁴ This reasoning implies that the identity of the prosecuting party should not determine whether the action is criminal or civil. The reason is not difficult to grasp, especially in light of the refutation of the previous argument. This approach equally proves too much and too little. Resource inequalities also exist in civil cases brought by the government without giving rise to criminal procedural protections. It would be ludicrous to insist that the Civil Division of the U.S. Attorney General's Office should be forced to use EPP whenever it sues for compensatory damages on a government contract. More broadly, the same kind of inequality can exist between civil parties; some private parties have access to resources equal to, or in some cases superior to, government prosecutors. While the U.S. Department of Justice has an annual budget of some \$22 billion for civil, criminal and other operations,⁹⁵ its scope is nationwide (and sometimes international) and includes the Bureau of Prisons, the FBI's various crime statistics collection and reporting activities, parole, the detention trustee, the Civil Rights Division, and other nonprosecutorial operations. At a state level, where most criminal activity is prosecuted, the budgets are significantly smaller. For example, the state budget for the entire California Department of Justice in the 2005–06 fiscal year was about \$328 million.⁹⁶ This figure includes all significant civil and criminal representation for the wealthiest and most populous state in the union. North Carolina allocated less than \$89 million for its Department of Justice for 2004–05.⁹⁷ For purposes of comparison, the net earnings of General Electric in 2004 were \$16.6 *billion* (out of \$152.4 billion in revenues), of which GE exercised its discretion to distribute some \$10.6 *billion* to shareholders that year.⁹⁸ The net earnings (so to speak) of Cisco Systems in fiscal year 2002 were \$1.9 billion (out of \$4.8 billion in revenues), of which Cisco exercised its discretion not to distribute any dividends to shareholders.⁹⁹ Even some individuals have income that rivals that of the wealthiest governments. American investor Warren Buf-

94. *Id.* at 551. *Hess* involved a *qui tam* action, brought by a private person against the defendants on his own behalf and on behalf of the United States, alleging fraud against the government. *Id.* at 541–42.

95. Office of Management and Budget, Department of Justice, <http://www.whitehouse.gov/omb/budget/fy2004/justice.html> (last visited Sept. 28, 2004).

96. California Department of Finance, 2005–06 Final Budget Summary 59, http://www.documents.dgs.ca.gov/osp/GovernorsBudget05/pdf/fbudsum_05.pdf (last visited Mar. 19, 2006).

97. North Carolina Office of State Budget and Management, 2003–05 Budget Certified by General Assembly, http://sdc.state.nc.us/budget_narratives/certified_budget.html (select budget code “13600 Justice”; then select biennium “2003–2005”) (last visited Mar. 19, 2006).

98. General Electric, Company Information Fact Sheet, http://www.ge.com/en/company/companyinfo/at_a_glance/fact_sheet.htm (last visited Mar. 19, 2006).

99. Cisco Systems, News@Cisco: Cisco Systems Reports Fourth Quarter and Fiscal Year 2002 Earnings, http://newsroom.cisco.com/dlls/fin_080602.html (last visited Aug. 10, 2002).

fett had a net worth of roughly \$28 billion in 2002.¹⁰⁰ Lawrence J. Ellison, founder of Oracle Corp., had a net worth of approximately \$55 billion the same year.¹⁰¹ The net worth of William Gates, III, the founder of Microsoft Corp., was about \$60 billion in 2002.¹⁰² Gates easily had sufficient disposable wealth that he could afford to endow a charity foundation with \$24 billion¹⁰³—enough money to fund the entire Department of Justice for a year (with a 9% increase over last year, no less),¹⁰⁴ or the California criminal justice system for several uninterrupted decades.¹⁰⁵ Nor is extreme wealth concentrated in individual hands a recent phenomenon. Cornelius Vanderbilt, for example, amassed \$100 billion in the mid-nineteenth century.¹⁰⁶ If the principle is adopted that EPP are granted based on the relative resources of the litigants, then, many private individuals and private organizations will benefit from no EPP under any circumstances, while defendants against such individuals and organizations who lack comparable resources would benefit from EPP against their opponents. It is difficult to imagine a rule that would confer a burden of proof beyond a reasonable doubt when Warren Buffett sues a small company for breach of contract,¹⁰⁷ and imposes a preponderance of evidence standard when the company countersues Mr. Buffett, without violating the principle of equal protection of the laws.¹⁰⁸

Of course, examples of individuals and organizations whose resources outclass those of the municipal, state, or especially federal government are atypical. From this, it could be argued that the principle of requiring EPP against defendants facing a public authority while always denying such protections to defendants facing private litigants works well as a general rule, if it does not work uniformly in practice. This may arguably be true with respect to some EPP, such as the prohibition on double jeopardy, the violation of which may entail as much expense to the plaintiff as to the defendant, or the right to the effective assistance of counsel, which may be necessary only when the plaintiff's resources significantly outclass the defendant's. However, such a rule, if generally applied, would be unfair to both the government and private litigants. As noted earlier, public authorities often undertake civil litigation under circumstances very similar to those of private defendants. Governments

100. Dennis O'Connell, *Top 10 Richest Men of All Time*, Askmen.com, http://www.askmen.com/toys/top_10/11_top_10_list.html (last visited Aug. 10, 2002).

101. *Id.*

102. *Id.* (available on page 2 of article, access through hyperlink to page 2).

103. Bill & Melinda Gates Foundation, Foundation Fact Sheet, <http://www.gatesfoundation.org/MediaCenter/FactSheet/default.htm> (last visited Aug. 10, 2002).

104. DEPARTMENT OF JUSTICE, BUDGET SUMMARY 2002, available at http://www.usdoj.gov/jmd/2002summary/pdf/sum_of_budget_authority.pdf.

105. STATE OF CALIFORNIA DEPARTMENT OF FINANCE, 2002–03 Final Budget Summary, 22, available at <http://www.documents.dgs.ca.gov/osp/GovernorsBudget/pdf/2002-03budsum.pdf>.

106. O'Connell, *supra* note 100.

107. I wonder if you can. JOHN LENNON, *Imagine*, on IMAGINE (Capitol Records 2000).

108. See U.S. CONST. amend. XIV, § 1.

must collect small debts just as private litigants do, and the appearance of massive wealth and power does not mitigate the government's need to allocate its limited budget efficiently. To impose an elevated burden of proof and other EPP against public authorities in such cases would unduly prejudice the government when acting *de iure gestionis*.

At the same time, public authorities could capitalize on an identity test to avoid the EPP by delegating their erstwhile criminal enforcement functions to private entities or individuals. This scenario is not as fanciful as it might appear at first. In light of the renascent politically conservative push to contract out more government functions to private corporations,¹⁰⁹ as well as the historical practice of private prosecutions for crimes,¹¹⁰ the concept is far from unthinkable. Governments now commonly delegate the task of imprisonment—formerly considered a quintessential function of sovereignty—to private corporations.¹¹¹ Indeed, the longstanding practice of awarding punitive, multiple, and statutory damages in tort and administrative cases¹¹² is a standing example of privatization of the government function of prosecution to achieve deterrence and punishment. Kenneth Mann went so far as to refer to punitive damages as “private criminal proceedings.”¹¹³ Similarly, in some cases, the legislature provides for punitive or multiple damages in order to use private litigants to supplant or supplement public prosecution. The Clayton Act, for example, provides for multiple damages in order to encourage private parties to enforce market regulation through expensive and difficult anti-trust litigation that might otherwise not occur.¹¹⁴ And the political popularity of this position is likely to rise in coordination with crime rates and taxes (which fund state prosecutorial functions), particularly if the state can avoid the inconvenience of EPP by contracting prosecutions out to a private party.

The Clayton Act and punitive damages are not the only instances of the quasi-privatization of public law enforcement and punishment. An-

109. See generally Betty Reid Mandell, *The Privatization of Everything*, NEW POL., Summer 2002, at 83.

110. Rachelle K. Hong, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through the Victims' Rights Amendment*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 209 (2002).

111. The administration of incarceration has increasingly been turned over to private parties. See Mandell, *supra* note 109, at 97–98; Tom Shoop, *Going, Going, Gone*, GOV'T EXECUTIVE MAG., June 1995. See generally J. MICHAEL QUINLAN ET AL., *PRIVATIZING GOVERNMENTAL FUNCTIONS* § 10 (Deborah Ballati ed., 2001). As of September 2001, the federal and state governments of the United States, United Kingdom and Australia had delegated to private corporations the responsibility for administering some 142,521 beds in 181 prison facilities. See Colin Fenwick, *Private Use of Prisoner's Labor: Paradoxes of International Human Rights Law*, 27 HUM. RTS. Q. 249, 253 (2005). See generally CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* (1990).

112. Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 87; Brian C. McManus, Note, *Analyzing Excessive Punitive Damages Under Massachusetts Law*, 36 SUFFOLK U. L. REV. 559, 559–60 (2003).

113. Mann, *supra* note 6, at 1848–49. Mann offers as an example a case in which the punitive civil money judgment exceeded the potential criminal fine for the same conduct. *Id.* at 1849.

114. See 15 U.S.C. § 15(a) (2001).

other noteworthy example is the venerable institution of the *qui tam* action, in which private litigants may enforce various punitive laws, most commonly the False Claims Act,¹¹⁵ for their own profit.¹¹⁶ In a *qui tam* action, the enforcer of a law sues civilly seeking both compensation and penalties.¹¹⁷ The enforcer may be a private individual, although tax and customs laws historically have allowed government law enforcement officials to share in the recovery as well.¹¹⁸ A *qui tam* action under the False Claims Act allows a private party who has discovered a fraud on the government to bring suit on behalf of the state and himself in the name of the government,¹¹⁹ and to collect a substantial portion of the proceeds from the suit if successful.¹²⁰ The relator (the party bringing the action), need not have suffered any damages himself. A “civil penalty” in the amount of \$5500 to \$11,000 per violation, plus triple actual damages, is imposed on unsuccessful defendants under the Act, absent certain mitigating circumstances.¹²¹

By virtue of a *qui tam* action, the government gains the benefit of some compensation for the fraud committed against it without having to undertake its prosecution (although the government can take over the prosecution, or institute an alternative civil prosecution, at will¹²²). The False Claims Act imposes “damages that are essentially punitive in nature,” in the Supreme Court’s terms,¹²³ and that are, therefore, the function of the government to administer. Although it could be argued that allocating the rewards of litigation (and, thus, most of the financial incen-

115. 31 U.S.C. §§ 3729–3733 (2001). See generally Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989). The original False Claims Act was enacted in 1863, as chapter 67 of the Act of March 2, 1863, 12 Stat. 696 (1863), and was directed primarily (though not exclusively) at suppliers of the Union Army who defrauded the government with false invoices. The 1863 False Claims Act provided for criminal punishments, but entitled the prosecutor in section 6 to receive one half of the proceeds of the suit. On December 23, 1943, the Act was amended to provide for any person to bring suit on behalf of the government as well as himself, and reserved to the government the right to take over the prosecution, but reduced the private share of the award to a maximum of 25% and left the precise amount to the court’s discretion. 57 Stat. 608–09 (1943). Amendments made in 1986 restored the Act’s effectiveness by adding treble damages and civil penalties. 100 Stat. 3153 (1986).

116. Consistent with the Supreme Court’s early practice of treating deterrence as a “remedy” as opposed to a punishment, the False Claims Act was called a “remedial” statute by one district court in a late nineteenth-century case, in spite of its overwhelming deterrent and punitive purposes. See *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885), *aff’d*, 30 F. 762 (C.C.D. Or. 1887).

