Half the Guilt

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Criminal law conceptualizes guilt and the finding of guilt as purely categorical phenomena. At the end of trial, the defendant is pronounced either "guilty" or "not guilty" of the charges made against her, excluding the possibility of judgment of degree. Judges or juries cannot calibrate findings of guilt to various degrees of epistemic certainty by pronouncing the defendant "probably guilty," "most certainly guilty," or "guilty by preponderance of the evidence." Nor can decision makers qualify the verdict to reflect normative or legal ambiguities. Findings of guilt are construed as asserting factual and legal truths. The penal results of conviction assume similar "all or nothing" properties: punishment can be calibrated, but not with the established probability of guilt.

The prevailing decision-making model, with its 'on-off' formulation of guilt, is so broadly established that it is considered an axiom—but there is nothing natural or pre-political about it, nor about the derivative distribution of punishment. This Article attempts to expose the hidden potential rooted in the construal of criminal verdicts as judgments of degree, by drawing three hypothetical manifestations of a linear conceptualization of conviction and punishment in the criminal trial and plea-bargaining arena. It also offers a normative assessment of converting criminal verdicts from categorical decisions to continuities.

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Introduction

The phenomenon of legal discontinuity, whereby minute changes in legal input result in dramatic discrepancies in legal output,[1] is at its most blatant in the context of criminal procedure. When the incriminating evidence against the defendant falls even slightly short of the beyond-a-reasonable-doubt threshold, the defendant is categorically acquitted and exempt from all punishment. Satisfaction of this standard of proof, even by a narrow margin, can result in a life sentence or even capital punishment. The prevailing decision-making model, with its yes-no formulation of guilt and sentencing, is so broadly established that it is considered axiomatic. Both legal doctrine and academic discourse take these characteristics of criminal procedure as a given. However, contrary to this common wisdom, there is nothing natural or pre-political in the categorical conceptualization of criminal guilt, nor in the derivative sentencing regime. In fact, in the ancient juridical worlds, criminal guilt and punishment assumed a linear structure. Thus, under Talmudic and Romano canonical law and, later, under medieval English and Continental law, criminal guilt was not conceptualized in an "on-off" manner. Partial compliance with proof requirements resulted in partial conviction and in partial imposition of punishment. Thus, "full proof" requirements for serious crimes entailed the incriminating testimony of at least two witnesses,[2] but the testimony of one witness or the testimony of two witnesses who were insufficiently credible could amount to "half proof" which justified the imposition of a lenient sanction.[3] Michel Foucault termed this the "Continuous Gradation" principle:

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1 Adam Kolber, Opening Remarks of the Theoretical Inquiries in Law Symposium held at Tel Aviv University: Legal Discontinuities (Dec. 29, 2019), https://ssrn.com/abstract=3597427.

2 *See* 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); 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."); The "full proof" requirement could also be fulfilled when the accused confessed to the alleged crime.

3 Such as imprisonment, fine, or legitimization of investigatory means. *See:* John H. Langbein, Torture and the Law of Proof: Europe and England in the

> The different pieces of evidence did not constitute so many neutral elements, until such time as they could be gathered together into a single body of evidence that would bring the final certainty of guilt. Each piece of evidence aroused a particular degree of abomination. Guilt did not begin when all the 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. The suspect, as such, always deserved a certain punishment; one could not be the object of suspicion and be completely innocent. Suspicion implied an element of demonstration as regards the judge, the mark of a certain degree of guilt as regards the suspect and a limited form of penalty as regards punishment. A suspect, who remained a suspect, was not for all that declared innocent, but was partially punished. When one reached a certain degree of presumption, one could then legitimately bring into play a practice that had a dual role: to begin the punishment in pursuance of the information already collected and to make use of this first stage of punishment in order to extort the truth that was still missing.[4]

Unlike the linear ("continuous gradation") conceptualization of criminal guilt and distribution of punishment in the ancient juridical worlds, today's verdicts ideally assume the categorical structure of an "on-off" decision.[5] Criminal conviction, in its ideal form, is construed as a cohesive and singular phenomenon, with the rich facets underlying criminal culpability reduced to the one-dimensional dichotomy of conviction or acquittal. Closer scrutiny, however, reveals some forms of deviation from the "on-off" configuration

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Ancient Regime 47 (1976) (describing the development of the system of full proof and half proof and discussing the practice of *Verdachtstrafe*, "punishment upon suspicion" – partial punishment upon the court's belief in a defendant's guilt, without full proof).

4 Michel Foucault, Discipline and Punish: The Birth of the Prison 42 (1995); *See also* Edward Peters, Torture 84 (1996) (claiming that in the Romano-canonical systems of the ancient world, it took evidence to acquit as well as to convict, and when evidence for either was lacking, the imposition of partial punishments filled the epistemic gap).

5 Adam J. Kolber, *Smooth and Bumpy Laws*, 102 Calif. L. Rev. 655, 671 (2014).

of guilt in prevailing practice,[6] as well as in central criminal law doctrines (including "residual doubt," "the recidivist premium," or "the jury trial penalty").[7]

In what follows, I would like to offer a broadening of legal imagination and to unearth the hidden potential of further deserting the "on-off" categorization of conviction and punishment in each of the three spheres of criminal justice—substantive criminal law, criminal procedure, and plea bargaining. In the context of *substantive criminal law*, I would like to discuss the deviation from the categorical model in the form of calibration of severity of punishment

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6 "A criminal trial might be nominally required to end with a verdict of innocence or guilt but, in reality, judges and juries convert these categories to continuities by adjusting prison sentences or other penalties." Saul Levmore, *Probabilistic Disclosures for Corporate and other Law*, 22 Theoretical Inquiries L. 263, 270 (2021).

