

COMPARATIVE SENTENCING

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ABSTRACT

THE article discusses comparative sentencing in criminal trials—namely, correlating punishment severity with the probability of guilt. The criminal proceeding is conducted in two phases: the guilt-innocence phase, in which the issue of the defendant's culpability is addressed, and the sentencing phase, in which the punishment is determined. There is an underlying assumption of separation between the decision-making processes in each of these phases, in that all questions of guilt are supposed to be resolved at the conviction phase of trial, and are not to be re-considered during sentencing. Once the defendant is found guilty beyond reasonable doubt, the extent to which the court was persuaded of her guilt is not meant to be included amongst the sentencing considerations: the severity of the punishment is considered to be detached from the probative strength of the evidence underlying the conviction. Likewise, when the incriminating evidence fails to cross the beyond reasonable doubt threshold, the defendant is not supposed to be subjected to any sanction. The court is prohibited from convicting her but expressing the epistemic doubt in a partial lenient sentence. This article will challenge the separation ideal both descriptively and normatively, and will contest the derivative all-or-nothing punishment regime, which dictates uniformity of punishment in the epistemic space above the reasonable doubt threshold and non-punishment in the space below this threshold. On the descriptive front, the article will demonstrate that prevalent criminal law doctrines and practices—such as the residual doubt doctrine, the recidivist sentencing premium, and the jury trial penalty—effectively tear down the boundaries between the decision-making processes in the two phases of the trial, creating a de-facto correlation between certainty of guilt and severity of punishment. On the normative plane, the article will point to the sub-optimality of the bipolar all-or-nothing regime. The article will show that correlating magnitude of punishment with certainty of guilt is preferable to uniform punishment in the epistemic space above the reasonable doubt threshold. It will also demonstrate that when the level of certainty as to the defendant's guilt does not meet the reasonable doubt standard of proof, the imposition of partial punishment, reflecting the epistemic doubt, can also lead—in certain circumstances—to better outcomes than the presently existing alternative of full acquittal and no punishment. The article will conclude by contending with the expressive, retributivist, and institutional objections that can be raised against a comparative sentencing regime.

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INTRODUCTION

Criminal trials are bifurcated into two distinct phases: the conviction phase, devoted to determining the matter of the defendant's culpability, and the sentencing stage, in which the punishment is set.¹ The distinctions between the two phases in criminal proceedings are numerous and include the application of looser evidentiary and procedural rules at the punishment stage than in the guilt-innocence stage,² less sweeping constitutional protections at sentencing,³ and institutional differences relating to the judge-jury dichotomy.⁴ These

¹ Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 292 (1992) (discussing the dichotomy and describing the discrepancies between the two phases of the criminal trial).

² *Williams v. New York*, 337 U.S. 241, 246 (1949) (delivering the majority opinion, Justice Black ruled that a sentencing judge has wide discretion regarding the evidentiary sources she can use in sentencing decisions); Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 313 (2005) (discussing the low level of evidentiary and procedural safeguards at the sentencing phase of trial).

³ Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C.L. REV. 1771 (2003) (claiming that although the Supreme Court has upheld constitutional rights relating to criminal adjudication, it has yet to articulate whether and when they apply to the sentencing phase of trial); Kyron Huigens, *Sentencing: What's at Stake*

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evidentiary, procedural, and institutional distinctions are intended to set-up a partition between the decision-making processes in each of the two phases of the criminal trial.⁵ They are designed to shield the decision-making process in the first phase—determination of guilt—from the infiltration of problematic information, such as bad character evidence, that is admissible only during the second phase of sentencing.⁶ This partition is also intended to insulate the decision making process in the second phase—of sentencing—from the question of guilt set at the heart of the conviction phase of trial, so as to facilitate a punishment regime in which the severity of the punishment is detached from the probative strength of the evidence underlying conviction.⁷ Thus, all questions of guilt are to be resolved at the conviction phase of trial, and are not to be re-considered during sentencing.⁸ Once the defendant is found guilty beyond reasonable doubt, she is exposed to punishment whose severity is detached from the question by “how much” the evidence exceeded the evidentiary threshold.⁹ The extent to which the court was persuaded regarding guilt is not meant to be included amongst the sentencing considerations.¹⁰ Likewise, when the incriminating evidence fails to cross the beyond reasonable doubt threshold, the defendant is not supposed to be subjected to any sanction.¹¹ The court is prohibited from convicting her but expressing the epistemic doubt in a partial lenient sentence. Put differently, the partition between the two phases of trial is intended to promote a bipolar all-or-nothing criminal sentencing regime – where no punishment is imposed in the epistemic space below the reasonable doubt

for the States? Panel Two: Considerations at Sentencing—What Factors Are Relevant and Who Should Decide? Solving the Williams Puzzle, 105 COLUM. L. REV. 1048, 1079-80 (2005) (claiming that the importing of Sixth and Fourteenth Amendment rights into sentencing following *Apprendi* has been criticized due to the bifurcation between the different phases of trial and the historical fact that constitutional protections have never been extended at the sentencing phase of trial).

⁴ See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (discussing the judge-jury and factfinding-punishment dichotomies).

⁵ Elizabeth R. Jungman, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1089 (2002-2003) (claiming that one of the central justifications for bifurcated trials is to shield decision-makers from problematic information that might alter the way in which they make their decision).

⁶ Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C.L. REV. 621, 682 (2004) (discussing the problem of evidence admissibility in a unified proceeding).

⁷ In the civil context, as well, the determination regarding damages, conducted at the second stage of trial, is not supposed to be influenced by the certitude level embodied in the determination of the defendant's legal liability in the first phase. A 51% level of certainty as to the defendant's liability is sufficient for the court to award the plaintiff the full scope of the sought-after remedy, and there is no difference in this respect between cases in which the court is convinced of the defendant's liability by 51% and those in which certitude of liability is extremely high, say, amounting to 99.9%. Similarly, when the evidentiary threshold as to the defendant's liability is not met, no damages are awarded. There is no difference, in this regard, between instances in which the court is left completely unconvinced of the defendant's liability and those in which it is only partially unconvinced (up to a 50% level of certitude). The isolation of the two phases of the civil trial thus facilitates a bipolar "all-or-nothing" decision with regard to damages. Further on, I will discuss the exceptional cases of probabilistic recoveries in civil proceedings. See *infra* ##.

⁸ Jungman, *supra* note 5, at 1089.

⁹ *Id.*

¹⁰ The severity of the criminal sanction is supposed to be based solely on variables relating either to the gravity of the particular offense or to the characteristics of the convicted defendant herself. See Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1179 (1993) (claiming that the sentencing guidelines are infused with considerations relating to the circumstances surrounding the commission of the crime).

¹¹ Samuel Bray, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1307 (2005) (analyzing the binary nature of the criminal verdict).

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threshold, while from that threshold upwards the amount of punishment is fixed in that it is disconnected from the weight of the evidence regarding culpability.

The objective of this article is to call into question the separation of the two phases of criminal proceedings, and to reconsider the bipolar all-or-nothing decision regime that detaches severity of punishment from certainty of guilt. These issues will be contested on both descriptive and normative grounds. On the descriptive front, the article will demonstrate that— in contrast to the separation ideal— prevailing criminal law doctrines effectively demolish the boundaries between the decision-making processes in the two phases of the criminal trial, creating a de-facto correlation between severity of punishment and certainty of guilt. On the normative plane, the article will show that in particular circumstances, it is actually desirable to implement a non-binary regime of comparative (probabilistic) punishment in the criminal process and to correlate magnitude of punishment with probability of guilt.

The article proceeds as follows: After the theoretical ground for the discussion has been laid out in Part I, Part II will discuss central criminal law doctrines and practices that create a de-facto correlation between severity of punishment and certainty of guilt, thereby reflecting “comparative punishment” logic. Part III will then be devoted to elucidating the normative argument. It will be argued that correlating the size of punishment with the extent to which the court is persuaded of the defendant’s guilt, and imposing partial punishment in situations in which the probative weight of the incriminating evidence fails to meet the reasonable doubt standard, should lead—in certain circumstances—to a desirable outcome from a social perspective. In Part IV, the article will contend with some of the potential objections that can be raised against a comparative sentencing regime. Part V will wrap-up with a summary of the discussion and conclusions.

I. THEORETICAL FOUNDATIONS

Though a comparative verdict regime may seem inconceivable to the modern mind, it has deeply tangled historical roots, stretching back to punishment practices prevalent in Roman law and in medieval Europe. Under Romano canon law and, later, medieval English and Continental law, conviction for the most serious crimes required either a confession from the accused or incriminating testimony from at least two witnesses, to meet the “full proof” requirement of these legal systems.¹² The testimony of one witness or the testimony of two witnesses who were insufficiently credible could, however, amount to “half proof,”¹³ which sufficed to justify imposing more lenient punishment than that prescribed for full proof of the

¹² See Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1964 (2008) (“The number of witnesses required to prove various acts varied, but for many crimes, such as murder, the testimony of at least two witnesses was required for the ‘full proof’ necessary to sustain a conviction.”); Barbara J. Shapiro, *“Fact” and the Proof of Fact in Anglo-American Law*, in HOW LAW KNOWS 28, 30 (Austin Sarat et al. eds., 2007) (describing the sources of the two-witnesses requirement and its adoption by various systems of law); John Henry Wigmore, *Required Numbers of Witnesses; A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 84 (1901) (describing the two-witnesses prerequisite in Roman law, early English law, and Continental civil law).

¹³ Shapiro, *supra* note 12, at 31 (describing the development of the system of full proof and half proof).

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crime.¹⁴ In other words, under the penal and evidentiary practices prevalent in medieval Europe, partial certainty of guilt resulted in partial punishment, reflecting what Michel Foucault termed the “continuous gradation” principle:

"Guilt did not begin when all evidence was gathered together, piece by piece, it was constituted by each of the elements that made it possible to recognize a guilty person. Thus a semi proof did not leave the suspect innocent until such time as it was completed; it made him semi-guilty; slight evidence of a serious crime marked someone as slightly criminal. In short, penal demonstration did not obey a dualistic system: true or false; but a principle of continuous gradation; a degree reached in the demonstration already formed a degree of guilt and consequently involved a degree of punishment."¹⁵

The procedural detachment of the questions of culpability and punishment is also a relatively modern phenomenon.¹⁶ Sentencing developed as a distinct procedural stage only in the late eighteenth century with the advent of offender-oriented sentences.¹⁷ Early common law systems did not distinguish between the conviction and sentencing phases of the criminal trial. Character evidence was presented together with witness testimony relating to the event being deliberated, and the determination of criminal culpability was partly based on factors that are today classified as sentencing considerations.¹⁸ The facts on which sentencing decisions were grounded were determined by a jury,¹⁹ and the sentencing phase of the trial was of a more ceremonial than substantive nature.²⁰ As noted above, the transition from the historical single-stage criminal process to the contemporary bifurcated trial has been justified in light of the need to isolate the two decision-making phases of trial from one another.²¹

¹⁴ Bray, *supra* note 11, at 1308; John H. Langbein, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME* 47 (1976) (discussing the various possibilities of punishment without full proof).

¹⁵ Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 42 (Alan Sheridan trans., Vintage 2d ed. 1995).

¹⁶ Herman, *supra* note 1, at 303 (describing the history of the trial bifurcation process).

¹⁷ For an in-depth account of the historical circumstances that led to the emergence of sentencing as a distinct phase of trial *see*: Anat Horowitz, *The Emergence of Sentencing Hearings* 9(3) *PUNISHMENT & SOC'Y* 271 (2007); *See also* Herman, *supra* note 1, at 302-03 ("Historically, sentencing developed as a truly distinct procedural phase only with the advent of the offender-oriented indeterminate sentence Sentencing proceedings had their field of vision expanded, looking not only to the past but to the future as well by considering a defendant's prognosis for rehabilitation. Information about the defendant that might well be extraneous and prejudicial at trial became necessary to the future-oriented inquiry.") .

¹⁸ Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 *U. MICH. J.L. REFORM* 93, 94 (2006) (claiming that during the seventeenth and eighteenth centuries, most trials in England dealt with the sanction to be imposed rather than the guilt or innocence of the accused).

¹⁹ *Id.* (claiming that in seventeenth- and eighteenth-century England, juries were quasi-sentencing bodies); Herman, *supra* note 1, at 302 ("At early common law... the facts on which sentencing was based were decided by the jury.") .

²⁰ Note, *Procedural Due Process at Judicial Sentencing for Felony*, 18 *HARV. L. REV.* 821, 821 (1968) (describing the history of sentencing practices in the Anglo-American world).

²¹ Raymond J. Pascucci et al., *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 *CORNELL L. REV.* 1129, 1225 ("Bifurcation ... prevents the prosecution from offering, at the guilt determination stage, prejudicial evidence that should be considered only for sentencing purposes."). For further discussion of other justifications for the bifurcated trial, such as the preservation of the defendant's ability to exercise the right to remain silent, *see* Herman, *supra* note 1, at 299-311, claiming

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The bifurcated trial model and the partition between the decision-making processes in the two phases of the criminal proceeding have attracted the attention of social scientists and legal scholars, with research efforts focused on the effects of expected sentences on guilt determination. Examples include Edward Snyder's econometric study, which indicated that following the Antitrust Penalties and Procedures Act of 1974, an increase in the size of the sanction resulted in a decline in the conviction rate.²² Martha Myers demonstrated in her empirical study that juries are more likely to acquit when the crime is severe and the expected penalty high.²³ Another study, conducted by Kaplan and Krupa, found an increase in the incidence of acquittals when the punishment was to be decided by a different decision-making body.²⁴ Experimental studies conducted on mock juries also found evidence suggesting that the severity of the potential sanctions constituted a factor in deciding to convict.²⁵ Alongside these empirical studies, other researchers have emphasized the normative dimensions of the guilt-sentence correlation. Stoffelmayr & Sediman-Diamond have claimed that triers of fact ought to adjust the standard of proof that they apply in the determination of guilt (and, subsequently, the rate of conviction) to the severity of the potential penalty.²⁶ Lillquist, too, has shown that such correlation is not only consistent with the way decision-makers act in practice, but also leads to the socially desirable outcome.²⁷

that the bifurcation of the criminal trial allows the defendant to refrain from testifying at the guilt phase without waiving the opportunity to speak on her behalf on the issue of sentencing.

²² Edward A. Snyder, *The Effect of Higher Criminal Penalties on Antitrust Enforcement*, 28 J.L. & ECON. 439 (1990) (examining the number of cases and convictions following the Antitrust Penalties and Procedures Act of 1974).

²³ Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781, 793-94 (1979). See also Joanna Shepherd, *Blakely's Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 560 (2007) (discussing judges' circumvention of the sentencing guidelines).

²⁴ Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilty Verdicts*, 10 LAW & PSYCHOL. REV. 1, 8 (1986) (explaining the increase in acquittal rates as the result of decision-makers seeking to impose appropriate punishments).

²⁵ See, e.g., Neil Vidmar, *Effects of Decision Alternatives on the Verdict and Social Perceptions of Simulated Jurors*, 22 J. PERSONAL. & SOC. PSYCHOL. 211 (1972) (claiming that limiting the decision alternatives available to jurors may increase the likelihood of obtaining a not-guilty verdict, especially when the guilty alternative has a consequence that is perceived as excessively severe); Martin F. Kaplan & Rita Simon, *Latitude and Severity of Sentencing Options, Race of the Victim and Decisions of Simulated Jurors*, 7 LAW & SOC'Y REV. 87 (1972) (finding that larger potential penalties result in fewer convictions); Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors' Verdicts*, 36 J. PERSONAL. & SOC. PSYCHOL. 1431, 1439 (1978) ("Increasing the severity of the prescribed penalty for an offence resulted in an adjustment of subjects' conviction criteria such that more proof of guilt was required for conviction and thus resulted in a reduced probability of conviction.").

²⁶ Elisabeth Stoffelmayr & Shari Sediman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y & L. 769, 778 (2000) (claiming that the reasonable doubt instruction should leave room for flexible tailoring of the standard of proof to the severity of the penalty). See also James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?*, 22 RAND J. ECON. 385 (1991) (examining the enforcement-compliance relationship and presenting a model in which increased penalties reduce the enforcement rate).

²⁷ Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS 85 (2002) (suggesting that the standard of proof in criminal cases should vary from case to case in accordance with the expected sanction).

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The studies conducted to date, however, highlight only one aspect of the link between guilt and punishment phases of trials - namely, the impact of sentencing on the tendency to convict. This one-way analysis exposes only half of the picture. No less important is the examination of the decision-making process in the sentencing phase and how the earlier guilt phase impacts it. This article takes the latter perspective, examining the effect of what unfolds at the guilt-determination stage on the decision-making regarding severity of punishment.

II. COMPARATIVE DECISION-MAKING UNDER PREVAILING LAW

In contrast to the abovementioned theoretical understanding of criminal law proceedings as polarized processes that lead to all-or-nothing binary outcomes, closer scrutiny reveals that central doctrines and practices that have taken root in criminal law exhibit the logic of comparative sentencing. Some of these doctrines, such as the residual doubt doctrine, create a direct and explicit correlativity between certainty of guilt and severity of punishment. Other legal practices, such as the recidivist sentencing premium or jury trial penalty, forge an indirect reciprocity. In this Part, I will survey a number of the prevailing criminal law doctrines that embody comparative decision-making logic. I will, furthermore, offer preliminary support for the claim that regardless of the formal legal regime, decisions regarding sentence severity are often affected in practice by the extent of certainty of the defendant's guilt.

A. *The Residual Doubt Doctrine*

"Residual doubt acts as ... [a] mitigating factor when juries decide not to impose a death sentence because they are not absolutely certain of the defendant's guilt."²⁸ The residual doubt doctrine thus creates a correlation between gravity of punishment and certainty of guilt, blurring the borderline between the decision-making processes in the two phases of the criminal proceeding. To explain in brief, the fact that the jury decided to convict the defendant, after finding him guilty beyond reasonable doubt, does not—in and of itself—preclude any remaining doubt as to his guilt.²⁹ Even if such epistemic uncertainties do not amount to reasonable doubt, they cannot be completely dismissed.³⁰ Residual doubt thus

²⁸ Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307, 313 (2001).

²⁹ Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 55 (2001) (defining residual doubt as "[d]oubt that is experienced, discussed, and ultimately remains, though it does not yield an acquittal of the crime or a negative finding as to the aggravating factor. It may not be a 'reasonable doubt' but it is a real doubt nonetheless."); Pignatelli, *supra* note 28, at 308 (defining residual doubt as "(1) [a]ctual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that defendant was guilty of a capital offense, as opposed to other offenses; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future.").

³⁰ The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no *reasonable* doubt—doubt based on reason—and yet some *genuine* doubt exists. It may reflect a mere possibility. It may be the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty can be real.