117. BLACK’S LAW DICTIONARY 1282 (8th ed. 2004).

118. See, e.g., *Dorsheimer v. United States*, 74 U.S. (7 Wall.) 166, 173 (1868).

119. 31 U.S.C. § 3730(b)(1) (2000).

120. *Id.* § 3730(d)(1)–(2).

121. *Id.* § 3729(a). The increase in penalties results from an inflation adjustment instituted in 1999. See 28 C.F.R. § 85.3 (2005). Because the Supreme Court has held that protections against Double Jeopardy do not apply to civil penalties, as discussed above, these penalties are *in addition to* any criminal fines or other prosecution that may result from an alleged fraud. Thus, in one case, the Supreme Court held that a relator who simply copied the government’s criminal indictment and framed it as a *qui tam* complaint could collect the damages due under the Act. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943).

122. 31 U.S.C. § 3730(c)(1)–(2), (5) (2000).

123. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

tives to litigate) to private parties effectively removes the public element from the enforcement effort, the *qui tam* action circumvents the resource advantages to defendants of such a rule by awarding multiple damages or high statutory damages to its delegates, thereby encouraging private funding of such litigation by a government measure in hopes of obtaining awards highly disproportionate to any damages suffered. The *qui tam* action is only one step removed from the government funding private litigants as its delegates, and, to move it that one step closer, it can recoup any costs of funding its delegates by requiring its delegates to share the rewards with the government (as it already does to a lesser extent through the *qui tam* action¹²⁴). The resource differential is, in short, easily circumvented without sacrificing the government's interest in enforcement. Indeed, the proliferation of *qui tam* actions evidences its effectiveness. One government contracts litigation specialist reports that, between 1986 and October 2004 alone, over 4700 *qui tam* suits were filed.¹²⁵ The *qui tam* action is a private criminal proceeding *par excellence* and, although it follows from the arguments made in this article that the punitive aspects of a *qui tam* action should give rise to the constitutional EPP, the nominally civil nature of such actions has resulted in the Supreme Court so far denying such protections to defendants.¹²⁶

The converse of a *qui tam* action in a sense is the lawsuit brought by a state as *parens patriae*. In such cases, the state prosecutes an action, but not necessarily for the vindication of a public interest. Instead, the state seeks damages on behalf of specific private citizens for a wrong allegedly done to them.¹²⁷ For example, a state may act as *parens patriae* on behalf of a child or mentally incompetent person who has no other guardian.¹²⁸ Or a foreign state may bring an action in a U.S. court on behalf of its citizens for an antitrust injury done to them.¹²⁹ In each case, the government may bring the action, but there is no cogent reason to afford EPP to opposing parties in such cases where remediation is sought.

To summarize, to the extent that multiple or statutory damages have the systemic effect of encouraging plaintiffs to enforce a public policy as a substitute for, or complement to, a state enforcement system, the

124. In May 2000, the Supreme Court referred to the *qui tam* delegation as a "partial assignment of the Government's damages claim." *Id.* at 773. The Court rejected the theory that the relator is an "agent" of the government because relators have an interest in the outcome of the suit. *Id.* at 772. The Court's reasoning leaves much to be desired. The relator's interest is entirely derivative of the government's (like an agent's would be) and, moreover, agents are commonly paid on a commission, the entitlement to which does not materialize until the agent has succeeded at the assigned task.

125. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.01, at 1-4 (Aspen 3d ed. 2006).

126. *Hudson v. United States*, 522 U.S. 93, 101-05 (1997).

127. For a general discussion of lawsuits brought by states as *parens patriae*, see *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995), and *In re Mid-Atlantic Toyota Antitrust Litig.*, 560 F. Supp. 760 (D. Md. 1983).

128. *Hatch v. Dep't of Children*, 274 F.3d 12, 31 (1st Cir. 2001).

129. See generally Russell L. Caplan, Comment, *Parens Patriae Antitrust Suits by Foreign Nations*, 6 DENV. J. INT'L L. & POL'Y 705 (1977).

damages have far more in common with criminal penalties than civil remedies. In such cases, the legal system calls upon private plaintiffs to assume the role of enforcers of public policy and subsidizes them by providing financial incentives. The identity test does nothing to discourage such strategic behavior by the state.

The SSET, in contrast, does not distinguish between actions brought by the state or by private persons. In both theory and practice, making the identity of the law enforcer the litmus test for whether EPP applies would not accurately or consistently protect defendants from the gravest threats to their dignity and liberty. Although the danger posed to the defendant may vary according to the wealth and power of the plaintiff or prosecutor, all actions brought to punish the defendant may potentially infringe on the defendant's liberty and dignity. In all cases, punishment is coercive, involves the state's judicial apparatus, is authorized or encouraged by the law of the state, and, if successful, satisfies the state's retributive or deterrent goals. For this reason, the SSET treats any attempt to apply a punitive sanction as requiring EPP regardless of whether the punishment is proposed by the executive branch or its delegate.

E. Stigma or Blame

It has been noted that the distinction between civil and criminal sanctions facilitates legislative efforts to express official condemnation of prohibited acts. Natural persons and legal entities convicted of crimes suffer from a social stigma associated with antisocial conduct. In contrast, there is no pejorative appellation for a contract breacher or tortfeasor equivalent to "felon" or "criminal" and, usually, no equivalent social consequences.¹³⁰ The stigma itself has often been considered a deterrent to crime, as urged by Montesquieu: "Let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be the infamy attending it."¹³¹ Criminal convictions are, accordingly, a matter of public record (as are civil court judgments). The social expression of stigma may assume the intangible form of public and personal self-devaluation, ostracization of family, divorce, loss of child custody, or other negative social and personal repercussions.¹³² It may also cause

130. On the other hand, the decriminalization of an act, or the failure of the legislature to criminalize an act deemed socially destructive by a majority of the subject population, may have little effect on the preexisting stigma attached to commission of the act.

131. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 84 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

132. See H. May, *Murderers' Relatives: Managing Stigma, Negotiating Identity*, 29 J. CONTEMP. ETHNOGRAPHY 198 (2000); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 937-38 (2003). For a discussion of negative public stereotypes of criminals, see generally JULIAN V. ROBERTS & LORETTA J. STALANS, *PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE* 111-13 (1997). Further evidence may be found in Web sites devoted to assisting private persons to research the criminal convictions of other private persons. See, e.g., Citizen Data, *Criminal Background Record Search*, <http://citizendata.com/criminal.htm> (last visited Sept. 28, 2004).

negative economic effects, such as loss of employment and decreased prospects of future employment.¹³³

A legislative label principle, discussed above in Part II.B, provides a recursive rationale for the guarantee of EPP whenever an act is deemed “criminal” by the legislature. The labeling of an act plays some role in defining what kinds of rule violations result in the assumption of social stigma by the defendant. While jurists traditionally draw a dichotomy, derived from Natural Law Theory, between crimes that are *malum in se* and *malum prohibitum*,¹³⁴ the designation of a previously noncriminal act as a crime may in some cases attach a burden of stigma to an otherwise unreviled act. Beyond the usual stigma accompanying an antisocial act, if any, additional social stigma tends to accompany violations of criminal law *by virtue of the law’s* (and, consequently, the violator’s) designation as criminal. In fact, because the words “crime” and “criminal” themselves generally carry negative social and legal implications,¹³⁵ labeling an act with these terms has a tendency to stigmatize one even suspected or accused of the crime at issue.

While it is clearly the prerogative of the legislature prospectively to stigmatize designated classes of antisocial acts, the effect of the legislative label principle is to eliminate any necessary correlation between the legislature’s desire to deter and punish conduct and the stigma that accompanies criminality. Acts that the legislature has taken few concrete steps to prevent become officially stigmatized conduct, while acts that the legislature deems socially destructive may not carry the trappings of formal legislative disapproval (although they may carry some of the other consequences).¹³⁶ There is, then, a practical impediment to relying on the label of a sanction as criminal to determine whether EPP should apply.

Although some commentators, such as Carol Steiker and Donald Dripps, view the state blaming function as the focus of the determination

133. See Daniel Nagin & Joel Waldfogel, *The Effect of Conviction on Income Through the Life Cycle*, 18 INT’L REV. L. & ECON. 25, 25–27 (1998); Joel Waldfogel, *Does Conviction Have a Persistent Effect on Employment and Income?*, 14 INT’L REV. L. & ECON. 103, 103–05 (1994).

134. THOMAS AQUINAS, *SUMMA THEOLOGICA* I–II, Q.90, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1946) (1273) (arguing in favor of a natural law); cf. *id.* I–II, Q.95, art. 2 (asserting that some human laws derive their force from natural law, while others stand on their own force only).

135. Jerome Hall went further, arguing that “in penal law . . . the immorality of the actor’s conduct is essential—whereas pecuniary damage is irrelevant,” and “moral culpability is of secondary importance in tort law.” Hall, *supra* note 81, at 971. This assertion is quite inaccurate as a purely descriptive matter. Crimes that are *malum prohibitum*, such as certain administrative offenses (for example, failure to keep records regarding certain trade transactions), often carry little or no moral valence. Certain torts, on the other hand, can demonstrate moral turpitude without necessarily being a crime. Sexual harassment and race discrimination are two examples.

136. An interesting perspective on this issue was advanced by Edwin Sutherland in 1949. Sutherland noted the increasing political pressure to decriminalize the misbehavior of the rich and powerful (such as corporations), and explained it in terms of the stigma accompanying acts labeled “criminal.” See EDWIN SUTHERLAND, *WHITE COLLAR CRIME* 29–49 (1949). If Sutherland is correct, it might explain the increasing use of “civil penalties” against corporations in place of criminal prosecutions by the government. See *infra* Part IV.B for a discussion of this phenomenon.

to classify a sanction as civil or criminal,¹³⁷ any attempt to rely on measures of stigma beyond that conferred by the sanction's label as criminal would quickly become bogged down in the inherent subjectivity and mutability of the concept. Most immediately, there is a measurement problem. The need for constitutional protections cannot rest on surveys of public feeling or the ideas of legislators about the blameworthiness of any particular violation of the law, which may vary over time and from place to place. Nor can they rest on the intuitions of individual judges, who, as members of an elite class, tend to be somewhat removed from popular morality. Courts are in no position to assess the stigma associated with a sanction unless they do so by proxy, using one of the other tests described in this Part (in which case it is not the stigma that triggers EPP so much as the proxy factor).¹³⁸ As one commentator noted, an attempt to distinguish civil from criminal sanctions by measuring the stigma associated with the charged offense (for example, combining severity and the nature of the offense and creating an index), would be highly subjective,¹³⁹ and would probably be applied inconsistently by courts. The judiciary could conceivably rely on official legislative expressions of reprobation, if such expressions were made in the statute itself or its legislative history. However, because these do not necessarily reflect popular feeling, one cannot be confident that, as a rule, they will result in the negative consequences that might justify the imposition of EPP.

Even if there were no a priori measurement problem, the measurements might vary significantly by community, time period, and the circumstances of each case. Some criminal acts, such as vigilante murder of criminals or mob justice, may result in no stigma or may widely and consistently benefit from public approbation. The person who steals to forestall starvation may suffer no stigma. Marijuana growers and users may be approved by some communities and reviled by others. Thus, the law

137. See Dripps, *supra* note 59, at 207–08 (arguing that enhanced procedural protections are necessary to rein in the state's "monopoly of severe sanctions accompanied by blame"); Steiker, *supra* note 6, at 804–06.