7 For example, 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. On the sentencing plane, it facilitates correlativity between severity of punishment and certainty of guilt. On the culpability level, it leads to the effective fragmentation of the category of conviction into two (informal) subcategories of "conviction on guilt beyond residual doubt" and "conviction on guilt beyond a reasonable doubt." Similarly, 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 latest alleged offense, for a person who has committed past offenses is more likely to be involved in subsequent criminal activity. Submission of information regarding past convictions thus 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. For further discussion of how the doctrines of "residual doubt," "jury trial penalty," or "the recidivist premium" reflect a probabilistic conceptualization of guilt and punishment. *see* Talia Fisher, *Conviction without Conviction*, 96 Minn. L. Rev. 833 (2012); For more on probabilistic sentencing, see Adam Kolber, *The Bumpiness of Criminal Law,* 67 Ala. L. Rev. 855 (2016); Jacob Schuman, *Probability and Punishment,* 18 New Crim. L. Rev. 214 (2015); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. Rev. 1297 (2000); Doron Teichman, *Convicting with Reasonable Doubt: An Evidentiary Theory of Criminal Law*, 93 Notre Dame L. Rev. 757 (2017). In light of these instances of continuous decision-making, which have already taken root in the criminal arena, there is room to contest the inexorableness of the categorical ideal model.

with the established certainty of guilt. In the *criminal procedure* context, I would like to examine a deviation from the monolithic conceptualization of criminal conviction under the prevailing 'on-off' model through the mirror-image calibration of the standard of proof necessary for conviction with the applicable punishment. My discussion of deviation from the on-off model in the realm of *plea bargaining* will be dedicated to a widening of the scope of the negotiable features of trial, so as to incorporate the standard of proof. Using these examples, I would like to demonstrate how a linear conceptualization of conviction and derivative distribution of punishment could allow for a better realization of the goals underlying the criminal justice system.[8]

It should be emphasized at the outset: the object of this Article is to serve as an intellectual tool for unearthing the possible manifestations and hidden potential of deviation from the categorical formulation of criminal conviction and punishment. It has no prescriptive pretensions. Therefore, the manifestations of the linear conceptualization of conviction and punishment underlying each of the arenas (substantive, procedural, plea bargaining) will be examined in isolation. Of course, if the aim of my project was to function as a policy-guiding tool, such acoustic separation between the conceptualization of guilt and sentencing in each of the three realms would be deemed artificial, mandating an examination of the interface.

While such policy-oriented examination is beyond the scope of this paper, one must bear in mind that all of the manifestations of the linear conceptualization of guilt and punishment that will be portrayed below (and others) can potentially operate in tandem. Thus, it is possible to imagine a legal regime in which the evidentiary threshold for conviction is flexible and reactive to the prospective sanction, while also operating as a default rule from which the prosecution and defense can choose to deviate. Similarly, it is possible to imagine such a legal regime whereby the decision-maker may further calibrate the severity of punishment so as to reflect any lingering doubt. As mentioned, for purposes of clarity and due to the analytical or "intellectual exercise" (rather than policy-oriented) nature of this Article, I will deal with the substantive, procedural, and negotiations facets in isolation, starting with the first:

8 This is not an exhaustive list. One can imagine a host of additional manifestations of a nonlinear conceptualization of guilt and conviction. While this Article cannot address all possibilities, it would seem that they can all be classified according to one of the three categories—i.e., implicating criminal law, criminal procedure, and plea bargaining.

I. Probabilistic Sentencing

The process of determining punishment in criminal trials is governed by the "threshold model": failure by the prosecution to meet the beyond-a-reasonable-doubt evidentiary threshold results in categorical acquittal, and thereby in no punishment. Satisfaction of the beyond-a-reasonable-doubt standard of proof leads to the polar-opposite result of categorical conviction, and punishment that is uniform and absolute in the sense that its severity is detached from any residual epistemic doubt as to the defendant's guilt. Under such an "all or nothing" distribution of punishment, once the defendant is found guilty beyond a reasonable doubt, the extent to which the court was persuaded of her guilt must not further affect the severity of the punishment. Likewise, when the incriminating evidence fails to cross the beyond-a-reasonable-doubt threshold, the judge or jury is prohibited from convicting the defendant while expressing the epistemic doubt in alleviation of the sentence. This decision-making model is institutionally embedded in the bifurcation of the criminal trial into two distinct phases of conviction and sentencing.

The alternative to the "threshold model" that I will be advocating is probabilistic sentencing. Such a penal regime would revolve around a plurality of convictions along the evidentiary spectrum and would allow for the introduction of conviction categories such as "conviction on guilt beyond a reasonable doubt," "conviction on guilt by clear and convincing evidence," and "conviction based on guilt by preponderance of the evidence."[9] Punishment would be correlated with each of these types of conviction and with the corresponding probability of guilt. For example, conviction on guilt

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9 Implementing a probabilistic regime would, naturally, open the door to a continuous spectrum of intermediate convictions of exact statistical rates—such as conviction at an 86% degree of certainty or 73% degree of certainty. However, in practice, the spectrum of choice can 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. The court draws its conclusions from categorical generalizations, making the judicial decision a crude assessment that is not necessarily 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. *See* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 Harv. L. Rev. 1187, 1197 (1979); Lawrence M. Solan, *Refocusing on the Burden of Proof in Criminal Cases: Some Doubts About Reasonable Doubt,* 78 Tex. L. Rev. 105, 126 (1999); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1372 (1971); State v. Cruz, 639 A.2d 534, 537 (Conn. App. Ct. 1994).