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relates to the epistemic space that stretches between the beyond reasonable doubt standard of proof and the point of absolute certainty.³¹ Under prevailing law, the existence of residual doubt as to a defendant's guilt in a capital offense could, in some cases, constitute a (non-statutory) consideration for commuting the death sentence to life imprisonment.³² Federal courts applied the doctrine sweepingly until it was redefined by the Supreme Court in *Franklin v. Lynaugh*,³³ where the majority opinion, delivered by Justice White, held that residual doubt is not a constitutionally mandated mitigating factor.³⁴ In its 2006 *Oregon v. Guzek* decision, the Supreme Court reiterated its *Franklin* holding, ruling that a judge is not obligated to direct the jury with regard to the residual doubt doctrine.³⁵ The broader and more fundamental question of whether residual doubt regarding guilt can serve as a mitigating factor in sentencing was deliberated in the *Davis* case, where it was held that in the federal legal system, defendants are permitted to raise a residual doubt claim at their sentencing hearing;³⁶ moreover, held the court, when the defense makes such a claim, the jury is required to weigh it in determining the sentence.³⁷

At the state level, there is great variance amongst the different jurisdictions on the issue of inclusion of residual doubt in the category of mitigating circumstances,³⁸ for *Franklin* left it for each state to decide as to the application of the doctrine in its justice system.³⁹ Some

Smith v. Balkcom, 600 F.2d 573, 580 (5th Cir. 1981).

³¹ *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (describing residual doubt as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty'").

³² Jennifer R. Treadway, *Residual Doubt in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 CASE W. RES. 215, 215-28 (1992) (examining the treatment of the residual doubt doctrine by the Supreme Court and by the different states). Justice Marshall has commented on the justification of the residual doubt doctrine:

One of the most fearful aspects of the death penalty is finality... The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.

Heiney v. Florida, 469 U.S. 920, 921-22 (1984).

³³ 487 U.S. 164 (1988) (rejecting the petitioner's claim that the trial court's jury instructions—which did not inform the jury of the possibility of commuting the death sentence to life imprisonment due to residual doubt—were in violation of the Constitution). For further description of *Franklin v. Lynaugh*, see Jungman, *supra* note 5, at 1087.

³⁴ 487 U.S., at 172. See also *Penry v. Lynaugh*, 492 U.S. 302, 320 (1989), which characterized *Franklin v. Lynaugh* as a case in which the majority agreed that "residual doubt" is not a constitutionally-mandated mitigating factor. Moreover, it arises from the majority opinion that even if it were within the ambit of constitutionally-protected mitigating factors, there still is no corresponding right to jury instruction. See 487 U.S., at 174-75 (the particular defendant had not been deprived of any constitutional right, as the trial court had not prevented the defendant or his counsel from presenting the residual doubt doctrine before the jury).

³⁵ 546 U.S. 517, 524 (2006) ("This Court decided and that case makes clear ... that this Court's previous cases had not interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction.").

³⁶ *United States v. Davis*, 132 F. Supp. 2d 455, 463 (E.D. La. 2001) (holding that in the federal system, defendants are permitted to raise residual doubt arguments under 18 U.S.C. § 3592).

³⁷ *Id.* (ruling that residual doubt arguments must be considered by the jury if raised by the defense).

³⁸ Louis D. Bilonis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1695 (1993) (surveying the different approaches state systems have adopted on the issue of residual doubt).

³⁹ *Franklin v. Lynaugh*, 487 U.S. 164, 173 (1988). See also Treadway, *supra* note 32, at 222 n.58 (claiming that this approach is consistent with the Supreme Court's general unwillingness to impose constitutional controls with respect to the procedures that states use in their criminal justice systems).

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states, such as New Jersey, require both oral and written presentation of the residual doubt doctrine before the jury at the sentencing hearing.⁴⁰ In Ohio, the defendant's attorney has the option of bringing a residual doubt claim before the jury.⁴¹ In contrast, in Florida the doctrine is not recognized and defendants are precluded from raising residual doubt as a mitigating factor in sentencing.⁴² In Virginia, too, the doctrine is not applied.⁴³ The Virginia Supreme Court held in *Stockton* that defendants are not entitled to challenge a determination of criminal liability at the sentencing hearing, for the issue of guilt has already been resolved in the first stage of trial.⁴⁴ In its *Atkins v. Commonwealth* the defendant had contested the bifurcated decision-making system *per se*, claiming that it violates his constitutional rights in preventing him from arguing residual doubt as to his guilt at sentencing. The Court rejected his claim, holding that defendants cannot make residual doubt claims at sentencing.⁴⁵

These formal legal regimes notwithstanding, the prevailing practice that has emerged amongst juries is to mitigate the punishment and impose life imprisonment rather than the death penalty when there are residual doubts as to a defendant's guilt.⁴⁶ "How the law treats the issue of a jury's consideration of residual doubt is one thing ... but how juries treat it is reasonably clear. Various studies have concluded that residual doubt about guilt is the single most persuasive aspect of a case leading to the imposition of a life sentence."⁴⁷ For jurors, then, residual doubt has become a de-facto mitigating factor, including in those states where the doctrine does not apply de-jure.⁴⁸ For example, in Florida, 69% of jurors who had decided on a life sentence admitted in retrospect that their choice of the reduced penalty had stemmed from residual doubt as to the defendant's guilt.⁴⁹ A similar pattern is apparent amongst jurors in Virginia, where the residual doubt doctrine also does not officially apply.⁵⁰ In a comprehensive study that examined 600 homicide cases in Georgia on a variety of

⁴⁰ *State v. Biegenwald*, 594 A.2d 172, 195 (N.J. 1991).

⁴¹ *State v. Watson*, 572 N.E.2d 97, 111 (Ohio 1991).

⁴² *King v. State*, 514 So. 2d 354, 358 (Fla. 1987). *See also* Jungman, *supra* note 5, at 1088.

⁴³ Pignatelli, *supra* note 28, at 312 ("While some states have given residual doubt a prominent role in their sentencing schemes, Virginia has declined to do so").

⁴⁴ *Stockton v. Commonwealth*, 402 S.E.2d 196 (Va. 1991). *See also* *Frye v. Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986) (ruling that the defendant was not entitled to challenge the determination regarding his criminal responsibility at the sentencing hearing, for "the issue of guilt has been resolved in the first phase of the trial and could not properly be raised again in the penalty phase").

⁴⁵ 534 S.E.2d 312, 315 (Va. 2000).

⁴⁶ Treadway, *supra* note 32, at 231-32.

⁴⁷ Bruce A. Antkowiak, *Judicial Nullification*, 38 CREIGHTON L. REV. 545, 582 (2005).

⁴⁸ Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 371 (2003) (data suggest that juries are impacted by their impression from the guilt stage of the trial at sentencing even without the formal application of the residual doubt doctrine). *See also* Susan D. Rozelle *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 775 (2006) ("Residual doubt, or the jurors' lingering fear that the defendant may not be guilty after all, is the most potent mitigator in capital cases."); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1563 (1998) ("The best thing a capital defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about his guilt").

⁴⁹ William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AMER. J. CRIM. L. 1, 28 (1987-1988) (interviewing and examining jury members from capital trials in Florida).

⁵⁰ Pignatelli, *supra* note 28, at 314 ("[C]omments by capital case jurors in Virginia indicate that despite Virginia's prohibition on argument about residual doubt at sentencing, their own residual doubt impacted their decision to recommend a life sentence.").

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parameters, it was found that residual doubt about guilt effectively influenced the severity of the penalty imposed and led to the commuting of death sentences to life sentences.⁵¹

In sum, over the years, juries have integrated uncertainty regarding guilt into their sentencing calculations, turning residual doubt into a central mitigating factor for conversion of death sentences to life imprisonment.⁵² It is in this respect that the residual doubt doctrine can be construed as an instance of comparative sentencing, creating correlativity between punishment severity and certainty of guilt.

B. *The Recidivist Sentencing Premium*

Enhancement of sentences due to recidivism is another example of how probabilistic logic has infiltrated criminal proceedings. In the United States, repeat offenders are punished more harshly than first-time offenders.⁵³ In fact, a defendant's criminal record (alongside offense severity) is the weightiest determinative factor in sentence gravity.⁵⁴ The imposition of a "recidivist premium" is entrenched in formal legal doctrine on the federal, state, and administrative levels.⁵⁵ The federal sentencing guidelines, for instance, use two sets of numerical scores to determine a convicted offender's sentence: offense level, which represents the seriousness of the crime, and criminal history. Under these guidelines, the richer an offender's criminal record, the more determinative its effect on the applicable range of punishment for the most recent offense.⁵⁶ State guidelines likewise incorporate recidivist provisions.⁵⁷ Noteworthy examples of recidivism-based penalty escalation statutes include the "Three-Strikes-and-You're-Out" laws adopted by various state jurisdictions.⁵⁸ Moreover,

⁵¹ Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1343 (1985).

⁵² See Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 357 n.326 (claiming that residual doubt about a defendant's guilt is a major factor in a jury's decision to impose life sentence and may even amount to the strongest possible mitigating evidence).

⁵³ See Chu C. Cyrus et al., *Punishing Repeat Offenders More Severely*, 20 INT'L REV. L. & ECON. 127, 127 (2000) (arguing that punishing repeat offenders more harshly is a generally accepted practice and characterizes the vast majority of penal codes and sentencing guidelines). See also Moshe Burnovski & Zvi Safra, *Deterrence Effects of Sequential Punishment Policies: Should Repeat Offenders Be More Severely Punished?*, 14 INT'L REV. L. & ECON. 341, 341 (1994); Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 342 (1997).

⁵⁴ Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 571 (2009) ("In the United States, the most important determinant of punishment for a crime, other than the seriousness of the crime itself, is the offender's criminal history.").

⁵⁵ David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 735 (2001) ("The principle is embedded in formal federal, state and administrative codes ...").

⁵⁶ U.S. Sentencing Guidelines Manual § 1A1.1 4(h). See also Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 572 (2008); Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 305 (2001).

⁵⁷ Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS L.J. 425, 434 (2000) ("newer guidelines systems are likely to incorporate recidivist and 'dangerous offender' provisions").

⁵⁸ John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 245 n.27 (2006) (specifying the twenty-five states). For a survey of three-strikes laws, see Mark Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L.

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both state and federal courts have also effectively endorsed the policy of recidivist premiums. There are unequivocal indications that first-time offenders receive lighter sentences than repeat offenders, and that offenders with a long history of criminality are more severely punished than those with few prior convictions.⁵⁹ In addition, the U.S. Supreme Court has held that recidivist premiums do not violate the double jeopardy prohibition on imposing multiple penalties for the same offense.⁶⁰ Complementing the formal legal doctrine and case law are prosecutors' enforcement norms that also embrace the notion of increased sentences for recidivists.⁶¹ The enhancement for re-offenders principle has become so broadly accepted and popular "*that it strikes most people as simple common sense.*"⁶²

This widespread practical acceptance of recidivist premiums notwithstanding- the question of whether an offender's criminal history ought to affect her penalty for a current offense has been the subject of heated theoretical debate, dating back to Plato.⁶³ Utilitarian justifications for the recidivist premium include deterrence considerations that "*dictate that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence.*"⁶⁴ It has been suggested in this context, that individuals who have been convicted of one crime need enhanced penalties to be optimally deterred from re-offending, for by engaging in criminal behavior in the past, such individuals have revealed their proclivity for criminal activity.⁶⁵ Moreover, one must bear in mind that when offenders have been subjected to prior criminal punishment, the formal sanction is eroded, resulting in a weaker deterrent effect than for first-time offenders. Thus, individuals with criminal records have lower opportunity costs; the marginal cost of the first years behind bars is lower than the marginal cost of subsequent imprisonment years, and the additional reputation costs entailed in a greater number of convictions decrease as the number of convictions rises.⁶⁶ From a rehabilitation perspective, prior convictions are considered an important proxy for low rehabilitative potential.⁶⁷ Other consequentialist rationales for the recidivist doctrines relate to the need to preserve public trust in the justice system and to the damage that may result from the "revolving door" phenomenon, where offenders repeatedly exit and reenter jail in

& POL'Y REV. 9 (1999). For more elaborate discussion of recidivist statutes, see 39 Am. Jur. 2d Habitual Criminals §§ 1-55 (2008).

⁵⁹ Dana, *supra* note 55, at 735.

⁶⁰ Witte v. United States, 515 U.S. 389, 400 (1995) (holding that later prosecution for previously uncharged conduct taken into account in sentencing for a prior offense does not constitute a double jeopardy violation).

⁶¹ Dana, *supra* note 55, at 735 (claiming that the principle of increased penalties due to recidivism has become an enforcement norm "of prosecutors and government officials at all levels of government"). See also A. Mitchell Polinsky & Steven Shavell, *On Offense History and the Theory of Deterrence*, 18 INT'L REV. L. & ECON. 305, 305 (1998).

⁶² Dana, *supra* note 55, at 735.

⁶³ O'Neill, *supra* note 56, at 296 (claiming that the preoccupation with a defendant's criminal past has extensive theoretical foundations that can be traced back to Aristotle and Plato).

⁶⁴ United States Sentencing Commission, Guidelines Manual, Ch. 4, Pt. A (Nov. 1994).

⁶⁵ Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1338 (2003) ("those who have previously committed crimes have revealed a preference for criminal activity"). See also Lee, *supra* note 54, at 573.

⁶⁶ Strandburg, *supra* note 65, at 1338 ("the additional stigma due to additional convictions for similar offenses surely decreases rapidly as the number of convictions rises").

⁶⁷ JULIAN V. ROBERTS, PUNISHING PERSISTENT OFFENDERS: EXPLORING COMMUNITY AND OFFENDER PERSPECTIVES 35 (2008) (discussing the significance of recidivism for estimating rehabilitation capacity).

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short periods of time.⁶⁸ Retributivists have traditionally been more critical of sentencing enhancement based on prior convictions, their common objection being that the punishment should fit the current crime and not past behavior.⁶⁹ However, even proponents of just desert have defended recidivist doctrines on the grounds that the moral culpability of past offenders is graver in light of their prior acts, for which they were punished and from which they failed to learn. Indeed, Andrew Von Hirsch maintains that the later sentences can bring to bear the full weight of the law because the offender has been forewarned of the illegitimacy of his behavior (by way of the previous sentence).⁷⁰

It is my contention that alongside these various rationales, the recidivist premium can also be construed as a manifestation of the link between certainty of guilt and severity of punishment: There could be room to claim that the additional information submitted post-conviction—regarding the defendant’s prior convictions—“updates” and increases the likelihood of her involvement in the most recent offense attributed to her.⁷¹ It reinforces the first-stage convicting verdict and pushes the probability of guilt, which has already crossed the reasonable doubt threshold (as inferred from the fact of conviction), to a point that comes even closer to absolute certainty. Thus, the recidivist premium both reflects and is a consequence of the greater certainty level regarding a repeat offender’s guilt and involvement in the current offense. This also explains why the recidivist premium for offenders with numerous prior convictions is more substantial than that imposed on repeat offenders with a more modest criminal record: for the richer a convicted defendant’s criminal record, the greater the “added certainty” of his culpability in the most recent offense. In sum, recidivism doctrines can be understood in the context of the correlation between severity of punishment and probability of guilt, reflecting comparative decision-making logic in criminal proceedings.

C. The Jury Trial Penalty

The imposition of harsher sentences on convicted defendants who chose to assert their constitutionally-protected procedural rights—most notably, the right to trial by jury—has become routine practice in many American courtrooms.⁷² Data collected nationwide over the

⁶⁸ See Markus D. Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 194 (1994) (terming this phenomenon “revolving door justice”).

⁶⁹ See Lee, *supra* note 54, at 575.

⁷⁰ ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 85 (1976).

⁷¹ See Alon Harel & Ariel Porat, *Criminal Liability for Unspecified Offenses*, 94 MINN. L. REV. 261, 280 (2009) (“The pattern of behavior doctrines are rooted on the premise that a person who has committed several offenses in the past is more likely to either have intended or have actually the offense of which that person is presently accused. It is the interdependence between the past offense and the present alleged offense that provides the rationale for conviction.”). See also Ariel Rubinstein, *An Optimal Conviction Policy for Offenses that May Have Been Committed by Accident*, APPLIED GAME THEORY 406 (1979); For an empirical examination of the link between exposure to information of prior convictions and probability of conviction on current charges, see THEODORE EISENBERG & VALERIE P. HANS, *TAKING A STAND ON TAKING THE STAND: THE EFFECT OF A PRIOR CRIMINAL RECORD ON THE DECISION TO TESTIFY AND ON TRIAL OUTCOMES* (Cornell Legal Studies Research Article No. 07-012, Aug. 28, 2007), available at <http://ssrn.com/abstract=998529>.

⁷² Nancy J. King et al., *Difference in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 962 (2005) (claiming that the practice of exchanging

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past four decades indicate that when the offense-type variable is constant, bench trial sentences are, on average, more lenient than jury trial sentences.⁷³ This discrepancy would imply that courts impose a "jury trial penalty" on defendants who invoke their right to a full jury trial.⁷⁴ The most prevalent justification for this phenomenon is that it is intended to provide defendants with an incentive to waive expensive procedural safeguards and thereby reduce the costs entailed in the administration of criminal justice.⁷⁵ Another justification for the jury trial penalty, most particularly imposed on those defendants who plead not-guilty, relates to the lack of remorse that the insistence on innocence expresses.⁷⁶ Other explanations point to the greater public scrutiny of jury trial sentences, which may discourage elected trial judges from imposing lenient sentences in such cases.⁷⁷

These considerations notwithstanding, it can also be argued that the imposition of higher sentences in jury trials can be understood as an expression of the link between certainty of guilt and severity of punishment. The decision of twelve jurors to convict embodies a greater measure of certainty as to the defendant's guilt than the verdict of a lone judge. Not only is a jury conviction based on the prosecution's ability to convince a greater number of fact-finders that the defendant is guilty as charged, but juries, it has been asserted, tend to *a priori* favor the defense on issues of reasonable doubt.⁷⁸ As Schulhofer has stated, "*a bench trial is seen as an option that reduces the chances for acquittal.*"⁷⁹ It can thus be claimed that the relatively higher degree of certainty as to a defendant's guilt in cases where she is found

punishment concessions for waiver of procedural safeguards is widespread in the United States and elsewhere).

⁷³ See, e.g., Tiffany et al., *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial 1967-1968*, 4 J. LEGAL STUD. 369 (1975) (demonstrating that conviction by jury leads to more severe sentences than bench trial conviction); Thomas Uhlman & N. Darlene Walker, "*He Takes Some of My Time, I Take Some of His*": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 LAW & SOC'Y REV. 323, 323-41 (1980) (finding jury trial sentences harsher than bench trial sentences); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289, 300 (1985) (showing sentence discrepancies between jury and bench trials across state courts); King, *supra* note 72 (surveying the literature on the trial penalty phenomenon); Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 631 (2006).

⁷⁴ See DAVID W. NEUBAUER, *AMERICA'S COURTS & THE CRIMINAL JUSTICE SYSTEM* 287 (1988) (claiming that the penalty reflects the philosophy that the defendant must "pay" for taking up the jury's time); Thomas Weigend, *Is the Criminal Process About Truth? A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 167 (2003) (arguing that "defendants pay a heavy price for the 'second bite' of a jury trial if they are convicted"); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1063 (1984) (arguing that defendants waive procedural rights for leniency in punishment). For further discussion of the size of the penalty, see Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 113 (2005-2006).

⁷⁵ King, *supra* note 72, at 964. (describing the efficiency rationale for the trial penalty and quoting one judge's famous remark in this regard: "He takes some of my time, I take some of his.").

⁷⁶ *Id.*

⁷⁷ *Id.* ("Public scrutiny of sentences may be highest in cases that go to jury trial. This may contribute to the reluctance of elected trial judges and prosecutors to select and recommend lenient sentences after a jury has returned a guilty verdict.").