138. Steiker recognizes that one possible proxy would be the legislative label principle. See Steiker, *supra* note 6, at 809. But Steiker claims that her argument does not hinge on the legislative label principle because

if, as [she] also argue[s], one of the other reasons that special procedural protections are important to blaming is that they limit the state's ability to resort to blaming as a weapon against its political enemies or despised minorities, those procedures must be invoked to prohibit a wily state determined to blame from circumventing the criminal process by "rechristening" crimes as "administrative violations" of some sort.

Id. at 809–10. This explanation is, however, as tautological as the legislative label principle itself. The state cannot "rechristen" crimes unless there is a preexisting concept of "crime," and the entire purpose of Steiker's argument is to define "crime" in the first place. Thus, if the state creates stigma by calling an act a "crime" (or, conversely, removes blame by calling it a "civil violation"), then the state's "christening" produces the character of the sanction and creates or alters the blame associated with it. The only way we can determine whether a "wily state" is attempting to blame outside of the criminal law is with reference to some exogenous measure of blame other than state blame itself. Unfortunately, Steiker identifies no such principle.

139. See Clark, *supra* note 6, at 409.

is inconsistently attuned to public morality in the best of circumstances. In the United States, the unparalleled diversity of cultural, social, religious, and political traditions further undermines the impact of the purported stigma. Given that the EPP are established by the federal Constitution, they are not permitted to vary from place to place.¹⁴⁰

Another theoretical obstacle to relying on stigma to define the class of cases in which EPP is guaranteed is that the amount of stigma in crimes and civil causes of action is not fully dichotomized, but instead lies in heavily overlapping sections of a sliding scale. There are many *malum prohibitum* crimes that do not involve significant stigma in many communities (for example, gambling, illegal immigration, tax evasion), though some torts and breaches of contract that are intentional, or even negligent, tend to create stigma in the defendant (for example, adultery, some kinds of nuisance or slander, failure to pay child support, etc.). Persons who repeatedly cause negligent accidents may suffer social stigma in the form of avoidance by others, loss of employment, and public scorn or ridicule. Professionals who are found liable for malpractice even once may lose status and income in spite of the fact that negligence in all of the professions is far from rare.¹⁴¹ A person who repeatedly breaches contracts will soon find himself commercially and personally ostracized. A company that negligently causes an environmental catastrophe may find itself the subject of protests or boycott.¹⁴² In none of these cases would it be either feasible or necessary to secure EPP to defendants merely by virtue of public stigma.

Finally, there is no convincing reason why a certain critical mass of state blame should result in criminal procedural protections as opposed to some other criterion considered here, such as the harshness of the sentence. Some people might reasonably prefer being designated a criminal by the state to being bankrupted by a civil fine or penalty, thrown into prison, or otherwise suffering the effects of being used as the state's tool for the deterrence of others. It would be difficult to argue that the stigma

140. This same reasoning, of course, casts doubt on the viability of a First Amendment obscenity test that varies by local community standards. *See, e.g., Miller v. California*, 413 U.S. 15, 24–25 (1973).

141. In some cases, one reason for bringing a civil lawsuit is to bring practices thought objectionable into the light of public reprobation. The fear of this very kind of scrutiny may convince defendants to settle privately rather than litigate publicly. *See Ficker v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997); *Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197, 204–05 (Minn. 1986); *see also* Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085–87 (1984) (arguing *inter alia* that the public interest suffers when parties settle their cases because the defendant can thereby keep its reprehensible conduct secret).

142. A memorable example is the Exxon Corporation's irresponsible conduct following the 1989 oil spill in Valdez, Alaska, which while not criminal, resulted in a lasting and damaging boycott. As reported in one source: "So dissatisfied was the public with Exxon's reaction to the crisis that national consumer groups urged the public to boycott all the firm's products. Dissatisfaction with cleanup efforts was also expressed by 20,000 Exxon credit card holders who cut their cards up and returned them to Exxon." *The Exxon Valdez Oil Spill*, <http://www.wku.edu/~jan.garrett/321valdz.htm> (last visited Jan. 31, 2006); *see also* O.C. FERRELL ET AL., *BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES*, Case 10 (5th ed. 2002).

of a criminal label as a rule poses more of a threat to human dignity and liberty than imprisonment or a significant deprivation of property.

Although stigma may not constitute a feasible basis for the distinction between civil and criminal sanctions, it may in some circumstances justify protecting suspects or defendants through the application of EPP. Regardless of whether there is an extrinsic basis for stigma in any given legal system, stigma that results from a judgment of criminality constitutes an additional sanction that may merit a guarantee of EPP. The Supreme Court has shown sympathy for the notion that the stigma attendant upon a judgment of violation of a law may necessitate the application of the EPP, such as the right to counsel.¹⁴³ Although a legislative characterization of a sanction as civil does not significantly undermine the policy rationales for providing EPP in a trial for the violation of any given legal rule where the state deters or punishes, the reverse does not necessarily follow. Because the legislative use of the term “criminal” tends to carry at least some inherent social stigma for the alleged offender, the legislative designation of an act as criminal may be thought to create ipso facto a rebuttable presumption that the EPP must be respected.¹⁴⁴ This is using the sanction’s label as a proxy for the presumption that it may pose a threat to the dignity and liberty interests of defendants without denying that troublesome consequences can follow a mistaken judgment, even though no public stigma may follow from the judgment.

143. See *In re Winship*, 397 U.S. 358, 363–64, 367 (1970); *In re Gault*, 387 U.S. 1, 23–24, 36 (1967).

144. But see Clark, *supra* note 6, at 408 (arguing that “it may . . . seem anomalous to accord the good name of a defendant more constitutional protection than his property”). This position misses several crucial considerations. First, the loss of property in a civil case is limited to the amount of harm suffered by the victim, whereas the amount of stigma in a criminal case is in no manner limited. Almost all civil cases require proof of the existence and extent of an injury; criminal cases rarely do. Second, a civil money judgment is more or less limited by the present ability of the defendant to pay, while stigma can have massive, negative effects far into the future on the defendant’s prospective employment and ability to obtain credit. Third, the personal and psychological effects of stigma from a criminal conviction may far outweigh a large loss of money in a civil case. Cf. THE BEATLES, *Can’t Buy Me Love*, on A HARD DAY’S NIGHT (Capitol Records 1964) (“I don’t care too much for money / Money can’t buy me love.”). See generally TODD F. HEATHERTON ET AL., *THE SOCIAL PSYCHOLOGY OF STIGMA* (2000); IRVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

F. Middleground Jurisprudence

A final proposal worth considering¹⁴⁵—perhaps the most appealing and in some ways the antipode of the SSET—is Middleground Jurisprudence. Middleground Jurisprudence, proposed by Kenneth Mann in a 1992 article in the *Yale Law Journal*, wholeheartedly embraced deterrence as a necessary and proper function of a civil law.¹⁴⁶ Mann appears to accept the Benthamite and Austinian arguments that all remediation deters, but contends that the Supreme Court has misdescribed punitive civil sanctions in order to allow or encourage the legislature to circumvent the EPP.¹⁴⁷ He presents a relativistic and functional approach by ar-

145. Other proposals have been published, but none successfully defends what approaches a resolution to the constitutional problem. For example, Jonathan Charney, writing in the *Cornell Law Review* in 1974, recognized the increasing prominence of nominally civil punishment in the modern regulatory legal system and the role of the distinction between civil and criminal for constitutional purposes. See Charney, *supra* note 6, at 480–82. Charney rejected the possibility of basing the distinction on legislative labels or the enforcer’s identity, and proposed instead that a criminal penalty be defined as a sanction imposed when all of the following conditions are fulfilled:

- (1) the sanction is an involuntary and uncompensated deprivation of life, liberty or property;
- (2) the sanction is authorized or allowed by the government;
- (3) the sanction exceeds the amount required to compensate any injured parties for the offending act;
- (4) the sanction is inflicted “not merely for purposes of general deterrence”; and
- (5) the sanction is “determined on the basis of retribution or is an unreasonable or unnecessary incidental effect of governmental action.”

See *id.* at 512. Charney’s proposal is based, as it should be, upon a concern for the proper application of the criminal procedural protections guaranteed by the Constitution. However, although the proposed test is a valiant effort, it offers limited assistance in solving the criminal/civil conundrum.

With respect to the first factor, the imposition of a criminal sanction need not be involuntary—the state of mind of the offender, who may even feel guilty and welcome a criminal sanction, is irrelevant to its character. Indeed, most civil remedies are not undertaken voluntarily by the defendant. Is not litigation necessary in the first place because the sanction is imposed on an uncompensated non-volunteer?

All sanctions, civil and criminal, are authorized or allowed by the government, so the second factor is not germane as well. If civil damages were not authorized by the government, courts would not aid plaintiffs in collecting them. The third factor also offers little help. Clearly, a sanction need not exceed the amount required to compensate any injured parties for the sanction to be criminal. The *quantum* of a criminal fine, for example, is designated by statute and may be quite a bit less than required to compensate the crime’s victim. A statutory criminal prohibition on an act may prescribe a \$10,000 fine per violation, even though violation may result in no actual damages whatsoever or \$10 million in actual damages. The fact that the fine is fixed in any given instance at an amount less than the damages caused by the violation does not affect the character of the levy as civil or criminal. Notably, though, the fine may be imposed in addition to any compensation rendered for actual damages because, *after such compensation has been paid*, any fine may cause the offender’s payment to exceed the amount required to compensate the damages caused by the act.

Regarding the fourth factor, the purpose of the statute is much less relevant than its effect for constitutional purposes, as discussed in Part II.A above and as Charney seemed to recognize himself earlier in the same article. *Id.* at 493–94. Finally, a sanction’s basis in retribution (again, properly “effect of retribution”) is a sufficient *but not necessary* condition for classifying a sanction as criminal. Charney seemed to recognize that the distinction between civil and criminal cannot hinge on moral judgment, upon which a theory of retribution must necessarily be based, but for some mysterious reason he included this factor anyway. *Id.* at 496. If a crime cannot be defined based on the moral valence that the state attaches to it, it follows that retribution need not be a “basis” or effect of a sanction for the sanction to be classifiable as criminal.

146. Mann, *supra* note 6, at 1830.

147. *Id.*

guing that, when punitive sanctions are imposed for behavior that falls short of egregious criminal conduct, some (but not all) of the EPP should be afforded to the defendant regardless of whether the sanctions are labeled civil or criminal.¹⁴⁸ Mann's proposal, if implemented, would create a constitutional "middleground" between civil and criminal law, in which sanctions that are "not as punitive as criminal sanctions" may be meted out for "culpable" behavior that is "not egregious enough to require criminal sanctions."¹⁴⁹

It is not initially clear how lines would be drawn between true civil cases (requiring no EPP), middleground cases (requiring some EPP), and criminal cases (requiring the full complement of EPP). Mann suggests that the criminal law should shrink to encompass only "clearly egregious behavior," including only "the most damaging wrongs and most culpable defendants."¹⁵⁰ Although these standards seem nebulous, they are no more so than the current mishmash of doctrines relied upon by the Supreme Court. In fact, Mann's proposal could hardly be criticized as revolutionary, as it calls for merely a more explicit pursuit of the current trajectory of the Court's jurisprudence, with some qualifications to preempt grave violations of constitutional norms.¹⁵¹

Mann's proposal offers several doctrinal advantages by explicitly acknowledging and formalizing the middleground. First, the proposal would allow the imposition of sanctions for punitive and deterrent purposes by administrative agencies and private parties only when the defendant is afforded at least some constitutional EPP. Swift, certain, and severe punishment is thought to promote deterrence best, and punishment tends to be swifter and more certain when the defendant benefits from fewer constitutional protections and the standard of proof is lower. In addition, the use of punitive civil sanctions for victimless crimes, petty and middle-range crimes, and regulatory and administrative offenses allows the state to achieve deterrence without severely stigmatizing the person against whom the sanction is imposed. Those who commit minor trespasses would not suffer the stigma and deprivations caused by a criminal record, but would be afforded most of the EPP, excepting perhaps the right to counsel, and the right to grand jury indictment and a jury of peers. Middleground Jurisprudence thus resolves several serious problems with the Court's current approach while promoting the core practicality of reducing burdensome constitutional protections that has been the Court's recurrent, if uneven, objective in both its historical and modern jurisprudence.