by preponderance of the evidence would result in a more lenient sentence than conviction on guilt beyond a reasonable doubt for the same crime.[10] Conviction beyond a reasonable doubt, but with lingering residual doubt, would yield a lesser punishment than conviction beyond any residual doubt for the same crime. Probabilistic sentencing of this type can be justified on utilitarian, expressive, and distributive justice grounds. In what follows, I shall attempt to demonstrate why (and to briefly sketch the circumstances under which) such a linear penal regime of probabilistic sentencing may prove superior to the "threshold model" in terms of fulfilling the social objectives of punishment. I will begin by examining probabilistic sentencing from the perspective of deterrence, and then move on to expressive considerations. The normative assessment of probabilistic sentencing will culminate with retributivism.

A. Deterrence Considerations

From a deterrence perspective there is room to claim that in cases where the criminal sanction generates a social cost that is a function of its severity (all incarcerable offenses), probabilistic sentencing will facilitate a higher level of deterrence as compared to the prevailing "threshold model," for any given level of social expenditure on punishment. Put differently, in the epistemic space above the beyond-a-reasonable-doubt (hereinafter BARD) threshold, correlating punishment to certainty of guilt is preferable, in terms of deterrence, to uniform punishment. Concurrently, in the epistemic space beneath the BARD threshold, imposition of partial sanctions that are correlated with probability of guilt may yield a higher deterrent effect, as compared to acquittal and no punishment. The starting point for this argument is Henrik Lando's path-breaking article from 2005, in which he 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.[11] As Lando pointed out, just as punishment of the factually innocent yields a lower deterrent effect than punishment of the factually guilty, punishment of defendants whose probability of guilt is

10 The interplay between civil and criminal trials can be viewed as a way in which our justice system accommodates probabilistic 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. It reflects satisfaction of the less demanding civil standard of proof as to the involvement in the alleged conduct, leading to the imposition of a "partial sanction" in the form of monetary compensation. I would like to thank David Sklansky and Adam Kolber for this point.

11 Henrik Lando, *The Size of the Sanction Should Depend on the Weight of the Evidence,* 1 Rev. L. & Econ. 277 (2005).

low yields a lower deterrent effect than identical punishment imposed upon defendants whose certainty of guilt is high. Since deterrence effectiveness lessens with diminishing probability of guilt, correlating the magnitude of the sanction with the certitude of guilt should yield more deterrence per given social expenditure on punishment. A move to a sliding scale punishment regime—based on certainty of guilt—would therefore increase deterrence utility per given level of social expenditure on punishment.

The abovementioned positive link between the deterrent effect of punishment and the certainty of the defendant's guilt is, indeed, imperative for understanding the deterrence advantage associated with probabilistic sentencing. Lando's argument for correlating severity of punishment with certainty of guilt rests upon this causal connection. In my opinion, though, the positive association between the certainty of guilt and the deterrent effect of punishment does not offer a complete justification for such a sentencing regime (even from a deterrence perspective). In fact, on its own, this association may actually lend support to the "threshold model," for deriving the deterrent effect of each unit of punishment (incarceration year) solely from certainty of guilt would seem to imply that punishment should be imposed only at the highest measures of certainty, thereby reinforcing the binary "all-or-nothing" regime, where conviction and punishment are limited to a narrow epistemic range of maximal levels of certainty. This conclusion, implicitly arising out of the Lando model, ought to be qualified by two additional variables, which impact the deterrent utility of years of imprisonment, and which should also be taken into account: the first is *the defendant's attitude to risk*; the second is the deterrence cost associated with *wrongful acquittals*. Elsewhere I have developed the full economic model of probabilistic sentencing when these variables are accounted for.[12] In what follows I will make the intuitive claim that when these two variables are taken together with the positive link between the deterrent effect of punishment and probability of guilt—to which Lando pointed—they collectively substantiate the deterrence-based case for probabilistic sentencing.

To start with attitude to risk, prospective offenders often exhibit risk-seeking tendencies.[13] Under such conditions, the probability of conviction

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12 Talia Fisher, *Constitutionalism and Criminal Law: Rethinking Criminal Trial Bifurcation* 61 U. Toronto L.J. 811 (2011).

13 *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-

has a greater marginal deterrent effect than severity of punishment.[14] (A low probability of conviction coupled with a proportionately higher sanction will yield less deterrence than a higher probability of conviction coupled with a proportionately lower sanction.) Under such conditions, when the disutility to the defendant increases at a sub-proportional rate to the increase in length of imprisonment, punishment should not be limited to the highest evidentiary threshold (maximal punishment at maximal levels of certainty). Likewise, the effect of the incidence of false acquittals may also justify, from a deterrence perspective, the expansion of the epistemic space for conviction and punishment to sub-maximal evidentiary levels. Evidence establishing a higher probability of guilt is less likely to appear in court, and this may lead to a higher incidence of false acquittals under a regime that places maximal evidentiary requirements as a precondition for conviction. The force of this effect is a product of the distribution of wrongful convictions and acquittals at different epistemic levels and is likely to vary across different classes of cases. 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 at sub-maximal levels of certainty of guilt. These types of situations can be regarded as the criminal counterparts to market share liability and other tort law cases, in which structural failures in proving causation justified a shift to a probabilistic remedies regime.[15]

The deterrence-based justification for probabilistic decision-making in court has been challenged in the civil context (even when the argument for the probabilistic regime was formulated in efficiency terms). David Kaye famously argued that considerations of ex post error cost minimization justify the "threshold model" in the civil case context, as probabilistic remedies

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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).