⁷⁸ Schulhofer, *supra* note 74, at 1063 ("defenders ... believe that juries are often more favorable to the defense on reasonable doubt questions").

⁷⁹ *Id.* (arguing that bench trials reduce the probability of acquittal, while increasing the chance for leniency in sentencing). See also Weigend, *supra* note 74, at 167 (claiming that the jury trial acquittal rate is higher than the rate of acquittal following a bench trial).

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guilty by a jury—as compared to bench trials—is another contributing factor in the discrepancy in sentences. The relative gravity of sentences in jury trials is reflective of the elevated certainty as to guilt in the wake of a jury verdict, whereas the relatively lenient sentences in bench trials is due, at least in part, to a lower degree of epistemic confidence in the conviction.

D. The Criminal-Civil Interplay and Plea Bargains

The discussion hereto has demonstrated how central criminal law doctrines are effectively saturated with comparative sentencing logic. However, correlativity between the certainty of guilt and the size of punishment can also be detected outside of the criminal trial arena - as exemplified by the interplay between criminal trials and civil trials and by the practice of plea bargaining:

Starting with the former, as suggested to me by David Sklansky, the interplay between civil and criminal trials can be construed as another way in which our justice system accommodates comparative decision-making. When a defendant is acquitted in criminal trial but is then held liable in a tort suit on parallel grounds, the civil judgment effectively functions as a "halfway" criminal conviction- reflecting satisfaction of the less demanding civil standard of proof as to the involvement in the alleged conduct, and leading to the imposition of a "partial sanction" in the form of monetary compensation. An illuminating example of this function of the civil judgment is the O.J. Simpson case.⁸⁰ Following the criminal trial's acquittal, the Goldman and Brown families filed wrongful death and survival suits in civil court. On February 4, 1997 a civil jury found Simpson liable for the wrongful death of Ron Goldman.⁸¹ Fred Goldman- the victim's father- stated repeatedly that the civil suit was not financially motivated, but rather that he had filed it so that the court would establish through the civil trial what the criminal trial had failed to substantiate – namely, that O.J. Simpson was responsible for his son's death.⁸² This is also how the public perceived the role of the civil judgment in the O.J. Simpson case.⁸³

The practice of plea bargaining is another arena of comparative sentencing.⁸⁴ Plea bargains have come to dominate the American criminal justice system.⁸⁵ As many as 95% of individuals indicted for felony crimes in the United States resolve their cases by way of a

⁸⁰ For the criminal trial *see* *People v. Simpson*, No. BA097211, 1995 WL 704381, with the verdict of acquittal at *2 (Cal. Super. Trans. Oct. 3, 1995). The civil trial can be found as *Brown, Goldman, Rufo v. Simpson*, No. SC036876, SC036340, SC031947, 1996 WL 530984, at *1 (Cal. Super. Doc. Sept. 10, 1996).

⁸¹ Laura Hock, *What's in a Name? Fred Goldman's Quest to Acquire O.J. Simpson's Right of Publicity and the Suit's Implications for Celebrities*, 35 PEPP. L. REV. 347, 352 (2008)

⁸² *The 2004 Fleming Award Acceptance Speech*, 33 PEPP. L. REV. 929, 931 (2006)

⁸³ In fact, Goldman announced that he would renounce the financial award in the event that Simpson admits the crime. *See Learning from Japan: the Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 567 (2000).

⁸⁴ *See* Henrik Lando, *The Size of the Sanction Should Depend on the Weight of the Evidence*, 1 REV. L. & ECON. 277, 286 (2005) ("...legal systems that rely on plea bargaining (mainly the American) are likely to produce sanctions that are weighted by the probability of conviction").

⁸⁵ Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (claiming that the right to a jury trial and the right against self-incrimination are routinely bargained away in the criminal arena, in exchange for sentence reduction).

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guilty plea.⁸⁶ Plea bargains are struck in the shadow of the criminal trial and are reflective of the likelihood of conviction in court (and of the post-conviction sentence).⁸⁷ The likelihood of conviction, in turn, is a function of the strength of the prosecution's case. In this way, plea bargains calibrate sentences to the probative value of the incriminating evidence and form a link between the severities of the (negotiated) sentences imposed upon defendants and the level of proof gathered against them.⁸⁸ Obviously, the correlativity between severity of punishment and probability of guilt is far from straightforward, for plea bargain outcomes are affected by a host of exogenous factors other than the expected outcomes at trial. These include agency costs, the defendant's attitude to risk, information asymmetries between the prosecution and defense, the quality of legal counsel, and various cognitive biases.⁸⁹ Plea bargaining outcomes may deviate from the shadow of the criminal trial for yet another reason: the prosecution's primary interest in reaching plea agreements is the reduction of enforcement costs—i.e., the “release” from having to continue investing resources in the gathering of more proof once the plea bargain has been struck. Without the plea bargain, enforcement officials may be induced to persist in their search for additional evidence to be presented at trial, and thus the probative weight of the incriminating evidence could end up being greater than at the point at which the plea bargain is made. But despite the absence of a perfect correlation between the certainty of guilt and the negotiated sentence, plea bargains by and large adjust sentences to level of proof regarding culpability.

As noted, plea bargains are struck outside the criminal trial arena. Although these agreements are subject to the court's formal stamp of approval, from a conceptual perspective, they belong to the “contract world,” reflecting a contractual ordering of the criminal case. Yet, given that the vast majority of criminal cases are concluded in various types of plea bargains, the practice cannot be regarded as merely anecdotal.⁹⁰ Plea bargains have come to be an integral part of the criminal justice system, constituting the central decision-making route in

⁸⁶ Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (referring to the Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties*, 2002, at 28 (2006): “in felony cases filed in May 2002 in the nation's seventy-five largest counties guilty pleas accounted for 95% of the estimated 31,772 convictions obtained within 1 year of arrest”). See also Jacqueline E. Ross, *Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006) (“In the criminal justice systems of the 50 states, over 95 percent of all criminal cases are disposed of without a trial, through the entry of a guilty plea. In the federal system the percentage of bargained-for convictions is even higher.”).

⁸⁷ For an elaborate description of the shadow-of-trial model, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2465 (2003-2004).

⁸⁸ As expressed by Alschuler, “plea bargaining effectively substitutes a concept of partial guilt for the requirement of proof of guilt beyond a reasonable doubt.” Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1413 (2003).

⁸⁹ See *id.* (discussing how structural distortions emanating from agency costs, attorney competence, workloads resources, sentencing and bail rules, information gaps, psychological biases, and socio-economic variables distort plea outcomes); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (discussing the effects of agency costs and conflicts of interest between the defendant and her attorney); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1925 (1992) (discussing the effects of attitude toward risk). For a parallel discussion in the context of the civil sphere, see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2663 (1995).

⁹⁰ Strandburg, *supra* note 65, at 1331 (describing plea bargaining as the most widely used method of criminal conviction).

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criminal law today.⁹¹ Due to this prominent role, therefore, plea bargains have entrenched a sweeping regime of comparative punishment in the criminal justice system.

III. THE NORMATIVE UNDERPINNINGS OF COMPARATIVE DECISION-MAKING

Thus far, I have sought to ground the claim that a comparative punishment model is consistent with a wide range of current criminal law doctrines and practices that tie severity of punishment to certainty of guilt. As shown above, these probabilistic practices are prevalent in the framework of the criminal court, in the interplay between criminal and civil trials, as well as in the plea bargaining arena. They relate both to the epistemic space stretching above the reasonable doubt standard (as in the case of residual doubt) as well as to the space below it (as in plea bargaining⁹²). Having presented the dissonance between the ideal of separation and the reality of the criminal justice system, I will now turn to the normative discussion.

The question of the normative desirability of a comparative sentencing regime can be understood as an offshoot of the well-known tort-law debate over causal apportionment and probabilistic recovery. Coons' 1964 article was ground-breaking in challenging civil procedure's winner-takes-all decision rule and inquiring into remedy-splitting based on certainty of liability. He defined four classes of cases in which courts should be allowed residual authority to issue compromise verdicts and to split the remedy between the parties, in deviation from the bipolar regime of full remedy awards: compromise of doubt; compromise of policy; compromise of discretion; and compromise due to community interests.⁹³ The pertinent category for our purposes is compromise of doubt cases, in which Coons advocated remedy-splitting due to factual or legal doubts regarding legal liability. In this context, he allowed only a narrow opening (which was widened by subsequent authors), restricting remedy-splitting to a 50%-50% ratio and to instances in which the court finds the parties' versions equally likely.⁹⁴ Almost two decades passed before the issue of probabilistic recoveries was raised again, with the publication of Kaye's article in 1982.⁹⁵ There, Kaye asserted that the civil "all-or-nothing" decision rule was preferable to an expected value rule. The former system, he argued, minimizes the overall costs of error, whereas the latter enhances the social costs of error. The central development in the literature on probabilistic remedies in tort law emerged in subsequent years with a string of publications that abandoned the ex-post error minimization approach and turned instead to the issue of probabilistic

⁹¹ Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2016 (2000).

⁹² See Patricia M. Wald, *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 *U. CHI. LEGAL F.* 101, 108 (1993) (claiming that plea bargaining effectively lower the standard of proof).

⁹³ John B. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 85 *NW. U. L. REV.* 750, 754 (1963-1964).

⁹⁴ *Id.* at 751. Nonetheless, Coons' pioneering approach was broader than later work by other authors, in that it forged a link between the allocation of the remedy and the level of certainty of liability not only on the factual front but also on the legal front. Only in 2001 did Abramowicz revisit the possibility of allocating the remedy due to uncertainty on legal issues, Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 *CAL. L. REV.* 231, 299 (2001).

⁹⁵ David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 *AM. BAR FOUND. RES. J.* 487.

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liability from an ex-ante deterrence perspective.⁹⁶ Studies showed that the shift to a regime of probabilistic remedies would advance deterrence objectives in instances of systematic failure in proving causation.⁹⁷ The failures discussed in the literature can be divided into two central types of cases.⁹⁸ The first category encompasses multiple causation cases, in which there is structural uncertainty as to whether, in the concrete circumstances, the damage was caused as a result of the defendant's behavior or due to exogenous background factors. A typical example is the factory that emits pollution known to produce 20% of the cancer morbidity in a given area, but it cannot be proven in each individual case that the factory's polluting is the cause of illness. In such circumstances, holding the factory liable for 20% of the damage for each plaintiff will ensure internalization of the damage caused due to the pollution and will generate a set of optimal incentives for potential wrongdoers.⁹⁹ The second class of cases relates to mass torts and comprises instances of uncertainty with regard to the wrongdoer's identity: singling out from among a number of potential wrongdoers the actual wrongdoer who caused the plaintiff's injury. These are situations in which it is not possible to determine by a preponderance of the evidence that the particular/specific defendant caused the damage to the plaintiff, but it can be proven that he belongs to the group that includes the actual wrongdoer.¹⁰⁰ In this context, too, the argument has been made that a shift to a Market Share Liability decision regime, under which each of the potential wrongdoers would bear a proportion of the damage relative to its share of the market (which reflects the probability of individual responsibility for the specific plaintiff's damage), would enable optimal deterrence and ameliorate the inherent failures of the all-or-nothing decision regime, where each and every wrongdoer is exempt from legal liability. Adding to the literature, Abramowicz's 2001 article proposed implementing a hybrid, two-phased regime that applies the all-or-nothing decision rule whenever the court has been strongly persuaded as to (the existence or absence of) liability and a probabilistic regime when the proof level is low.¹⁰¹

In contrast to the decades-long scholarly interest in the civil context, the issue of probabilistic punishment in the criminal sphere was essentially disregarded by researchers. The first sign of change came only in 2005, with the publication of Henrik Lando's seminal article *The Size of the Sanction Should Depend on the Weight of the Evidence*. Lando showed that for incarcerable offenses, graduating sanctions with the probability of guilt to reflect remaining doubt- even once the "beyond reasonable doubt" level of certainty has been attained- would promote deterrence objectives.¹⁰² Another noteworthy milestone was the Harel & Porat 2008 article, *Criminal Liability for Unspecified Offenses*, which applies the conjunction principle

⁹⁶ Examples of such works, making the claim that proportional liability would promote deterrence, include Saul Levmore, *Probabilistic Recoveries, Restitution and Recurring Wrongs*, 19 J. LEGAL STUD. 691 (1992); ARIEL PORAT & ALEX STEIN, *TORT LIABILITY UNDER UNCERTAINTY*, at ch. II (2001); Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J.L. & ECON. 587 (1985). Counter-criticism can be found in Nesson's seminal article, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

⁹⁷ Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399 (1980).

⁹⁸ PORAT & STEIN, *supra* note 96, at 58.

⁹⁹ Shavell, *supra* note 96.

¹⁰⁰ PORAT & STEIN, *supra* note 96, at 58.

¹⁰¹ Abramowicz, *supra* note 94.

¹⁰² Lando, *supra* note 84, at 281.

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to cases in which multiple unrelated charges are made against a defendant.¹⁰³ This article follows in their path, by engaging in a fundamental normative examination of probabilistic punishment in the criminal context. In contrast to Lando's model, the analysis here will not be limited to challenging the uniformity of punishment in the epistemic space above the "beyond reasonable doubt" threshold, but will also address the possibility of correcting systematic evidentiary failures by applying a comparative punishment model in the epistemic expanse lying below the beyond reasonable doubt point. And in contrast to Harel & Porat, my analysis will not restrict itself to cases of conjunction or multiple charges, but will instead consider the implementation of probabilistic decisions in the general class of cases, including instances in which a defendant is accused of only one criminal offense.

In what follows, I will seek to challenge the normative desirability of the bipolar decision paradigm by showing that the uniformity of punishment in the epistemic space above the reasonable doubt threshold and the absence of any punishment below this threshold are likely to impair ex-ante deterrence goals. The discussion will highlight cases in which differential punishment correlating to certainty of guilt is preferable to uniform punishment in the evidentiary space above the reasonable doubt threshold (i.e., the abandonment of the "all" prong of the "all or nothing" regime) and cases in which partial conviction and sanction should be preferred to acquittal and no punishment in the epistemic space beneath the standard (i.e., the abandonment of the "nothing" prong). From a practical standpoint, this would mean a decision regime that recognizes different classes of convictions, including intermediate categories, while adjusting punishment severity to the various decision categories. For example, for a given offense, conviction beyond all residual doubt could yield maximal punishment (capital punishment, for instance), whereas conviction beyond all reasonable doubt would render near-maximal sanctions (allowing for life imprisonment but precluding capital punishment). Conviction by clear and convincing evidence for the same crime would lead to an intermediate level of punishment (less than a life sentence), while conviction by a preponderance of the evidence would entail only the lowest of the possible sanction alternatives (a fine perhaps).¹⁰⁴

¹⁰³ Under the current legal regime, if a defendant is accused of committing armed robbery and murder and, at the end of the day, the court concludes a 0.9 extent of certainty of his guilt in each of the crimes, then assuming that the reasonable doubt standard is quantified as a 0.95 extent of certainty, the defendant will be acquitted ($0.9 < 0.95$). Harel & Porat's claim is that in the described scenario, the probability that the defendant did not commit either of the two offenses is $0.1 * 0.1 = 0.01$. That is to say, the certainty that the defendant committed at least one of the two crimes (without us knowing which one) is $1 - 0.01 = 0.99$ ($0.99 > 0.95$). Thus, according to Harel & Porat, the defendant should be convicted for one offense and receive, at least for one of the possibilities, the penalty for the lesser offense. Harel & Porat, *supra* note 71.

¹⁰⁴ Of course, from a theoretical point of view, implementing a probabilistic regime would likely open the door to a continuous spectrum of intermediate convictions of exact statistical rates with corresponding degrees of punishment, such as, for example, conviction at an 86% degree of certainty or 73% degree of certainty. However, in practice, the spectrum of choice can be expected to be more limited, for in typical cases, the court lacks the tools and information necessary for making an exact calculation of the probability of guilt. Consequently, the court draws its conclusions from categorical generalizations, making the judicial decision a crude assessment that is not amenable to precise statistical quantification. Irrespective of the practical hurdles, there are those who object in principle to turning the judicial decision into a precise statistical determination, as I will discuss further on in the article. See the discussion of the expressive component of Nesson's criticism at *infra* ##. Nesson expressed the opinion that an exact quantification of the reasonable doubt standard would impair its functional purpose, which is subjective in nature. See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1197 (1979). See also Lawrence M. Solan, *Refocusing on the Burden of Proof in Criminal*

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A. Deterrence

In this section, the claim will be formulated that in cases where the criminal sanction generates a social cost that is a function of its severity, a probabilistic punishment regime will facilitate a higher level of deterrence compared to the bipolar regime, for any given level of social expenditure on punishment enforcement. This obviously relates to all incarcerable offenses, for with imprisonment, the lengthier the sentence, the greater its cost to taxpayers.¹⁰⁵ My argument that in such cases a comparative decision regime yields better deterrent effects will be grounded upon three foundations: the positive correlation between certainty of guilt and the deterrent effect of punishment; the risk-loving tendencies of defendants; and the adverse effect of false acquittals on deterrence.

1. *The Effect of Certainty of Guilt on Deterrence: Lando's Model*

The criminal verdict cannot advance its deterrence goals by randomly allocating convictions and acquittals. Rather, it must reflect the factual truth, for there is a clear and unequivocal link between deterrence and the accuracy of the determination of criminal responsibility.¹⁰⁶ In his 2005 article, Lando asserted a positive link between the deterrent effect of the punishment and the certainty of the guilt of the person on whom it is imposed.¹⁰⁷ According to Lando, the deterrence value of the criminal sanction is determined by whether it is imposed on the factually guilty or the innocent. In his words, "a sanction applied to an innocent defendant does not have a deterrent effect on potential offenders *ex ante*, since the sanction is not

Cases: Some Doubts About Reasonable Doubt, 78 TEX. L. REV. 105, 126 (1999); A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 132 (1989); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372 (1971). Supporting the normative difficulties in making a precise statistical quantification of judicial decisions is the fact that that even "reasonable doubt" remains vague from a statistical perspective. Indeed, courts have systematically objected to a statistical quantification of this evidence standard. *See, e.g.*, *State v. Cruz*, 639 A.2d 534, 537 (Conn. App. Ct. 1995). It should be noted from a practical perspective, that the majority of judges surveyed in one empirical study assessed the reasonable doubt standard of proof as standing at 90%. Solan, *supra* at 126. Regardless, under a probabilistic punishment regime, judges can be expected to resort to general evidence standards that have already been recognized in the case-law, such as the preponderance of evidence or clear and convincing evidence standards of proof.

¹⁰⁵ Fine offenses are a more complex case. There are those who challenge the conception of fines as purely a case of transfer and moreover assert a link between the amount of the fine and the social cost embodied in its imposition, for the following reasons: the costs of the stigma borne by the offender, which cannot be transferred; the injury to marginal deterrence; the risk-aversion of some defendants; and the possibility of bankruptcy. However, the Becker model refutes the basic assumption that the social cost of the fine derives from its amount. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (claiming that fines are transfers of wealth). In any event, assuming that in the case of fines as well, the social cost of imposing punishment is the product of the amount of the penalty, it is possible to extend the analysis in this article also to that particular category of offenses.

¹⁰⁶ Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 2 (1994) (examining the deterrence implications of fact-finding errors).

¹⁰⁷ Lando, *supra* note 84, at 282.

