CIVILITY AND THE BURDEN OF PROOF

DALE A. NANCE*

What should we presume about our neighbor? In this Article, I intend to give a partial answer to this question. My suggestion is motivated by two related considerations. First, there is today an appreciable deficit in the generosity with which we appraise one another's conduct. This is an observation not limited to the legal or political context, thought it is particularly evident there. It is manifested by a general inclination to blame others for our troubles and, more specifically, a readiness to assume the worst about others' motives, attitudes, or conduct. I do not claim that this phenomenon is worse today than in other historical periods; scapegoating, for example, has a long pedigree. It is, rather, a recurring problem that requires perpetual attention.[1] Second, and this is a point directed more specifically at the legal culture, there is a fairly widespread failure to appreciate fully, in some contexts even to recognize, the importance of such generosity in our public life. I illustrate this phenomenon in the following pages.

To go right to the point, we may categorize people according to three alternative presumptions. One may presume the worst about others; one may presume the best about others; or one may decline to presume either way. We may call representative members of these classes, respectively, the Pessimist, the Optimist, and the Agnostic, recognizing of course that real people will be mixtures of these ideal types, and some will display different types at different times. In keeping with the theme of this symposium, my primary thesis is prescriptive. I claim that, among these three ideal types, the one that is most practical and ethical in many contests is the Optimist, or more precisely, a particular variant of the Optimist. Among the most important of such con-

* Professor of Law and Norman and Edna Freehling Scholar, Chicago-Kent College of Law, Illinois Institute of Technology. Helpful comments on a draft were provided by Hal Krent and Laurie Burgess. My general appreciation for the importance of civility has been significantly heightened by my association with Philippe Nonet, begun when I was a graduate student at Berkeley. However, the particular theses presented here are entirely mine, and I do not even know that Professor Nonet would agree with them. Financial support was provided through the Marshall D. Ewell Research Fund.

1. Of course, the form in which the impulse to blame arises does vary over time. For an examination of some current parameters of the phenomenon, see ROBERT HUGHES, CULTURE OF COMPLAINT: THE FRAYING OF AMERICA (Warner Books, forthcoming 1994).

texts are the realms of moral and legal action and discourse. My claim has an important implication for the question of the allocation of burdens of proof in these realms. I call this implication the *principle of civility*: One ought to presume, until sufficient evidence is adduced to show otherwise, that any given person has acted in accordance with serious social obligations.[2] As a corollary, how much evidence is "sufficient" depends upon the nature and severity of the alleged breach, as well as the nature and severity of the contemplated consequences of a determination of breach.

I begin by addressing the ideal types and how they function or fail to function in society. Having argued abstractly the case for a guarded Optimism in ordinary life, I illustrate how the principle of civility is manifested in one important area of discourse where there are voluminous available records with which I am at least reasonably familiar—the allocation of burdens of proof in Anglo-American legal proceedings. A separate part will address the more ambiguous question of the constitutional status of the civility principle. We shall see that an appreciation of the significance of civility has important implications for the administration of law, even at the constitutional level.

I. The General Argument

Consider an extreme form of the Pessimist, one who assumes the worst even in the face of powerful evidence to the contrary. Perhaps you have known someone like this. Such a person, we might call him the Misanthrope, will have serious problems managing social life. Trust is almost impossible, and without that, one's network of social dependencies is strained, to say the least,

2. A comment on the term "civility" may be in order. From the most generic notion of not offending someone, one can identify a more particular use of the term referring to the norm against disclosure or assertion of a stigmatizing fact *even if known to be true*, that is, after "sufficient" evidence has been adduced to warrant a conclusion contrary to the presumption prescribed in the text. From this use, which connotes *politeness*, it is only one step to the more serious norm indicated in the text; what might be called *epistemic* civility demands giving others the benefit of doubt. Further, one can broaden the concept of civility to embrace both politeness and epistemic modesty with regard to merely *embarrassing* facts. Though not my primary focus, I will advert to this last point later. *See infra* note 36. Some colleagues, upon being presented with my thesis, expressed agreement with its general thrust, but puzzlement over the use of the term "civility" to describe it. To refer to it this way was thought by some to trivialize the thesis. But this is true only if civility is a trivial matter. It is not.

being perceived as a fearful maze of disasters waiting to happen.[3] Lawyers seem to be particularly prone to this disease. And it may seem surprising that such people survive at all, except as hermits. No doubt their proliferation is one of those unfortunate consequences of the tendency of social and economic advances to blunt the forces of natural selection, as those of less extreme views tolerate and subsidize, with or without good reason, the Misanthrope's anti-social tendencies.

Though perhaps a more attractive character, the extreme Optimist, one who presumes the best even in the face of powerful evidence, is no better adapted for social life. This type of person, call her the Pollyanna, is ultimately at the mercy of those who would take advantage of her naivete.[4] The predators among us, the amoral "rent seekers" who will take advantage of any situation until the costs exceed the gains, will rarely see net cost to the use and abuse of Pollyanna.[5] Trusting everyone unconditionally, Pollyanna is driven to the wall, unless once again the protection of others subsidizes her dysfunctional viewpoint.

It is fairly obvious why neither the Misanthrope nor the Pollyanna can serve as a normative guide. Given the extremely dysfunctional nature of these views, we need not take them seriously as candidates for adoption. The last of our types, the Agnostic, is no better, but for a rather different reason. Once again, it is an unstable attitude to live by on a general basis, but not because of the *consequences* of the decisions one makes; rather because of the enormous costs of decision making itself that such an attitude imposes upon its adherent. Rejecting any presumption in social interaction simply fails to appreciate the tremendous significance of "default" reasoning. One cannot think through every one of the hundreds and thousands of decisions that must be made on a

3. The effect upon one's economic prosperity in an interdependent economy is obvious, but even the process of knowledge acquisition is seriously undermined by such a view. *See* NICHOLAS RESCHER, COGNITIVE ECONOMY 33-69 (1989) (examining the role of trust and social cooperation in the development of knowledge).

4. For those who follow such things closely, I should perhaps note that my choices of gender for pronouns were dictated by the availability of the connotations associated with the terms "Misanthrope" and "Pollyanna." *See* MOLIERE, THE MISANTHROPE (Gustave Rudler ed., 1947)(1666); ELEANOR H. PORTER, POLLYANNA (1915). Whatever the intentions of these literary forbearers, no gender stereotype is intended here; it is simply convenient to be able to refer to the two main types of personalities with different pronouns. Of course, those who follow such things *too* closely risk offending the principle in question.

5. The term "rent seeker" is taken from the law and economics literature. *See generally* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds. 1980). Although it does not necessarily connote amorality, the rational calculator image may conduce to such an attitude.

daily basis without the benefit of presumptions one way or the other, including the much maligned "stereotype."[6] And very many of these are default assumptions about the propriety of others' conduct. Unlike the Misanthrope or the Pollyanna, I doubt that anyone can identify a real world example of the Agnostic, occasional professions notwithstanding, except perhaps when the presumptive attribution is being performed with respect to a person with whom the Agnostic has no genuine occasion to interact. In the absence of an occasion for practical decision, there is no need to adopt or reject a presumption, so Agnosticism becomes a practicable option; indeed, it may be preferable for its conservation of cognitive resources. However, by definition it also becomes irrelevant to practical choice.[7]

That leaves us with two serious contenders for a normative principle—the non-extreme Pessimist and the non-extreme Optimist. (Hereafter, references to these types will mean non-extreme forms.) The Pessimist suffers from a blend of the difficulties of the Misanthrope and the Agnostic. He incurs severe administrative costs in order to reach decisions that allow the establishment of trust relationships, or for that matter even the minimal confidence necessary to engage in arms-length transactions. But, without specifying how strong this uncivil presumption is, it is difficult to say that he is truly dysfunctional. Much the same point can be said of the Optimist, but again for different reasons. If she does not learn that in certain stereotypical situations the confidence she is inclined to place in others must be seriously modified, she is likely to be quickly and seriously jeopardized when those situations arise. One thinks, for example, of walking down a dark alley in a rough neighborhood

6. The ubiquity of default reasoning is one of the recurrent themes in RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE (1992). The inevitability and utility of such reasoning, arising form problems of economizing cognitive resources relative to complex decision making tasks, is one of the recurrent themes in much psychological and philosophical theory about reasoning. *See generally* CHRISTOPHER CHERNIAK, MINIMAL RATIONALITY (1986); HERBERT A. SIMON, MODELS OF THOUGHT (1979).

