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RESPONSE

THE PERSISTENCE OF BOUNDARIES: A REPLY TO ROSEN-ZVI AND FISHER

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FOR those who have studied the blurry distinction between the civil law and the criminal law, it is natural to consider jettisoning the procedural divide between the two. Almost none of the literature on the subject, though, describes how the two bodies of law could be merged, or even takes the stance that they should be merged. Rather, scholars have tended to look for new standards or tests to help place a sanction within one of the two existing categories,[1] to enhance the procedural protections available in certain civil proceedings,[2] or to propose a new additional category for hybrid sanctions.[3]

Professors Issachar Rosen-Zvi and Talia Fisher make a valuable contribution to the discussion by finally advancing a plausible way

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[1] See Wayne Logan, The Ex Post Facto Clause and the Jurisprudence of Punishment, 35 Am. Crim. L. Rev. 1261 (1998); Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 Geo. L.J. 775, 783 (1997).

[2] See John Leubsdorf, Constitutional Civil Procedure, 63 Tex. L. Rev. 579 (1984).

[3] See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L.J. 1795 (1992).

to dispense with the criminal-civil procedural bifurcation.[4] They propose making procedural protections contingent solely upon the severity of the sanction and upon the symmetry (or lack thereof) between the adversarial parties in the proceeding. This approach eliminates the need to draw false distinctions between nearly identical sanctions, to divine a legislature's motivation, or to apply procedural safeguards that are either excessively high or dangerously low. But the authors' attempt to erase boundaries ends up erecting new ones, which are perhaps equally arbitrary and dysfunctional.

Professors Rosen-Zvi and Fisher acknowledge that their proposed procedural model is not a finished product,[5] so in this brief reply, I hope to direct their attention and others' to a few areas that warrant closer examination.

CONTINUED PROBLEMS WITH STANDARDS

"Sanctions"

The article seems to take for granted that certain actions by the government, and certain decisions handed down by the courts, are obviously sanctions. The article refers to "sanctions" dozens of times, but nowhere does it define the term. This is unsurprising because the definition is far from clear.

Experience indicates that we cannot trust the names that the legislatures or the courts assign to various measures. The authors acknowledge that the status quo provides an incentive to exploit or evade procedure by attaching a "civil" or "legal" label in whatever way is convenient.[6] Thirty-five years ago, Professor Alan Dershowitz referred to this practice as a "legal labeling game."[7] Dershowitz also pointed out that "civil" and "legal" are not the only labels with which legislatures and courts play games; the government has also tinkered with other dichotomies, such as

[4] Issachar Rosen-Zvi and Talia Fisher, Overcoming Procedural Boundaries, 94 Va. L. Rev. 79 (2008).

[5] Id. at 134.

[6] Id. at 83, 86.

[7] Alan M. Dershowitz, Preventive Confinement: A Suggested Framework for Constitutional Analysis, 51 Tex. L. Rev. 1277, 1295–1301 (1973).

"predictive" versus "retrospective" and "adversarial proceedings" versus "nonadversarial proceedings."[8] I would add "punitive" versus "non-punitive" to that list. I believe that the ambiguity between "sanction" and "non-sanction" is as ripe for government exploitation as any other taxonomic vagueness, which is why Professors Rosen-Zvi and Fisher's failure to define the term is a problem for their proposal.

The authors do provide an extremely wide range of examples of what they regard as sanctions—from imprisonment to home foreclosure.[9] Just about anything that deprives someone of liberty or property would appear to fit within the nebulous category of "sanction." This can get dicey, however. Would a public health quarantine count as a sanction? What if the quarantine were imposed only upon prostitutes, and had the effect of holding the prostitutes longer than a prison sentence would permit them to be confined?[10] Would the government have to provide evidence beyond a reasonable doubt before imposing any quarantine? If so, is the resultant public health risk one that we can tolerate?

Take another example. Would a tax count as a sanction? Certainly, it is depriving someone of property, but most people would not consider taxes to be sanctions. How about "sin taxes," which disproportionately inconvenience—punish, some would say—those who engage in behavior that the government deems undesirable? If those are not sanctions, then how about a tax that is only imposed upon individuals convicted of drug crimes?[11] If it is only a tax, can it be taken into account when trying to determine before the trial how severe the sanction might be, as required by Professors Rosen-Zvi and Fisher's model for determining the appropriate burden of proof? Or should the court consider only sanctions deemed not to be taxes?

It is easy to think of more examples: sex-offender notification laws; takings under eminent domain; protective confinement of material witnesses; subpoena of testimony at a trial, which requires

[8] Id. at 1301–1303.

[9] Rosen-Zvi and Fisher, supra note 4, at 94–95.

[10] See Wendy E. Parmet, AIDS and Quarantine: The Revival of an Archaic Doctrine, 14 Hofstra L. Rev. 53, 66–69 (1985).