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applied to an offender".¹⁰⁸ The imposition of an identical penalty on the factually guilty, in contrast, will yield a higher level of deterrence, as a causal link is created between criminal behavior and exposure to sanction. Moreover, just as punishment inflicted on the innocent has a lower deterrence effect than punishment of the factually guilty, the punishment of defendants whose probability of guilt is low yields less deterrence value than identical punishment imposed upon defendants whose certainty of guilt is higher. For "when the defendant's guilt is more certain, the probability that any given sanction will be 'wasted' on an innocent person is smaller"¹⁰⁹ In light of the fact that deterrence effectiveness lessens with diminishing probability of guilt, correlating the magnitude of the sanction with the certitude of guilt will therefore yield more deterrence per given social expenditure on punishment. This claim is illustrated by the following example, based on a similar numerical test-case presented by Lando in his article.

Assume two defendants on trial for rape. In the case of Defendant A, the point in dispute is consent to the sexual act. The evidence submitted before the court consists of the testimony of the alleged victim, which establishes a 95% probability of guilt. In Defendant B's trial, the point in dispute is the identity of the perpetrator of the crime. DNA findings from the scene of the crime tie Defendant B to the commission of the crime and establish a 99% probability of guilt, higher than in the case of Defendant A. Assuming, as does Lando, an identical probability (say, of 50%) of appearance of the evidence in court following the occurrence of the act, and assuming that the penalty for rape is four-years imprisonment- under the current bipolar verdict regime, the penalty would be identical in both cases and the effect on the expected sanction as follows:

$$0.5 \times 0.95 \times 4 + 0.5 \times 0.99 \times 4 = 3.88$$

In contrast, under a comparative punishment regime, which would correlate certainty of guilt and severity of sanction, a differential allocation of years in prison would obtain, even though the aggregate number of imprisonment years (eight years in total) would be maintained. Defendant B would receive more years in prison (five years) than Defendant A (three years). This differential allocation of years of incarceration between the two defendants would increase the deterrent effect as follows:

$$0.5 \times 0.95 \times 3 + 0.5 \times 0.99 \times 5 = 3.9$$

Following the same intuition underlying the above example, Lando reached the general conclusion that a move to a varying punishment regime—based on certainty of guilt—would increase deterrence utility per sanctioning cost (per given level of social expenditure on punishment).¹¹⁰

Lando's model serves as a good starting point for understanding the deterrence advantage of comparative sentencing. However, the picture he presents seems only partial. For the Lando

¹⁰⁸ *Id.*, at 278. Further on, I will argue that the infliction of punishment on the innocent is likely not only to have a low deterrence effect, but also to generate a negative deterrence value, due to the decrease in the marginal cost of choosing criminal activity as compared to the legal alternative. *See infra* ##.

¹⁰⁹ Lando, *supra* note 84, at 282, uses a slightly different numerical example, but the underlying conceptual basis is the same.

¹¹⁰ *Id.*

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model derives the deterrent effect of each unit of punishment (incarceration year) solely from certainty of guilt, thereby entailing an additional, implicit conclusion relating to the correspondence of punishment with certainty of guilt: namely, that punishment should be imposed only at the highest measures of certainty. This point can be illustrated using our numerical example from above: it is possible to claim—which Lando declined to do—that under his model, raising the evidentiary bar to a maximal level of 99% and imposing the full eight years of incarceration on Defendant B would lead to a maximal improvement in the level of deterrence:

$$0.5 \times 0.95 \times 0 + 0.5 \times 0.99 \times 8 = 3.96$$

Lando focused on the comparison between the first and second scenarios and refrained from fully contending with the ramifications of his underlying premise that arise from this third possible scenario. While the Lando model justifies correlating punishment with probability of guilt- in focusing exclusively on the deterrent effect of certainty of guilt, it constricts the epistemic space of conviction and punishment to only the highest levels of certainty. In this sense it can be claimed- that in complete contradiction to its original objective- the Lando model may in fact support the bipolar regime, where conviction and punishment are limited to a narrow epistemic range of maximal levels of certainty and maximal levels of punishment.

Put otherwise, it is my contention that the conclusions that arise from Lando’s model can be separated into two prongs. The first prong, which Lando explicitly engages in, relates to the promotion of deterrence goals by deviating from the notion of fixed punishment and correlating severity of punishment with measure of certainty, all things equal. This layer of the model is a foundational component in the constitution of a comparative punishment regime, but it is only half the picture. The second layer of Lando's model relates to the restriction of the ambit of punishment to the highest levels of certainty on the evidentiary spectrum. This layer can be derived implicitly from Lando’s model, since only at the highest levels of certainty regarding guilt is there a minimization of the probability of the imprisonment years being “wasted” on innocents, and since this is the only variable that Lando's model considers as impacting deterrence effectiveness. This second prong of the model is problematic, in my opinion, in that it ignores additional variables that affect the deterrent utility of imprisonment years, first and foremost, the defendant’s attitude to risk and the deterrence cost of wrongful acquittals. Incorporating these two variables into the equation makes the picture more complete and facilitates the expansion of the epistemic space for conviction and the imposition of criminal punishment at lower levels of certainty (i.e., the lowering of the evidentiary threshold, perhaps even to levels falling below the reasonable doubt standard). The next two sub-sections discuss these two variables and consider their implications for the desired verdict regime.

2. The Effect of the Defendant’s Attitude to Risk on Deterrence

Under Lando’s model potential criminals are assumed to be risk-neutral. However, potential offenders may exhibit risk-loving tendencies in light of a decrease in the marginal cost of

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imprisonment years.¹¹¹ The reasons for this decreased marginal cost are varied. To begin with, there is the a-priori postulation that, over time, inmates grow accustomed to the prison environment, making each year more tolerable than its predecessor. An additional explanation relates to reputation harm, which is generally of greatest weight at the time of entry into jail and the early stages of imprisonment.¹¹² Finally, the diminishing marginal cost can be attributed to the lower degree of certainty that the latter part of the prison term will be served (as opposed to its early stages) due to the increasing likelihood of pardon or early release on account of illness over time.¹¹³

Given the decreasing marginal cost of incarceration years, probability of conviction has a greater marginal deterrence effect than punishment severity.¹¹⁴ In order to illustrate this claim, consider two possible scenarios: Under the first scenario, which reflects the bipolar regime, the probability of conviction for a particular offense is 0.1, and in the event of conviction, the maximal punishment of ten years' imprisonment is imposed. Under the second scenario—reflecting a comparative punishment regime—the probability of conviction may be greater, for example, standing at an average of 0.2, for it is possible to convict defendants also at a measure of certainty that falls below the reasonable doubt threshold. However, when conviction is at the lower standard, partial, sub-maximal punishment is imposed, averaging only five years of imprisonment. The punishment expectancy and costs of punishment enforcement for the taxpayer are identical under both regimes, since in the second scenario, the amount of people serving prison sentences doubles, while the length of the average sentence is half of what arises in the first scenario. Despite the identical punishment expectancies and social expenditure on punishment enforcement in the two scenarios, a differential deterrence utility emerges as a consequence of defendants' attitude toward risk: if the marginal disutility that is created for defendants vis-à-vis the latter five years of their prison term is less than the disutility produced for the first five years, the deterrent effect of the second scenario (five years in jail at a probability of 20%) will be greater than the deterrence effect in the first scenario (ten years' imprisonment at a

¹¹¹ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968) (claiming that offenders are deterred more by the certainty of conviction than by the severity of the sanction); William Spelman, *The Severity of Intermediate Sanctions*, 32 J. RES. CRIME & DELINQ. 107, 113 (1995) (surveying empirical evidence suggesting that offenders regard a five-year term as only twice to four times as severe as a one-year term and discussing some of the reasons for the decrease in the marginal cost (disutility) of prison years).

¹¹² Strandburg, *supra* note 65, at 1338 (discussing this effect in the case of past convictions).

¹¹³ Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. ECON. REV. 276, 296 (1999) (discussing some of the reasons why defendants prefer uncertain sentences over uncertain probability of detection). For further discussion, see A.M. Polinsky & S. Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999).

¹¹⁴ See Michael J. Block & Robert C. Lind, *An Economic Analysis of Crime Punishable by Imprisonment* 4 J. LEGAL STUD. 479, 483 (1975) (noting that an increase in the certainty of conviction has a greater deterrence capacity than an identical increase in punishment severity).

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probability of 10%).¹¹⁵ Thus, given risk-loving tendencies, certainty of conviction improves deterrence to a more significant degree than punishment severity.¹¹⁶

Indeed, attitude toward risk has direct implications for the optimal decision model from a deterrence perspective. In situations in which the disutility to the defendant increases at a sub-proportional rate to the increase in length of imprisonment (i.e., in situations of decreasing marginal cost of imprisonment years), limiting punishment to the highest evidentiary threshold (maximal punishment at maximal levels of certainty or, in other words, maximal penalties at lowest probability of conviction) will not lead to optimal results from a deterrence point of view. For risk-loving individuals, a vector emerges pulling in the direction of partial punishment at higher likelihood of conviction (a lower evidentiary threshold for conviction). Incorporating risk-seeking tendencies into Lando's model thus mandates the lowering of the evidentiary threshold for conviction to sub-maximal levels (while still correlating the size of the sanction to the probability of guilt established ex post-maximal sanctions to maximum certainty of guilt and partial punishment to sub-maximal levels of certitude as to guilt).

To demonstrate the combined functioning of these two vectors—certainty of guilt, on the one side, and defendants' risk-seeking tendencies, on the other—I will return to the Defendants in the rape example, but this time incorporating risk-seeking tendencies in the underlying set of assumptions. I will thus presume a decreasing marginal cost of incarceration years, as presented in the table below:

Year of Imprisonment	Marginal Cost (Disutility) in Terms of Imprisonment Years
1	1
2	0.95
3	0.9
4	0.89
5	0.88
6	0.5
7	0.3
8	0.1

For Defendant A, the evidence linking him to the commission of the rape established a 95% certainty of guilt, while for Defendant B, the evidentiary findings produced a 99% degree of certainty. Assuming a 50% probability of the presence of both types of evidence following rape and assuming that the penalty for rape is four years' imprisonment, under the prevailing bipolar verdict regime, the sanction would be identical in both cases and the effect on the expected sanction would be:

¹¹⁵ Similarly, increasing the sanction will not lead to a proportionate increase in the disutility from imprisonment or a corresponding increase in the level of deterrence. A 10% depreciation rate from incarceration year to incarceration year suffices for the general disutility embodied in a ten-year prison sentence to be only 6.1 times greater than the disutility embodied in only one year of prison. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1214 (1985).

¹¹⁶ The opposite scenario, where the defendant is risk-averse, is also possible, with the marginal cost for each year of incarceration incrementing rather than depreciating as time passes. This could occur, for example, due to the defendant's assumption that each year will become less and less tolerable with continued imprisonment.

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$$0.5 \times 0.95 \times (1 + 0.95 + 0.9 + 0.89) + 0.5 \times 0.99 \times (1 + 0.95 + 0.9 + 0.89) = 3.63$$

In contrast, under a comparative punishment regime, Defendant A would be sentenced to three years' imprisonment, whereas Defendant B would receive a five-year jail sentence. Such an allocation of incarceration years would enhance the overall deterrence effect as follows:

$$0.5 \times 0.95 \times (1 + 0.95 + 0.9) + 0.5 \times 0.99 \times (1 + 0.95 + 0.9 + 0.89 + 0.88) = 3.64$$

That is to say, even assuming that defendants are risk-loving, a shift to a regime of differential punishment—correlated to certainty of guilt—would increase, in our example, the deterrence utility generated by a given expenditure on punishment resources.

This notwithstanding, however, in the extreme third scenario, where the evidence bar is raised to 99% and the maximal length of eight-years incarceration is imposed on Defendant B, his risk-seeking tendencies will change the picture. Under these conditions, due to the decreasing marginal cost of incarceration years for Defendant B, sub-optimal outcomes from a deterrence standpoint will arise:

$$0.5 \times 0.95 \times 0 + 0.5 \times 0.99 \times (1 + 0.95 + 0.9 + 0.89 + 0.88 + 0.5 + 0.3 + 0.1) = 2.73$$

This final numerical example demonstrates why, given risk seeking tendencies, there can be situations in which improving the deterrence level will be contingent on reducing the burden of proof for conviction and on expanding the epistemic space in which punishment can be imposed, even to levels of certainty below the reasonable doubt threshold.¹¹⁷ When risk-seeking tendencies are incorporated into Lando's model, the possibility emerges of situations in which a comparative verdict regime—where the size of the sanction is adjusted to the probability of guilt and sub-maximal punishment is imposed in line with sub-maximal levels of certainty—would likely lead to a Pareto improvement in deterrence.¹¹⁸

3. The Effect of False Acquittals on Deterrence

The effect of the incidence of false acquittals may also justify, from a deterrence perspective, the expansion of the epistemic space for conviction to sub-maximal evidentiary levels. To explain in brief, an explicit assumption underlying Landos' model is that the two types of evidence – that establishing the higher probability of guilt (DNA), and that substantiating a lower probability of guilt (victim testimony) – are equally likely to appear in court following the commission of the crime. However, in light of increasing marginal costs of evidence gathering,¹¹⁹ there is room to contest the assumption that evidence more likely to arise

¹¹⁷ At the outset of the article, econometric and other studies were referred to that point to the fact that increasing the size of sanction and imposing a minimum penalty do not necessarily lead to an increase in deterrence due to judges' and jurors' increased tendency not to convict when the severity of the sanction increases. *See supra* ##. Defendants' love of risk raises an additional explanation, of a different type, for the fact that an increase in severity of punishment may fail to promote deterrence goals to the same degree.

¹¹⁸ Without increasing the social expenditure on punishment.

¹¹⁹ *See, e.g.,* Harel & Porat, *supra* note 71 ("It is typically much harder—and costly—to collect the tenth item of evidence than the ninth item, the eighth item, and so on"); Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 950-51 (2007) ("one can posit a situation where the task of proving the final X percent¹¹⁹ of the prosecution's case requires a vast investment in resources on its part, such as the monetary cost of obtaining evidence from out of state

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against the actual offender can be expected to appear in court- following the commission of the crime- as often as evidence of lower probative value. The fact that evidence establishing a higher probability of guilt is less likely to appear may lead to a high incidence of false acquittals under a regime that places maximal evidentiary requirements as a precondition for conviction. In light of this effect, restricting the evidentiary threshold for conviction and punishment to maximal levels may be self-defeating.¹²⁰

In other words, Lando's model rests on a link between verdict accuracy and deterrence.¹²¹ As discussed above, it justifies increasing the severity of punishment as we go up the epistemic scale and, implicitly, also the setting of the evidentiary threshold for punishment at maximal levels of certainty, based on the positive deterrent effects of reducing the incidence of wrongful convictions.¹²² False convictions, however, are only one aspect of verdict accuracy, and their effect on deterrence is only partial. The second component of verdict accuracy, which must also be taken into account, is the matter of wrongful acquittals.¹²³ Wrongful acquittals hamper deterrence for the simple reason that they reduce the punishment

witnesses, the emotional price paid by child witnesses, or the cost of revealing evidence where the prosecution wants to preserve the cover of police agents. The prosecution may regard this evidence as crucial for proving its case "beyond a reasonable doubt", but find it unnecessary when a move to a lesser standard of proof has been made...") Richard J. Gilbert & Michael L. Katz, *When Good Value Chains Go Bad: The Economics of Indirect Liability for Copyright Infringement*, 52 *Hastings L.J.* 961, 970 (2001) ("If it is relatively easy to detect some infringers, but not others, this pattern may lead to decreasing returns to scale (i.e., increasing marginal costs of enforcement at a given stage)").

¹²⁰ To demonstrate this effect, I will return to the rape example: This time, I will incorporate a differential rate of appearance of the evidence following the commission of crime in the underlying set of assumptions. Assume, that for Defendant A, the victim testimony linking him to the commission of the rape establishes a 95% certainty of guilt; for Defendant B, the DNA findings produce a 99% degree of certainty; while for defendant C eye-witness testimony produces a 55% certainty of guilt. Assume, in addition, that there is a 30% probability that victim testimony and DNA evidence could be collected and presented at trial following rape, and a 40% probability that eye-witness testimony would be presented following the commission of such a crime. Under the prevailing bipolar verdict regime, in which a high evidentiary threshold (say 95%) is required for conviction and in which a uniform punishment (say four years) is imposed following conviction the effect on the expected sanction would be:

$$0.3 \times 0.95 \times 4 + 0.3 \times 0.99 \times 4 + 0.4 \times 0.55 \times 0 = 2.328$$

Under a probabilistic punishment regime, in which the punishment is correlated with the ex-post certainty of guilt, Defendant A would be sentenced to three years' imprisonment, whereas Defendant B would receive a five-year jail sentence. Such an allocation of incarceration years would enhance the overall deterrence effect as follows:

$$0.3 \times 0.95 \times 3 + 0.3 \times 0.99 \times 5 + 0.4 \times 0.55 \times 0 = 2.34$$

However, lowering the evidentiary threshold for conviction and allocating the imprisonment years so that Defendant A receives a two year sentence, defendant B receives a five year sentence and Defendant C receives a one year sentence would result in a higher deterrent effect :

$$0.3 \times 0.95 \times 2 + 0.3 \times 0.99 \times 5 + 0.4 \times 0.8 \times 1 = 2.375$$

The reasons it would not be advisable, even from a deterrence perspective to impose all eight years on Defendant C are discussed comprehensively in Strandburg, *supra* note 65

¹²¹ See *supra* ##.

¹²² Lando's model is based on a differential deterrence utility between rightful and wrongful convictions. Wrongful convictions can, of course, be construed as a cost (disutility) in terms of deterrence. See Kaplow & Shavell, *supra* note 106. The model proposed here accommodates both sets of assumptions.

¹²³ In later work, Lando acknowledged the inherent deterrence costs entailed in wrongful acquittals and asserted that implementing a high standard of proof for conviction is usually detrimental to deterrence goals see Henrik Lando, *Prevention of Crime and the Optimal Standard of Proof in Criminal Law* (LEFIC Working Article No. 2003-03, Oct. 3, 2003), available at <http://ssrn.com/abstract=238334> ("a higher standard of proof will in general ... lead to less deterrence").

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expectancy embedded in the choice to engage in criminal activity.¹²⁴ Raising the standard of proof for conviction to maximal levels of certainty does, indeed, have some positive effects on deterrence, in that it minimizes the incidence of false convictions; but at the same time, it also yields an opposite deterrence outcome through the raising of the probability of wrongful acquittals: “when the proof burden rises, the probability of false convictions falls and that of false acquittals rises.”¹²⁵ The adverse deterrence outcomes produced by wrongful acquittals pull towards lowering the evidentiary threshold for conviction.¹²⁶

In general, then, the deterrence costs of wrongful acquittals also impact the optimal decision model. When we add this vector to the set of forces discussed thus far, a class of situations emerges in which a full probabilistic decision regime—where the degree of punishment is correlative to the certainty of guilt and the standard of proof for conviction is sub-maximal—would facilitate a Pareto improvement in the level of deterrence as compared to a bipolar decision regime. The force of this vector is, of course, a product of the distribution of wrongful convictions and acquittals at different epistemic levels and is likely to vary across different classes of cases. But the exact distribution in each and every context is immaterial for the purposes of this article. Rather, of significance is the fact that inserting the false acquittal variable into the equation allows us to identify situations in which optimal deterrence is achieved by lowering the standard of proof to enable conviction and punishment at sub-maximal levels of certainty of guilt (alongside maximal punishment at the higher levels of certainty). These situations can be regarded as the criminal counterpart to the abovementioned tort cases, in which structural failures in proving causation justify a shift to a probabilistic remedies regime.¹²⁷

To sum up, the fundamental explanation for why shifting to a comparative punishment regime could be expected to promote deterrence is as follows: Due to the varying deterrence effect of incarceration, as a function of the variance in probability of guilt, and given an ex-post restriction on enforcement costs (aggregate years of incarceration), there is cause to bind certainty of guilt to severity of punishment. Punishing more severely those with a higher probability of guilt than those with a lower probability of guilt can be justified on the grounds that the greater the certainty of the defendant’s guilt, the lesser the concern of “wasting”

¹²⁴ Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1484 (1999).