7. *See* 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2485, at 285-86 (Chadbourn rev. 1961):

> So far as mere logic is concerned, it is perhaps questionable whether there is much importance in the doctrine of burden of proof as affecting persons in controversy. The removal of the burden is not in itself a matter of logical necessity. It is the *desire to have action taken* that is important. In the affairs of life there is a penalty for not sustaining the burden of proof—i.e. not persuading M beyond the doubting point—namely, that M will not take the desired action to which his persuasion is a prerequisite.

Id. (Emphasis in original; footnotes omitted).

and being willing to engage a stranger who claims to seek directions. Nevertheless, if the burden of proof is not set too high in the Optimist's formulation of those contexts in which her presumption must be reversed, then she will not be seriously dysfunctional.

If, then, we are to choose between the two, we need a *comparative* argument, one that accepts each view as plausible, but endorses one as superior on balance. Such an argument should depend not only on the practicality of adopting one or the other, but also on the ethical propriety of doing so. In order to facilitate this kind of judgment, it is necessary to be more precise about the presumption that is in question. When one says, "Presume the best," or "Presume the worst," what do we mean by "best" and "worst"? Clearly, both the Pessimist and the Optimist remain unrealistic alternatives if "best" means "perfect" or "saintly" and "worst" means the opposite. A practical guide must mean something less extreme in either direction.

Lon Fuller provided us with a realistic frame of reference when he differentiated between a "morality of aspiration" and a "morality of duty." He described an ascending scale of morality and a market that divides the demands of duty below from the challenge of aspiration above.[8] Thus, what I have in mind by the question as originally formulated is that "best" denotes simply "compliance with the demands of moral duty," and "worst" denotes non-compliance. This, of course, is not the only way to give content to the concepts of "best" or "worst," but it has the advantage of placing us within a realistic framework. Moreover, by using these specifications, there is no conspicuous middle zone left out of the alternative viewpoints delineated above, as there would be if, for example, "best" and "worst" took on meanings of aspirational extremes. So the questions becomes: Ought one to presume compliance with moral duty by others, or ought one to presume breach of duty? The significance of the distinction between the morality of duty and the morality of aspiration is just that the failure to live up to the former is a ground of criticism or more severe sanction, whereas failure to live up to the latter is

8. *See* LON L. FULLER, THE MORALITY OF LAW 3-32 (rev. ed. 1969). Part of Fuller's purpose in drawing this distinction was to emphasize the importance of not trying to set the marker too high, of not trying to convert what should be aspirational goals into moral duties. In our terms, one untoward consequence of this mistake would be to undermine our capacity to adopt, explicitly or implicitly, decision procedures based on a default presumption of compliance with moral duty.

ground at most for regret or disappointment. Ought we, then, to presume actions that warrant criticism or even sanction?

Several factors suggest not. First, as social theorists have long noted, moral and legal norms have an ambivalent character that arises from the process of their evolution: They are prescriptive to be sure, but they are also usually accurate as descriptions, at least on a general statistical basis.[9] If a norm is violated routinely, it will appear hollow and gradually lose any serious moral force.[10] This evolutionary feature, which tends to assure descriptive accuracy of serious norms, is itself a reason to presume as the Optimist does, for it maximizes the *ex ante* probability of accuracy and, as a consequence, the probability of successful social interaction. In this, social norms share the same mechanisms as general or abstract propositions of fact.[11]

Second, social life has an important creative capacity: What we pretend to be so about our conduct, even when not, can become more so because of the pretense. *Expectations* imposed on people to live up to a certain standard can increase the frequency with which they do, even in the absence of effective sanctions for failure. I trust that anyone who has been a parent or teacher, or who has participated in group projects, will understand the force of this claim.[12] One might respond that this argument applies only to presumptions about *future* conduct, since presumptions about

9. In legal philosophy, one of the most famous examples of an argument emphasizing this duality of social norms is H.L.A. HART, THE CONCEPT OF LAW 113-14 (1961) (arguing that a theory of law must attend to the "internal" point of view of those who accept the rules of the system, as well as to the general obedience to primary rules of conduct within the system, both of which are necessary for law to exist). For a more developed evolutionary theory, see FRIEDRICH A. VON HAYEK, 1 LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER (1973).

10. *See, e.g.*, Kent Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18 GA. L. REV. 727, 760 (1984) (duty of fair play fails when law is routinely disobeyed). Of course, routine violation will generally be accompanied by the dissolution of sanctions, which further reduces the moral force of the norm. *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 127-40 (1973) (discussing American analogue of Roman law principle of *desuetudo*, that persistent nonenforcement renders a law legally unenforceable).

11. *See, e.g.*, NICOLAS RESCHER, METHODOLOGICAL PRAGMATISM 208-15 (1977) (qualifying factual propositions as presumptively true is an integral part of pragmatic theories of knowledge relying on evolutionary mechanisms).

12. Scottish Enlightenment thinkers were particularly interested in the way that social conventions develop and obtain moral force by the internalization of social expectations. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE (Selby-Bigge 2d ed. 1978) (1740); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Liberty Classics ed. 1976) (1759). And modern education theorists have provided some experimental verification of such phenomena. *See, e.g.*, ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM (rev. ed. 1992).

past conduct can have no effect, positive or negative, on the facts of past events. However, a general presumption of non-breach with respect to future conduct coupled with the general presumption of breach with respect to past conduct would surely be irrational.[13] So the stance of the (non-extreme or guarded) Optimist is to be preferred for both its functional practicality and its virtue-enhancing potential.

But that is not all. These relatively consequentialist underpinnings are complemented by a deontological, rights-based argument, one based on respect for the person about whom the presumptive attribution is to be made. Our duty to respect others entails a duty to presume their compliance with serious social obligations. It is not that we deny the person's *autonomy* by presuming breach, for the assumption of autonomy is entirely compatible with breach of duty. Indeed, breach of duty presupposes the existence of autonomy. Rather, to presume that someone has breached his or her duty fails to accord that person the dignity associated with the status of *membership* in the community that is governed by the norms whose breach is at issue. It fails to accept the person as reasonably committed to the good of the community for which those norms exist, since reasonable commitment entails by-and-large compliance with the community's moral duties.[14]

Obviously, my conclusion is supported by several highly abstract and thus easily contested arguments.[15] In particular, like most normative arguments, mine depends upon contestable empirical propositions. These propositions provide interesting clues as to the limits of the principle of civility. Both the argument

13. To see this, one need only imagine someone thinking in the future perfect tense: I presume that X will not breach, though I also presume that he *will have* breached once the time for the relevant conduct has passed. Try to imagine making plans based on such presumptions.

14. For the sense in which there can be a good of the community, or common good, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154-56 (1980). To be sure, there are the proven *outlaws* and the *aliens*, for which an exclusionary attitude may be appropriate. But that presupposes, for nominal citizens, breaches from which the status of outlaw can be rightly determined. And for aliens, it presupposes that the alien's community has evolved radically different norms; given the considerable commonality of human experience, such differences ought not to be assumed without good reason.

15. While I do believe that consequentialist and non-consequentialist arguments can be combined in some fashion, that they are to some degree commensurable as arguments, to argue this here would be a distracting digression. Suffice it is to say that when the multiple modes of argument generate compatible implications, we may take increased confidence in the result. *See, e.g.*, Randy Barnett, *Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611 (1989).

from functional practicality and the argument from respect for the person are strongest under the conditions of a community with well-established conventions about the demands of moral duty. In such a community the predictive value of moral norms is highest, and the expectation of compliance that follows from membership is most reasonable. Accordingly, one can derive the pathologies affecting civility from the pathologies afflicting the moral cohesiveness of society generally.

One relevant form of social disintegration occurs when moral conventions are still coherent and unitary, but the citizenry loses its commitment to them. If it proceeds too far, this disintegration of the community's moral fiber undermines the statistical basis for the expectations of even our non-extreme Optimist and leaves breach at most ambiguous with respect to one's membership in the community, if indeed there can still be said to be one. "Every man for himself" becomes the standard, though there may still be cohesion among families, churches, or other subcommunities where the actor can have reasonable expectations of compliance with the established norms. This is a form of social pathology that many conservatives, and perhaps some liberals, see around them today.