14 *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 severity of punishment).

15 *See* Saul Levmore, *Probabilistic Recoveries, Restitution and Recurring Wrongs,* 19 J. Legal Stud. 691 (1992); Ariel Porat & Alex Stein, Tort Liability Under Uncertainty, 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).

would lead to a higher incidence and scope of error in the system.[16] The case may be even more pronounced when it comes to error costs associated with criminal trials, for the social costs of false convictions and false acquittals are not commensurate. Conditioning criminal conviction and punishment on a BARD measure of certainty is compatible with the utilitarian calculus aimed at lowering the aggregate social costs of error, for it leads to a lower incidence of costly errors (false convictions) even if by way of a higher incidence of low-cost errors (false acquittals).[17] A probabilistic sentencing regime (or, to be more precise, imposing punishment in the epistemic space below the BARD threshold) would function in the reverse manner. So, irrespective of the deterrence advantages of probabilistic sentencing, the argument may go, ex post error cost minimization points in the direction of the "threshold model."

There is room, however, to challenge the minimization of overall error cost as an intrinsic normative end or as a policy directive for the design of the criminal justice system.[18] Shavell has made a similar assertion in the civil setting, when he claimed 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.[19]

Even taking ex post error costs into account, one must bear in mind that the social costs of wrongful convictions are not uniform. They are, in and of themselves, a function of the severity of the accompanying punishment: the social cost of a wrongful conviction that results in a light sentence of one day in prison is not equivalent to the cost of a wrongful conviction resulting in life imprisonment. Under the probabilistic model, the cost of wrongful conviction at the lower epistemic levels is a priori lower, for the punishment imposed is sub-maximal.

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16 David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation,* 7 Am. Bar Found. Res. J. 487 (1982).

17 Alex Stein, *The Refoundation of Evidence Law*, 9 Can. J.L. & Juris. 279 (1996).

18 *See* Mark Spottswood, Towards a Continuous Burden of Proof (FSU College of Law, Research Paper No. 905, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348701 ("there is no convincing policy justification for designing a system that minimizes errors at all costs").

19 Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J.L. & Econ. 587, 605 (1985).

B. Expressive Considerations

The probabilistic model presents an interesting test case when viewed through the expressive prism. Expressive theories of law are concerned with the expression of collective attitudes through legal action.[20] The expressive function of criminal law is particularly potent, for the criminal trial constitutes a natural arena for clarification of, and reflection on, the social value scale.[21] Conviction conveys a message of moral opprobrium of the offender and of the offense.[22] 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."[23] A probabilistic decision-making regime could potentially undermine the expressive functions of the criminal trial: *First,* probabilistic sentencing reflects the uncertainty with which convictions are infused, and exposes the evidentiary continuum upon which they rest. The explicit recognition of the innate uncertainty of the criminal verdict could potentially undermine the institution of criminal conviction and its power to stigmatize.[24] *Second,* the realization of the expressive function of criminal punishment is contingent on the ability of the public to forge a link between severity of punishment and the force of the moral repudiation of the offense and the offender. Reflecting epistemic doubt by mitigation of sentencing may sever this connection and neglect to validate the social value scale. In other words, in order for the criminal sentence to perform its expressive function, constraints must be placed on the ability to tinker with the severity of punishment for the realization of exogenous goals, including deterrence goals, in the context of probabilistic sentencing.[25]

Indeed, at first glance, expressive considerations would seem to support the "threshold model" for the reasons mentioned above. But closer scrutiny reveals

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20 *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1510 (2000).

21 Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161, 209 (2000).

22 Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. Davis L. Rev. 85, 136 (2002).

23 Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. Legal Stud. 609, 615 (1998).

24 *But see* Spottswood, *supra* note 18 (making the counterclaim that modern approaches recognize the innate uncertainty of the criminal verdict, and that probabilistic sentencing is better aligned with these views).

25 *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. 1743, 1749 (2005).

that a probabilistic decision-making model may actually be better-equipped to cope with the expressive functions of criminal trials. The incorporation of relativity into criminal conviction and the incorporation of variability into criminal sentencing would allow for further refinement of the criminal trial's expressive message. Starting with a nuanced conception of guilt, the question of criminality invokes the most complex and tangled categories dealt with in law, interweaving the descriptive and the normative. Findings of guilt depict the alleged actions in a morally laden manner, and entail the weighing of a rich assortment of factual, normative, social, and psychological variables. The threshold model dictates that the manifold aspects of criminality and criminal culpability ultimately be translated into the legal lexicon's strict, one-dimensional terms of conviction or acquittal. However, such an impoverished conceptualization may result in the loss of valuable information. A probabilistic regime, in contrast, would allow for a more accurate reflection of the gray areas that permeate criminal culpability.

Moreover, the message emanating from criminal conviction is only one facet of the expressive function underlying the criminal verdict. Another facet refers to the expressive role played by the institution of acquittal. Under the "threshold model," acquittal covers a vast epistemic space, stretching from the end-point of full certainty regarding innocence to just below the BARD threshold as to guilt. In such circumstances, criminal acquittal cannot serve as a positive finding of innocence nor signal clearance of a defendant's name, because it does not necessarily indicate sufficiently high levels of certainty regarding factual innocence. Under a probabilistic regime, on the other hand, the message of acquittal is of expressive meaning and significance, due to the narrowing of the epistemic space it encompasses. The positive expressive effects associated with the finding of acquittal under probabilistic sentencing must also be taken into account when evaluating the expressive capacities of this penal regime.