¹²⁵ Jeffrey Reiman & Ernest Van Den Haag, *On the Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro and Con*, 7 SOC. PHIL. & POL. 226, 241 (1990) (“High standards of proof make sure that fewer innocents are convicted but also that fewer criminals are ...”).

¹²⁶ To illustrate the dampening effect of wrongful acquittals on deterrence, suppose that 99% of the rape cases in a given society revolve around the question of consent, where testimony can substantiate a certitude level that does not exceed 95%. Only in 1% of the cases does the dispute rest on the question of the perpetrator’s identity, and DNA evidence substantiating a certitude level of 99% can be used. Suppose also that the move from a 95% to a 99% standard of proof will not affect the incidence of false convictions, because the distribution of cases is such that the number of false convictions under both standards is identical. Setting the higher 99% (rather than 95%) standard as the evidentiary threshold for conviction would likely lead to under-deterrence: this would yield no deterrence benefits (because the level of false convictions would remain the same under both standards), which would be outweighed by the deterrence costs that result from the increased incidence of false acquittal. Such systematic failures in deterrence due to an inability to meet the burden of proof can be understood as the criminal counterpart to tort cases in which structural failures in proving causation justify a shift to a probabilistic remedies regime.

¹²⁷ See *infra* ##.

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punishment resources while obtaining a weaker deterrence effect, and vice versa. This is the rationale for varying sanctions for the same behavior based on certainty of guilt. Yet it should not be inferred from the deterrence advantage of allocating the punishment units in cases of a very high probability of guilt that conviction and criminal sanctions should be limited to only the maximal levels of certainty of guilt, for this is likely to lead to under-deterrence. One factor that justifies lowering the standard of proof to sub-maximal levels is risk-loving tendencies. The common assumption in the economics literature is that offenders tend to seek risk due to the decreasing marginal cost of incarceration years. Under this premise, probability of conviction has a greater effect on deterrence than does severity of punishment. Increasing the probability of conviction, accompanied by a proportionate decrease in the average size of sanctions, can also be expected, therefore, to improve the level of deterrence. Moreover, in choosing a decision regime, the deterrence costs of both wrongful convictions and wrongful acquittals must be weighed. This is another reason why it may be justified to lower the standard of proof for conviction to sub-maximal levels and expand the epistemic conviction space to encompass also lesser degrees of certainty of guilt. Deterrence, in other words, is positively impacted by certainty of guilt and negatively affected by defendants' risk-seeking tendencies and by false acquittals. When the vectors created by risk-seeking tendencies and the adverse effects of wrongful acquittal are strong enough, reducing the evidentiary standard for conviction even to levels below the reasonable doubt threshold could be justified. The combined operation of the three vectors thus leads to the deterrence advantage of a comparative punishment regime, where severity of punishment is correlated to ex post certainty of guilt and where the standard of proof for conviction is reduced to sub-maximal levels (as a function of the decrease in marginal disutility of imprisonment years and of the distribution between wrongful convictions and acquittals at different epistemic levels).

B. Error Costs

The discussion has thus far shown that the uniformity of punishment in the epistemic space above the reasonable doubt standard and the lack of punishment at the levels of proof below that standard have a deterrence cost. This cost is avoided under a comparative punishment regime, with its differential sanctions correlated to certainty of guilt. Yet the sub-optimal deterrence outcomes of the bipolar model are only part of the picture, for the ex-ante deterrence perspective ignores the ex-post social costs of convicting the innocent. That is to say, even assuming that a comparative punishment regime would advance ex-ante deterrence goals, the bipolar regime could still prove to be preferable when ex-post error costs are taken into account.

Errors that can occur in the framework of criminal proceedings can be divided into two types: wrongful convictions and wrongful acquittals. The social costs of these two types of error are not commensurate, with the social cost of wrongful conviction regarded as significantly greater. To minimize the aggregate social costs of error in criminal proceedings, emphasis should, therefore, be placed on lowering the incidence of false convictions, even if by way of increasing the rate of false acquittals.¹²⁸ Assuming, for example, that the social cost of a false

¹²⁸ Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J.L. & JURIS. 279 (1996) (the risks of error must be allocated between the defense and prosecution so as to reflect the disutility ratio between wrongful conviction and wrongful acquittal). For further discussion of the cost minimization approach to evidence

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conviction is 9 times greater than the cost of false acquittal, the evidentiary threshold for conviction should be set at a 90% certainty level. Such a standard of proof would be aimed at reducing the likelihood of erroneous conviction, by compromising on the certainty of the innocence of acquitted defendants proportionate to the 9:1 disutility ratio between wrongful convictions and acquittals.¹²⁹ This evidentiary threshold for conviction would allocate the risk of error between the defense and prosecution in a way that promotes error in favor of defendants—which is considered less costly to society—at the expense of error in favor of the prosecution—which entails a more substantial social cost.¹³⁰ The bipolar decision regime, which conditions criminal conviction and punishment on a beyond reasonable doubt measure of certainty, is compatible with this utilitarian calculus, for it reduces the risk of false conviction by increasing the risk of false acquittal.¹³¹ A comparative decision regime (or, to be more precise, the component in that regime relating to lowering the standard of proof for conviction) would function in the reverse manner: the savings in false acquittal errors would be achieved by increasing the incidence of false conviction, with the likely general outcome an increase in the aggregate social cost of error in judicial decisions. This increase in error might outweigh the marginal deterrence utility that would result from a move to a probabilistic regime. Therefore, even in situations in which a bipolar regime is inefficient from an ex-ante deterrence perspective, it may nonetheless lead to more efficient outcomes ex-post.

This analysis and its conclusions must be qualified, however. Incorporating the ex-post error costs into the equation undoubtedly adds another vector, pulling towards elevating the evidentiary threshold for conviction. This is likely to constrict the comparative regime's scope of operation. Nonetheless, the mere existence of this vector does not mandate a general sweeping preference of the binary regime. One reason is that the social cost of wrongful conviction is not constant but is rather a function of the severity of the accompanying punishment: the social cost of a wrongful conviction that results in a sentence of one day in prison is not equivalent to the cost of a wrongful conviction resulting in life imprisonment.¹³² Under the comparative model, the cost of wrongful conviction at the lower epistemic levels is

law, see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408-17 (1973) (discussing the cost minimization model and the search model); Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27, 34 (1996).

¹²⁹ See David M. Appel, *Note, Attorney Disbarment Proceedings and the Standard of Proof*, 24 HOFSTRA L. REV. 275, 277 (1995) (the risk of error in the administration of criminal justice is borne predominantly by the prosecution).

¹³⁰ See Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27, 34 (1996). Assuming that the beyond reasonable doubt standard of proof is set at a 90% certainty level (probability of 0.9), the social harm inflicted by erroneously convicting an innocent defendant is considered to be about nine times costlier than the social costs of wrongful acquittal. For further discussion on the desirability of quantifying the reasonable doubt standard, see Henry A. Diamond, *Note, Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716 (1990) (arguing that jury instructions defining reasonable doubt should always be given). *But see* Peter Tillers & Jonathan Gottfried, *United States v. Copeland*: 369 F. Supp. 2d 275 (E.D.N.Y. 2005): *A Collateral Attack on the Legal Maxim that Proof Beyond a Reasonable Doubt Is Unquantifiable?*, 5 L. PROBABILITY & RISK 135, 140-41 (2006) (arguing that the usual reasons given for the unquantifiability of reasonable doubt are unsatisfactory, with the recent case of *United States v. Copeland* serving as a reminder that there are strong considerations in favor of quantifying at least some standards of persuasion).

¹³¹ Stein, *supra* note 128.

¹³² This runs contrary to the existing literature on the criminal standard of proof and the allocation of risk of error in criminal proceedings, which tends to ignore the differential social costs of wrongful convictions and implicitly assumes a fixed social cost to such errors. See, e.g., Posner, *supra* note 128, at 408.

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relatively low, for the punishment imposed is only partial. This weakens the force of the ex-post error costs consideration and must be taken into account when calculating the standard of proof for conviction. Moreover, even assuming that realizing the teleological objective of error-cost minimization is possible under only the bipolar model, there is still the matter of the accompanying price in deterrence. The deterrence costs of wrongful acquittals cannot be ignored when determining the desirable decision regime, and when they are extensive, there is no justification for a-priori preference of the bipolar model. Steven Shavell has made a similar assertion in the civil setting, claiming that “it is a mistake to take error cost minimization as the social goal, and a mistake which explains such anomalous implications as the recommended use of the more-probable-than-not threshold even where it would result in defendants’ always escaping liability for harm done.”¹³³

As a rule, then, under the comparative model, some of the ex-ante deterrence problems arising under the binary model of allocation of risk of error are likely to be resolved. At the same time, the ex-post costs of error should be a constraint on the application of a comparative decision regime in the setting of the standards of proof for conviction. In other words, in all cases of incarcerable offenses, it would be justified to apply that element of the comparative punishment model related to the correlation between certainty level and measure of punishment. In setting the evidentiary threshold, however, the ex-post cost of wrongful conviction should also be taken into account. Circumscribing the model’s exact parameters—as a derivative of the social cost attributed to wrongful convictions at different levels of punishment—is a political decision to be made in concrete contexts.

IV. POSSIBLE OBJECTIONS

Despite the deterrence advantages of a comparative regime, this model can be challenged on expressive, retributive, institutional, and implementation grounds. The discussion below will contend with some of the hypothetical criticism that can be made against the proposed model. While the possible objections do not completely collapse the comparative model, they do bring to light some of its adverse effects and—similar to the noted effect of ex-post costs of error—also can serve as possible constraints on its application.

A. *The Expressive Critique*

Despite the deterrence utility likely to be generated by a comparative punishment regime, it can be claimed that it would hinder other teleological purposes of criminal conviction and punishment, first and foremost, their expressive functions. Expressive theories of law are concerned with the expression of collective attitudes through legal action.¹³⁴ The expressive

¹³³ Shavell, *supra* note 96, at 605.

¹³⁴ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1510 (2000). As a social practice, law has a significant expressive function, which can be understood in two distinct senses. One is purely symbolic and nonconsequential. Many people support or object to law not for any consequential reasons (such as the law’s deterrent effect), but due to its symbolic content, namely, the declaration it makes about the community’s morals and values. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022-23 (1996). The other aspect of law’s expressivity is consequential and relates to its power to shape, change, and reinforce social norms. Law’s expressive function is manifested, in this sense, in its ability to influence normative behavior by

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function of criminal law is particularly potent. Concurrent to promoting either deterrence or retribution, criminal law and the criminal trial serve a communicative function,¹³⁵ expressing society's moral outrage at the act committed. They constitute natural arenas for clarification of, and reflection on, the social value scale:¹³⁶ The very labeling of certain behaviors as "criminal" grants one moral approach precedence over contradicting visions of justice.¹³⁷ The criminal conviction also has an expressive function: it denounces the offender and thus conveys a message of moral opprobrium regarding the defendant herself as well as her value system.¹³⁸ The severity of criminal punishment, in turn, reflects the force of the moral reprobation. As stated by Dan Kahan, "What a community chooses to punish and how severely tells us what (or whom) it values and how much."¹³⁹ A comparative decision-making regime could undermine each of these expressive functions of the criminal proceeding. I will turn to discuss the expressive harms associated with the relativity of punishment; the expressive harm associated with the relativity of conviction; and the potential damage to the conceptualization of judicial decision-making as a result of probabilistic sentencing:

1. *The Expressive Harm Associated with the Relativity of Punishment*

Under a comparative decision-making regime, the punishment imposed following conviction reflects epistemic doubt as to guilt: when the defendant's guilt is established at a lower degree of certainty (such as the clear and convincing evidence level of proof) the punishment is moderated to sub-maximal levels. There could be room to claim that the leniency of partial punishment, due to epistemic uncertainty, may fail to validate the social value scale. It might not succeed at expressing society's moral outrage at the crime committed, sending instead the wrong message that the criminal act is not sufficiently grave. To explain in brief, the realization of the expressive function of criminal punishment is contingent on the ability to create a link between severity of the punishment and the force of the moral repudiation of the offender and his conduct. Since under the comparative model, the severity of the punishment is the product not only of the severity of the crime, but also of the probative weight of the incriminating evidence, an ambiguous expressive message may emanate from the courtroom. The reduction of the sanction and imposition of partial punishment, albeit due to evidence deficiencies, might be construed as stemming from the negligibility of the moral harm,

making statements that create and sustain shared social norms, rather than controlling behavior directly. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 471 (1997).

¹³⁵ For additional discussions of expressive theories of law, see Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Sunstein, *supra* note 134. For criticism of the expressive approach, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1462 (2000).

¹³⁶ Martin Sabelli & Stacey Leyton, *Criminal Law: Train Wrecks and Freeway Crashes*, 91 J. CRIM. L. & CRIMINOLOGY 161, 209 (2000).

¹³⁷ The expressive function of criminal proceedings is reflected also in the procedural features. Thus, the criminal procedural structure reflects social justice concepts similarly to the substantive law that applies in the proceedings. Compare Charles H. Koch, *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 635 (2000); with Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1140 (1982).

¹³⁸ Lillquist, *supra* note 27, at 136 ("Behavior is criminalized, in part, in an effort to express society's moral condemnation of the behavior, as well as the values that the behavior symbolizes.").

¹³⁹ Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998).

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thereby sabotaging the expressive goals of criminal punishment. That is to say, the expressive function of criminal punishment may be understood as a possible constraint on the system's ability to tinker with the severity of punishment for the realization of external aims, including deterrence goals.¹⁴⁰ The potential harm to the expressive function of criminal punishment may thus serve as a possible constraint on promoting deterrence by way of comparative sentencing.

2. The Expressive Harm Associated with the Relativity of Conviction

In addition to relativity in punishment, a probabilistic regime would also establish relativity in conviction, effectively fragmenting the criminal conviction into varying sub-types, such as Conviction beyond Reasonable Doubt; Conviction by Clear and Convincing Evidence; Conviction by Preponderance of the Evidence, and so forth. This underlying fragmentation process would expose the existence of an evidentiary continuum at the base of the criminal verdict and could, therefore, undermine the labeling power of the criminal conviction. Such potential harm to the institution of criminal conviction would be an additional expressive cost, then, of this regime. To explain in brief, under the bipolar decision regime, the institution of criminal conviction enjoys a monolithic status, due in part to the weighty evidentiary grounds of beyond reasonable doubt that it requires. The underlying intuition is that for the criminal conviction to carry out its denouncing and stigmatizing function, it must be founded on credible information regarding the offender's guilt, and must be distinguishable from all other decisions made by the state vis-à-vis its citizens.¹⁴¹ Assigning a maximal standard of proof as a pre-requisite for conviction protects the criminal conviction from dilution and sustains its labeling power, by perpetuating the credibility of the information on which it rests. In light of the high probability of guilt in a conviction, the public is willing to subject the convicted offender to various social sanctions, while internalizing the costs that this entails. Under a comparative regime, in contrast, the evidentiary threshold for criminal conviction would be moderated and a dimension of variability introduced. This could weaken the force of criminal conviction in conveying stigma and moral culpability. The greater extent of uncertainty with regard to the convicted offender's factual guilt may produce negative expressive externalities and lead to the dilution of the criminal conviction as a legal institution, resulting in public reluctance to impose social sanctions upon offenders.

3. The Harm to the Conceptualization of Judicial Decision-Making

Adopting a comparative punishment regime and conceding the existence of an evidentiary continuum could also hinder the appropriate conceptualization of judicial decision-making, in which the criminal process also plays an expressive role. To explain briefly: for the judiciary

¹⁴⁰ As asserted by Bierschbach & Stein, "the accepted social meaning of punishment imposes expressive limitations on authorities' abilities to manipulate criminal sanctions." Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1749 (2005).

¹⁴¹ Carol S. Steiker, *Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 808 (1997) ("[F]or punishment to be able to perform its blaming function, it must be distinguishable to the wrongdoer and the community at large from all other things that governments may do in the course of governing and all of the other burdens citizens must bear as citizens. Thus, special procedures are necessary to make punishment more, rather than less, powerful.") See also Lando, *supra* note 84, at 285.

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to fulfill its purpose in a liberal society, the structuring of judicial decision-making must be understood as directed at the pursuit of justice and premised upon factual truth.¹⁴² Factual truth is of a binary and unambiguous nature (did or did not occur; valid or invalid; did or did not perpetrate). Adjudicative fact-finding, in contrast, is inherently infused with uncertainty.¹⁴³ It is situated at some point along the spectrum between absolute certainty of innocence and absolute certainty of guilt. Under the prevailing bipolar regime, when the court reconstructs the historical events underlying the trial, it converts the intermediate points along the evidentiary continuum into one of the end points of the spectrum – whether guilt or acquittal.¹⁴⁴ This requirement for conversion into a binary outcome can be justified on the background of the desire to preserve the potential of a link to the factual truth: since the factual truth is binary, the verdict that allegedly manifests that truth must have a similar epistemic structure. Under a comparative regime, however, judicial fact-finding decisions would systematically and a-priori deviate from what occurred in reality, in all those situations where partial probability of (full) criminal responsibility is translated into a determination of “partial criminal responsibility.”¹⁴⁵ That is to say, the difference between the comparative regime and the bipolar decision regime can be described as the tension between a-priori systematic error and ex-post random error—or as the difference between situations in which the judge makes a “half-error” in 100% of the cases and those in which he completely errs in 50% of the cases.¹⁴⁶ Given this, a possible criticism of the comparative punishment regime could be that creating such a built-in discrepancy between the judicial decision and the factual truth would undermine the way in which judicial decision-making is publicly portrayed. It would alter the perception of the judicial verdict from a decision with a link to the factual truth to a probabilistic game premised on risk allocation, thereby impairing the criminal trial’s expressive function in relation to judicial decision-making. In addition, the epistemological basis of relative determinations regarding criminal culpability can also be challenged: just as the concept “half pregnant” is meaningless, so does “half criminally culpable” lack any epistemological meaning. The human information-processing mechanism, it can be claimed, is not capable of contending with “probabilistic” truths in this context. Verdicts convicting on a preponderance of the evidence or on clear and convincing evidence would be devoid of concrete meaning, which would constitute another expressive harm produced by comparative sentencing.¹⁴⁷

¹⁴² David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U.L. REV. 941, 954 (1997) (discussing the public policy goal of truth-seeking).