A different form arises from conflict over which set of serious social norms ought to control a given group, a phenomenon that can obviously arise from the balkanization of a society along racial, ethnic, or gender lines, along lines of economic class, or along any other axes to the extent that they serve to present distinct and competing value systems.[16] In terms of civility, this presents its most serious problems in the context of interaction between members of different groups, when presumptions based on civility must be made in terms that are "group relative," thereby reducing their epistemic utility and symbolic value. This is a form of social disintegration that many liberals and some conservatives see around them, though they are likely to differ in their suggestions for dealing with the problem.

To be candid, we must acknowledge that both of these forms of social disintegration afflict our national community to some

16. For examples of the claim of distinct systems of value, see CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (distinguishing feminine value systems based on ethic of nurturance and care from dominant masculine value system based on autonomy and rights); LINDA J. MEYERS, UNDERSTANDING AN AFROCENTRIC WORLDVIEW (1988) (distinguishing Afrocentric value system based on collectivism and group ownership from dominant American value system based on materialism, competition, and individualism).

extent. But just how bad are things? And, though this may be the least of our concerns if things are really bad, has the deterioration gone so far as to undermine severely the arguments for civility as a general principle of social interaction?

What is striking is the degree to which the serious social norms of our society are neither controversal nor routinely ignored. One can, of course, point to the exceptions, like abortion and affirmative action, but the long list of universally decried moral wrongs strongly suggests that this is not just a question of whether the glass is half empty or half full. At least with reference to these, the case for the civility principle is unimpaired. Moreover, one of the three arguments for civility, its educative, virtue-enhancing function, actually increases in significance as the others weaken under the stress of social disintegration. Of course, to the extent that such disintegration is of the second form identified above, there will be the unavoidable issue facing all educational efforts: Into which set of community norms are people to be educated? Just how serious a problem this is for the notion of civility depends on how *pervasively* our fundamental differences affect social norms.

In the next two sections, I will support the thesis by more concrete examples, drawn from a context where public authority seeks to reinforce the most serious moral norms and to resolve any conflicts of fundamental value incident thereto. We consider, that is, adjudications with respect to the regulation of conduct by legal rules. This examination will give content to the notion of the rebuttability of the presumption of compliance, about which I have said little so far.[17]

II. Civility in the Law

In the realm of legal adjudications, the principle of civility is as well instantiated in practice as it is generally ignored in theory. An examination of the law of burdens of proof provides a rich and detailed set of examples of how the principle of civility is in

17. One matter I do not address in this paper directly is the question of whether the principle of civility, including its rebuttability feature, provides a norm that is *determinate*. Put conversely, the question is whether the principle is so subject to manipulation (for political or other purposes) as to be ineffectual as a guiding norm of conduct. This is another recurrent theme in Richard Gaskins' books. *See* Gaskins, *supra* note 6, especially Chs. 2-4. Suffice it here to say that the following discussion will illustrate that there is a reasonable determinacy in the idea of civility, despite the unavoidable invocation of human judgment so pervasive in law and other normative structures. *See generally* Kenneth Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283 (1989).

fact employed.[18] At the same time, a parallel examination of the modern view of academic commentators, and courts influenced by them, illustrates the lengths to which many will go to avoid recognition of this fact.

A. *Criminal Cases*

The best known example of civility at work is the so-called "presumption of innocence" said to attend criminal prosecutions. Nowadays, it is commonly believed that the primary significance of this concept is simply to restate the rule that the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt.[19] This may be understood as suggesting that the allocation and severity of that burden are determined on independent grounds, that is, grounds independent of the principle of civility so succinctly, if imprecisely, expressed in the phrase "presumption of innocence." The usual suggestion along this line is that the burden flows from the nature and severity of the *sanction* that may attend conviction. The suffering and curtailment of autonomy entailed by death or imprisonment certainly demand rigorous justification at the substantive level, when we determine what hypothetical behavior is rightly subjected to such sanctions.[20] Should not the same be true when it comes to procedural justification, to the justification of applying the criminal sanction in a particular case where the facts are disputed?

But this account is incomplete. The substantive norms that form the corpus of criminal law represent a collective judgment, however misguided at particular points, about the most serious duties whose breach must be suppressed. It is this fact that justifies both the severity of the sanctions associated with criminal conviction and—by way of the principle of civility—the alloca-

18. Technically speaking, what I mean by the term "burden of proof" is the combination of (a) the burden of producing evidence, and (b) the burden of persuasion, at any point in a proceeding when these two burdens are placed on the same party. In civil cases especially, based on what evidence the parties produce, the burden of producing evidence may shift as the trial proceeds or cease to be operative against either party. In more unusual cases, the ultimate burden of persuasion, also called the risk of non-persuasion, may shift. *See generally* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 337 (4th ed. 1992). Presumptions are vehicles employed in some cases to accomplish such shifts. *Id.* § 342. Only if both burdens are shifted to the same party will I say that the burden of proof has shifted.

19. *See* MCCORMICK, *supra* note 18, § 342, at 452-54.

20. Even when the facts are known, or can be taken as given, the justification for using the criminal sanction, as opposed to civil sanctions, is not an easy matter. *See, e.g.*, JEFFRIE MURPHY & JULES COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 114-23 (1984).

tion of a strenuous burden of proof to the prosecution. If this were not so, it would be much harder to explain the significant doctrinal divergences from the proposition that criminal proof burdens apply if and only if sanctions involving loss of liberty are at stake.[21] Even those cases that draw upon the nature and severity of the sanction to be applied in determining the applicable burden of proof emphasize not only the defendant's potential loss of "life, liberty, or property," the relevant constitutional terms, but also the *stigma* associated with a determination of criminal behavior.[22] This stigma, to be independently significant, must be attributable not to the severity of the formal sanctions but rather to the seriousness of the alleged criminal acts and to ancillary consequences attached thereto *because* of their seriously wrongful character. It is, in part, the need to be reasonably sure before we impose this kind of stigma, together with the material sanctions, that serves to justify the peculiarly high burdens of proof on the prosecution.[23]

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21. As a constitutional matter, the panoply of relatively strict criminal procedures, including the proof burdens, may be required even though only a monetary assessment or property forfeiture is at issue. *Compare* Helwig v. United States, 188 U.S. 605 (1902) (extra duty levied for underdeclaration of value of imported goods held penal) *with* United States v. Ward, 448 U.S. 242 (1980) (property forfeiture held civil under facts), in which the constitutional test for applicability of criminal procedural standards is restated as:

> '[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether it operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative propose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .'

Id. at 247-48 n.7 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). Conversely, loss of liberty by confinement may constitutionally result from procedures of a civil nature. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (civil commitment proceedings required to satisfy only the "clear and convincing evidence" standard in order to be constitutional under due process guarantee).

22. *See, e.g.*, In Re Winship, 397 U.S. 358, 363-64 (1970) (beyond a reasonable doubt standard constitutionally required in juvenile delinquency proceeding):

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Id. In other words, the deprivation of life, liberty, or property is the trigger for due process protection under the Constitution, but by itself it does not determine the process that is due. Recourse to other considerations is necessary to make that determination.

23. The significance of stigmatization was poignantly demonstrated long ago when one observer argued that the public interest in preserving law and order was given too little weight by the onerous proof requirements, noting that the innocent individual erroneously convicted ought to be considered as "falling for his country." WILLIAM PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 356 (9th Am. ed. 1818). A reply by a famous

Moreover, the specification of conditions under which the presumption of innocence is rebutted embraces more than the quantum of proof that the prosecution must adduce, that is, proof "beyond a reasonable doubt." In legal adjudications, for example, there is a question of institutional role: It is for the tribunal, primarily the so-called "trier of fact" (whether judge or jury), to evaluate the evidence for its sufficiency relative to the determined standard. In particular, the burden is to be applied without regard to the fact that the system of police investigation and prosecutorial oversight in place in our system indicate a high probability that the defendant is guilty before any evidence is actually presented at trial.[24] So it is not surprising that courts have routinely included a jury instruction on the presumption of innocence in addition to instructions on the allocation and standard of the burden of proof.[25] The principle of civility, as I have called it, thus refers both to our presumption that any person's conduct upon a given occasion was lawful and to the specification of the conditions under which this presumption is overcome.

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evidence scholar criticized Paley for failing to see the crucial difference that the erroneously convicted individual does not fall in honor but is "branded with public ignominy." WILLIAM M. BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT 292 (1844). Lest this be misunderstood, note that the idea of a right not to be so stigmatized is an objective claim about justice, as well as a claim about the suffering of the person involved, and applies even if the person so stigmatized is unaware or does not care about the injustice. It embraces what Ronald Dworkin has called the "moral harm" of erroneous adjudications. *See* RONALD M. DWORKIN, *Principle, Policy, Procedure, in* A MATTER OF PRINCIPLE 79-84 (1985).