[11] See, e.g., Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994).

an individual to give up her time; compulsory vaccinations; commitment of individuals who have been acquitted at a criminal trial by reason of insanity; "perp walks" that subject criminal defendants to media scrutiny; and so on. Each of these, to some extent, "has physical aspects similar to the imprisonment of a convict" or financial ramifications similar to those of "severe sanctions imposed in the framework of civil proceedings,"[12] but it is unknown whether the authors would apply their proposal to these cases. If they would, it is not exactly clear how they could do so. What, exactly, would be the question at issue in a hearing preceding a sex-offender notification? Or before a perp walk?

The authors rightly acknowledge the difficulty in differentiating between a severe sanction and a lenient sanction, but they downplay that difficulty, saying that this distinction would be "easier to administer than any of the taxonomies employed by the courts to date."[13] What they fail to acknowledge is the difficulty of defining "sanction" in general. The examples above show that loss of liberty and diminution of financial well-being are excessively broad criteria. Ultimately, a line has to be drawn somewhere—at which point, we face a legal labeling game very similar to the one we have now.

"Institutions" Versus "Individuals"

The second axis of Professors Rosen-Zvi and Fisher's proposal—whether the parties in the proceedings are individuals or institutions—is also dubious. First, "individual" and "institution" should not be treated as monolithic terms. Both can vary quite widely. Individuals can be rich or poor, educated or uneducated, represented by excellent attorneys or no attorney at all, powerful or not. Institutions can be large or small, well-financed or not financed at all, popular or not. If the authors really want to capture the balance of power in adversarial legal proceedings, the duality they have set up is insufficient. If "the civil-criminal divide is a poor and inadequate proxy for th[e] balance of power"[14] in adversarial

[12] Rosen-Zvi and Fisher, supra note 4, at 95.
[13] Id. at 140.
[14] Id. at 135.

legal proceedings, they have failed to explain why their proposal is a significantly better proxy.

Additionally, how would one decide whether an organization is a "repeat player" or a "one-shotter,"[15] which is one of the determinations required by the authors' model?[16] And why is it impossible for any individual to be regarded as an institutional entity, even though Professors Rosen-Zvi and Fisher classify all repeat players as institutional entities?[17] If an individual has been sued often, wouldn't that make him a repeat player? What if the individual has often initiated lawsuits? What if that person happens to be a billionaire? Given their extended description of courts' current difficulty in drawing lines, it is odd for the authors to trust the courts with this delineation.

There is also a risk that institutions will exploit the procedural advantage of the authors' plan by having individuals file lawsuits on their behalf. There are numerous instances when both an individual and an institution could have standing. In such cases, the individual can sue and the institution can provide the individual with legal and financial support. How could the courts check this practice? Would there be a cap on the amount of contributions the individual could receive from outside parties, a la campaign finance? If so, would it include amicus curiae briefs or less tangible resources, such as public relations efforts?

Finally, for better or worse, it appears that the proposal would either abolish or significantly change the character of in rem suits. For example, the authors treat asset forfeiture actions as an example covered by their plan, but such actions are actually initiated against property, not people. The authors seem to want the owners of the property, not the property itself, to be party to the lawsuit.

Why Standards Are Problematic

Professors Rosen-Zvi and Fisher dismiss the standards that currently exist to separate civil from criminal measures. For example, they regard the factors listed in Kennedy v. Mendoza-

[15] Id. at 102–103.
[16] Id. at 137.
[17] Id.

Martinez[18] as "unable to yield a principled and predictable answer."[19] But no standard will consistently yield a principled and predictable answer if the judges who apply the standard are free to twist words and to manipulate the criteria in order to arrive at the outcomes they prefer. The problem does not inhere in the standards; the problem is with the judges who cannot—or will not—agree on how the standards should be applied. The proposal in the article does not solve this problem. Judges will have a field day drawing lines between "sanction" and "non-sanction," "lenient" versus "severe," and "institution" versus "individual."

THE PROPOSED PROCEDURAL PROTECTIONS

The authors make a laudable attempt to state clearly what the evidentiary standards would be under their new regime. This gives rise to a couple of problems, however.

First, the authors propose to change only evidentiary burdens of proof. Yet, other procedural protections also play into the outcome of a trial, as Professors Rosen-Zvi and Fisher note when they decide to ignore them "[f]or simplicity's sake."[20] They concede that "hard choices would have to be made and additional considerations would have to be taken into account" in order to incorporate these additional procedural protections into their model, but they focus on the standard of proof "due to its unparalleled importance."[21] Not once, however, do the authors mention the Ex Post Facto Clause, which has been perhaps the most important area of dispute in several significant cases on the civil-criminal divide, including key decisions on the civil commitment of sex offenders and sex-offender notification laws. It is a longstanding precedent that criminal penalties are not permitted to be retroactive, but civil sanctions may be. With the civil-criminal distinction gone, it becomes extremely difficult to answer questions about retroactivity and other procedural issues—for example, the privilege against self-incrimination or the prohibition on double jeopardy—that diverge along the civil-

[18] 372 U.S. 144 (1963).
[19] Id. at 126.
[20] Id. at 141.
[21] Id. at 141 n.207.

criminal fault line. The "hard choices" and additional considerations to which the authors alluded might well pose insuperable difficulties. Professors Rosen-Zvi and Fisher claim that "[t]he current structure of criminal procedure is largely a result of the 1960s Warren Court revolution," and that "[t]here is nothing sacred about this structure,"[22] meaning that it can and should be torn down to make way for this new model. But this new framework omits elements that have either existed since long before the Warren Court, or are explicitly required by the U.S. Constitution. They therefore cannot be set aside so easily.