For all its merits, however, Mann's proposal has deeply troubling but unacknowledged implications. Middleground Jurisprudence is

148. *Id.* at 1861–62.

149. *Id.* at 1862.

150. *Id.* at 1802, 1863.

151. *Id.* at 1813.

clearly designed to facilitate punishment by limiting the Constitution's EPP. Putting aside the wholly formal question of how Mann's proposal could be adopted without amending the Constitution, it is wise to ask *why* we should be so eager to jettison these procedural protections before doing so. By allowing the legal system to punish without affording constitutional EPP to the defendant, Mann's proposed system would necessarily allow law enforcement authorities to impose fines and other sanctions that are significantly disproportionate to any harm caused by the sanctioned behavior without the need to prove the prosecution's case beyond a reasonable doubt or observe other EPP normally afforded in such cases. It is not difficult to imagine a Kafkaesque scenario in which the perpetrator of a petty or "middle-range" crime is subjected to substantial, even life-altering, fines without, for example, honoring the privilege against self-incrimination or disclosing exculpatory evidence. Other important licensed freedoms, such as the rights to drive or to conduct business, may be revoked as a result of such proceedings as well. The whole purpose of enshrining these procedural protections in the Constitution, instead of leaving it to the legislatures, is to protect defendants from balancing against the state's interests in deterrence and retribution. By sacrificing these protections, fundamental civil rights would be brushed aside. If we are willing to do so, we ought to have a very good reason.

Mann justifies these consequences as necessary for nonpunitive deterrent purposes.¹⁵² There are many situations, Mann observes, in which the state may seek to deter without necessarily punishing.¹⁵³ Here, at the critical stage of justifying Middleground Jurisprudence, Mann's argument becomes self-contradictory. Deterrence is only effective *because* it threatens to punish. Deterrence is essentially a sophisticated Pavlovian experiment. The state tells or shows the public in general (and for specific deterrence, Person *A* in particular) that if Person *A* performs Act *X* under certain defined circumstances, the state will make Person *A* wish he had not performed Act *X* by imposing on Person *A* some kind of pain or deprivation that outweighs, in Person *A*'s calculus, the benefit received from performing Act *X*. This is both deterrence and punishment. There can be no effective deterrence *without* punishment. This confusion stems from Mann's insistence that all remediation deters, which, though a popular myth, is both doctrinally and theoretically inaccurate.¹⁵⁴

Another serious problem with Mann's justification for Middleground Jurisprudence is that it assumes that it is necessary to deter violations by depriving certain defendants of EPP. Mann fails to prove this critical assumption. Without such proof, it is difficult to understand why we should willingly part with civil rights designed to protect citizens

152. *Id.* at 1864.

153. *Id.* at 1830.

154. See Fellmeth, *supra* note 2, at 31–35.

against the threat to their dignity and liberty posed by deterrent and retributive sanctions. Mann's idea, judging from his earlier arguments, is that there are some sanctions that are so inconsequential or mild in their punitive effects that many of the EPP are not necessary to protect defendants. In other words, there are some classes of behavior that the state may seek to deter that should not necessitate the full range of EPP. Minor regulatory violations, such as speeding in an automobile, illegal parking, or failure to maintain adequate corporate minute books, may warrant deterrence and punishment, but do not carry social stigma or punitive consequences severe enough to justify full constitutional EPP. In such cases, Mann would presumably contend (as others have) that "fundamental fairness" does not require the elaborate protections of the criminal law.¹⁵⁵ This is perhaps the most compelling argument in favor of allowing a limited place of civil deterrence in constitutional jurisprudence.

First, a cavil: fundamental fairness has absolutely nothing to do with the gravity of the punishment. A fine of ten dollars and ten years of imprisonment are both fundamentally unfair if imposed on the innocent. Justice is fundamentally offended by *any* arbitrary punishment. For this very reason, a person is apt to become morally outraged on principle even at an unmerited speeding ticket. That justice may be quantitatively more offended by a severe unjustified punishment than a minor one does not mean the minor one is not fundamentally unfair, nor does it argue in favor of abandoning EPP when punishment is less severe.

That said, it could be argued that if the state's need for deterrence were dramatic enough, the reduced harm associated with minor punishments can justify abandoning some or all of the EPP in spite of a resulting increase in social injustice. At some point, a pure rights-based ethics must balance some rights against others and the rights of some persons against those of others.

This argument carries superficial appeal, but breaks down on closer examination because it is based on some unlikely assumptions. Specifically, it assumes that where regulatory authorities seek to impose minor sanctions that carry little or no stigma, deterrence cannot be achieved while honoring EPP. Yet, contesting even a minor sanction can be very expensive. Very few defendants are likely to decide to expend their own resources to contest such sanctions unless they are, in fact, innocent in their own views, in which case everyone but the most resolute utilitarian would agree that even a minor punishment is unjustified. In other words, the nuisance value that contesting the fine creates for the regulatory authority is likely to be balanced or outweighed by the nuisance value that the same action creates for the defendant. For this reason, most fines charged for minor crimes and infractions, such as speeding or parking

155. *E.g.*, Kerrigan et al., *supra* note 6, at 377.

tickets, are paid without contest. Indeed, most persons accused of any kind of street crime (including felonies) plead guilty in spite of the EPP.¹⁵⁶ The claim that guaranteeing the full panoply of EPP to defendants (such as, for example, the right to cross-examine a ticketing officer) will impose crippling obstacles to the efficient functioning of the legal system does not correspond with empirical reality.¹⁵⁷ Even if there were an increase in the number of accused persons contesting minor crimes or infractions after all of the EPP were imposed, the reduction of the injustice might reasonably be thought well worth whatever small cost the regulatory system must bear in order to sustain a high burden of proof and afford other EPP when minor regulatory actions are contested.¹⁵⁸

A third weakness in Middleground Jurisprudence is Mann's justification for a proposed sliding scale of civil rights. Mann's sole explanation for why the state should be allowed to punish in some cases and not others without observing the constitutional EPP is based indirectly on the "severity of sanctions" test considered and rejected in Part II.C. Mann does not address the many difficulties with relying on the severity of sanctions to determine whether EPP should apply, such as the fact that the severity of a sanction is highly contextual, while the law speaks in general rules. He does not seem to recognize that EPP may protect interests other than citizens' desire not to experience significant discomfort or a substantial deprivation of property.¹⁵⁹

III. CONSEQUENCES FOR "CIVIL" FORFEITURES

The practice of forfeiture dates back beyond the Constitution and has long been considered, by both Congress and the courts, to be normally civil in nature.¹⁶⁰ Nonetheless, forfeiture cases rank highest among

156. Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1373 (2000) ("[T]here is no crime for which guilty pleas account for less than 70% of all convictions."). Moreover, such "minor" cases presumably do not threaten imprisonment but rather typically involve monetary penalties. In such cases, at least some of the EPP do not apply. The right to assistance of counsel, for example, does not apply to purely monetary penalties. See *Scott v. Illinois*, 440 U.S. 367 (1979).

157. Clark made precisely this argument in support of abolishing the protections of criminal procedure in criminal cases involving minor penalties. See Clark, *supra* note 6, at 405.

158. Kerrigan and her colleagues claimed that, "because the burden of proof in criminal proceedings is so high, the probability of conviction is relatively low. Thus, criminal sanctions are largely ineffective." Kerrigan et al., *supra* note 6, at 378. However, they offered no evidence to support this bold assertion.

159. A fourth issue—more a problem of definition than an objection—is that Mann's proposal is obscure in application. The question of which kind of sanctions should trigger which constitutional EPP is as unclear under Middleground Jurisprudence as it currently is under the Supreme Court's jurisprudence. Although the basis of Mann's argument is that "punitive" cases require constitutional protections not necessary in deterrence and compensatory cases, Middleground Jurisprudence offers no principle for distinguishing between punitive and compensatory cases.

160. See, e.g., Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39 (goods unloaded at night or without a permit subject to forfeiture and persons unloading subject to criminal prosecution), quoted in *United States v. Ursery*, 518 U.S. 267, 274 (1996); *id.* § 25, at 43 (persons convicted of buying or concealing illegally imported goods subject to both monetary fine and in rem forfeiture of the goods); *id.* § 34, at

those risking violation of the Eighth Amendment prohibition against excessive fines. Some forfeitures, such as the confiscation of illegal narcotics or other contraband, can be justified as necessary to terminate the ongoing illegality of the possession of the contraband. In other cases, however, forfeitures are punitive and unnecessary to terminate an ongoing illegality. The predominantly or exclusively punitive purposes and effects of this latter type of forfeiture have not prevented legislatures from framing such forfeitures, and the Supreme Court from upholding them, as civil sanctions under various federal and state laws.¹⁶¹

As the Court has recognized, historically a “civil forfeiture could not be *instituted* unless a criminal conviction had already been obtained.”¹⁶² This may not inescapably justify the inference that the forfeiture is punitive, but it certainly does not lead to the opposite conclusion. Regardless, the Court has more or less consistently insisted that EPP do not apply in forfeiture cases because such forfeitures are not “criminal sanctions.”¹⁶³ Some of these cases involved forfeitures in amounts so extreme and so punitive that to deny the Constitution’s EPP would seem a miscarriage of justice to all but the most slavish of positivists. In one 1974 case, for example, a company had leased a yacht to private individuals, who had been caught on board by law enforcement authorities with a single marijuana joint in violation of Puerto Rican law.¹⁶⁴ There was no allegation that the lessor had any reason to know that any narcotics would be brought aboard the yacht. Nonetheless, federal authorities seized the yacht without notice or hearing to the lessor pursuant to a civil forfeiture law permitting the forfeiture of any “conveyance,” including a boat or aircraft used “in any manner to facilitate the transportation, sale, receipt, possession, or concealment” of illegal narcotics.¹⁶⁵ The yacht was appraised at nearly \$20,000.¹⁶⁶ Challenging the forfeiture, the lessor claimed a violation of due process because he was not notified of the seizure and because the forfeiture punished an innocent party.¹⁶⁷ Calmly trampling the lessor’s constitutional right to due process, the Court stated that “statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents”¹⁶⁸ The Court admitted that a forfeiture may be punitive¹⁶⁹ (as the one before it surely was) but, invoking the ancient and mystical law

46 (imposing criminal penalty and in rem forfeiture where person convicted of relanding goods entitled to drawback).

161. See generally *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (upholding civil forfeiture of an innocent party’s yacht); *Ursery*, 518 U.S. at 291.

162. *Ursery*, 518 U.S. at 275.

163. See, e.g., *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234–35 (1972).

164. *Calero-Toledo*, 416 U.S. at 693 (Douglas, J., dissenting in part).

165. *Id.* at 667; see also P.R. LAWS ANN. tit. 24, § 2512(a)(4) (2002).

166. *Calero-Toledo*, 416 U.S. at 668 n.4.

167. *Id.* at 668–69.

168. *Id.* at 680.