¹⁴³ Stein, *supra* note 128 (claiming that adjudicative fact-finding is bound to rest upon probabilities rather than certainty for a number of reasons: it does not always relate to the past but can instead consist of predictions of future occurrences; in the criminal trial context in particular, it deals not only with the empirical question of whether something happened, but also why something happened; and the fact that some facts are not easily severable from value judgments).

¹⁴⁴ Bray, *supra* note 11, at 1307 (“the evidence at trial lies somewhere along a continuum between absolute proof of guilt and absolute proof of innocence, while the output demanded of the jury is binary—guilty or not guilty”).

¹⁴⁵ This is analogous to the blurring of the distinction between a determination that “the door is wide open in half of the cases” and the determination that “the door is half-open.”

¹⁴⁶ John E. Coons, *Compromise as Precise Justice*, 68 CAL. L. REV. 250, 258 (1980).

¹⁴⁷ Support for this approach can be found in a decision handed down by the Florida Supreme Court, where it was stated, “A convicted defendant cannot be ‘a little bit guilty’” in the context of its rejection of a residual doubt claim as the basis for leniency in sentencing. *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981). See also F.S.C. Northrop, *The Epistemology of Legal Judgements*, 58 NW. U. L. REV. 732 (1963-1964); Vern R. Walker, *Preponderance, Probability and Warranted Factfinding*, 62 BROOK. L. REV. 1075 (1996).

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The described expressive harms to the public perception of judicial decision-making are commonly presented in the literature from the slightly different perspective of legitimacy and public acceptability of the criminal legal system. Nesson¹⁴⁸ and Tribe¹⁴⁹ are the central authors to have linked public trust in the adjudication system to the prevailing binary decision-making regime. Under their approach, the courts' legitimacy is contingent on the public's perception of the criminal verdict as "statements about what actually happened,"¹⁵⁰ rather than the product of probabilistic calculations and evidentiary decision rules. Nesson and Tribe both maintain that the justification for the binary structure of the criminal verdict (and for the beyond reasonable doubt standard of proof) derives not only from the positive effects on the *actual accuracy* of judicial decisions, but also from the utility of the public trust embodied in maintaining an *appearance of accuracy*.¹⁵¹ From this standpoint, the comparative punishment model can be criticized in that its admission of the existence of an evidentiary continuum and of the fact that the criminal sanction is based on a probability of guilt would lead to a loss of public legitimacy for the judicial system.¹⁵² The concern is that verdicts that stress the decision rules and statistical basis on which they are founded will "transform the substantive message from one of morality ... to one of crude risk calculation," thereby undermining the legitimacy of the criminal justice system in the eyes of the public.¹⁵³

B. The Expressive Critique Reconsidered

The abovementioned hypothetical expressive objections to the comparative punishment regime warrant reconsideration. With regard to the claim that comparative punishment would not properly validate the social value scale, it is important to note that under the bipolar regime, as well, severity of punishment is determined on the basis of a multiplicity of variables. The defendant's age, family status, chances of rehabilitation or prior conviction record can all affect the gravity of her sentence. There is no reason to assume that the expressive function of punishment, or its capacity to reflect the full extent of social condemnation of the criminal activity, would be impaired by including the probative weight of the evidence in the long list of considerations. Moreover, under a comparative punishment regime, the probative weight of the evidence would be expressed explicitly in the court's

¹⁴⁸ Nesson, *supra* note 96 (claiming that the successful projection of legal rules and the facilitation of public trust in the judicial system depend on a court's ability to cast the verdict as a statement about the actual occurrence rather than as a statement about the evidence). See also Abramowicz, *supra* note 94, at 256; Thomas Weigend, *Law and Truth: Truth, the Jury and the Adversarial System: Is the Criminal Process about Truth?*, 26 HARV. J.L. & PUB. POL'Y 157, 172 (2003); S.E. Sundby, *The Virtues of a Procedural View of Innocence*, 41 HASTINGS L.J. 161, 161 (1989).

¹⁴⁹ Lawrence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) (advising caution in using statistical evidence and claiming that mathematical information must be converted for the verdict to facilitate public trust in the judicial process).

¹⁵⁰ Nesson, *supra* note 96, at 1358.

¹⁵¹ Lillquist, *supra* note 27, at 177 ("their writings suggest the possibility that, irrespective of any costs and benefits from accurate and inaccurate verdicts, the way in which the current reasonable doubt instruction is implemented can be explained ... by the benefits that arise from these other values").

¹⁵² Lando, *supra* note 84, at 284 ("The argument is that legitimacy is enhanced by public understanding that the convicted are (as good as) certain to be guilty, since this gives the impression that the system is able and dedicated to finding the truth, and does not sanction people in a superficial manner." Lando then turns to a critique of this claim).

¹⁵³ Nesson, *supra* note 96, at 1362.

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actual determination regarding type of conviction (and in the distinctions between Beyond Reasonable Doubt Convictions; Clear and Convincing Evidence Convictions, and so forth). The transparency as to the extent of epistemic doubt incorporated into the verdict and punishment would allow the public to calculate the extent of condemnation of the given criminal conduct under the assumption of maximal certainty.

It is also possible to qualify the claim that incorporating the dimension of relativity into the criminal conviction would necessarily weaken its expressive message. As discussed, the expressive function of the criminal conviction is dependent on the public at large being able to infer an informative decree from the conviction regarding the defendant's involvement in the crime with which she is charged and, accordingly, on the existence of a minimal standard of proof as a condition for conviction. However, I contend that this, in itself, does not preclude—from an expressive perspective—basing convictions on sub-maximal levels of proof or correlating the conviction to the probative value of the evidence at points beyond the minimal evidence threshold:

To begin with, there is room to claim that in setting the minimal evidentiary threshold for conviction, focus should not be placed solely on the expressive function of the criminal conviction. Rather, the expressive role played by the institution of the criminal *acquittal* must also be taken into account. Under the bipolar decision regime, verdicts are restricted to either full conviction or full acquittal. Due to the high standard of proof required for conviction, acquittal covers a vast epistemic space, stretching from the end of full certainty regarding innocence to beyond reasonable doubt of guilt. Criminal acquittal thus serves only a limited expressive function: it cannot clear a defendant's name because it does not necessarily indicate high levels of certainty regarding innocence. “[T]he only way to escape both conviction and stigmatizing acquittal is to avoid trial altogether. At trial, the defendant will suffer from the very requirement that is meant to protect him—a high burden of proof.”¹⁵⁴ Under a comparative regime, on the other hand, although reducing the standard of proof would come at the expressive cost of an increased rate of wrongful convictions (and the accompanying contamination of the expressive message embedded in the criminal conviction), the expressive message of acquittal would be fine-tuned due to the narrowing of the epistemic space it encompasses. This positive effect on the institution of criminal acquittal must be taken into account when weighing the expressive harm to the criminal conviction associated with comparative sentencing.¹⁵⁵

Secondly, the variability of convictions critique loses force when we consider that there is nothing sacred, natural, or pre-political about the existence of one monolithic category of conviction or a bipolar verdict structure of innocent/guilty.¹⁵⁶ There is nothing in the expressive role of the criminal conviction to preclude the possibility of establishing a limited number of different categories of conviction, differentiated from one another and relative to one another. Breaking down the criminal conviction into sub-types with differentiated

¹⁵⁴ Bray, *supra* note 11, at 1325.

¹⁵⁵ For further discussion of the expressive costs associated with false acquittal, see Lillquist, *supra* note 27, at 136.

¹⁵⁶ Bray, *supra* note 11, at 1324.

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probative values should in fact enhance its expressive function and enable a more accurate regulation of the accompanying social sanctions.¹⁵⁷

Thirdly, we can also challenge the binary logic on which the conceptualization of judicial decision-making is supposedly founded, as well as its mandate that the world be divided into two clear and exclusive categories of guilt and innocence.¹⁵⁸ The question of criminal culpability invokes the most complex and tangled categories dealt with in law. Imposing criminal liability entails a weighing of a rich assortment of factual, normative, social, moral, and emotional variables—which do not always draw a clear and sharp line between innocence and guilt.¹⁵⁹ The current bipolar system dictates that the manifold aspects of criminal culpability be translated into the strict, uni-dimensional terms of full guilt or acquittal. It can be argued that this binary and dichotomous conceptualization of criminal liability strips this matter of its complexity, at both the normative and evidentiary levels.¹⁶⁰ A comparative regime, in contrast, would allow for more complex and sophisticated answers to the question of criminal responsibility (at least with regard to its evidentiary dimension). By creating multiple standards of criminal culpability, the comparative model would facilitate a more exact reflection of the evidentiary gray areas that permeate criminal decision-making. It would enable the transformation of the question of criminal culpability from a qualitative question of “yes or no” to the quantitative “how much.”¹⁶¹ The latter, “how much” deliberation may ultimately lead to a conceptualization of criminal culpability that is more nuanced, as well as to verdicts that are richer and more accurate than the simplistic binary presentation of criminal culpability, while at the same time setting a clear and unequivocal borderline between guilt and innocence.¹⁶²

¹⁵⁷ An infinite fragmentation of the criminal conviction into sub-classes and categories may, indeed, impair its force in transmitting information regarding factual guilt. But as noted earlier, under the probabilistic punishment model, the conviction need not be broken down endlessly; four or five conviction categories may suffice. *See supra* ##

¹⁵⁸ Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 582 (1995) (discussing the bipolar logic inherent to criminal law “with its insistence on dividing the world into mutually exclusive categories of people: legally, into guilty and innocent; sociologically, into blamers and blamed”).

¹⁵⁹ *See Weigend, supra* note 148, at 170 (discussing the notion of “the whole truth,” which encompasses the “myriad of facts including the psychological and biographical factors that might help explain why the offense was committed”).

¹⁶⁰ For further discussion, see Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 988 (2007).

¹⁶¹ For a similar approach with respect to contractual liability, see HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 268-72 (2004) (challenging the conceptual binarism underlying the distinction between breach of contract and performance).

¹⁶² It is true that this transformation is only partial, in the sense that it allows for refinement of the judicial verdict and the concept of criminal liability only with regard to the underlying evidentiary dimension. The normative aspect of the question of criminal culpability remains binary and continues to be relegated to either full guilt or innocence. In other words, there is indeed a basic distinction between a verdict dealing with (full) criminal liability at partial probability and a verdict that deals with “partial criminal liability.” The probabilistic model allows for verdicts of the first kind, which depend on an evidentiary base, but this would not suffice to establish the essential infrastructure for a verdict of the second kind. However, the very conceptualization of criminal liability on a hierarchical scale, even if only in relation to the evidentiary stratum, constitutes a first step toward opening a pluralistic and graduated discourse in relation to the normative question as well.

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Finally, the claim of impaired public trust in the adjudicative system under a comparative regime can also be contested. First and foremost, the conceptualization of public acceptability as an intrinsic normative end is, in itself, questionable. The system must merit acceptability; the matter of trust cannot be detached from the objective performance of the courts. Moreover, even if we accept a teleological objective of public acceptability, it is doubtful that this goal can be realized by denying the risks of error inherent to all judicial decisions.¹⁶³ There is no empirical basis to the contention that creating trust in the criminal justice system is contingent on the transmission of a misleading message of certainty as to the guilt of every person convicted in court.¹⁶⁴ In fact, quite the opposite may be true: the dissonance between public awareness of wrongful convictions and the façade of certainty of guilt could fatally undermine the system's public legitimacy. As Abramowicz has asserted, "even if legal institutions have developed methods of fooling the public because such fooling in individual cases increases the prestige of the courts, the general practice of trying to fool the public may decrease the prestige even more."¹⁶⁵ Indeed, making the probabilistic foundation of the judicial decision transparent may foster public trust in the judicial system far more effectively than camouflaging the risks of error.

C. The Retributivist Critique

The comparative punishment model can also be attacked from a retributivist standpoint. Unlike the described consequentialist theories of punishment—which justify criminal punishment in light of its instrumental role in pursuing desirable social ends, such as deterrence or communication of social repudiation—retributivism holds the criminal punishment of the culpable to be an intrinsic good.¹⁶⁶ At the center of retributivism stands the premise that criminal punishment, like any other social institution, must be valid from a moral standpoint and its ramifications for public welfare cannot constitute a justifying rationale.¹⁶⁷ Under the retributivist approach, the sole justification for criminal punishment is

¹⁶³ See Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 908 (2008).

¹⁶⁴ Daniel Shaviro, *Statistical Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 544 (1989) ("Perhaps the best way to create a perception of verdict accuracy is to create the reality of verdict accuracy. Perceptions created at the expense of the reality may be unstable, especially over the long term, because not everyone is likely to be fooled. Some people may know that the system as a general matter is pursuing perception at the expense of reality. Other people may simply know or believe that verdicts are inaccurate in particular cases; more such cases will create more such people. The question then becomes one of determining how widely the disillusioning knowledge about verdict error will spread over time. If society learns that the legal system pursues perception at the expense of reality, it may experience greater disillusionment than if it merely discovered some inaccuracy.").

¹⁶⁵ Abramowicz, *supra* note 94, at 239.

¹⁶⁶ See Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 727, 727 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) (claiming that consequentialists look forward into the future with regard to criminal punishment and focus on the instrumentality of the criminal sanction in advancing desired social outcomes, whereas retributivists take a retrospective view of punishment). See also Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 862 (2002) (arguing that retributivism focuses on the appropriate and the just as opposed to the desirable or effective in terms of various teleological goals).

¹⁶⁷ Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 216 (2003) ("[I]nstitutions should produce morally correct decisions regardless of ultimate effects on society This conception of justice punishes

the connection between the sanction and the criminal act committed.¹⁶⁸ In Kant's words, "Punishment by a court ... can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime."¹⁶⁹ Only a link between the criminal act and the act of punishment can ensure that the defendant's human dignity is preserved and prevent his transformation into an instrument for realizing social goals.¹⁷⁰ A possible retributivist line of criticism against the proposed comparative punishment regime would then be that it would generate moral harm that cannot be counterweighed by its social outcomes, including any deterrence utility. This potential moral harm can be divided into three different prototypes. First, by allowing the imposition of criminal punishment in the epistemic space below the reasonable doubt threshold, the comparative regime deviates from retributivist principles, which prohibit inflicting punishment absent moral certainty regarding guilt. Second, by incorporating epistemic uncertainty into the magnitude of the sanction, the comparative model departs from the retributivist principle of proportionality, which mandates formulaic sanctions correlating solely with moral guilt. This thirdly leads to a deviation from the derivative principle of treating like cases alike.

1. *Punishment in the Absence of Moral Certainty Regarding Culpability*

A principal element in retributivist thought is that the sole justification for punishment is the existence of guilt.¹⁷¹ Some retributivists posit that this refers to moral guilt; others contend that it refers to legal guilt.¹⁷² Regardless, the fundamental notion is that punishing in the absence of the highest humanly possible level of certainty as to guilt is morally illegitimate.¹⁷³ Retributivists would thus criticize the comparative decision-making model for eroding the evidence threshold and thereby weakening the moral legitimacy of inflicting

not in service of some greater societal goal but in proportion to the criminal's moral blameworthiness and the harm caused by his offense.").

¹⁶⁸ R. ANTHONY DUFF, TRIALS AND PUNISHMENTS 4 (1986) (describing all retributivist theories as finding the "justification of punishment in its relation to a past offence").

¹⁶⁹ IMMANUEL KANT, THE METAPHYSICS OF MORALS: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 140-41 (Mary Gregor trans., Cambridge Univ. Press 1991).

¹⁷⁰ In Kant's words, "For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: His innate personality protects him from this, even though he can be condemned to lose his civil personality." *Id.* at 140-41.

¹⁷¹ Anthony M. Quinton, *On Punishment*, 14 ANALYSIS 7 (1954) (discussing the ontological connection between punishment and a past offense and arguing that punishment of the innocent is impossible because if the person is not guilty, then what is imposed upon him cannot be deemed punishment).

¹⁷² For further discussion of the distinction between "moralistic" and "legalistic" retributivism, see Christopher, *supra* note 166, at 881.

¹⁷³ Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987) ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it."). The scope of the present article precludes an extensive discussion of the complex matter of defining moral certainty, although I will address further on the link between moral certainty and the standard of proof in criminal proceedings. For the time being, I will suffice with the following definition of moral certainty: "the form of certainty that any person is capable of achieving from an understanding of the nature of things, applying reason and thought to the testimony of others, along with personal observation and experience." Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1170 (2003).

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criminal punishment. Punishing a defendant based on evidence with a probative weight falling below the beyond reasonable doubt standard -i.e., below the standard of moral certainty- results in his objectification, causing moral harm that is incommensurable with counter-deterrence utilities.¹⁷⁴

2. Deviation from the Principle of Proportionality

The existence of guilt, albeit a mandatory requirement, is not sufficient to legitimize criminal punishment from a retributivist standpoint. In addition, the severity of the punishment must be reasonable and proportionate to the severity of the crime committed.¹⁷⁵ This principle of proportionality, which prescribes the offender's just desert, was described by Kant as follows:

Whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (*ius talionis*) ... can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.¹⁷⁶

Hegel explained the principle of proportionality on the fact that both the crime and act of punishment constitute coercion. The latter act of coercion—infliction of punishment—has the power to eliminate the coercive element of the earlier action—the criminal act. This can occur only if there is correspondence between the second and first acts of coercion.¹⁷⁷ On this background, Hegel termed criminal punishment “the crime turned round against itself.”¹⁷⁸

¹⁷⁴ See Lillquist, *supra* note 27, at 140 (describing the incommensurability principle). In other words, from the retributivist viewpoint, the deterrence approach turns things upside down in extolling certainty in punishing the guilty when what should in fact stand, absolutely, at the center of every theory of punishment is certainty of not punishing the innocent. See Lillquist, *supra* note 6, at 695.

¹⁷⁵ A distinction should be made in this context between retributivist approaches that advocate mandatory punishment and those that view the existence of guilt as a justification for punishment but do not mandate its imposition. Kant and Hegel believed that the existence of guilt creates an obligation on the part of society and the sovereign to inflict criminal punishment. According to Kant, “the Principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment.” KANT, *supra* note 169, at 141. In contrast, there are thinkers who contend that the existence of guilt creates the authority, and not the duty, to punish. For a review of retributivists of this orientation, see Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 *FORDHAM L. REV.* 93, 125 (2003).

¹⁷⁶ KANT, *supra* note 169, at 141. For an expansion on this principle, see Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 *VA. L. REV.* 1197, 1204 (2007); Jeffrie G. Murphy, *Symposium on Kantian Legal Theory: Does Kant Have a Theory of Punishment?*, 87 *COLUM. L. REV.* 509, 530 (1987); Christopher, *supra* note 166, at 859. There is a distinction in this context between negative retribution approaches, which set only the uppermost standard of punishment, and positive retribution approaches, which also set a minimal standard of punishment.

¹⁷⁷ For further discussion of Hegel's articulation of the *lex talionis* principle, see Christopher, *supra* note 175, at 127.

¹⁷⁸ G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 129 (Allen W. Wood ed. & trans., 1991) (1821).