C. Retributivist Considerations

Retribution theories pose the most serious, but not necessarily insurmountable, hurdle for probabilistic sentencing. Retributivist theories revolve around the organizing principle that the sole justification for punishment is the existence of guilt, and that punishing in the absence of the highest humanly possible level of certainty as to guilt is morally illegitimate.[26] Retributivists may

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26 Michael S. Moore, *The Moral Worth of Retribution*, *in* Responsibility, Character, and the Emotions: New Essays in Moral Psychology 179 (Ferdinand Schoeman ed., 1988).

therefore be critical of probabilistic sentencing's erosion of the evidentiary threshold, resulting in the negation of the moral legitimacy of punishment. In addition, they would object to probabilistic sentencing on the ground that it breaches the proportionality principle, which mandates the imposition of formulaic sanctions suited to the moral gravity of the underlying offense.[27] Retributivists would strongly object to the merging of the penal and epistemic dimensions of criminal verdicts and to the deviation from the principles of just desert for reasons of epistemic uncertainty.

The failure to meet the abovementioned retributivist imperatives does not refute the possibility of justifying probabilistic sentencing on distributive justice and fairness grounds. Under the "threshold model," minimal differences in the probative weight of the incriminating evidence result in huge discrepancies in penal outcomes. Many of the factually guilty go unpunished, while a minority of defendants incurs a high level of criminal punishment, in excess of the severity of sanction were punishment resources allocated across a wider group of defendants. There is room to contest such an ex post distribution of punishment, irrespective of the fact that all potential defendants may be facing the same expected punishment ex ante. The distributive tradeoff under the probabilistic sentencing model is more egalitarian. By imposing punishment upon a greater number of the factually guilty, while reducing the median severity of sanction, such a regime can mitigate ex post outcome distortions among cases exhibiting minimal epistemic divergences, and result in a fairer distribution of punishment across the general class of defendants. Moreover, there is room to claim that the practical realities of the BARD threshold model do not comply, in and of themselves, with the retributivist prescriptions. The probative demands that are effectively imposed under the BARD standard suggest that what we, as a society, are already willing to tolerate as appropriate retribution is consistent with a non-negligible probability of innocence. In accordance with this view, we ought not to condition the imposition of punishment upon a level of minimum confidence which is virtually unseen in the criminal justice system.[28]

The discussion hereto highlighted one possible manifestation of a linear conceptualization of conviction and punishment in the criminal trial: the matching of sentencing with the established probability of guilt. It unraveled the hidden potential of probabilistic sentencing in promoting the objectives

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27 For an extensive discussion of this principle, see Thomas. E. Hill Jr., *Kant on Wrongdoing, Desert and Punishment*, 18 L. & Phil. 407 (1999). *See also* Michael S. Moore, Placing Blame: A General Theory of the Criminal Law 153 (1997).

28 *See* Spottswood, *supra* note 18.

of criminal trials. In what follows, I would like to portray another possible manifestation of the incorporation of linearity into the criminal realm—the mirror image calibration of the standard of proof necessary for conviction according to the applicable sanction.

II. Calibrated Standards of Proof

The book of Genesis tells us of the negotiation between Abraham and God over the fate of the city of Sodom. Abraham says to God:

> Will you sweep away the righteous with the wicked? What if there are fifty righteous people in the city? Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Will not the Judge of all the earth do right?

And God replies: "If I find fifty righteous people in the city of Sodom, I will spare the whole place for their sake." Abraham continues to inquire about forty five innocent people, forty innocents, thirty, twenty, and finally ten innocent men, to which God replies: "For the sake of ten, I will not destroy the city." The notion that the guilty ought to be spared punishment so as not to impose punishment also upon the innocent has become a staple of legal thinking, and is manifested in the seminal Blackstone ratio: "better that ten guilty persons escape, than that one innocent suffer."[29] Differences emerge as to the ratio of guilty to innocents, with Maimonides, for instance, asserting, that "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent one to death."[30] What is less contentious is the *uniformity* of the ratio (be it Blackstone's 10:1 or Maimonides's 1000:1) across the entire class of offenses.[31] The formal rules of criminal procedure dictate the implementation of the same standard of proof—beyond a reasonable doubt—in all criminal cases, irrespective of the applicable sanction.[32] This fundamental principle, that the prosecution must bear the burden of proving all elements

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29 William Blackstone, 4 Commentaries on the Laws of England 358 (7th ed. 1775).

30 Moses Maimonides, The Commandments, Neg. Comm. 269 (Charles B. Chavel trans., 1967).

31 Alexander Volokh, *N Guilty Men*, 146 U. Pa. L. Rev. 173, 174 (1997).

32 *In re Winship*, 397 U.S. 358, 364 (1970) (every criminal defendant is constitutionally protected "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *See also* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 Mich. L. Rev. 597, 597 (2012).

of guilt beyond a reasonable doubt as a prerequisite for conviction in all criminal cases, dates back to the 18th century[33] and is considered a "bedrock" principle of American criminal procedure.[34]

Empirical and experimental studies, conducted since the early 1970s, indicate that these formal requirements of a uniform standard of proof across the criminal spectrum are not necessarily met in practice. They demonstrate that decision-makers in the criminal realm effectively adjust the standard of proof, which they apply in particular cases, to the expected size of punishment. For example, Edward Snyder's econometric study indicated that following the Antitrust Penalties and Procedures Act of 1974, an increase in the magnitude of the sanction resulted in a decline in the conviction rate.[35] Experimental studies conducted on mock juries also found evidence suggesting that the severity of the potential sanctions constituted a factor in the tendency to convict.[36] Other researchers have focused on the normative dimensions underlying the connection between the standard of proof that is applied and the severity of the expected sanction. Guttel and Teichman, for instance, advocated the setting of mandatory sentences as a mechanism for inducing factfinders in the criminal legal system to comply with proof demands, and limiting convictions only to circumstances of high probability of guilt.[37] 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

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33 Bruce A. Antkowiak, *Judicial Nullification*, 38 Creighton L. Rev. 545, 560 (2005).