169. *Id.* at 686.

of deodands, took shelter in historical practice, apparently on the theory that any injustice can be excused if enough courts had committed similar injustices before it.¹⁷⁰

The Court has more recently denied in *United States v. Ursery* that such forfeitures constitute punishment in the first place.¹⁷¹ Instead, the Court claimed, the forfeiture of a drug dealer's house is a civil sanction because it is imposed in rem instead of in personam.¹⁷² The Court apparently felt that Congress intended not to punish or deter the drug dealer, but rather to teach the house a lesson by transferring its ownership to someone less desirable. That the highest Court in the land could adopt such specious reasoning is perplexing. The difference between in rem and in personam is of absolutely no import to the constitutional issue of whether a person is being punished without EPP. All property belongs to someone (otherwise, it would not be *property*). By depriving the owner of his or her property, in rem actions that are not strictly necessary to end a threat to public health or safety or terminate an ongoing illegality are ineluctably in personam with respect to the owner of the property. The Court ignored this elementary logic and instead held that the defendant had failed to adduce the "clearest proof" that the forfeiture was criminal in nature, and that it was consequently a remedial sanction under *Ward*.¹⁷³ To explain what exactly the forfeiture remedies, the Court assumed that the forfeiture approximated "'liquidated damages' for the harms suffered by the Government as a result of a defendant's conduct."¹⁷⁴ Of course, by this reasoning, all criminal fines are remedial (indeed, imprisonment at hard labor is remedial as well), but the Court was not so bold as to follow its own reasoning to its logical conclusion.

The quality of the Court's reasoning actually deteriorates further when compared across cases. In *Ursery*, the Court observed that at common law "a civil forfeiture could not be *instituted* unless a criminal conviction had already been obtained."¹⁷⁵ Two years later, in *United States v. Bajakajian*, the Court held that a forfeiture was criminal if it is "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony . . ."¹⁷⁶ In *Bajakajian*, the Court held that a forfeiture of undeclared currency was not in rem, but rather in personam,¹⁷⁷ and labored unsuccessfully to distinguish the case from prior holdings to the contrary on comparable facts.¹⁷⁸ In short, a forfeiture of a yacht owned by an innocent lessor because one marijuana cigarette be-

170. *Id.* (citing *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921)).

171. 518 U.S. 267 (1996).

172. *Id.* at 276.

173. *Id.* at 278.

174. *Id.* at 283-84.

175. *Id.* at 275.

176. 524 U.S. 321, 328 (1998).

177. *Id.* at 332-33.

178. *Id.* at 334-44.

longing to lessees was found onboard was in rem and remedial, while the forfeiture of a large amount of cash by a person who dishonestly told the government that he was not exporting the cash was in personam and punitive. The principle that emerges is that the government is free to deprive *innocent* parties of property without affording constitutional EPP if a drug offense was committed using the property, but it may not deprive *guilty* parties of property without affording EPP for offenses related to the property. If there is a policy to be found here, it relates to the Constitution not of a liberal democracy, but of the nation known as Erewhon.¹⁷⁹

The SSET would decommission this juggernaut of arbitrary and ill-considered decisions on forfeitures and establish a single clear principle. Except to the extent necessary to terminate an ongoing state of illegality, no forfeiture may *ever* be imposed without a trial or compensation as an involuntary taking.¹⁸⁰ Forfeitures imposed for deterrent or retributive purposes are always punitive under the SSET. Therefore, a trial leading to forfeiture requires the state to afford the defendant the EPP guaranteed by the Constitution, including a trial and proof beyond a reasonable doubt of the defendant's culpability. Where the forfeiture is remedial, as that term is defined for purposes of the SSET,¹⁸¹ the EPP need not apply and civil procedures may be used. Under the SSET, then, punitive civil forfeitures, particularly the most egregious examples often cited as naked abuses of governmental power, would be curbed without any need to develop judicial fictions distinguishing in rem and in personam forfeitures or resort to the Biblical law of deodands. Instead, the Excessive Fines Clause, the Due Process Clause, and other EPP would come into play and, if properly applied, preempt such abuses.

IV. CONSEQUENCES FOR REGULATORY REGIMES

The field of jurisprudence most frequently affected by the increasing overlap of civil and criminal, and the one giving rise to most Supreme Court opinions dealing with the subject, is regulatory. Indeed, of the early cases in which the Supreme Court attempted to define when the constitutional EPP must be applied in nominally civil cases, the large majority involved regulatory regimes—customs law and tax law.¹⁸² In such cases, the government sought to penalize the evasion of customs duties or, later, income or excise taxes, for deterrence value by awarding multi-

179. SAMUEL BUTLER, *EREWHON* ch. 11 (1872).

180. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

181. See Fellmeth, *supra* note 2, at 18.

182. *E.g.*, *United States v. Zucker*, 161 U.S. 475 (1896); *Passavant v. United States*, 148 U.S. 214 (1893); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871); *Taylor v. United States*, 44 U.S. (3 How.) 197 (1845).

ple damages or statutory penalties to the government or the individual enforcing the sanction, or both.

Regulatory regimes generally seek to control public behavior to achieve some legislated policy, such as maintaining health standards in food preparation or service, ensuring adequate banking reserves, reducing environmentally harmful atmospheric emissions, or ensuring that professional sports are conducted without unnecessary safety risks. Various economic and non-economic behaviors are regulated at different levels of government, including federal (for example, international trade, toxic waste disposal, tax collection, and securities fraud), state (for example, professional licensing, automobile licensing and registration, tax collection, and corporate bookkeeping), and municipal (for example, conduct of parades and demonstrations, business licensing, and vehicle parking). Legislatures at all levels have adopted the practice of providing for nominally civil penalties, sometimes alone and sometimes alternatively with criminal penalties, for violations of the relevant statute or regulations adopted thereunder.¹⁸³ In addition, state licensing practices often provide for debarment and related proceedings in response to alleged violations of the statute or regulations using civil procedures.¹⁸⁴ These now-common practices raise troubling questions about the extent to which the state may punish in a uniquely regulatory setting without the necessity of affording EPP to the object of the state action.

A. *Administrative Civil Penalties*

Federal law currently provides that civil fines and forfeitures of money can be recovered in a “civil action,”¹⁸⁵ a provision that Congress intended to allow executive branch agencies to accomplish deterrence objectives without affording criminal procedures in general, and the constitutional EPP in particular, to defendants. It is precisely this convenience and relative certainty of punishment that makes nominally civil punishment more attractive and much more widely used in cases than the same punishment imposed under a criminal label.

Several commentators have already observed that the “civil fine has assumed a place of paramount importance in the search for a more effective enforcement tool,”¹⁸⁶ as evidenced by the fact that “[v]irtually every major administrative regulatory program authorized today contains some type of civil monetary penalty sanction.”¹⁸⁷ The constitutional and social

183. See 19 U.S.C. § 1592 (2001).

184. See CAL. BUS. & PROF. CODE § 6075 (2003) (attorney disbarment by civil proceedings); N.Y. GEN. BUS. LAW § 410 (revocation of aesthetician’s license in civil proceeding) (McKinney 1996).

185. 28 U.S.C. § 2461(a) (2001) (“Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.”).

186. Kerrigan et al., *supra* note 6, at 387.

187. *Id.*

consequences of the civil penalty's rise have not, unfortunately, been observed as closely.¹⁸⁸

Regulatory and administrative agencies resort to civil penalties in order to prosecute violations of law while conserving enforcement resources.¹⁸⁹ The lower burden of proof, reduced procedural protections, and penalties that can be vastly disproportionate to any actual damages put pressure on the respondent to settle before the case ever reaches a court. For this reason, most civil penalty cases brought by administrative agencies settle—sometimes for millions of dollars¹⁹⁰—before a complaint is ever filed in court. The high complexity of regulatory systems tends to make a certain number of violations inevitable. The Internal Revenue Code, Customs Regulations, Export Administration Regulations, securities and commodities exchange regulations, and the federal labor law regulations are notorious for their labyrinthine and often vague or befuddling architecture and provisions. It has been argued that, should the government be deprived of its ability to intimidate charged parties through quick proceedings under circumstances favorable to the state, regulated persons would be emboldened to avoid harsh penalties by threatening to exercise the right to a criminal trial with its attendant EPP. The regulatory regime, deprived of its ability to coerce compliance without the undue expenditure of limited resources, it is alleged, might even break down entirely.¹⁹¹

This argument—that the Bill of Rights should yield to the convenience of prosecutors—although sometimes made explicitly,¹⁹² has a lamppoonish ring to it. The purpose of the Bill of Rights is to provide certain inviolable guarantees to defendants regardless of any inconvenience to the legislative or executive branches. The Supreme Court rejected just

188. For example, J. Morris Clark's 1976 assertion that "legislatures seldom impose heavy fines without also providing for potential imprisonment and, therefore, constitutional safeguards," see Clark, *supra* note 6, at 410, was superannuated by the rise of the regulatory legal system decades before he wrote those words.

189. Mann, *supra* note 6, at 1863.

190. See, e.g., Ross Kerber, *Raytheon to Pay \$25M in Civil Fines*, BOSTON GLOBE, Feb. 28, 2003 (discussing Raytheon Co.'s agreement to pay \$25 million to settle charges seeking civil penalties for alleged violations of the International Traffic in Arms Regulations); Rachel McTague, *Merrill Lynch Agrees to Pay \$80 Million Over SEC Charges of Aiding Enron's Fraud*, Daily Rep. for Executives: Reg. & Law (BNA), (Mar. 18, 2003), 52 DER A-6, (Westlaw) (discussing Merrill Lynch's settlement agreement to pay \$80 million for aiding and abetting alleged violations of the Securities Exchange Act); Christopher S. Rugaber, *Hughes and Boeing Accept \$32 Million Fine to Settle Export Control Violations*, 20 Int'l Trade Rep. (BNA) 476 (Mar. 13, 2003) (discussing settlement agreement with Hughes Electronics Corp. and Boeing Satellite Systems Inc. for violations of the Arms Export Control Act and the International Traffic in Arms Regulations).

191. Cf. Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. 1235, 1238 (1995); Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 932, 977 (1990); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 45 (1993).

192. E.g., Robin W. Sardegna, *No Longer in Jeopardy: The Impact of Hudson v. United States on the Constitutional Validity of Civil Monetary Penalties for Violations of the Securities Laws Under the Double Jeopardy Clause*, 33 VAL. U. L. REV. 115, 172 (1998); see, e.g., Clark, *supra* note 6, at 405.

such an argument in *Kennedy v. Mendoza-Martinez*¹⁹³ when it repudiated Justice Stewart's view that "[t]he question of whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective."¹⁹⁴ Justice Brennan, in his concurring opinion, pointed out that the presence of a policy objective does not render the retributive or deterrent objectives nonpunitive.¹⁹⁵ Indeed, if the fact that a policy objective underlay a sanction made the sanction nonpunitive, criminal law would disappear. At its core, the assertion that criminal procedures should be relinquished in cases involving minor penalties results from an emphasis on the government's interest in "saving judicial [and prosecutorial] time and energy"¹⁹⁶ and a dereliction of the interests of those the state seeks to harm, and the Bill of Rights to protect. However inefficient and inconvenient the EPP may be, it is constitutionally mandated for reasons that should not be disregarded lightly.

The efficiency argument further fails to address why some unknown amount of economic savings should relieve the state of the duty to afford EPP to defendants before forcing them into a position of serving as a negative example or of suffering punishment to deter one's own speculative future misbehavior without an offer of proof beyond a reasonable doubt and other EPP.

The difficulties raised by the deprivation of such rights become more apparent upon close examination of government regulatory behavior. Regulatory agencies often do not seek either abstract justice or an application of the law strictly concordant with standard positivist interpretive methods. A statutory penalty is a unilateral imposition by the government, often for the government's own benefit, and, as such, is susceptible to bias and abuse. The agencies, like civil litigants, are often revenue maximizers; they seek the largest possible settlement or award and can be quick to overlook the rule of law if it interferes with revenue maximization or other professional or institutional goals.