24. Thus, Professor Packer distinguished between two seemingly contradictory, yet distinct presumptions at work in different ways in the criminal process:

> The presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence is, then, a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities. . . . [T]he presumption of guilt is descriptive and factual; the presumption of innocence is normative and legal.

HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 161-62 (1968). *See also* 9 WIGMORE, *supra* note 7, § 511, at 530-32 (arguing that the term presumption of innocence "does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their own conclusion solely from the legal evidence adduced").

25. MCCORMICK, *supra* note 16, at § 453. Indeed, not to give such an instruction may be held unconstitutional. *See* Taylor v. Kentucky, 436 U.S. 478 (1978) (refusal to give instruction on presumption of innocence violates due process rights under Fourteenth Amendment).

B. *Civil Cases*

All this may be readily acknowledged in the criminal context.[26] What is less easily accepted is that analogous propositions can be stated with regard to the burden of proof in civil cases. To be sure, the duties are somewhat less pressing and the corresponding sanctions and stigma are generally less severe. Moreover, the *standard* of proof is relaxed in most civil cases—from "beyond a reasonable doubt" to "a preponderance of the evidence" in most contexts—a fact reflecting the law's approximately equal concern to avoid mistaken judgment for either side.[27] Nonetheless, it remains true that the burden is placed, in the vast majority of contexts, on the person or institution claiming that someone has breached a duty serious enough to warrant legal recognition: on the person who claims an intentional tort by another;[28] on the person who claims the negligence of another;[29] on the person who claims the breach of a contract by another;[30] on the person who claims the violation of his civil rights;[31] on the person who claims that his use of violence was in defense against aggression

26. One controversial matter is nomenclature, with many commentators plausibly preferring a term such as "assumption," rather than "presumption," in order to distinguish the current idea from the device of presuming some proposition from and after the presentation of specific evidence at trial. *See, e.g.*, MCCORMICK, *supra* note 18, § 342, at 453. The point applies in both civil and criminal cases. *See* OTIS H. FISK, THE LAW OF PROOF IN JUDICIAL PROCEEDINGS Ch. 2 (1928).

27. *See* MCCORMICK, *supra* note 18, § 339. A formalization of the insight that this measure of persuasion is attributable to the relative weighting of different error types can be found in John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1071-72 (1968), and is substantially developed in later work. *See, e.g.*, David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naken Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487.

28. *See, e.g.*, WILLIAM PROSSER & PAGE KEETON, PROSSER & KEETON ON TORTS § 113, at 802 (defamation), § 119, at 871 (malicious prosecution), § 120, at 892-96 (wrongful civil proceedings), § 121 (abuse of process), § 128, at 967-70 (injurious business falsehood) (5th ed. 1984).

29. *Id.* § 38.

30. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 752 (2nd ed. 1993) ("In the typical contract suit, plaintiff bears the burdens of production and persuasion on agreement, consideration, performance, breach, and damages.") To the extent that contractual duty is strict, in the sense that the promisor's duty is to perform, not to make a reasonable effort to perform, it is nonetheless a duty that the promisor has *undertaken*—strictly—to perform. *See generally* CHARLES FRIED, CONTRACT AS PROMISE (1981) (contract law as enforcing the moral obligation of promises). Breach of contract thus entails sufficient moral opprobrium to activate the civility principle, even when the impliedly promised performance is simply to insure the promisee against the non-performance of an explicit promise.

31. *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 3.01, at 135-36 (3 ed. 1991).

or other misconduct by another;[32] on the person who claims the contributory negligence of an injured person;[33] on the person who claims that his contractual duty is excused by his obligee's breach of contract or acts of fraud or duress;[34] on the employer who claims that a termination of employment was due to the employee's misconduct;[35] and so on.[36] Generally, the burden of proof is on the plaintiff, though the latter examples illustrate how that may not be so. While exceptions and qualifications are not difficult to find,[37] the general pattern is unmistakable.[38]

These commonplace facts of procedural life illustrate that the oft-supposed symmetry between civil litigants should not be overstated. In any case where breach of a serious social duty is at issue—and if it were not serious it would not likely be the basis of a lawsuit—the party whose breach is at issue is subject to an aspect of injustice, if the decision erroneously goes against him, that

32. *See* PROSSER & KEATON ON TORTS, *supra* note 28, §§ 19-23. Certain qualifications on this point are addressed later. *See infra* notes 118-126 and accompanying text.

33. *See id.* § 65.

34. *See* 17A C.J.S. CONTRACTS § 584, at 1126-33 (burden of proof generally on party claiming fraud, duress, or undue influence), § 590, at 1148 ("where defendant asserts the breach as a ground of affirmative relief or as an affirmative defense, the burden is on him"); *see also* 3 SAMUEL WILLISON, WILLISTON ON CONTRACTS § 7.11 (4th ed. 1992) (failure of consideration as affirmative defense, distinguished from lack of consideration).

35. *See* OWEN FAIRWEATHER, FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 194-95 (3rd ed. 1991). Of course, some terminations "for cause" do not involve issues of employee wrongdoing so much as incompetence. But even allegations of incompetence raise issues of civility. *See infra* note 36.

36. The influence of civility extends to contexts where the conduct at issue constitutes not a legal wrong but only a moral wrong, and in these contexts the presumption is particularly uncorrelated with the status, as plaintiff or defendant, of the person whose conduct is at issue. The same is true of presumptions that protect the dignity of a person against claims that, though lacking the element of legal or moral fault, would nonetheless prove highly embarrassing to that person or others. *See e.g.*, 9 WIGMORE, *supra* note 7, § 2527 (presumption of legitimacy of child, § 2528 (presumption of chastity), § 2500 (presumption of sanity of testator or contracting party).

37. In some contract cases, for example, the plaintiff's performance is construed as constituting a condition precedent to the maturation of defendant's duty, in which case the burden of proof of plaintiff's performance may be on plaintiff, as with other conditions precedent, in deference to the parties' freedom to arrange the matter as they choose. *See* MUELLER & KIRKPATRICK, *supra* note 30, at 752. Conversely, in one contract law context, the significant showing is simply proof of the existence of a matured contractual duty coupled with a claim of nonperformance, upon which the burden of proof (production and persuasion) is often placed on defendant to prove performance of that duty, a result based on the superior access of the obligor to evidence of payment. *See generally* Alison Reppy, *The Anomaly of Payment as an Affirmative Defense*, 10 CORNELL L.Q. 269 (1925). And in tort cases, there used to be a substantial split of authority on the question of who bears the burden of proving the plaintiff's contributory negligence. *See* CHARLES E. CLARK, CODE PLEADING § 47, at 303-07 (2nd ed. 1947). This ambivalence may have been in part a consequence of the notion that negligence with respect to one's *own* safety is less serious, as a breach of moral duty, than negligence with respect to another's safety.

38. *Cf.* GASKINS, *supra* note 6, at 21 (drawing the analogy to criminal cases and recognizing a "presumption of nonliability" of civil defendants).

does not apply to his opponent in the case of an erroneous decision going the other way. An erroneous decision for the defendant, whose breach of duty is at issue, does not necessarily attribute fault to the plaintiff; it only attributes the absence of fault to the defendant.[39] In many cases, after all, *no one* is at fault.[40] Thus, the placing of the burden on the plaintiff reflects the greater weight to be attributed to the risk of error in one direction than to the corresponding risk of error in the other. This asymmetry is suppressed if one attends only to the material sanction: In a damages action, for example, an erroneous decision for the defendant means that she wrongly keeps her money, while an erroneous decision for the plaintiff means that he wrongly receives defendant's money. In other words, the situation looks symmetrical when it is not. The reciprocal point applies to an alleged breach of duty by a plaintiff.[41]

Despite the obvious role of civility in these non-criminal contexts, there is a striking and curious tendency to ignore this principle by emphasizing other factors in the allocation of burdens, factors such as: (1) a policy of favoring or disfavoring certain kinds of claims; (2) the comparative availability of evidence to the parties; and (3) the *ex ante* probability of the truth of the factual issue; as well as (4) the structure of, or intent to be derived from, any applicable agreement between the parties; and even (5) the convenience of telling a story in temporal order.[42]

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39. This is a good place to dispel a potential confusion. One might say that an erroneous decision for the defendant improperly attributes fault in the plaintiff's bringing suit. However, persons may litigate in good faith, even though they turn out to be in error. Moreover, there is complete symmetry in this respect between plaintiff and defendant, since an erroneous decision for the plaintiff improperly imparts no less fault to the defendant's refusal to settle.