34 Azhar J. Minhas, *Proof Beyond a Reasonable Doubt: Shifting Sands of a Bedrock?*, 23 N. Ill. U. L. Rev. 109, 109 (2003).

35 Edward A. Snyder, *The Effect of Higher Criminal Penalties on Antitrust Enforcement*, 33 J.L. & Econ. 439 (1990). For an elaborate survey of the empirical and experimental literature on this matter, see Guttel & Teichman, *supra* note 33, Part I.

36 *See, e.g.,* Neil Vidmar, *Effects of Decision Alternatives on the Verdict and Social Perceptions of Simulated Jurors*, 22 J. Pers. & Soc. Psychol. 211 (1972); Martin F. Kaplan & Rita Simon, *Latitude and Severity of Sentencing Options, Race of the Victim and Decisions of Simulated Jurors: Some Issues Arising from the "Algiers Motel" Trial*, 7 L. & 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. Pers. & 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.").

37 Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 Mich. L. Rev. 597 (2012).

conviction) to the severity of the potential penalty.[38] 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.[39] I would like to continue this line of thinking and make the normative case for the imposition of a multitude of standards of proof in the criminal apparatus, underlying and supporting a multiplicity of conviction categories. Tying the standard of proof to the applicable sanction by, for example, setting a higher threshold for conviction when the expected punishment is severe would make it possible to apply different standards of proof to incarcerable and non-incarcerable offenses. Such distinctions, I shall claim, can better facilitate the objectives underlying criminal procedure.

The case for applying the BARD standard in criminal trials rests on utilitarian and egalitarian grounds.[40] From a utilitarian perspective, the underlying presumption is that the social disutility ratio between false convictions and false acquittals is higher than 1:1. The criminal standard of proof is aimed at reducing the likelihood of erroneous convictions by compromising on the certainty of the innocence of the acquitted.[41] It allocates the risk of error between the defense and prosecution in a way that promotes errors in favor of the defendant (considered less costly) at the expense of errors in favor of the prosecution (which entail more substantial costs).[42]

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38 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).

39 Lillquist, *supra* note 22.

40 For a full account of the utilitarian and egalitarian grounds, as well as a discussion of additional normative considerations, see Issachar Rosen Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 Va. L. Rev. 79 (2008) (challenging the civil-criminal procedural divide).

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

42 *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 410–15 (1973); Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. Legal Stud. 27, 34 (1996). Assuming that the BARD standard of proof is set at a certainty level of 90 percent (probability of 0.9), the social damage inflicted by erroneously convicting an innocent defendant is considered to be about nine times greater than the social cost of wrongful acquittal.

However, for this utilitarian rationale to justify the application of a *uniform* standard of proof across all criminal cases, these cases must generate a *universally* high disutility ratio. Criminal cases can be said to differ in this respect. One categorical distinction, which can be drawn, is between incarcerable and non-incarcerable offenses. When criminal sanctions involve the denial of liberty, significant harm can justifiably be ascribed to a false conviction, and the high disutility ratio assumption can be said to hold true. However, many criminal convictions lead to the imposition of relatively lenient sanctions, such as fines or other forms of symbolic punishment. In this latter type of cases, the disutility ratio of erroneous convictions to erroneous acquittals can be assumed to be lower,[43] and a lower standard of proof would optimize the allocation of the risks and costs of error between the prosecution and the defense. Put differently, the constancy of the disutility ratio between pro-defendant errors and pro-prosecution errors, across different types of offenses, can be disputed. In light of this functional division, a utilitarian case can be made for imposing variable standards of proof across criminal cases which are correlative with the applicable sanctions.

The second line of argument, used to justify the application of the BARD standard in criminal cases, is premised upon structural power disparities underlying the criminal trial, one of the defining features of which is the inherent involvement of the state in its prosecutorial capacities.[44] Both within the courtroom and outside it, the state enjoys comparative advantages. It has at its disposal vast resources, trained personnel, and highly skilled counsel. It is able to start conducting an investigation and to collect evidence (some of which is time-sensitive) long before the defendant is even made aware of the fact. The state can utilize the monopoly it has over the use of force for investigative purposes, and exert enormous amounts of pressure on suspects and witnesses. It can exercise its policing authority to investigate the suspect, search and seize her property, and, in some cases, put her behind bars. State organisms also set the basic rules of the game and impact the procedural features of trials. These and other structural advantages tilt the scales in the prosecution's favor. They have great bearing in the adversarial system, which relies upon the parties to produce the evidence and to delineate the factual

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43 It should be emphasized that when calculating the severity of punishment, all sanctions deriving from the court ruling ought to be taken into account. Thus, if a defendant, convicted of a petty offense, is prevented from practicing law for the rest of her life, the sanction exceeds the $1000 prescribed in the penal code.

44 *See* Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 Cornell L. Rev. 478, 505 (1974).

and legal boundaries of the case. Conditioning conviction on the ability of the prosecution to prove its case beyond a reasonable doubt is intended to restore the balance of power between the defense and the prosecution, so as to enable the adversarial system to function properly and thus produce more accurate and just outcomes.