This observation is less skeptical than it may at first appear. Regulatory agencies act as revenue maximizers because the bureaucratic incentive systems generally favor the collection of receipts and the publication of deterrent information as the primary concrete goal of the system. The regulatory systems, holding significant legislative, executive, and judicial power, are particularly susceptible to ephemeral political priorities and influence pandering.¹⁹⁷ Government bureaucrats are rewarded for

193. 372 U.S. 144, 168–69 (1963).

194. *Id.* at 208 (Stewart, J., dissenting).

195. *Id.* at 189–90 (Brennan, J., concurring).

196. Clark, *supra* note 6, at 405.

197. One particularly egregious example was presented when Bacardi Ltd., a rum distiller, convinced Jeb Bush, the governor of Florida and brother to the U.S. President (to whom, not surprisingly, Bacardi had contributed hundreds of thousands of dollars), to pressure the Director and Deputy Di-

obtaining large penalties for deterrence value and income; there is no institutional recognition or reward for dealing out justice per se. The pressure to obtain a large settlement is magnified when the procedural deck is stacked in the agency's favor. In most administrative schemes, civil penalties must be pursued through a hearing before an administrative law judge, or ALJ.¹⁹⁸ This proceeding is usually a precondition to any remedy the defendant may be able to seek in court—referred to as the duty to exhaust “administrative remedies.”¹⁹⁹ Some commentators have rather naïvely called this a “right” to a hearing, which “provides more options and quicker results at a lower cost.”²⁰⁰ In fact, because the ALJ is employed by and formally subservient to the agency or department itself,²⁰¹ the hearing is nearly always an expensive and time-consuming re-affirmation of the agency's position, which wears down the patience and exhausts the funds of the defendants in order to coerce a settlement. Regulatory bureaucrats may of course often be well meaning, but they may have a law enforcement rather than a guarantor of justice mentality, and the system tempts them with the possibility of extorting a settlement from a party that wishes to avoid costly legal fees for administrative hearings followed by civil litigation; the risk of high statutory civil penalties; incurring the ill will of regulators; and the pitfalls of having to report a potential liability to shareholders as required by securities laws. To compound the risk of abuse, courts tend to defer to the agencies' formulation of administrative remedies based on the greater specialization and, by implication, expertise of the agencies.²⁰²

The SSET offers the state two bases for regulating behavior in an administrative regime. Where prohibited acts or omissions that negatively affect the state can be remedied by some act of the offender, the regulated person is subjected to a civil process resulting in the payment of compensation or an injunction to perform some remedial act. Civil proceedings would generally be used, for example, in environmental regulation to force a polluter to restore the environment to its original state (or pay to have it restored); in tax law to force derelict taxpayers to

rector of the Patent and Trademark Office to influence the administrative law judges sitting on the Trademark Trial and Appeal Board in a case before it involving a trademark that Bacardi was seeking to cancel. See Dan Christensen, *Trademark Court Gets Jeb's E-Mails on Bacardi*, MIAMI DAILY BUS. REV., Mar. 19, 2003, available at <http://www.law.com> (search “Trademark Court Gets Jeb's E-Mails” hyperlink; full text available to registered users only).

198. See Kerrigan et al., *supra* note 6, at 377.

199. See *id.* at 425–26 (“In the past, all administrative remedies needed to be exhausted before criminal or civil remedies could be pursued.”).

200. Kerrigan et al., *supra* note 6, at 377.

201. See *Iran Air v. Kugelman*, 996 F.2d 1253, 1261–63 (D.C. Cir. 1993).

202. Cf. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that, when Congress has delegated agencies the power to issue regulations with the force of law and established formal procedures for the promulgation of such regulations, the Court will defer to agency interpretations of the law); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982) (“In construing a statute, this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration.”).

pay back taxes and interest; or in labor law to require employers to honor a collective bargaining agreement or to compensate the breach of such an agreement. Where prohibited acts or omissions that negatively impact the state have a deterrent or retributive effect, regulators would bring a criminal action against the offender. Criminal proceedings would generally be used, for example, in environmental regulation to punish a person who willfully or negligently pollutes the environment and to deter the polluter (and other potential polluters) from doing the same; in corporate law to punish and deter the evasion of corporate taxes; or in labor law to punish and deter coercive bargaining tactics, such as the use of intimidation to prevent the formation or operation of a union. In these criminal actions, the regulated person maintains the right to the EPP guaranteed by the Constitution.

A second objection to applying the SSET to regulatory law is that the stigma attendant upon criminal conviction seems an extreme consequence for many regulatory violations. Imposing the label of criminal on someone who may have acted in a merely negligent manner (for example, filling in paperwork) seems unjustifiably harsh,²⁰³ even if one effect of the stigma is to increase deterrence. This problem may easily be solved without altering the fundamental basis for the distinction between criminal and civil sanctions proposed in the SSET. First, the SSET does not dictate what label is attached to a law; it merely provides the conditions for the application of the EPP required by the Constitution. To the extent the label criminal carries stigma, there is no reason why a new nomenclature producing reduced stigma cannot be adopted. Administrative crimes can be divided into two or more categories, just as crimes in state law are often divided into multiple categories (for example, felonies, misdemeanors, and infractions). Crimes in some categories may carry no consequences aside from warning letters, small fines, or other minor penalties. The relative diminution of the penalties will encourage pleas among the guilty without forcing the innocent to sacrifice their constitutional rights on the altar of economic efficiency. The state can thereby achieve its deterrence objectives without imposing undue stigma or other unintended negative consequences upon minor violators. The SSET does not interfere unduly with regulatory flexibility, but it does interfere with attempts to make an end-run around the constitutionally mandated EPP.

B. Debarment Proceedings and License Revocations

Finally, special attention should be directed at the administrative practice of disqualifying a legal or natural person from the practice of a profession or engaging in a licensed activity, such as practicing medicine,

203. Kerrigan and her colleagues also made this point. See Kerrigan et al., *supra* note 6, at 379. On the nexus between crime and social stigma generally, see discussion *supra* Part II.E.

exporting munitions, or distributing liquor. Debarment (sometimes called disbarment) has long been considered a civil remedy in most circumstances,²⁰⁴ even though imposed for punitive purposes and to punitive effect, so long as prevention of future social harm—deterrence—is a goal.²⁰⁵ The rationale adopted by the Supreme Court for denying EPP in cases where debarment is threatened is that debarment “is not for the purpose of punishment,” but for the purpose of enforcing the legitimate preconditions for the practice of the activity in question.²⁰⁶ For example, the deprivation of a license to practice law may be effected by a civil court order if the defendant has committed a felony, on the theory that persons who have committed felonies are ipso facto unqualified to practice law. Thus, the Court has held that the denial of EPP “cannot involve any constitutional principle.”²⁰⁷

In *Hawker v. New York*, the Court considered generally whether the Ex Post Facto or Double Jeopardy Clauses applied to a law that debarred the petitioner from practicing medicine based on a past felony conviction where the law was enacted after the conviction.²⁰⁸ The Court framed the primary question as being whether the state was imposing an additional criminal punishment on the petitioner, and held that it was not.²⁰⁹ Instead, the Court found that the state had a legitimate interest in exercising its police power to prescribe the qualifications for the practice of a profession (in that case, medicine).²¹⁰ According to the Court, the state was not seeking to punish the petitioner, but “only to protect its citizens from physicians of bad character.”²¹¹ Justice Harlan, in dissent, countered that the law at issue did not deal with the petitioner’s “present moral character,” but merely a past offense, “and makes that, and that alone, the substantial ingredient of a new crime.”²¹² The majority seemed to base its position on the argument that the debarment, although a deprivation of a vested right, was not punitive in the sense of being retributive, but was, rather, preventative and, as such, a civil licensing decision, not a criminal matter.²¹³ The dissenting opinion was premised on the perception, *a contrario*, that the law was not tailored to accomplish the goal of protecting society and, thus, was merely an added punishment.²¹⁴ Both the majority and the dissent based their arguments on the principle that the prevention of future harm to society was a valid goal of a civil action, while punishment for past acts requires criminal prosecution.

204. See *Ex parte Wall*, 107 U.S. 265, 288–89 (1882).

205. See *Hawker v. New York*, 170 U.S. 189, 196, 200 (1898).

206. *Wall*, 107 U.S. at 288–89; see also *Hawker*, 170 U.S. at 196, 200.

207. *Wall*, 107 U.S. at 289.

208. 170 U.S. at 191.

209. *Id.* at 190–91.

210. *Id.* at 192–94, 196.

211. *Id.* at 196.

212. *Id.* at 204–05 (Harlan, J., dissenting).

213. See *id.* at 191.

214. *Id.* at 202–05 (Harlan, J. dissenting).

They mainly disagreed about whether the prevention of future threats to consumers of medical services really was the purpose of the law at issue.

As is often the case when the Supreme Court has addressed the applicability of EPP guaranteed by the Constitution, the Court's reasoning is founded primarily upon tautology and question begging. Whether debarment is punishment, as opposed to the prevention or termination of a forbidden practice, cannot be decided a priori by an appellate court on a motion for summary judgment. It is a question to be decided only after determining whether the defendant is accused of failing to fulfill a legitimate condition reasonably related to the practice of the activity of which debarment is threatened. Absent such a determination, a person could be debarred and publicly humiliated for an infamous offense without any of the traditional protections of criminal law. As Justice Field wrote in a dissent to the Court's first major case establishing debarment as a civil remedy where no EPP were necessary:

what a spectacle would be presented if, upon reports . . . or even upon written charges, that attorneys in different parts of the country have committed murder, burglary, forgery, larceny, embezzlement, or some other public offence, they could be cited here to answer summarily as to such charges without being confronted by their accusers, without previous indictment, without trial by jury, and, of course, without the benefit of the presumptions of innocence which accompany every one until legally convicted.²¹⁵

Indeed, this *spectacle* is exactly what the majority opinion countenanced and what the Court continues to approve.

The SSET addresses Justice Field's concern by treating debarment as punitive whenever it has the social effect of punishment, and treating it as remedial when its function is to terminate an existing or continuing state of illegality (and any punitive effects other than incapacitation are entirely incidental). If the defendant is accused of nothing more than failing to satisfy a precondition of the activity (for example, a doctor is accused of having no valid medical degree, or a U.S. munitions manufacturer is accused of being owned by nationals of an embargoed country), the effect of debarment will merely be to terminate an existing state of illegality (in the examples, the unlawful practice of the activity at issue), not to punish. The action is, therefore, properly undertaken using civil procedures under the SSET. If, in contrast, the act of which the defendant is accused is not a reasonable and legitimate qualification for the practice of the activity at issue (for example, a doctor is accused of reckless driving), the purpose of debarment is, indeed, to punish because there is *ex hypothesi* no reason why the accused's act should create an *existing* state of illegality merely by virtue of the person's continued practice of the activity in question (i.e., practicing medicine). Unless there is a sound reason to believe a reckless driver is usually an unsafe or incom-

215. *Ex Parte Wall*, 107 U.S. 265, 297 (1882) (Field, J., dissenting).

petent doctor, it is not a legitimate exercise of a state's police power to punish the doctor by depriving her of her livelihood without a criminal trial. In such cases, a debarment would be unconstitutional under the SSET unless the defendant had been afforded EPP.²¹⁶

V. CONSEQUENCES FOR PUNITIVE DAMAGES CLAIMS

Although the Supreme Court has asserted that “[p]unitive damages are not a substitute for the criminal process,”²¹⁷ the two punishments share important characteristics. Punitive (sometimes called exemplary) damages and criminal sanctions are both intended to exert retribution or practice deterrence on the defendant, both may carry stigma, and both are enforced by courts only. Further, because they are both intended to punish, they both pose a greater threat as a rule to the liberty interests of the defendant than remedial sanctions. Several commentators have argued persuasively that punitive damages would qualify as criminal even under the *Mendoza-Martinez* test²¹⁸ (although it is highly unlikely that the Supreme Court justices who penned the *Hudson* opinion would share that view). In any event, the Court has recognized that punitive damages, like criminal fines, “pose an acute danger of arbitrary deprivation of property.”²¹⁹

Generally, jury instructions regarding punitive damages are not designed to limit those damages to what is necessary to serve remediation, and awards of punitive damages do not, consequently, necessarily reflect any demonstrable harm to the plaintiff. Juries “assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.”²²⁰ Nominally civil punitive damages may (and sometimes do) exceed exponentially the maximum criminal fine applicable for the same conduct.²²¹ The lack of correspondence between harm and damages reflects the fact that punitive or exemplary damages are gener-

216. This position constitutes an exception to the SSET because punitive deterrence was defined to include incapacitation. As the foregoing discussion implies, not all incapacitation is punitive. Where incapacitation refers not to confinement but to the revocation of a discretionary license granted by the state, any punishment caused by the revocation may be purely incidental.

217. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

218. See Jeffrey W. Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241, 247 (1985); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 349 (1983); see also *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 298 (1989) (O'Connor, J., concurring in part and dissenting in part) (“I agree with those commentators who have found it easy to conclude that punitive damages are penal under the *Mendoza-Martinez* factors.”).

219. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994); see also *Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (calling punitive damages “private fines levied by civil juries”) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

220. Wheeler, *supra* note 218, at 276 (citing *Gertz*, 418 U.S. at 350). Indeed, punitive damages may be used for purposes of punishment that surpass those authorized by the Constitution, such as the selective punishment of unpopular views in press libel cases. See *id.*

221. See, e.g., Colleen P. Murphy, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1457 n.68 (2004).

ally not remedial, but rather serve retributive or deterrent functions. The Supreme Court has recognized the noncompensatory nature of punitive damages on numerous occasions.²²² The fact that state courts instruct juries to base their punitive damages awards on the culpability of the defendant's conduct and the defendant's wealth far more than the plaintiff's need for further compensation demonstrates this point adequately.²²³ As a result, in punitive damages awards, as in criminal convictions, an erroneous judgment against an innocent defendant is much more serious than an erroneous judgment vindicating a responsible defendant. In the former case, the legal system punishes an innocent defendant and thereby creates an injustice spontaneously, whereas the failure of the legal system to impose punitive damages on a responsible defendant merely forfeits one of many opportunities to deter future wrongdoing and causes no immediate injustice to any specific party (except perhaps in a strictly metaphysical sense).

Punitive damages also parallel criminal fines in that they may express social condemnation and carry stigma similar to criminal conviction.²²⁴ The condemnation reflects that the purpose of punitive damages is to vindicate a public interest threatened or damaged by the defendant's conduct. While the stigma associated with a tort or breach of contract may not result in a criminal record or the denial of employment, the public derision and scorn resulting from such damages may harm the defendant's psychological well-being and even general economic interests, as when an adverse civil award results in a boycott of the defendant's goods or services.²²⁵ That said, punitive damages have never been officially considered equivalent to criminal sanctions. American courts have allowed them for nearly the entire length of the country's existence²²⁶ without requiring constitutional EPP.

The civil treatment of punitive damages may reflect their essentially remedial nature in early U.S. jurisprudence. At the time the country was

222. *E.g.*, *State Farm*, 538 U.S. at 416; *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 474–75 (1993) (O'Connor, J., dissenting); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19–21 (1991); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981); *Gertz*, 418 U.S. at 350; *see also TXO*, 509 U.S. at 463–64 (“The instruction to the jury on punitive damages . . . stated that one of the purposes of punitive damages is ‘to provide additional compensation for the conduct to which the injured parties have been subjected.’ . . . We . . . do not understand the reference in the instruction to ‘additional compensation.’”); RESTATEMENT (SECOND) OF TORTS § 908(1) cmt. a (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984).

223. *TXO*, 590 U.S. at 463.

224. *See Wheeler*, *supra* note 218, at 280–83, for an argument to this effect.

225. *See supra* note 143.

226. *See Coryell v. Colbaugh*, 1 N.J.L. 77 (1791) (instructing the jury “not to estimate the damages by any particular proof of suffering or actual loss,” but to “give damages for example's sake, to prevent such offenses in future”); *cf. Day v. Woodworth*, 54 U.S. 363, 371 (1852) (“It is a well-established principle of the common law, that in actions . . . for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant.”). *See generally* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1284–1304 (1993) (discussing the history of punitive damages).

founded, compensatory damages in civil cases were limited largely to out-of-pocket expenses. Pain and suffering, humiliation, loss of consortium, lost profits, and emotional trauma were not recoverable as they are today; punitive damages filled this void.²²⁷ Yet, in almost 250 years of constantly expanding causes of action and species of recoverable damages, the nature of punitive damages has almost completely changed. In most states, they no longer serve any substantial remedial function.²²⁸ Nonetheless, in spite of this drift toward punitive damages being used for retributive or deterrent purposes, the Supreme Court has repeatedly declined invitations to provide EPP where punitive damages are sought,²²⁹ even while acknowledging that punitive damages “serve the same purposes as criminal penalties.”²³⁰

Nor does the Court demand an elevated standard of proof before punitive damages may be awarded. A preponderance of evidence of misconduct will suffice to satisfy due process under current law; clear and convincing evidence, much less proof beyond a reasonable doubt, is unnecessary under the current jurisprudence.²³¹ Nonetheless, when the Court last confronted and rejected the argument that the Eighth Amendment Excessive Fines Clause should apply to private punitive damages awards, at least two dissenting Justices (O'Connor and Stevens) were convinced that the protections of this clause should apply not just in cases involving punitive civil fines, but in private punitive damages cases as well, because they serve the same function as criminal punishment—retribution and deterrence.²³²

Instead, the Court now commonly holds that the sole procedural protections that must be provided to defendants threatened with such nominally civil punishment is that excessive punitive damages awards may violate due process under the Fifth and Fourteenth Amendments.²³³ The test for whether punitive damages violate due process is fact-intensive and evaluated on a case-by-case basis,²³⁴ but is evidently in-

227. See LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.3(D) (2d ed. 1989); Wheeler, *supra* note 218, at 305.

228. See, e.g., Wyatt v. Wehmueller, 806 P.2d 870, 874 (Ariz. 1991); Champagne v. Raybestos-Manhattan, Inc., 562 A.2d 1100, 1113–14 (Conn. 1989); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968); Brewer v. Second Baptist Church of L.A., 197 P.2d 713, 720 (Cal. 1948); see also *In re Winship*, 397 U.S. 358, 363–64, 367 (1970); *In re Gault*, 387 U.S. 1, 23–24, 36 (1967).

229. See Tudor Assocs. v. AJ & AJ Servicing, Inc., 843 F. Supp. 68, 77 (E.D.N.C. 1993); see also Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 12 (1991) (“The constitutional status of punitive damages . . . is not an issue that is new to this Court . . .”).

230. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

231. *Pacific Mutual*, 499 U.S. at 23 n.11.

232. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 286–87 (1989) (O'Connor, J., dissenting).

233. E.g., *State Farm*, 538 U.S. at 416; *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453–54 (1993); *Pacific Mutual*, 499 U.S. 12; *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915).

234. *Accord TXO*, 509 U.S. at 458 (“In the end, then, in determining whether a particular award is so ‘grossly excessive’ as to violate the Due Process Clause of the Fourteenth Amendment, we return to what we said two Terms ago in *Haslip* . . .”) (citations omitted); cf. *State Farm*, 538 U.S. at 425

tended to ensure that awards do not exceed the amount necessary to punish the defendant and deter other potential tortfeasors.²³⁵ Whether punitive damages violate due process depends on the ratio of actual damages to punitive damages, the extent of actual or potential harm to the plaintiff and others, the presence of bad faith, past similar acts, and the defendant's wealth.²³⁶ Courts are to weigh these factors and come to some conclusion as to whether due process has been violated.²³⁷

The Court's approach to reining in jury awards of punitive damages is tantamount to jamming the proverbial square peg in a round hole. Fifth Amendment due process has nothing to do with the question of whether punitive damages are excessive. It takes little ratiocination to conclude that the analysis is properly conducted pursuant to the Eighth Amendment prohibition on excessive fines. Punitive damages are authorized and enforced by organs of the state (courts) and are, consequently, equivalent in every significant respect to a public fine.²³⁸ That the government may not collect all of the damages in many cases is irrelevant to the systemic function of punitive damages and whether EPP should apply.²³⁹ The SSET treats them as identical to criminal fines, and a complaint seeking them accordingly requires the normal EPP. In drawing the line between punitive damages, which require EPP, and remedial damages, which do not, the SSET clarifies the unnecessarily muddled jurisprudence that the Court has created by relying on a simultaneously vague yet complex notion of due process.

Of course, reframing the question of whether punitive damages violate some constitutional entitlement as one under the Eighth Amendment rather than the Fifth Amendment does not immediately lead to a more lucid conclusion as to whether any given award of punitive damages is *excessive* under the Eighth Amendment as opposed to being awarded with *due process* under the Fifth.²⁴⁰ It does, however, clarify the

("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."); *Pacific Mutual*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.").

235. See *State Farm*, 538 U.S. at 416; *Pacific Mutual*, 499 U.S. at 21.

236. *TXO*, 509 U.S. at 459–62.

237. *Pacific Mutual*, 499 U.S. at 21–22.

238. The Supreme Court has called punitive damages "private fines" because they are levied by a jury. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). This point is, of course, sophistical. Juries have no power to levy fines; only the legislature or a court can authorize and enforce such a sanction. Fines are quintessentially public acts.

239. See *supra* note 86 and accompanying text.

240. The subjectivity of the Court's due process test for punitive damages (like that of most multi-factor tests) gives it dubious value as a guarantor of constitutional rights except in the most extreme circumstances, such as where the punitive damages exceed actual damages by a factor of a dozen, as the Court recently held in *State Farm*. See *State Farm*, 538 U.S. 408; cf. *TXO*, 509 U.S. at 466–67 (Kennedy, J., concurring) ("I do not believe that the plurality's [test for the constitutionality of punitive damages under the Due Process Clause], a general focus on the 'reasonableness' of the award . . . , is a significant improvement. . . . This type of review, far from imposing meaningful, law-like con-

rights at stake. The right against excessive fines is not a *procedural* right, but more akin to a right against arbitrary deprivation of property or a right to equal protection under the laws. The Court has lately been asking something approaching the right question—how much punishment is *necessary*—but this question is one arising under the Eighth Amendment and not the Fifth.

I say “approaching” the right question because it is not so much a matter of what is necessary to punish or deter as an inquiry based on whether the fine at issue is *excessive*. There are two fundamental questions that must be resolved when evaluating what kinds of fines or damages are excessive. The standards for evaluating what kind of retribution is excessive and what kind of deterrence is excessive diverge because of the differing purposes of each approach to punishment.