40. There are some cases in the factual context of which either one party or the other must have been at fault, but this is not the general or more common case. It is one of the marks of social incivility that people tend to ignore the existence of genuine accidents, the inevitable collisions, literally or metaphorically, between people doing their human best to live together amicably, or at least peacefully.

41. *Cf.* DWORKIN, *supra* note 23, at 92-103 (discussing the "moral harm" of erroneous civil adjudication, but not applying the concept to the issue of burdens of proof). Elsewhere, Professor Dworkin recognizes at least occasional sources of moral asymmetry:

> Examples [of such asymmetry] are rarer in civil law, because it is generally assumed that a mistake in either direction involves equal moral harm. But when the burden of proving truth is placed on the defendant in a defamation suit, for example, after the plaintiff has proved defamation, this may represent some collective determination that it is greater moral harm to suffer an uncompensated and false libel than to be held in damages for a libel that is in fact true.

Id. at 89.

42. The most frequently cited, and remarkably similar, analyses are Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 8-14 (1959), and

For some, these context-dependent considerations are thought to supplement the more pervasive idea that the burden should be placed on the party seeking to disturb the *status quo* (almost always the plaintiff or counterclaimant).[43] Although this last might seem to be an example of mere conservative legerdemain, since the plaintiff and defendant are presumably equally entitled to our open-minded consideration of their respective claims, a modest preference for the *status quo* may be explained as a not wholly arbitrary desire to avoid enforcement costs. If we presume in favor of defendant, and the presumption is not rebutted, then the *status quo* is preserved and nothing need be done. If, however, we presume in favor of plaintiff, and the presumption is not rebutted, then the courts and associated legal machinery are subject to being set in motion in order to enforce the judgment against defendant.[44]

The foregoing factors are surely part of the story, but not all of it, for civility has largely been pushed aside. Perhaps we can attribute this to the "no nonsense" reductionism of post-Realist legal thought, from which viewpoint the idea of civility must seem soft-headed, ill-suited to the serious task of social engineering. But how, in the face of such a conspicuous connection between civility and proof burdens, is this restructuring of legal thought to be maintained? In particular, the focus on disturbance of the *status quo* may help explain many burdens placed upon plaintiffs (and counterclaimants), but it leaves affirmative defenses wholly untouched.[45] Less obviously, it does not even explain some aspects

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Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 58-61 (1961). Somewhat similar views were earlier expressed by various writers. *See* JOHN M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 179 (1947); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 318 (1954); EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 74-76 (1956); 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2486 (3rd ed. 1940). This now standard analysis continues to be repeated, with slight variations, in most civil procedure and evidence textbooks and hornbooks. *See, e.g.*, MCCORMICK, *supra* note 18, § 337; MUELLER & KIRKPATRICK, *supra* note 30, at 753.

43. *See* Cleary, *supra* note 42, at 7-8; MCCORMICK, *supra* note 18, § 337, at 428.

44. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.2, at 520 (3rd ed. 1986). Just how far does such an economic rationale take us? Certainly, one could say that without good reason to believe one result more just than the other, we are free to pick the result that is cheaper. (This expresses a general proposition, not the *only* important one, about the relationship between justice and efficiency, but developing this point would be another article.) However, just because the evidence does not clearly favor one party or the other does not necessarily mean there is no reason of justice that determines the issue.

45. Tracing the preservation of the *status quo* to an efficiency consideration does help explain why the opposite of the usual conclusion should be reached when the nominal plaintiff seeks merely declaratory relief: The granting of the plaintiff's request, which

of the burdens placed upon plaintiffs and counterclaimants. Consider, for example, the practice of set-offs for counterclaims.[46] If a plaintiff in negligence already has possession of funds sufficient to compensate him, which funds would otherwise be owed (uncontroversially) to plaintiff, then something other than avoiding enforcement costs must explain placing the burden of proof with respect to defendant's negligence on the plaintiff. Yet this situation does not invoke the ancillary factors noted above in any way that an ordinary negligence claim does not.

There is clearly reason to reconsider the adequacy of the modern orthodoxy. Where, amid that scheme, has civility been buried? In many contexts, the preservation of the *status quo* idea may really be motivated by a desire to assume, absent contrary proof, that the *status quo* has been reached by events that do not entail serious wrongdoing.[47] That would explain, for example, why preservation of the *status quo* would have to yield in the set-off case described above, since the hypothesis sets up the *status quo* against the civility principle. *Status quo* preservation thus becomes merely a surrogate for the latter principle. This interpretation is confirmed by two further observations that serve to illuminate the relationship between the civility principle and the modern consensus.

First, note that the commentators generally reject the notion, common in the cases, that the burden is to be placed on the party "asserting the affirmative" of a proposition, or that a party ought not to be required to "prove a negative." As is routinely observed, this norm is transparently useless as stated, since almost any proposition can be recast to change its form from positive to negative, or conversely.[48] However, in many judicial

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does disturb the *status quo* by eliminating uncertainty, nevertheless actually avoids the costs mentioned. However, the cases are in conflict, partly because of the civility issues that arise. *Compare* Traveler's Insurance Co. v. Greenough, 190 A. 129 (N.H. 1937) (burden placed on defendant on grounds that allocation should not depend on which party is the nominal plaintiff) *with* First National Bank v. Malady, 408 P.2d 724 (Or. 1966) (burden placed on plaintiff insurance company which claimed that driver was operating car without the permission of the insured).

46. *See generally* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 9.9, 9.11 (4th ed. 1992).

47. If the assumption is correct, then a presumption of justice in the *status quo* could arise from the justice of the process by which the *status quo* was reached. *Cf.* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 150-64 (1974) (articulating an historical theory of justice in holdings).

48. *See* Cleary, *supra* note 42, at 11 ("Thus a plaintiff's exercise of ordinary care equals absence of contributory negligence, in the minority jurisdictions that place this element in plaintiff's case."); James *supra* note 42, at 51.

opinions employing this rule of thumb, the assertion is really an inartful way of saying that the burden should be placed on the party "affirmatively" asserting a *breach of duty* ("You breached") rather than the negative of such a proposition ("I did not breach").[49] The former allegation cannot be verbally transmuted in such a way as to make the demands of civility shift to the other party. Wigmore inadvertently illustrates the point in the following passage:

> It is often said that the burden is upon the *party having in form the affirmative allegation.* But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove; a common instance is that of a promisee alleging nonperformance of a contract.[50]

What Wigmore ignores, of course, is that whether one talks in terms of "nonperformance" (a negative form) or in terms of "breach" (a positive form), the allegation is still one *affirming* wrongdoing by a particular party, whose identity does not change

49. *See, e.g.*, National Motor Freight Traffic Assoc. v. United States, 242 F. Supp. 601, 605 (D.D.C. 1965) (burden on party "affirming" breach of regulatory duty by company's acting without proper authority); Delaware Coach Co. v. Savage, 81 F. Supp. 293, 296 (D. Del. 1948) ("The burden of proof rests upon the party asserting the affirmative of an issue, such as, in this case, the negligence of the defendants."); Saari v. George C. Dates & Assoc., 19 N.W.2d 121, 123 (Mich. 1945) (burden on defendant "holding the affirmative" of the claim that plaintiff had breached employment contract, thereby warranting discharge). The matter was complicated in the older cases by the system of pleading then in effect, yet excellent discussions can be found in which the pleading of the affirmative test is functionally related to civility. *See, e.g.*, First Nat'l bank v. Ford, 216 P. 691 (Wyo. 1923) (holding the burden of proof properly placed on defendant to prove that amount on promissory note was altered), in which the court stated:

> The charge is grave, and, though this is not a criminal case, a finding to that effect would stamp the owner as a forger and as an outlaw in his community, unworthy of the confidence of his fellow men. Is it right that this fact should not affect the situation and should not be considered by the courts?. . . Here the presumption of innocence, that men act in good faith and not unlawfully, should operate in favor of plaintiff.

Id. at 697.