But for the power-disparity rationale to justify the application of a *uniform* standard of proof across all criminal cases, involving all types of defendants, they must exhibit a *universal asymmetry of power* vis-à-vis the prosecution. As an empirical matter, this is simply not the case. Marc Galanter famously argues that non-state repeat players, including financial institutions, insurance companies, and large corporations, operate in the courtroom in a manner that is comparable to the state and its organisms,[45] and this has been substantiated in numerous subsequent empirical studies.[46] When the state prosecutes Facebook or Citibank, there is a good basis for contesting any claim of a power disparity between the parties. In these situations, applying a BARD standard of proof could upset the balance required for obtaining accurate results and distort justice to the detriment of the prosecution (and the public at large). If an insolvent, homeless defendant were to be accorded the same procedural safeguards as IBM, the result would be either their enhanced exposure to risk of conviction, or a de facto immunization of powerful organizations against criminal liability. In other words, the "state/non-state" dichotomy is not a sensitive enough proxy for allocating risk of error and burdens of proof. The standard of proof ought to be calibrated to the defendant's characteristics in order to secure procedural justice and fulfill the objectives of the criminal trial.

My discussion hereto, addressing probabilistic sentencing and the application of calibrated standards of proof, was aimed at unraveling some of the hidden potential of a linear conceptualization of culpability within the criminal trial arena. In what follows, I will shift the attention to the realm of plea bargaining and demonstrate how a linear conceptualization of the criminal verdict can widen the scope of possible agreements between the prosecution and the defense, and further promote the normative ends underlying the institution of plea bargaining.

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45 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974).

46 Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, vol. 21 L. & Soc. Inquiry 497, 558 (1996); In Litigation: Do the "Haves" Still Come Out Ahead? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

III. Negotiable Standards of Proof

Plea bargains have come to dominate the criminal justice system throughout the Anglo-American world.[47] Such deals are struck in the shadow of the criminal trial and against the background of its expected outcomes.[48] The expected outcomes of trial are, in turn, a function of the strength of the prosecution's case. In this way, plea bargains effectively calibrate sentence severity to the probative value of the incriminating evidence.[49] Thus, the very practice of plea-bargaining, in and of itself, can be viewed as an instance of "judgment of degree." Deviation from the categorical conceptualization of conviction can *further* extend the boundaries of plea bargains, widen the zone of possible agreements, and optimize their results.

If criminal convictions assume linear properties, more features of the criminal trial—most notably the standard of proof—can be turned into negotiable default rules. Under the prevailing "on-off" configuration of criminal convictions, the prosecution and defense face two polar solutions to the criminal case. The first is to conduct a full-fledged trial, in which the entire burden of proving guilt beyond a reasonable doubt is placed upon the prosecution. The second is to enter a plea bargain, whereby the prosecution is fully exempted from having to prove its incriminating case, whether in its entirety (as occurs in sentence bargaining) or segments of it (as occurs in charge bargaining). One can imagine that in a world receptive to a multitude of conviction options, the negotiation process would no longer be limited to the attainment of a full exemption from proving guilt. Rather, the prosecutor would also be able to obtain from the defendant a reduction of the standard of proof required to establish criminal culpability, in return for an offer of leniency in sentencing. For instance, the parties could agree that the case will be tried in court according to the civil standard of proof—namely, preponderance of the evidence—and that the prosecution will make a partial concession on the sentence in the event of conviction in exchange.

The parties would opt to engage in bargains for reduction of the standard of proof when their marginal rates of substitution between (units of) sentencing

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47 Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801, 801 (2003).

48 For a critique of the shadow-of-trial model, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2465 (2004).

49 Obviously, the view that plea bargaining is an instance of partial guilt being translated into partial sentencing requires a skeptical leap with regard to the probative weight of the in-court confession underlying it. But, the fact that courts (or juries) do not independently evaluate the actual evidence of the crime could be interpreted as providing such an indication.

and (units of) proof waiver equalize at an intermediate point between a full trial and a full plea bargain. Under those circumstances, deals for partial conversion of (some units of) reduction in the evidentiary demands in exchange for (some units of) reduction in punishment are likely to improve the situation of both parties as compared to full conversion (plea bargains) or a full non-conversion (trial according to the BARD standard). One possible contributing factor to such intermediate equalization of marginal rates of substitution is rooted in a discrepancy between the prosecution and defense's subjective assessments of their chances for success at trial under the various proof requirements.[50]