Retribution has a moral or symbolic function, making the articulation of an ethical, legal, or policy principle that justifies limiting retribution challengingly abstract. So far, the Supreme Court has not even attempted to rise to the task. In *State Farm*, its most specific holding, the Court stated that “[s]ingle-digit multipliers [of damages] are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, or, in this case, of 145 to 1.”²⁴¹ It is never clear why such ratios are intrinsically objectionable, or upon what they are based. Surely a numerical constraint on the ratio of punitive to actual damages must necessarily be arbitrary. Avoiding arbitrary punishment is a central purpose of both the Due Process Clause and the Eighth Amendment.

Retribution in a Kantian or Hegelian sense reflects a notion of “desert,” meaning that retribution must be proportionate to the moral guilt of the wrongdoer. This definition, which would likely be widely accepted by ethicists, jurists, and the lay public alike, regards an excessive fine as a monetary penalty disproportionate to the wrongdoer’s moral guilt. Of course, the difficulty of accurately judging moral guilt on a case-by-case basis, much less of accurately correlating punishments to classes of behavior, may well exceed human ethical sophistication or even cognitive capacity. Even if not, however, one would think that a court cannot legitimately claim that a jury has imposed excessive retribution on a defendant without rejecting the very community morality that it is the function of a jury to personify.

straints on jury excess, could become as fickle as the process it is designed to superintend.”); *id.* at 500 (O’Connor, J., dissenting) (“The increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability.”); *Pacific Mutual*, 499 U.S. at 24 (Scalia, J., concurring) (arguing that the test for the constitutionality of punitive damages under the Due Process Clause “provides no guidance as to whether any . . . procedures [other than those at issue in the case] are sufficiently ‘reasonable,’ and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve”).

241. *State Farm*, 538 U.S. at 425 (citations omitted).

Nonetheless, as long as the legal system is founded on a notion of retribution, courts cannot escape making moral judgments in determining which fines are excessive. Rather than attempting—probably in vain—to resolve this problem here, it suffices to note that the Court has proved unable to articulate any policy basis for an analysis of punitive damages under the Fifth Amendment; it would do better instead to resort to considerations of moral guilt and the question of whether the fine is disproportionate in light of other fines imposed on other defendants in similar moral circumstances as the foundation of its Eighth Amendment analysis.

Reliably determining what is *excessive deterrence* is nearly as sticky a problem. Deterrence is a social goal that is most efficaciously achieved by maximizing fear in potential offenders. The concept that punishment can exceed what is necessary to deter must rely on a diminishing returns argument. In other words, at some point, more punishment does not result in significantly greater deterrence, and, therefore, the state would not be pragmatically or morally justified in imposing punishment beyond that point (a normative claim advanced, *inter alia*, by Locke in the seventeenth century).²⁴²

The question of when punishment begins to achieve diminishing or zero returns on deterrence is an empirical issue that, unfortunately, neither courts nor juries find themselves in a position to resolve. Nor has the Supreme Court ever suggested that any tribunal, including the Court itself, is better equipped to adjudge the deterrent effect of greater punishment than a jury. If a reliable determination of when deterrence begins to break off could be made, this might provide a basis for holding some sanctions excessive for deterrent purposes and others not. The problem with this approach is that one can foresee the deterrence rationale conflicting with the retribution rationale. After all, deterrence might become ineffective long after the state has dealt the defendant retribution equivalent to his or her moral guilt. For example, although capital punishment may be the most reliable deterrent to grand theft, a court might believe that imposing such punishment would be excessive as a matter of ethics (i.e., the punishment is disproportionate to the defendant's moral guilt).²⁴³

242. LOCKE, *supra* note 71, ch. II, § 12, at 293 (“Each transgression may be punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like.”); *cf.* BECCARIA, *supra* note 60, at 43 (“All [punishment] beyond [what is absolutely necessary to deter] is superfluous and for that reason tyrannical.”); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., Athlone 1970) (1789) (“But all punishment is mischief; all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”).

243. One solution, always assuming that retribution can be accurately measured and is affected by the severity of punishment, might be to resort to the “lesser of two evils” approach. A convicted defendant will be subjected to enough punishment to deter the sanctioned behavior or to equal his moral guilt, whichever is the lesser. Putting aside that the assumptions here are counterfactual, one trouble

One possible solution would be for the Court to limit fines for deterrence purposes to the point at which the fine imposed on the defendant equals an amount slightly greater than the average benefit to the defendant, adjusted for the probability that punishment will *not* be imposed. For example, if the average grand theft or violation of export regulations nets the perpetrator \$10,000, and only one in five thefts or violations result in a conviction, a fine (we are not considering imprisonment here) of something slightly greater than \$50,000 would be the maximum necessary to deter. One problem with this approach is that it assumes, probably wrongly in most cases, that perceptions among potential perpetrators of the probability of punishment are accurate and that the population of potential perpetrators²⁴⁴ is not risk-seeking. These factors introduce an element of uncertainty into the calculus of what constitutes an excessive fine for deterrence purposes and would justify giving substantial latitude to the legislature in assessing fines in amounts somewhat greater than what the calculus described above would justify.

Putting aside such statistical problems, a second problem is that this approach may theoretically be feasible for cases involving property losses, but for cases involving violence or destruction of property, it may be difficult to monetize the defendant's benefit. In such cases, the only evident basis for limiting fines would be a showing by the defendant that the fine is sought in an amount that is greater than that necessary to deter in practice. To prove this, the defendant would need to produce evidence establishing that reducing fines would not significantly affect the number of delicts committed.

However the Court elects to limit punitive damages under the Eighth Amendment, an exception to the treatment of punitive damages as criminal penalties requiring EPP is justified in the relatively rare cases in which punitive damages are limited to amounts necessary to serve a remedial function. According to some commentators, punitive damages are justified as compensatory, and in at least one state (Connecticut), such damages are limited to the plaintiff's litigation costs and attorney's fees.²⁴⁵ Normally, of course, victorious parties must pay their own attorney's fees, even when these fees exceed any award they receive at the conclusion of litigation. In the jurisdictions where punitive damages are limited to attorney's fees, the term "punitive" is a misnomer, as the damages do not tend to punish any more than other remedial damages. Their

with this approach is that it will tend to satisfy both ethical considerations and deterrent considerations in the rare instances where the punishments necessary to achieve desert and deterrence are more or less identical. And we have no reason to believe that this identity will be a common situation.

244. Alliteration not intended. Really.

245. See *United Aircraft Corp. v. Int'l Ass'n of Machinists*, 285 A.2d 330, 345 (Conn. 1971), cert. denied, 404 U.S. 1016 (1972). The commentators are many. See, e.g., Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 68-69 (1985); Sharon G. Burrows, *Apportioning a Piece of a Punitive Damage Award to the State*, 47 U. MIAMI L. REV. 437, 447 (1992); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1297 (1976).

function and effect are to compensate the plaintiff for a cost improperly imposed upon him by the defendant. They should simply be considered further remedial compensation.²⁴⁶ Consequently, nominally punitive damages cannot all be treated alike under the SSET, but must be evaluated based on their systemic social effect.

VI. CONCLUSIONS

The Systemic Social Effect Theory was developed among an historically rich field of theories about how best to define civil and criminal sanctions. Most of these theories have sought to differentiate civil and criminal sanctions based on criteria derived from positivist or natural law visions rather than concern for advancing a coherent political and ethical policy of constitutional governance. One purpose of this article was to evaluate how these theories fare in offering both a cogent vision of this foundational issue of jurisprudence and protecting the civil rights necessary in a liberal democracy. In the course of this analysis, it became apparent that relying on a priori, intuitive, or historical notions of criminality does little to effectuate the constitutional policies that are so important to sociopolitical theories of fairness and justice.

For constitutional purposes, civil and criminal sanctions cannot reliably be distinguished based on transitory legislative intent, the relative severity of the sanction, the fact that the state may be seeking the sanction or collecting any resulting revenue, or the social blame that may accompany the sanction. Although each of these theories expresses some measure of truth about the positive characteristics of criminal and civil

246. The argument has been raised that punitive damages sought by private litigants should be encouraged, because such damages “remove[] the burden of prosecution from the government, thereby allowing the private sector to fund law enforcement. A system that lets private plaintiffs secure punitive sanctions can save the government money and increase the community’s total sanctioning power.” Mann, *supra* note 6, at 1868 (citing William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975)). Several states allow punitive damages on the theory that such damages increase the incentive for private parties to bring suit to enforce society’s deterrent and retributive goals, especially where compensatory damages are not adequate to motivate such suit, effectively privatizing the enforcement of public policy in each instance. See Sandra L. Nunn, *The Due Process Ramifications of Punitive Damages, Continued: TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), 63 U. CIN. L. REV. 1029, 1036 n.48, 1037–38, 1088–89 (1995). For this reason, a minority of courts have held that punitive damages serve the purpose of compensating the plaintiff, *see id.* at 1035–37, in addition or their deterrent or retributive function.

This argument in favor of private punitive sanctions is internally inconsistent, however. It is based upon the postulate that punitive damages provide adequate incentive for private parties to enforce norms disfavoring the sanctioned behavior. Yet, if these monetary incentives are adequate to motivate private parties to litigate legitimate claims, there is no reason to believe they should not be equally adequate to motivate government criminal enforcement. Instead of punitive damages going into the hands of whatever party takes it upon itself to sue first, the funds would be deposited in government coffers, where they could be used to fund further enforcement activity. To contend that punitive damages result in more enforcement activity than criminal fines is facially unconvincing. In the absence of empirical data suggesting that punitive damages carry a significant advantage at encouraging private enforcement, it makes little sense to promote such a lottery-like wealth distribution measure.

sanctions under much current law, none of them encapsulates the reason we distinguish between civil and criminal sanctions and afford EPP only to those accused of the latter. A better theory is needed to explain when and how the Constitution's EPP should be guaranteed. The SSET offers a self-consistent approach that focuses on effectuating the constitutional policies underlying the EPP. As explained in *Civil and Criminal Sanctions*,²⁴⁷ we distinguish between civil and criminal sanctions because we believe that, where the state seeks to punish or deter, the danger to valued human liberty, dignity, and property is at its apogee. The EPP are designed, as they should be, to minimize abuses whenever the state seeks to use its power and authority to coerce the punishment of its subjects. For all their respective merits, the alternative theories discussed in Part II of this article fall short of a viable constitutional theory because they ignore this fundamental constitutional function.

Among the state abuses currently in widespread practice in the United States is the denial of EPP in cases in which the state exercises its coercive punitive power to impose forfeitures, retributive or deterrent fines, debarment, and punitive damages. Although each of these abuses is currently fully approved by Supreme Court jurisprudence, each poses a substantial threat to the civil rights that the EPP are designed to protect. Whatever the source of the longstanding judicial willingness to countenance punishment without constitutional EPP—whether it results from historical practices, deference to Congress, or simply careless thinking about constitutional policy—it has continued for far too long.

If we as a society, and the legal profession in particular, value the strong presumption of innocence, the protection against double jeopardy, excessive fines, ex post facto laws, and other constitutional rights, the solution is neither to place an upper limit on the abuses (for example, capping punitive damages or limiting forfeitures) nor to embrace the erosion of the civil rights by redefining punishment as remedial. If there is a feasible solution that arrests and rectifies the erosion of those rights without substantially impeding the state's ability to deter and punish, then there is little basis for resisting its adoption. The SSET is proposed as just such a solution. Because it preserves the strengths of several of the alternative tests discussed in Part II while eschewing their sundry weaknesses, the SSET integrates constitutional policy and self-consistent jurisprudence with a viable legal theory. The SSET obviates the current trend toward stopgap measures and restores clarity to the diverse fields of jurisprudence in which the distinction between civil and criminal measures has become increasingly obscure, incoherent, and violative of basic civil rights.

247. See Fellmeth, *supra* note 2, at 19–26.