50. 9 WIGMORE, *supra* note 7, § 2486, at 288 (citations omitted) (emphasis in original).

with the change of form.[51] In very many, probably most cases a civil claim or defense thereto will involve such allegations.[52]

Of course—and this is the second observation—if *any* allegation of breach of duty is considered a "disfavored claim," then the kind of affirmative proposition at issue could be subsumed under the first factor listed above as controlling under the modern view. This is not, however, how the "disfavored claim" idea has been used by the commentators; it has a more specific connotation of policies favoring an interest group in certain contexts or otherwise favoring or disfavoring a fairly limited class of claims on substantive grounds.[53] If we ignore these narrowing connotations, then the idea of "disfavored claims" becomes too vague and all embracing to be of any help in understanding the allocation of burdens. Indeed, all the other now conventional factors listed above can also be stated in terms of disfavoring certain classes of claims. On the other hand, if we take these connotations at face value, the civility principle is virtually squeezed out of the category. In the end, we must address the various *reasons* that a claim may be disfavored. Despite the selective focus of the

51. A somewhat similar argument is made in Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 571-82 (1973), as part of a general defense of the multistaged pleading of the common law. One of the only voices of dissent from the modern orthodoxy, Epstein argues convincingly that the standards offered to replace the "affirmative allegation" notion are in fact poor substitutes when the issue is who should bear the *burden of allegation*. However, he repeatedly concedes—as unnecessary to his argument—the greater viability of these substitute standards at the point of allocating burdens of proof, the issues on which the standards were primarily put forward by their proponents. *See id.* at 575 n.38, 580,581. Moreover, Epstein's defense of the formal test of affirmative allegations, which rests upon the notion of causation, requires him to qualify the test in several contexts, such as that of an allegation of nonperformance of an affirmative duty to act. *Id.* at 575-77. These problems are handled without qualification by the principle of civility, to the extent it applies.

52. Some affirmative defenses, such as immunities, will clearly *not* present any issue of civility, as that idea has been defined here, while others, such as the bar of the statute of limitations, will be ambiguously related to civility because of ambiguity in the substantive justification of the defense itself (for example, barring late claims for the sake of repose, which does not implicate civility, or for the sake of disciplining dilatory plaintiffs, which does). *See* Mary E. Miller, *Barbed Wire in the Borderland: Statute of Limitations Choices for Wrongful Discharge Claims*, 23 SAN DIEGO L. REV. 833, 836 (1986) (identifying factors supporting time limitations on actions, as understood by courts).

53. For example, Professor Cleary used as examples a rule (now defunct) that the plaintiff must prove freedom from contributory negligence and a rule that the plaintiff in a defamation case must prove the falsity of the defendant's allegedly defamatory statement. *See* Cleary, *supra* note 42, at 11-12. Such rules are apparently to be seen as motivated by a desire for plaintiffs to recover in personal injury cases in order to spread risk through insurance schemes and for defamation actions to fail in order to protect a robust freedom of speech. *See also* James, *supra* note 42, at 61 (adding fraud as a disfavored claim).

commentators, the most pervasively recurrent reason is simple civility.[54]

Consider, for example, the problem of fire insurance policies, which quite generally do not cover a fire intentionally set by or on behalf of the insured.[55] The courts routinely place the burden of proof for that issue on the insurance company.[56] This is so even though the insured is usually the one seeking to disturb the *status quo* and the one with best access to relevant evidence. Explanations of this rule under the now-prevailing standards will tend to emphasize one or both of two ideas. First, a claim of arson may be "disfavored." In order to keep this from being equivalent to a claim of civility, it could be articulated as a policy in favor of recovery against insurance companies for the sake of spreading risk. But this would be a strange rationale indeed, since the policy has no plausible stopping point consistent with any notion of freedom of contract.[57] Closely related, but more

54. An occasional reference to what I have here called the principle of civility can be found in the literature, but no significant weight is accorded the idea. In one standard text, a brief, almost apologetic reference appears in the course of explaining why it is that the factor of relative access to evidence is not uniformly accurate as a predictor of the allocation of burdens:

> Plaintiff usually has the burden to prove what the defendant's conduct was in negligence and breach of contract. Even more starkly, a plaintiff who has been defrauded has the burden of proving the falsity of the representations and, under the classic fraud doctrine, the fact that the falsity was known to defendant but not to plaintiff. If access to facts were a determining factor in allocating the burden of proof, it would be bizarre to require plaintiff to prove in court the facts about which he or she was deceived in the underlying transaction. The alleged wrongdoer's greater access to evidence as a factor in procedural justice is thus offset by another such factor—the sense that a charge of serious wrongdoing should be proven by the person making it.

JAMES, JR. ET AL., *supra* note 46, § 7.16, at 344 (citations omitted). The authors provide no further comments or citations which would illuminate or endorse this factor, leaving it as merely a "sense" of what is proper. That, at least, is an improvement over the previous editions of this work, which can be traced back to the article by Professor James already cited, where the idea was labeled merely a "feeling" and was not even identified as a "factor in procedural justice." *See* James, *supra* note 42, at 60.

55. Most forms of insurance are nominally subject to an exception, based either on policy language or rules imposed by law, for losses intentionally caused by the insured, though the policy behind the exception attenuates whenever the beneficiary is someone other than, and not in complicity with, the insured. *See generally* James A. Fisher, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95 (1990).

56. *See* 19 GEORGE J. COUCH, COUCH ON INSURANCE § 79:477 (rev. 2nd ed. 1983). Similar observations can be made as to other kinds of wrongdoing by the insured that would defeat coverage, under property insurance or other types of insurance. *See e.g., id.* § 79:326 (bad faith), § 79:331 (breach of condition), 79:397 (false swearing), § 73:399 (fraud), § 79:410 (misrepresentation), § 79:441 (nonpayment of premiums).

57. Under this policy, for example, why should the insured not be able to recover even when the loss is *clearly* excluded from coverage? Why should we even require the insured to have paid the premiums? Of course, I do not deny that a pro-coverage bias has existed

plausible, is the idea of interpreting ambiguous provisions against the insurer-drafter, a principle that can conceivably be based on, and limited by, the protection of reasonable consumer expectations. Now the question of proof burdens is one about which there will frequently be no expectations at all. Still, in default or ignorance of contractual specification, the insured's reasonable expectations might well be conditioned by assumptions about the principle of civility, as that principle is known to be instantiated elsewhere in life generally.[58] In the end, civility still comes into play.

As an alternative way to avoid civility, one could try to explain the rule in question by reference to the descriptive aspect of the norm against arson: Since most people, even people who are insured, do not commit arson, the *ex ante* probability seems to favor coverage, so the courts are thought warranted in allowing, or even requiring, a jury to infer the absence of arson unless the insurance company convinces them otherwise. This idea actually rests upon one of the basic considerations underpinning the civility principle, as developed in the previous section. The difficulty, however, is that, if accuracy alone were what this rule is about, the relevant *ex ante* probability would not be the probability that any randomly selected fire insurance claim will involve arson, but rather the probability that arson is involved in a claim randomly selected from all those in which the question of arson is raised and litigated.[59] The latter probability cannot easily be said to favor the insured. The relevance of the background probabilities is less direct than the standard analysis would suggest, a lesson easily perceived in the criminal context.[60] It is mediated by the principle of civility, which in the end is the better

in many courts, but this is a description not a justification. Even limiting the "policy" to procedural issues, why should the insured have to prove the existence of a contract? Or a loss of the type covered by the contract? Why not place the burden on these issues on the insurer as well? Yet the law does not. *See infra* note 63.

58. *See generally* Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992) (explaining how default rules can be consistent with the idea of consensual obligation in contract). Of course, I do not mean that a justification is ultimately correct just because it properly invokes the civility principle. In the insurance cases, for example, it may be that the burden should rest upon the insurer only where there is reason to doubt that the parties intended to allocate it by contract to the insured. This, of course, depends upon how great a weight one accords to the here conflicting principle of freedom of contract. *See generally* Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

59. *See* Cleary, *supra* note 42, at 13 ("The litigated cases would seem to furnish the more appropriate basis for estimating probabilities.").