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50 In order to illustrate this point, imagine the following hypothetical rape case where the prosecution is of the opinion that under the BARD rule it has a 40% chance of obtaining a criminal conviction, and that if convicted, the defendant will be sentenced to twenty years in prison. The defendant, for his part, assesses his chances of being found guilty under the BARD standard of proof as only 20%, due to an alibi claim he wishes to raise in court. He estimates that, if convicted, he will be sentenced to fifteen years in prison. In order to simplify the argument at this stage, I will focus only on the expected sanction, as perceived by each side, disregarding additional parameters such as the decline or increase in the marginal costs associated with each year of imprisonment over successive years. I will also assume reasonable costs of trial. Under the abovementioned set of assumptions, the lack of congruity between the prosecutorial and defense assessments of the expected punishment can stand in the way of striking a (full) plea bargain. The prosecutor would offer the defendant a prison term of slightly less than eight years (the length of the expected sentence times the probability of conviction, minus the costs of trial) in exchange for his self-incriminating guilty plea. The defendant, for his part, would demand that, if convicted, he be sentenced to a maximum of slightly more than three years (the expected punishment, in his opinion, plus costs of trial). Let us now introduce a category of conviction by preponderance of the evidence in addition to beyond a reasonable doubt (and a multitude of other conviction types made possible by a continuous gradation conceptualization of criminal culpability). Let us further assume that, following the move to a civil standard of proof ("preponderance of the evidence"), the expected sentence envisioned by each of the parties changes as follows: The prosecution calculates that the move to a civil standard of proof will result in a 90% probability of conviction. This is because from the prosecution's point of view the difficulties of proof relate mostly to the elimination of any reasonable doubt. The defendant, for his part, believes that the move to a "preponderance of the evidence" standard of proof will not dramatically aggravate his situation because of the alibi claim that he is keeping under his hat. In his opinion, the likelihood of conviction due to the move to a "civil" standard of proof will increase by only 5% (from a 20% to a 25% chance of conviction). In this scenario, the prosecution's proposal to request a ten-year sentence upon conviction, in

Another contributing factor—one that is relevant even under conditions of full information—is rooted in variable marginal costs of trial administration, faced by the prosecution at various levels of proof burdens, coupled with the risk-seeking tendencies of some defendants.[51] A third type of contributing factor, which may induce the negotiating parties to opt for a lowering of the standard of proof (rather than a full-fledged plea bargain or a full-fledged BARD-based trial) is rooted in signaling considerations. From the defendant's perspective, entering into a full plea bargain may serve as a social signal of her implication in the alleged crime, whereas a willingness to reduce the standard of proof for conviction signals factual innocence.[52] The prosecution may also face similar expressive considerations—while a full plea bargain effectively negates judicial and public scrutiny of the case at hand, conducting a trial according to a lowered standard of proof preserves the capacity to unveil what had occurred and to judge it in light of public standards.[53] When such expressive concerns are of significance, as in certain high-profile cases, the prosecution may opt for the possibility of conviction by preponderance of the evidence, rather than choose to engage in a full plea bargain.

A complete normative assessment of converting the standard of proof into a negotiable feature of criminal procedure is beyond the scope of this Article.[54]

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exchange for moving to a "preponderance of the evidence" standard of proof, will enable both parties to increase their expected utility. The prosecution's expected sanction will rise to nine years (an improvement on the original option of eight years). The defendant will face an expected sanction of only two-and-a-half years (an improvement on the original option of three years).

51 Risk-seeking tendencies create an incentive for defendants to opt for a trial in which the prosecution must prove its case beyond a reasonable doubt. However, this vector, directed towards the full trial end point, may be balanced against the opposing forces that work on both the prosecution and the defense, leading towards the full plea bargain end point, which derives from the tendency of both parties to save the costs of trial. Due to these opposing forces, it becomes possible to posit situations in which both parties would opt for interim solutions of partial reduction in the standard of proof in exchange for a lesser sentence.

52 Such face-saving considerations on the part of the defendant also form the basis for *nolo contendere* pleas. *See* Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 Cal. Crim. L. Rev. 2, 2 (2004).

53 Of course, there is room to claim that the stigmatizing effect of a conviction governed by a relatively low standard of proof (such as preponderance of the evidence) is not equivalent to the stigma of conviction according to the higher evidentiary standard of beyond a reasonable doubt.

54 For the full account, see Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. Crim. L. & Criminology 943 (2007).

However, a case can be made for the claim that such bargains may better serve the goals and normative ends underlying the institution of plea-bargains, be they efficiency or defendant autonomy. From a social efficiency perspective, changing the criminal standard of proof to a default rule would allow the prosecution to exchange mitigation of sentencing for evidentiary waivers not only *en bloc*, but also in a more compartmentalized manner. It would enrich the set of options made available to the prosecution in its pursuit of the social objectives underlying the criminal justice system. In addition, the alienability of the right to have one's guilt substantiated beyond a reasonable doubt, and the expansion of the spectrum of choice as to the exercise of this evidentiary right, can be said to facilitate defendant autonomy. Just as the right of the defendant to confess, or to proclaim her innocence, expresses her autonomy, so does her choice regarding the standard of proof by which she wishes to be tried. There is room to claim, in other words, that the normative considerations which support the institution of plea bargaining (and the contractual ordering of the criminal arena, more generally) are further promoted when convictions assume linear properties.

Conclusion

The question of criminal culpability pertains to the most complex and convoluted categories dealt with by law. Attempting to create a clear-cut and unequivocal borderline between guilt and innocence steamrolls the complexity characteristic of this question. It dictates the reduction of a wide variety of variables—factual, legal, and moral—into a thin, one-dimensional grouping. Transforming the question of criminal culpability from a qualitative question of "yes or no" to a quantitative one of "how much" allows for the refinement of these institutions, and paves the way for more successfully attaining the goals underlying criminal law, criminal procedure, and criminal settlement. As I have attempted to demonstrate hereto, such a linear conceptualization is compatible with deterrence considerations and meets expressive goals. It can also be supported from a distributive justice perspective, as it leads to a fairer ex-post distribution of criminal punishment. The possible drawbacks of the linear conceptualization of criminal convictions, whether based on ex-post error cost considerations or on moral and political legitimacy grounds, may justify circumscribing the scope of application of non-binary decision-making regime in the criminal sphere, but they do not undermine it completely.

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…"[55] In this article I have sought to embrace the contrary principle, and to demonstrate the feasibility and normative desirability of incorporating linear gradation into the criminal sphere.

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55 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).