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The proportionality principle mandates the imposition of formulaic sanctions suited to the moral gravity of the underlying crime.¹⁷⁹ The principle gives rise to another possible retributivist objection to the comparative regime, namely, its deviation from the principles of just desert due to epistemic uncertainty. Indeed, retributivists would strongly reject the merging of the penal and epistemic dimensions of criminal proceedings and the accompanying breach of proportionality between crime and punishment. In cases where the level of proof against the defendant does not reach the reasonable doubt threshold, a comparative decision-making regime would allow the epistemic gulf to be bridged through penal means, by eroding—in retributivist terms—the criminal sanction to a level below what is prescribed by the proportionality principle.¹⁸⁰ Even in cases in which the defendant’s guilt has been proven beyond reasonable doubt, comparative punishment would constitute a deviation from the just desert requirement, due to the penal variability that it entails. For penal variability—as a function of the probative weight of the evidence in any given case—collides head-on with the principle of proportionality, which prescribes the imposition of a sanction that reflects only the gravity of the crime, upon moral certainty of guilt.

3. *Deviation from the Principle of Treating Like Cases Alike*

The comparative punishment model can be charged with violating the Kantian principles of proportionality not only in terms of the non-correspondence between severity of the punishment and severity of the offense in each individual case, but also due to the inconsistency it is likely to create across cases that are identical from a moral viewpoint. This can be claimed as yet another moral harm produced by the comparative model.

Despite the fact that the principle of treating like cases alike is not explicitly identified with retributivist approaches, it can be regarded as a cardinal precept in retributivist theory.¹⁸¹ The duty to treat like cases equally can be inferred from the principle of proportionality, which serves as an external plane of attribution: “Since an offender’s desert or degree of culpable wrongdoing is the only determinant for the degree of deserved punishment, then retributivism must require that offenders with the same degree of desert and culpability receive equal treatment.”¹⁸² In other words, the proportionality principle under the retributivist approach does not relate solely to absolute proportionality and to doing justice in any given case by

¹⁷⁹ For an extensive discussion of this principle, see Thomas. E. Hill, *Kant on Wrongdoing, Desert and Punishment*, 18 *LAW & PHIL.* 407 (1999). See also MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 153 (1997).

¹⁸⁰ This type of harm can be understood as a sort of mirror-image of the harm deriving from punishment in the absence of moral certainty, discussed above. Under the retributivist approach, just as moral certainty of guilt cannot be waived as a precondition for criminal punishment, so is non-proportional punishment due to epistemic doubts intolerable. See Lillquist, *supra* note 6, at 623.

¹⁸¹ See Stein, *supra* note 128, at 326. Some scholars from the retributivist school of thought maintain that the duty to treat like cases alike is not only an implicit obligation, but also an explicit component of retributivist thought. For example, according to Fletcher, the Kantian doctrine derives this duty directly from distributive justice principles. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *BUFF. CRIM. L. REV.* 51, 59 (1999).

¹⁸² Christopher, *supra* note 175, at 132.

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correlating the extent of punishment to severity of crime. Rather, it also requires relative proportionality and doing justice comparatively over the cross-section of cases.¹⁸³

By correlating degree of punishment with measure of certainty of guilt, a comparative regime can be expected to violate this principle of relative proportionality. From a retributivist standpoint, there is no meaning to the distinction between a conviction based on DNA evidence and one resting on eyewitness testimony or between a 99% degree of certainty and a 95% degree of certainty as to guilt. Insofar as they establish moral certainty, these cases are identical in every relevant aspect. However, under a comparative punishment regime, the cases would receive differential penal treatment. Punishing differently people who committed the same crime, due only to extraneous variables from the retributive perspective, such as the probative weight of the incriminating evidence, stands in deep contradiction to retributive justice principles.

D. The Retributivist Critique Reconsidered

There is room to reconsider some of the hypothetical retributivist objections to comparative sentencing described above. Firstly, it should be borne in mind that there is not one monolithic retributivist approach. There are a number of variations to the theory, some of which are even likely to be compatible with a model of probabilistic punishment. The different retribution theories diverge from one another in how they interpret the principle of proportionality or *ius talionis* standard. Negative retribution theories regard this standard solely as an upper limit for punishment, whereas positive retribution theories embrace it also as minimal standard for legitimate punishment.¹⁸⁴ The former approach thus does not necessarily clash with the component of the comparative punishment model that addresses differential punishment in the epistemic space above the reasonable doubt threshold.

This notwithstanding, however, I acknowledge that as a general matter and from an internal-retributive viewpoint, the attempts to justify the comparative model are likely to appear unconvincing. Yet the retributivist viewpoint is not the be all and end all, which is my chief response to the hypothetical retributivist objections that can be aimed at the comparative model. It is my contention that the retributivist theory cannot serve as a standard for assessing the normative desirability of any given decision regime, including the comparative decision-making model, for the theory addresses only the individual case and does not provide a response at the general systemic level.¹⁸⁵ To clarify: Retributivist theories are concurrently committed to two fundamental principles: punishing the guilty and not punishing the innocent. Deviation from either one of these outcomes is considered a departure from the principles of just desert. But due to the focus on the individual case in retributivist thought, these two mandates are construed in absolute terms, without addressing the question of which

¹⁸³ R. ANTHONY DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 156 (2001), cited in Christopher, *supra* note 175, at 93 n.235.

¹⁸⁴ Christopher, *supra* note 166, at 865 (describing the differences between weak/negative retributivism and strong/positive retributivism).

¹⁸⁵ Bierschbach & Stein, *supra* note 166, at 1203 ("All varieties of retributivism care primarily about one thing: doing justice in the particular case Retributivism is case-focused because it judges the appropriateness of criminal liability and punishment by reference to the specific features of the wrongful act that has been committed.").

takes priority. Indeed, retributivism takes no stance with regard to the trade-off between wrongful conviction and wrongful acquittal over the general cross-section of cases. It is in this sense a utopian theory, disregarding the difficult day-to-day reality of unavoidable errors in legal fact-finding, where decreasing the incidence of wrongful convictions comes at the cost of increasing the overall rate of wrongful acquittals.¹⁸⁶ In light of this lack of a systemic outlook and the absolutist conception of the principles of non-punishment of the innocent and punishment of the guilty (with no inquiry into the comparability between the two) many contend that the retributivist theories cannot, in fact, justify any type of decision regime, the present binary regime included. Reiman and Van den Haag, for example, assert that the retributivist theories cannot justify the beyond reasonable doubt threshold, as it is inconsistent with the retributivist commitment to punishing the guilty: “Should we try to convict fewer innocents and risk letting more of the guilty escape or try to convict more of the guilty and unavoidably, more of the innocents? Retributivism (although not necessarily retributivists) is mute on how high standards of proof ought to be.”¹⁸⁷ Similarly, Michael Moore asserts that the retributivist approach no less justifies the relatively lower preponderance of evidence standard in the criminal sphere than it does the heightened reasonable doubt standard. In his opinion, absent any a-priori commitment to the appropriate systemic ratio between wrongful convictions and wrongful acquittals, “[t]he retributivist might adopt a principle of symmetry here—the guilty going unpunished is exactly the same magnitude of evil as the innocent being punished—and design his institutions accordingly.”¹⁸⁸ At the very most, then, retributivist theories embody pure ethics—while unable to lay an implementable normative groundwork upon which to evaluate different decision regimes. In neglecting systematic thinking, retributive theories cannot serve as a source of valid criticism against comparative decision-making.¹⁸⁹

¹⁸⁶ Luna, *supra* note 167, at 220 (discussing some of the difficulties entailed in “the practice of retribution”).

¹⁸⁷ Reiman & Van Den Haag, *supra* note 125, at 242.

¹⁸⁸ MOORE, *supra* note 179, at 157.

¹⁸⁹ Moreover, as a practical matter, epistemic mistakes in the administration of criminal justice are unavoidable: “[B]ecause punishment is administered by the state rather than by god ... it is inevitable that the practice of punishment will suffer from (at least) each of the following three deficiencies: It will be tremendously expensive, subject to grave error, and susceptible to enormous abuse” Douglas Husak, *Why Punish the Deserving?*, 26 *NOUS* 450, 451 (1992). It is therefore impossible to ensure that both mandates—punishing the guilty and not punishing the innocent—are simultaneously upheld. Retributivists are thus susceptible to the same criticism they direct at consequentialist approaches. For so long as they do not out-and-out reject criminal punishment, retributivists can be accused of subjecting the innocent to punishment to further the goal of punishing the guilty—and thus—of turning them into a means for furthering external goals:

The retributivist remains willing to trade the welfare of the innocents who are punished by mistake for the greater good of the punishment of the guilty, and thus it would seem committed to sacrificing—“using” the mistakenly convicted for the benefit of society in general ... by appealing to the inevitability of mistaken convictions ... retributivism itself can be accused of using convicted offenders, and thus stripped of its cloak of Kantian respectability.

David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1632 (1992) [hereinafter Dolinko, *Three Mistakes of Retributivism*]. The common retributivist response to these claims is that an a-priori systematic error is quite different from an ex-post random error. Retributivist theorists contend that adopting a criminal penal system, with all of its accompanying dangers, creates the risk of unjust desert for an unidentified public, but that it is qualitatively different from exposing specific defendants to a deliberate risk. See, e.g., Larry Alexander, *Retributivism and the Inadvertent Punishment of the Innocent*, 2 *LAW & PHIL.* 233, 236 (1983). These theorists base the moral legitimacy of the act of criminal punishment also on the doctrine of double effect propounded by Aquinas, under which moral norms are absolutely binding only

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E. The Mixed Retributivist-Utilitarian Critique

Under the retributivist line of criticism, a shift to a comparative punishment regime would generate moral harm that cannot be counterbalanced by any given social utility. I will now consider a different type of hypothetical objection to probabilistic sentencing—namely, that the *specific* tradeoff that can be expected in the framework of a comparative regime would be *morally* flawed. This line of criticism can be described as a mixed retributivist-utilitarian critique in that it rests on retributive foundations yet recognizes the possibility, in principle, of creating a moral balance between wrongful conviction and other social values.

Many attempts have been made to reconcile the consequentialist and retributivist theories of punishment, with Hart's punishment theory at the center of these efforts.¹⁹⁰ Hart's justification for criminal punishment is two-layered. The first layer, termed the "general justifying aim," relates to the justification of the general practice of punishment and rests on consequentialist grounds. It addresses the useful outcomes of criminal punishment in terms of deterrence. The second layer—the "distribution" component—relates to the distribution of punishment resources and the question of who should be punished. The answer to this second question, according to Hart, is deontological and grounded on retributivist precepts: only those who have committed a crime should be punished. Hart offered a similar mixed retributive-utilitarian approach with regard to the severity of the criminal sanction. While still

in cases of intentional outcomes. THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 225-27 (W. Baumgarth & R. Regan eds., 1988). An action that breeds concurrent positive and negative results will be considered illegitimate from a moral perspective if the negative result is an intentional outcome—whether as an end or as a means to other ends. The action will be allowed, in contrast, if the negative byproduct—even though anticipated in advance—is not intended as a final end or an intermediate means. See Michael Moore, *Justifying Retributivism*, 27 ISRAEL L. REV. 15, 20 (1993); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507, 512 (1997). The retributivist rationale for the institution of criminal punishment is, therefore, that the difficult outcome of wrongful convictions, despite being known and anticipated in advance, is not intentional—not as a final end nor as a means for punishing the guilty. In other words, under the retributivist paradigm, the moral legitimacy of criminal proceedings and the act of punishment is determined according to the efforts taken to prevent wrongful conviction and not the outcome of those efforts. In this sense, the wrongful conviction of a given defendant under the existing criminal proceedings model, whereby he receives the maximum punishment of ten years in prison, is not comparable to the parallel scenario likely to arise under a probabilistic punishment model: the conviction of a number of innocents by a lower standard of evidence and the infliction of one year of imprisonment on each. Christopher, *supra* note 166, at 901; Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714 (1981). There is a clear difference between the two scenarios even if we assume that their outcomes are identical from a substantive perspective. This difference is rooted in the fact that the first wrongful conviction is not systematic to the criminal proceeding or one of its intentional outcomes. In contrast, the wrongful convictions in the second scenario are a built-in component of the proceeding and unjust from the perspective of the decision regime itself. Here the question arises as to whether the probabilistic punishment model also meets the standards set in the double effect doctrine, and there may be conflicting views in this regard. For an analogous discussion in the context of reducing the criminal standard of evidence, see Christopher, *supra* note 166, at 914. For additional criticism of the application of the double effect doctrine, see Dolinko, *Three Mistakes of Retributivism*, *supra*, at 1635.

¹⁹⁰ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8-11 (Oxford Univ. Press 1992) (1968). For a discussion of these attempts, see Christopher, *supra* note 166, at 859.

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insisting that the punishment should be consistent with principles of just desert, he also acknowledged the possibility of deterrence goals constraining the level of punishment.¹⁹¹

Despite Hart's incorporation of deterrence elements into the theory and justification of criminal punishment, the comparative punishment model may still not align with it.¹⁹² From the Hartian perspective, the difficulty with a probabilistic tradeoff that renders more convictions but less severe penalties on average is not rooted in the reduction of the sanction's severity per se; for as per Hart himself, deterrence goals can constitute an upper limit to punishment. Rather, what is problematic is the possibility of imposing criminal punishment on defendants whose guilt has not been proven beyond all reasonable doubt. This potential for criminal punishment absent moral guilt could clash with the distributional component of Hart's justification and, thereby, form the crux of Hartian resistance to a comparative decision-making model.

F. The Mixed Retributivist-Utilitarian Critique Reconsidered

In response to the mixed retributivist-utilitarian objection, it is my claim that considerations of distribution may actually support the comparative model. Under the prevailing binary decision regime, minimal differences in the probative weight of the incriminating evidence result in dramatic discrepancies in the outcomes of the judicial process. Whereas when the probability of the occurrence of the events under deliberation exceeds the reasonable doubt threshold, even slightly, full-blown punishment is imposed-- when the probability of criminal culpability falls slightly below the evidentiary threshold, the defendant is acquitted and completely exempt from criminal punishment. It can be argued that such dramatic divergences in outcome due to only minimal epistemic disparities violate the principles of justice and fairness. In other words, the binary dichotomy of the current decision-making model may be contested in light of its effect on the distribution of punishment across the class of defendants. The distributive outcome of this all-or-nothing regime is that many of the factually guilty are released from all responsibility and go totally unpunished, while a minority of defendants incurs a high level of criminal punishment, in excess of what they would have received were the punishment resources distributed across a wider group of defendants. Although all of these potential defendants are exposed ex ante to the same punishment expectancy, there may be room to claim, that ignoring the ex-post distributive outcomes of the binary system may nonetheless be problematic. The distributive tradeoff under the comparative model could be more appropriate in this context: turning the dichotomy into a continuum and punishing a greater number of the factually guilty while reducing sanction severity would reduce the penal disparities between cases of similar epistemic infrastructure. Comparative sentencing lessens the ex-post outcome distortions amongst cases exhibiting minimal epistemic divergences, leading to a more just and equal distribution of punishment across the general class of defendants.

¹⁹¹ Hart, *supra* note 190. For an elaborate discussion of Hart's distinction between the "general justifying aim" of punishment and its distribution, see Christopher, *supra* note 166, at 868.

¹⁹² This is a central point of criticism made by retributivists against Hart's approach. See, e.g., Igor Primoratz, *Mixed Rationales*, in *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 560 (Christopher Berry Gray ed., 1999).

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Finally, there may be room to claim, that when considering the moral tradeoff, it is important to weigh not only the rights of the accused but also those of the victims of crime. Both the classic retributivist approach and the distribution component of Hart's theory can be criticized for disregarding the actual and potential victim of the crime.¹⁹³ Similarly to how the deterrence approach uses the defendant to realize external social goals, classical retributivism makes instrumental use of the present and future victims of crime, in its protection of defendants as subjects.¹⁹⁴ Prominent contemporary retributivist scholars, such as Fletcher, have even proposed expanding the conception of retribution so as to include also victims.¹⁹⁵ Accordingly, a regime of comparative punishment that opens the door to a balancing that incorporates victims' rights might enjoy a higher measure of moral legitimacy.

G. The Institutional Critique

The comparative punishment model can also be attacked on institutional and political grounds. Criminal law, as a distinct part of the law wielded by state organs, is the strongest expression of the state-law link. Criminal punishment is a potent manifestation of state coercion and poses the most substantial challenge to the justification of state action: "If punishment can be justified, so can other, lesser, forms of coercive state action. If it cannot, what's the point of legitimizing, say, taxation?"¹⁹⁶ Questions of political legitimacy arise in each of the criminal law arenas, from the very definition of the criminal offense (substantive criminal law arena), to its implementation in concrete cases (procedural criminal law arena), to its enforcement through the imposition of criminal punishment (the enforcement arena).¹⁹⁷

In principle and as a general rule, the liberal state is committed to ideological neutrality toward the different conceptions of good and therefore must refrain from moral denunciation, which is perceived as an infringement on individual autonomy. Yet the state's act of defining the criminal offense is aimed entirely at giving certain conceptions of good precedence over competing antiethical notions and at imposing these moral stances on the public-at-large. Criminal law thus constitutes a significant exception to the liberal principle of nonintervention.¹⁹⁸ The same holds true for the procedural and enforcement arenas: by

¹⁹³ Christopher, *supra* note 166, at 874 (claiming that "though deterrence theories may be unjust in justifying the intentional punishment of innocents, retributivism is unjust in exposing the innocent general public (innocent future crime victims) to a greater risk of victimization").

¹⁹⁴ *Id.* at 951 ("On the one hand, incorporating the interests of the victim into a determination of the deserved punishment of the victimizer seems incompatible with retributivism. On the other hand, using one set of persons (crime victims) as mere means in order to treat another set of persons (offenders) as ends in themselves, if not incompatible with retributivism, renders retributivism subject to one of its principal criticisms of consequentialism.").

¹⁹⁵ George Fletcher, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 188 (1995), *cited in* Christopher, *supra* note 166, at 951.

¹⁹⁶ MARKUS DIRK A. DUBBER, POLITICAL THEORY OF CRIMINAL LAW: AUTONOMY AND THE LEGITIMACY OF STATE PUNISHMENT (2004), *available at* <http://ssrn.com/abstract=529522>.

¹⁹⁷ Markus Dirk Dubber, *The Criminal Trial and the Legitimation of Punishment*, in *THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS* 85 (R.A. Duff et al. eds., 2004).

¹⁹⁸ See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307, 310 (2004) ("Any theory of state punishment in a liberal democracy must grapple with the problem of political legitimacy."). See also DUFF, *supra* note 183, at 35 ("A normative theory of punishment must include a conception of crime as that which is to be punished. Such a conception of crime presupposes a conception

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punishing a person, the state not only strips him of property and liberty or otherwise inflicts on him pain and humiliation, it also brands him as morally culpable. In so doing, the state acts in a way that exceeds its ordinary capacity and authority in a liberal democracy: "Punishment ... is prima facie illegitimate; in punishing its constituents, the state harms the very people it is supposed to protect, by interfering with the very rights it claims to guarantee, in the name of guaranteeing them"¹⁹⁹ The extraordinary functions that the state performs in the various arenas of criminal law raise a host of political legitimacy issues. Against this background of exceptional state interference in individual autonomy and in light of the concern that this unique capacity will be exploited for wrongful concentration of coercive state power, the traditional liberal view advocates restricting substantive criminal law to the *mala per se*.²⁰⁰ On the procedural front as well, the heightened procedural safeguards extended to defendants and the requirement that conviction be based on a high likelihood of guilt are intended to circumscribe the state's right to exceed its ordinary role and ascribe moral culpability to its citizens, while at the same time ensuring limited use of this coercive state power:²⁰¹ "Risk-allocating decisions ... determine the application of state power against individuals Allocation of the risk of error therefore is a matter of political morality."²⁰² The binary decision-making regime, which restricts the imposition of criminal punishment to situations in which the defendant's guilt is proven beyond reasonable doubt, is thus intended to restrain the coercive power of the state.²⁰³ Meeting the heightened requirement for accuracy is considered imperative for authorizing such extraordinary state action. The comparative model, in contrast, enhances the coercive capacity of the state, by expanding the range of situations in which individuals are exposed to moral denunciation to include even instances in which guilt is not proven beyond reasonable doubt. This extension of the space of coercive state action, it can be asserted, both violates the liberal principle of nonintervention and lacks political legitimacy.