60. *See supra* note 24 and accompanying text.

explanation and justification of these results. This is confirmed, and our corollary thesis is illustrated, by the fact that many jurisdictions also place a higher than usual burden of persuasion on the insurance company with regard to this issue.[61]

In reply, it may be argued that civility actually cuts the other way in these cases. After all, the plaintiff alleges breach of contract, and surely that is a wrongdoing.[62] Does not civility therefore require that the insured bear the burden? Of course, the gravamen of the complaint is that the insurance company has breached its contract by not paying as it is obligated to do. That is part of the reason that most of the elements establishing a contractual duty and its breach must be proved by the insured: elements like the existence of a contract, a loss of the appropriate sort, and of course, refusal to pay.[63] But insofar as the question of breach turns upon the question of arson, for example, the temporally prior issue of wrongdoing properly becomes the focus of an argument from civility. Indeed, in such cases the moral opprobrium associated with breach is muted to the extent that the defendant can show even reasonable grounds for believing that earlier wrongdoing took place. A similar point can be made in numerous contexts. While it is a wrong to defame, insofar as liability depends on the accuracy of the defamatory statements, statements that quite typically assert prior impropriety on the part of (or otherwise embarrassing facts about) the plaintiff, the principle of civility plausibly places the burden of proof on the defendant.[64] Likewise, a claim that a battery was a privileged re-

61. *See* Ziegler v. Hustisford Farmers Mut. Ins. Co., 298 N.W. 610, 612 (Wis. 1941) ("In civil actions, where fraud, crime, criminal conduct or conspiracy is alleged, the burden rests upon him who so charges, to establish the proof of such allegations by clear and satisfactory evidence."); *see also* 19 COUCH ON INSURANCE, *supra* note 56, § 79:477, at 430 (noting the rule in some jurisdictions that insurer must prove arson beyond a reasonable doubt).

62. Whatever may be said about contract cases generally, *see supra* note 30, in the insurance cases the insurer is generally not in a position to deny that the breach, if that is what it is, is willful. In the typical case with a defense of arson, for example, no intervening act of God has made it impossible for the company to pay on the policy; the company simply refuses. That is a breach that certainly entails fault.

63. *See* 19 COUCH ON INSURANCE, *supra* note 56, § 79:315.

64. Thus Wigmore appears implicitly to be embracing the notion of civility by what he simply calls "fairness":

> Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause which might otherwise have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege) are here put upon the plaintiff, who is requried to prove their nonexistence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation . . ., it might have been supposed on other

sponse to misconduct shifts the focus of civility to the plaintiff's breach of duty.[65]

It cannot be denied that many occasions arise in which the principle of civility does not figure, as where there is no allegation of wrongdoing but only a request for the court to declare the rights of individuals admittedly acting entirely in good faith, or at least without violating anyone's rights pending the resolution of the matter. Disputes over the interpretation of a will or trust often take this form. More pervasively, claims based on a theory of strict liability, in the sense of liability without fault, will not activate the civility principle.[66] Moreover, even for those very common causes of action entailing wrongdoing, a more fine-grained analysis will indicate elements that bear no moral opprobrium. Morally neutral elements, such as actual causation, may fall to be allocated in accordance with the other factors commonly cited.[67] There are also contexts in which the principle of civility, though applicable, must nonetheless yield to other principles or policies of greater weight *in that context*, especially the notion of placing the burden on the party with superior access to needed information once a significant circumstantial case of wrongdoing has been shown.[68]

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analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance.

9 WIGMORE, *supra* note 7, § 2486, at 291-92.

65. *See supra* note 32 and accompanying text.

66. One must be careful, of course, since strict tort liability actions may be indirectly premised on fault. Is moral opprobrium entailed by an allegation that one's products has an "unreasonably dangerous defect"? *See generally* Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980) (recommending candor in adopting a negligence standard for design defects). Similarly, in some contexts the basis of liability may be ambiguous as to fault, with resulting ambiguity about the allocation of proof burdens. The problem has arisen, for example, in so-called "disparate impact" discrimination suits under Title VII. *Compare* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989) (restricting the imposition of proof burden on defendants to a burden of producing evidence, relying on arguments using the language of fault-based liability) *with* Civil Rights Act of 1991, 105 Stat. 1071 (1991), § 105 (amending Title VII to reverse *Wards Cove* on this and other points).

67. This is consistent, for example, with those cases which shift the burden of proof to multiple defendants to establish which of them is causally connected to plaintiff's injury. The traditional example is Summers v. Tice, 199 P.2d 1 (Cal. 1948).

68. In the great majority of such cases, *at most* the burden of producing evidence shifts; the burden of persuasion remains on the party claiming breach. The recurring example is *res ipsa loquitur*. *See* PROSSER & KEETON ON TORTS, *supra* note 28, §§ 39-40. A similar pattern occurs in the litigation of "disparate treatment" discrimination suits. *See, e.g.*, Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (burden of production shifted in employment discrimination action). In a later case, the Supreme Court approved, by a six to three vote, a shift of the burden of persuasion to defendant in an employment discrimination case, but only after the employer's improper motive is shown

These concessions do not, however, deny the existence or importance of the principle of civility itself. They only establish that the principle is not alone among the relevant considerations.[69] Though it is commonplace now to observe, quite correctly, that no single factor is determinative in all contexts of the allocation of burdens, I venture beyond this agnosticism in asserting that, *in those cases where civility is implicated,* it is and ought to be strongly weighted.

Still, some will say that this is all just a tempest in a teapot. For the allocation of the burden of proof in civil ligation affects only those cases in which there is no evidence or in which the evidence on each side is of approximately equivalent strength. True, the mechanism of settlement will assure that it is mostly such cases that will go to trial, but one might think that if civility mattered so much, it would have a greater impact.

To some extent, it does. In the first place, a sense of civility may help to explain the empirical evidence to the effect that juries, and to a lesser extent even judges, give to the "preponderance of the evidence" standard an interpretation that quantifies at something significantly higher than 50% probability.[70] Moreover, certain claims are "disfavored" by way of formally requiring a standard of persuasion that is higher than the usual preponderance of evidence test, such as "clear and convincing evidence" or even "beyond a reasonable doubt."[71] And as noted in connection with the defense of arson in insurance cases, many of these re-

by direct evidence; the burden of persuasion resting on the employer is then the civility-neutral causal question of whether the employer's action would have been the same in the absence of that motive. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Appropriately, from a civility perspective, a default rule that presumptions shift the burden of persuasion, rather than the burden of production, was rejected in the codification of the Federal Rules of Evidence. See FED. R. EVID. 301.

69. *See generally* Ronald M. Dworkin, *The Model of Rules,* 35 U. CHI. L. REV. 14, 22-29 (1967) (discussing the nature of legal principles, as contrasted with legal rules, as involving a dimension of "weight" and not being subject to disproof merely by the existence of decisions that do not always follow the direction of the principle to the furthest extent).

70. *See* Rita J. Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom,* 5 LAW & SOC'Y REV. 319, 325 (1971) (55% for judges on average; 75% for jurors and students on average). This result is puzzling from the now conventional perspective. In a comment on the significance of the Simon and Mahan study, Judge (then-Professor) Winter revealingly dismissed, in a footnote, an explanation based on civility: "There may well be some predisposition to disfavor plaintiffs because there are 'accusers.' Such a view seems to me, however, more emotional than rational and wholly inappropriate in a highly commercialized and insured society." Ralph K. Winter, *The Jury and the Risk of Nonpersuasion,* 5 LAW & SOC'Y REV. 335, 337, 343 n.1 (1971).

71. Higher burdens are common in a wide variety of civil contexts. *See* MCCORMICK, *supra* note 18, § 340 (clear and convincing evidence standard applied), § 341, at 576-78 (beyond reasonable doubt standard rarely applied).

quirements, though certainly not all, are also best explained in terms of the principle of civility.[72] A compelling example is the placing of higher than usual burdens of persuasion on parties seeking punitive damages for another's malicious conduct.[73] Finally, whether or not the *de jure* or *de facto* standard of proof is increased to reflect the civility concern, the existence of *de jure* or *de facto* presumption against breach may have the effect of decreasing the *ex ante* probability of wrongdoing from which the trier of fact begins its adjustments according to the evidence presented.[74] Thus, it may in some cases be sensible to employ some procedural device reflecting the presumption against breach even if the burden of persuasion has been assigned by instructions in accord with the civility principle.[75]

These observations demonstrate a pressure in the law toward the corollary proposition advanced in my introduction, that the weight of the proof burden imposed under the principle of civility will depend on the severity of the alleged breach of duty. In which way, or combination of ways, the principle ought to be put into effect to achieve optimally the goals of civil adjudication is a

72. Judge Weinstein has noted the use of the clear and convincing evidence standard in cases where "moral turpitude is implied." United States v. Fatico, 458 F. Supp. 388, 404 (E.D.N.Y. 1978); *see also* SIDNEY L. PHIPSON, PHIPSON ON EVIDENCE §§ 4-38, at 78-79 (14th ed. 1990) (noting that in English law the standard of proof varies with the seriousness of the alleged breach).