Second, the evidentiary standards are themselves not enshrined in the Constitution; they, too, have been formulated by judges, as Professors Rosen-Zvi and Fisher acknowledge.[23] So it is odd that the authors treat those standards—which are highly ambiguous and open to interpretation[24]—as sacred. Moreover, it appears that the authors seem to have taken the evidentiary standards that exist today, ordered them from highest to lowest, and just plugged them into their matrix of severity of sanction versus balance of power.[25] To the extent that these standards can be measured cardinally—a notion that has met with hostility from many courts[26]—there are not necessarily equal "intervals" between them, in theory or in practice.[27] The difference between "preponderance of the

[22] Id. at 152.

[23] Id. at 153.

[24] See, e.g., Henry L. Chambers, Jr., Reasonable Certainty and Reasonable Doubt, 81 Marquette L. Rev. 655, 665 (1998) ("Though many definitions of reasonable doubt exist, giving precise content to reasonable doubt is difficult."); Thomas V. Mulrine, Reasonable Doubt: How in the World Is It Defined?, 12 Am. U. J. Int'l L. & Pol'y 195 (1997).

[25] Rosen-Zvi and Fisher, supra note 4, at 142.

[26] See Peter Tillers and Jonathan Gottfried, Case comment—*United States v. Copeland*, 369 F. Supp. 2d 275 (E.D.N.Y. 2005): A Collateral Attack on the Legal Maxim That Proof Beyond A Reasonable Doubt Is Unquantifiable?, 5 Law, Probability, & Risk 135, 135–138 (2007).

[27] See Gordon Tullock, Trials on Trial: The Pure Theory of Legal Procedure 79–80 (1980) (describing empirical evidence that many people treat "beyond reasonable doubt" as approximately 85 percent certainty, and "a fair preponderance of the evidence" as approximately 75 percent certainty). See also United States v. Fatico, 458 F.Supp. 388, 409–410 (E.D.N.Y. 1978) (listing data from a survey of judges from the Eastern District of New York about probabilities associated with standards of proof); C.M.A. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees, 35 Vand. L. Rev. 1293, 1325–1332 (1982) (providing findings from a survey of judges about probabilities associated with standards of

evidence" and "clear and convincing evidence" might not be the same as the difference between "clear and convincing evidence" and "beyond a reasonable doubt." The authors do not explain why, with a lenient sanction, a power imbalance might increase the burden of persuasion by, for example, approximately 25 percent, whereas with a severe sanction, a power imbalance might add only 10 to 20 percent.

THE ROLE OF POWER

The authors endorse the idea that repeat players in the legal process enjoy an enormous advantage over one-shotters. If this is true, the proposal undercorrects for it in some cases, and overcorrects for it in others.

In some cases, the quality of legal representation, amount of resources, and experience in litigation will be decisive in the outcome. In those cases, if the burden of persuasion were heightened, repeat players would be likely to expend the extra resources necessary to meet the higher burden, and win anyway. This is particularly probable due to the economies of scale and low start-up costs that supposedly exist. And now, with the higher burden, the result looks more legitimate. This is undercorrection.

In other cases, the amount of resources, et cetera will not be decisive in the outcome because the existence (or absence) of evidence is unambiguously and immutably the central issue. In these cases, no amount of resources can ever change the facts about the evidence, and so raising the evidentiary burden simply makes an unwinnable case even less contestable. This is overcorrection.

In addition to the overcorrection and undercorrection issue, shifting the burdens from case to case can foster suspicion in the minds of jurors and the public about certain institutional actors. It sends the message that the system favors certain parties more than others, and tells us that certain actors are less trustworthy or less deserving of procedural protections than others. It also reinforces

proof); Dorothy K. Kagehiro and W. Clark Stanton, Legal vs. Quantified Definitions of Standards of Proof, 9 Law & Human Behavior 159, 173 (1985) (sharing data from experiments in which students were asked to quantify the three burdens of persuasion).

in the popular imagination the notion that justice is less about finding the truth and ascertaining what actually happened, and more about who has the most money. Lastly, meeting the burden of persuasion is contingent upon who the parties are, rather than upon what they do to win the case. Identity determines how steep a hill one must climb. I cannot say how harmful all these effects might be, but they should nonetheless be taken into account.

I understand that the authors of Overcoming Procedural Boundaries make no claim to propose a panacea. But their proposal to do away completely with the civil-criminal divide has some important shortcomings. I encourage them and others to consider my observations as they fine-tune their proposal and continue their work in this increasingly important field.