H. The Institutional Objection Reconsidered

As explained above, the comparative model is intended to handle situations in which the setting of a high epistemic threshold leads to systematic under-deterrence, due to the existence of evidentiary obstacles. There may be room to claim, however, that insisting on the insurmountable beyond reasonable doubt threshold under such circumstances-- as prescribed by the binary regime--effectively precludes the execution of the substantive social choice to prohibit the underlying criminal activity. Thus, the very inclusion of a particular

of the criminal law—of its proper aims and content, of its claims on the citizen. Such a conception of the criminal law presupposes a conception of the state—of its proper role and functions, of its relation to its citizens. Such a conception of the state must also include a conception of society and of the relation between state and society.”).

¹⁹⁹ Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443, 443 (2004) (“When the state punishes a person, it treats him as it ordinarily should not. It takes away his property, throws him in prison, or otherwise interferes with his liberty.”).

²⁰⁰ For further discussion of this claim, see Bierschbach & Stein, *supra* note 166, at 1254.

²⁰¹ See George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 888-90 (1968) (explaining that the heightened burden of persuasion in criminal trials is attributable to the need to justify the use of criminal sanctions as a means of moral condemnation).

²⁰² ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 13 (2005).

²⁰³ See Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335 (2000) (claiming that the presumption of innocence is a presumption of inviolability).

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activity in the list of criminal offenses expresses the social choice to deter individuals from engaging in that activity. Yet heightened evidentiary requirements in the face of systematic proof barriers effectively prevent the conviction of individuals who engage in the underlying forbidden activity. This leads to a failure to realize the social choice with respect to that activity and to a *de-facto* deviation from the predetermined processes for resolving political disputes in society. In such cases, it is in fact the very *deviation* from the maximal evidentiary requirements that would enable the effective execution of the substantive social choice. The comparative model therefore validates the accepted social processes for assembling the collective value scale from the conflicting visions of the good life.²⁰⁴ This line of thought better aligns with the Rawlsian understanding of autonomy as contingent upon society's ability to predetermine the processes by which to choose between conflicting social values.²⁰⁵

The institutional criticism can be qualified in yet another respect, which relates to the victims of crime and the state-victim link (existing parallel to the state-defendant axis). There may be room to claim, that the liberal state's duty toward victims of crime and the need to balance their rights with those of defendants can serve as possible justifications for expanded use of the state's coercive power, as would occur under a probabilistic regime. Such an interpretation of the liberal model is naturally debatable and raises a host of possible objections,²⁰⁶ a deliberation that is beyond the scope of this article. Suffice it to say for present purposes that upholding victims' rights, if we assume them to be consistent with the underpinnings of the liberal tradition, can constitute yet another rationale for the expanded space of state coercion under the comparative decision-making model.

I. Implementational Drawbacks

The discussion thus far has addressed fundamental normative criticisms of a probabilistic decision-making regime. The comparative model can also be attacked on implementational grounds, in light of potential drawbacks related to its practical application by the courts. I will turn to address possible implementation difficulties of comparative sentencing that could arise due to cognitive biases in the judicial arena.

According to the behavioral economics literature, the choices that individuals make tend to be context-dependent, in that the way in which the options are presented before the choosing subject can influence, in an irrational manner, the ultimate decision that he makes. One such cognitive bias is extremeness aversion, also known as the compromise effect. This cognitive effect manifests in decision-makers' tendency to prefer choice categories that are formulated as intermediate categories rather than options that are framed as end categories. In light of this effect, the rate of preference of a given alternative can be expected to increase when it constitutes an intermediate option in the array of choices and to drop when it is positioned as

²⁰⁴ A similar measure (but in the opposite direction) was taken by Bierschbach & Stein, *supra* note 166, at 1254.

²⁰⁵ JOHN RAWLS, *POLITICAL LIBERALISM* 98 (expanded ed. 2005).

²⁰⁶ For further discussion of the claim that victims' rights conflict with the premises of the liberal model, see Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111 (2001).

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an extreme alternative along the array of choices.²⁰⁷ Thus, for example, the rate of choice of Alternative B relative to the choice of Alternative C is expected to be greater in the [A,B,C] array of choices than the [B,C,D] array of choices.²⁰⁸ Simonson & Tversky in fact found that adding a third extreme possibility to an existing array of two options of choice is likely to lead, paradoxically, to an increase in the level of absolute preference of one of the first two original alternatives. In one of their studies, the examinees were asked to choose between two types of cameras: a simple camera priced at \$169.99 and a sophisticated camera costing \$239.99. The distribution of choices across the described array was approximately 50-50. At the next stage, the researchers added a third option to the array of choices: a super-sophisticated camera costing \$469.99. At this point, the rate of choice of the simple camera plummeted from 50% to 22%, whereas the popularity of the sophisticated camera rose from 50% to 57%. The rate of preference for the super-sophisticated camera was 21%.²⁰⁹

Alongside the compromise effect, the behavioral economics literature has also identified the decoy phenomenon (considered to be part of the contrast effect).²¹⁰ This refers to the preference of choice options that share certain features with other alternatives, over discrete options. Studies have shown that splitting choice categories into two sub-categories will increase the aggregate rate of choice of those sub-categories; that is, the rate of choice of Alternative B from choice array [A,B] will be lower than the rate of choice of Alternatives B1+B2 in the alternatives array of [A,B1,B2].

These cognitive biases manifest in a wide range of decision-making contexts, including in the framework of judicial proceedings.²¹¹ The range of decision alternatives from which judges and juries are required to choose, and the way in which these alternatives are framed, can be expected to influence the substantive outcomes of trials.²¹² In simulative experiments, it was found that mock jurors were tainted by the compromise effect and demonstrated an unequivocal preference for the intermediate alternative of partial criminal responsibility (by reason of insanity) when presented with three options: full acquittal, partial responsibility, or full conviction.²¹³ From another study it emerged that when the murder category was divided into two categories of unpremeditated and premeditated murder, there was an impact on the

²⁰⁷ Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281 (1992).

²⁰⁸ Ran Kivetz et al., *Alternative Models for Capturing the Compromise Effect*, XLI J. MARKETING RES. 237, 238 (2004).

²⁰⁹ Simonson & Tversky, *supra* note 207, at 290.

²¹⁰ See Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 288 (1996) (defining the contrast effect as "the observation that the same option is evaluated more favorably in the presence of similar options"). For further description of the decoy/contrast effect, see Lillquist, *supra* note 6, at 627.

²¹¹ Kelman et al., *supra* note 210, at 303 (claiming that the discovery of context effects in experimental simulations constitutes prima-facie evidence that these effects are likely to influence jurors and judges in the real world).

²¹² Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL'Y & L. 622, 670 (2001) (surveying studies that have investigated the impact of verdict or sentencing options on jury decision-making and observing that "collectively, these studies suggest that allowing juries the opportunity to convict the defendant on a lesser charge has a substantial impact on their verdicts").

²¹³ Norman Finkel, *The Insanity Defense: A Comparison of Verdict Schemas*, 15 LAW & HUMAN BEHAV. 533, 545 (1991), *cited in* Bray, *supra* note 11, at 1314 (demonstrating that the third option verdicts (GBMI) were perceived as preferable to NGRI judgments and to guilty verdict judgments).

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choice between the categories of murder and manslaughter, with a significant augmentation of the murder category presenting.²¹⁴

Given these cognitive biases, the switch to a comparative regime—where decision-makers would face a more varied range of options than the simple bipolar choice of guilty or innocent—could result in an irrational tendency to convict. With respect to the extremeness aversion bias, for example, the concern could be raised that under a comparative punishment regime, judges and jurors would view the intermediate alternatives of partial conviction at lower levels of punishment (conviction by clear and convincing evidence or conviction by preponderance of the evidence) as attractive choices per se and would choose them at a rate in excess of what is mandated by the probative weight of the evidence presented to them. The inclusion of such intermediate conviction options could lead to an over-tendency on the part of judges or juries to pick these mid-point alternatives over the extreme options of full acquittal or full conviction, even when the probative weight of the incriminating evidence dictates otherwise. In light of the extremeness aversion phenomenon, therefore, shifting to a comparative decision-making structure would likely improve the fate of guilty defendants while worsening that of the factually innocent.

Moving from a binary to a graded decision structure can also be expected to produce the cognitive effect of the decoy bias: splitting the categories of conviction into many sub-categories (conviction beyond reasonable doubt, conviction by preponderance of the evidence, and so on) could create an irrational excess bias toward the conviction end of the spectrum. In other words, the fact that under the comparative model, the supra-category of “conviction” is the conceptual source of the additional intermediate alternatives could, in itself, lead to the category’s fortification relative to the possibility of acquittal. Giving decision-makers numerous “guilty” options instead of just one could result in their choosing “guilty” more often, simply due to the decoy effect of multiplicity.²¹⁵

It is important to stress that extremeness aversion and the decoy bias represent deviations from rational choice. For these phenomena arise unrelated to the effect produced by the exposure to the evidence presented at trial and are connected exclusively to the structural characteristics of the choice categories. Of concern is the fact that a shift from a binary spectrum of choice (innocent/guilty) to a probabilistic array of choices (innocent/guilty by preponderance of evidence/guilty by clear and convincing evidence/guilty beyond reasonable doubt/guilty beyond all doubt) may result in the effective elimination of the possibility of being acquitted at trial, including for innocent defendants. Accordingly, the criticism in this context would be that what seems at first glance to be a move that would generate utility in terms of punishment and deterrence is more likely to rapidly turn into social harm, due to the excessive increase in wrongful convictions.

²¹⁴ V. Lee Hamilton, *Obedience and Responsibility: A Jury Simulation*, 36 J. PERSON. & SOC. PSYCHO. 126 (1978). This study compared decision-making under the verdict options of “not guilty” (NG) and “guilty of premeditated murder” (G) to decision-making under the choice set of “not guilty,” “guilty of unpremeditated murder,” and “guilty of premeditated murder.” The conviction rate was lower when only two verdict options were available.

²¹⁵ See Lillquist, *supra* note 6, at 653 (claiming that presenting juries with more than one guilty option would result in an increase in the overall number of convictions). See also Bray, *supra* note 11, at 1315 (estimating that juries will acquit less often if presented with the option to convict on lesser-included offenses).

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J. Implementational Drawbacks Reconsidered

Extremeness aversion and the decoy phenomenon cast a cloud over the proposition to adopt a comparative regime and cannot be ignored. However, their ramifications must also be taken with a grain of salt: First and foremost, professional judges—as opposed to jurors, in relation to whom (and their counterparts) the described cognitive effects have been studied—are less vulnerable to these behavioristic biases, as they are repeat players in the judicial arena. As serial decision-makers, they undergo learning processes that reduce deviations from rational choice-making.²¹⁶ The susceptibility of professional judges to the specific cognitive effects of extremeness aversion and the decoy bias has yet to be investigated in the literature. However, studies conducted on professional judges regarding other cognitive biases (such as the representativeness heuristic or hindsight bias) are instructive as to the fact that judges decide in a less cognitively-biased manner than do jurors²¹⁷ and function better than one-shot decision-makers in the judicial arena.²¹⁸

Moreover, there are those who do not acknowledge the existence of these cognitive biases—even with respect to lay men- and who refute the irrationality attributed to the change in the distribution of choices following the introduction of intermediate categories of choice.²¹⁹ They contend that the very presentation of additional choice alternatives enriches the decision-maker's informative base and that it is in fact the addition of this new information that makes the change in the relative preference of the pre-existing alternatives compatible with the rational choice model.²²⁰ To demonstrate with our camera test-case: The rational choice explanation for the change in the distribution of choices between the simple \$169.99 camera and the sophisticated \$239.99 camera, following the introduction of the super-sophisticated \$469.99 camera, is that introducing this third choice provided, in itself, information as to the characteristics of the sophisticated \$239.99 camera. By learning about the \$469.99 option, consumers were better able to understand and evaluate the features of the \$239.99 camera; it was this new information—rather than the mere structure of the set of options—that indicated the preferability of the \$239.99 option. This alternative explanation, which modifies the rational choice model to include assumptions about additional information, can also have indirect implications for the operation of the comparative model. It is possible to argue that the very multiplicity of conviction and proof categories under the comparative model would introduce new information to the jury and, in light of the contrast between the varying proof standards (similar to the contrast between the different cameras in

²¹⁶ Erica Beecher-Monas, *Heuristics, Biases, and the Importance of Gatekeeping*, 2003 MICH. ST. L. REV. 987, 1002 (2003) (“[J]udges are repeat players in the way that juries are not. Repeat exposure to the decision-making task—at least in the presence of feedback—can improve performance.”).

²¹⁷ On judges' lesser susceptibility to the hindsight bias relative to mock jurors, see Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998). On the better performance of professional judges in terms of the representativeness heuristic, see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001). See also Charles R. Drahozal, *Mandatory Arbitration: A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROB. 105, 119 (2004).

²¹⁸ This is not the final word on jurors either. It is possible that the very awareness of the existence of such biases—due, for example, to explicit direction from the court—might mitigate their impact.

²¹⁹ See, e.g., Lillquist, *supra* note 6, at 667 (discussing the possibility that additional choices increase the informative basis presented to decision-makers and that their intermediate choices are affected by this additional information, rather than the framing of the choices between the original possibilities).

²²⁰ *Id.*

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the previous example), would clarify the probative gaps existing among them. This effect, in turn, would assist in preventing the current erosion of the probative value of the beyond reasonable doubt standard. Indeed, many studies indicate an effective erosion of the criminal standard of proof, finding that the proof burdens that are set in practice are significantly lower than the high measure of certainty attributed to the reasonable doubt standard in the theoretical literature.²²¹ Jurors tend to be satisfied with relatively low levels of certainty as the basis for criminal conviction.²²² It also emerges from the literature that there is variability in the evidence requirements across the different offense categories.²²³ It can be assumed that one of the factors in this erosion process is the binary decision structure, under which the option of maximal conviction is situated immediately opposite from acquittal alternative. Under a comparative regime with four or five different levels of proof and conviction,²²⁴ the contrast between acquittal and conviction beyond reasonable doubt will intensify.²²⁵ Thus, decision-makers may be expected to infuse stricter probative content into—as well as require a greater extent of proof for—the beyond reasonable doubt standard.

In sum, the effect on judicial decision-making of the introduction of multiple intermediate conviction categories is essentially an empirical question, which can be fully answered only after the practical implementation of a comparative sentencing regime. At this point, these hypothetical objections do not seem sufficient to completely rule out the viability and desirability of a probabilistic decision-making regime.

CONCLUSION

The bipolar conceptualization of the criminal verdict has been established to the point of being considered an axiom. The central purpose of this article was to bring to light the alternative of a probabilistic decision-making regime. As demonstrated, in contrast to the prevalent rhetoric of the partitioning of the two phases of the criminal trial, the current system is overrun by legal practices that reflect probabilistic decision-making logic. Central doctrines and practices in the criminal law world—such as the residual doubt doctrine, the recidivist premium, and even the jury trial penalty—have paved the way for incorporating certainty of guilt into the extent of punishment meted out. Moreover, the article showed, the comparative sentencing alternative is supported from a normative perspective by deterrence considerations. In situations in which the act of punishment comes at a social cost—which is contingent upon the severity of the sanction (namely, in all incarcerable offenses)—comparative punishment would lead to an efficient exploitation of punishment resources and to a Pareto improvement in the overall level of deterrence. The comparative model can also

²²¹ Lillquist, *supra* note 27, at 111 ("The traditional understanding assumes that a high level of certainty is required before jurors will convict a defendant, but the data show that this is not true. Instead, it is clear that jurors will convict at a level well below that which the traditional understanding predicts.").

²²² For an elaborate study pointing to substantial discrepancies between judges' expectations of juries' understanding of the beyond reasonable doubt standard of proof and juries' actual interpretations, see Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom*, 5 LAW & SOC'Y REV. 319, 322 (1971).

²²³ Lillquist, *supra* note 27, at 111 ("the studies to date also strongly suggest that the precise level of certainty required in any criminal case will vary, depending on a number of variables").

²²⁴ Going from acquittal, to conviction on preponderance of evidence, to conviction on clear and convincing evidence, to conviction beyond all reasonable doubt and ending with conviction beyond any residual doubt.

²²⁵ For an analogous claim in the context of jury sentences, see Lillquist, *supra* note 6, at 669.

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remedy situations of systematic under-deterrence resulting from evidentiary barriers that make the reasonable doubt standard of proof effectively insurmountable for the prosecution. It has also been shown that probabilistic sanctions are compatible with fairness and justice considerations, as they lead to a fairer ex-post distribution of criminal punishment. The possible drawbacks of the comparative regime, whether based on ex-post error cost claims or expressive, retributivist, political, or behaviorist grounds, were shown to fail to collapse the model. At the very most, these claims serve to circumscribe the scope of application of a comparative decision-making regime in the criminal sphere. This notwithstanding, however, the question of the regime's parameters is secondary in a reality in which the bipolar decision model is construed as the exclusive option for decision-making in criminal law. The ideal of binary decision-making at trial was questioned already by Hume, when he made the following claim:

[T]ho' abstract reasoning, and the general maxims of philosophy and law establish this position, that property, and right, and obligation admit not of degrees, yet in our common and negligent way of thinking, we find great difficulty to entertain that opinion, and do even secretly embrace the contrary principle... . An action must either be perform'd or not. The necessity there is of choosing one side in these dilemmas, and the impossibility there often is of finding any just medium, oblige us, when we reflect on the matter, to acknowledge, that all ... obligations are entire. But on the other hand, when we consider the origins of ... obligation and find that they depend on public utility, and sometimes on the propensities of the imagination, which are seldom entire on any side; we are naturally inclin'd to imagine, that these moral relations admit of an insensible gradation...Half rights and obligations, which seem so natural in common life, are perfect absurdities in their tribunal; for which reason they are often oblig'd to take half arguments for whole ones, in order to terminate the affair one way or other.²²⁶

In this article, I have sought to present a decision model that does not mandate that we “take half arguments for whole ones” and that recognizes the possibility of continuity and gradation in the criminal verdict. It is my hope that this will serve as a preliminary opening for continued dialogue on the subject of the place of comparative sentencing in the criminal arena and for a reconsideration of the bipolar ideal.

²²⁶ DAVID HUME, A TREATISE OF HUMAN NATURE 530-31 (Selby-Bigge ed., Oxford Univ. Press 1888), quoted in Joseph Jaconelli, *Solomonic Justice and the Common Law*, 12 OXFORD J. LEGAL STUD. 480, 481 (1992).