73. *See* Lee R. Russ, Annotation, *Standard of Proof as to Conduct Underlying Punitive Damage Awards*, 58 A.L.R. 4th 878 (1987) (although majority rule requires the same standard of proof generally applicable in civil cases, minority rule requires proof by clear and convincing evidence, with at least one state requiring proof beyond a reasonable doubt). There have also been numerous attempts, only partly successful, to increase the burden of persuasion in any context where a civil party is accused of particularly serious misconduct, such as conduct that could be subject to criminal prosecution, whether or not punitive damages are sought. *See* 9 WIGMORE, *supra* note 7, § 2498, at 421-31.

74. For those familiar with the Bayesian approach to probability adjustments, this will be understood as helping the trier to establish "prior odds" of particular facts, that is the odds prior to the formal presentation of evidence at trial. *See, e.g.*, Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1022-27 (1977). Establishing these prior odds is a difficult problem for the Bayesian analysis, a problem which the principle of civility helps to solve.

75. The problem is what device to use. One that may traditionally have been used is to instruct the jury about the presumption, in some cases telling the jury that the presumption may be considered *evidence* against the claim of breach even though evidence against the presumed fact is presented. *See, e.g.*, Maryland v. Baltimore Transit Co., 329 F.2d 738, cert. denied 379 U.S. 842 (1964) (error not to include instruction on presumption of due care by plaintiff's intestate). This "presumption as evidence" notion has been harshly and rightly criticized by commentators for many years. *See, e.g.*, J.P. McBaine, *Presumptions: Are They Evidence?*, 26 CAL. L. REV. 519 (1930). It was explicitly rejected in one form during the adoption of the Federal Rules. *See* SENATE COMMITTEE ON THE JUDICIARY, FED. R. EVID., S. REP. No. 1277, 93rd Cong., 2d Sess., at 9 (1974). But no one has, to my knowledge, noted the possibility that this procedural device has been an inartful way of expressing to the trier of fact something about the setting of prior odds.

more difficult issue, into which I will not delve here.[76] For now, I am content if our collective professional sensitivity to the principle is suitably heightened.

III. Constitutional Considerations

It is well accepted that the Due Process Clauses of the Constitution place substantial, though still imprecise and controversial, limitations on the placing of proof burdens on, or the shifting of such burdens to, the criminal defendant.[77] But the analogous proposition in civil cases is now routinely disparaged. A brief reconsideration of this issue will allow us to see how the civility principle provides a perspective on the constitutional issue that is not adequately recognized today. This, in turn, will shed some further light on the controversial issue of the specification of affirmative defenses in criminal cases.

A. *Civil Cases*

There was a time when constitutional constraints in civil cases were taken more seriously than they are today. With regard to the Due Process Clauses and their implications with respect to burdens of proof and presumptions, the most important case is *Western & Atlantic R.R. v. Henderson*,[78] decided in 1929. In that case, a unanimous Supreme Court struck down a Georgia statute that provided for a presumption of negligence by the railroad with respect to any damage done by trains, as applied in the case to a grade crossing collision. Thirty years later, however, in *Dick v. New York Life Insurance Co.*,[79] the Supreme Court sustained a North Dakota common-law rule imposing the burden of proving death by suicide on the defendant insurance company. Although

76. It may be, for example, that in civil cases the principle should *ordinarily* be limited to affecting the allocation of the burden of proof between the parties and suggesting how triers of fact should fix prior probabilities of certain events. The heightened standard of proof presents a variety of problems, including: (1) How to deal with the necessity of having multiple standards in the same case, if some issues are determined by a preponderance of evidence, others by a higher standard; and (2) How to deal with situations in which an uncivil explanation is one among many possible explanations of the evidence presented. Also, significant effect upon the standard of proof may create redundancies if prior odds are being suitably adjusted as well. *Cf.* Vaughn C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 Vand. L. Rev. 807, 817-18 (1961) (noting redundancy between jury's setting of priors and default favoring of a party based on *ex ante* probabilities).

77. *See* McCormick, *supra* note 18, §§ 346-348.

78. 279 U.S. 639 (1929).

79. 359 U.S. 437 (1959).

the constitutional question was not in fact raised in the later opinion, the prevailing analysis of the allocation of burdens in civil cases has led to the now standard view that *Dick* effectively overruled *Henderson*, since both involve shifting the burden of persuasion to the party who did not initially bear it.[80] Thus, it is widely believed that the effect of *Dick* was to leave the allocation of burdens in civil cases effectively uncontrolled by the Due Process Clauses.[81]

Yet, the civility principle illuminates a completely different and heretofore unnoticed relationship between *Henderson* and *Dick*, for each can be seen as a perfectly plausible application of that principle to the factually different contexts involved. *Henderson* rejects the idea of relieving the person alleging negligence from proving it; *Dick* allows shifting the burden to the one who defends its actions by alleging earlier wrongdoing by the claimant's decedent.[82] As in the case of intentional destruction of an insured structure, there is a large body of case law with regard to claims for life insurance where the insurer claims suicide. In accordance with the civility principle, the burden of proof is routinely placed upon the insurer.[83] Thus, from the standpoint of

80. The *Henderson* Court rightly interpreted the presumption there at issue as shifting the burden of *persuasion* to the defendants. *Henderson*, 279 U.S. at 643-44. As the Court noted, it had earlier been established that a weaker presumption, shifting only the burden of producing evidence, is constitutionally permissible under appropriate facts. *See* Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910) (injury resulting from derailment). Shifting the burden of production remains an oft-employed and constitutionally legitimate means of regulating the proof process when, for example, a significant prima facie case is coupled with superior access to evidence by the person to whom the burden is shifted. *See supra* note 67.

81. "Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the nonexistence of the presumed fact in civil cases is laid at rest by [*Dick*]" FED. R. EVID. 301, Advisory Committee's Note; *see also* MCCORMICK, *supra* note 18, § 345. Most commentators thus consider the only remaining due process restriction to be the rational relation test applied in minimal scrutiny, substantive due process cases, and reject even this as unsound to the extent it is construed as requiring a probabilistic basis for the presumption, rather than merely a plausible policy preference. *Id.* § 476-77.

82. While it is arguable whether suicide is a form of wrongdoing or misconduct, it is certainly an action which generates serious social criticism and embarrassment, thus triggering a broad civility principle. *See supra* note 36.

83. *See* 19 COUCH ON INSURANCE, *supra* note 56, § 79:458. In some contexts, depending on the wording of the contract, the burden of proof is placed on the insured, but even in such cases, the result is modified by invoking a presumption against suicide, which at least throws the burden of producing evidence on the insurer. *Id.* §§ 79:521-523; *see also* JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE §§ 12151-57 (rev. ed. 1980); 9 WIGMORE, *supra* note 7, § 2510, at 515-517. As in the property insurance context, there are many other examples of a burden being placed on the insurer to show wrongdoing by the insured that would defeat coverage. *See, e.g.*, O'Brien v. Equitable Life Assur. Co., 212 F.2d 383, 387 (8th Cir. 1954), *cert. denied*, 348 U.S. 835 (1954) (applying a "presumption against death from misconduct" of the insured to a life insurance claim where the question was

civility, *Dick* can hardly be seen as inconsistent with *Henderson.* Of course, I do not claim that the principle of civility is invariably determinative at the constitutional level, but there is no reason to be found in these cases not to consider it constitutionally relevant.

There is, however, one argument appearing in judicial opinions that would directly undermine civility, at least at the constitutional level, if it were consistently applied. It can be traced to the decision in *Ferry v. Ramsey,*[84] decided one year before *Henderson.* There, the Court faced a statute that made bank directors liable for funds deposited if the director knew the bank to be insolvent, and it held that a presumption of knowledge of illegal corporate acceptance of deposits could be placed by another statutory provision upon the directors of an insolvent bank. This was true, wrote Justice Holmes for the majority, because the legislature could have made the directors strictly liable in all cases, whether or not they knew of the illegal acts, and therefore a mere presumption of knowledge, which generates liability in no more cases, must be constitutional.[85] This "greater power includes lesser power" argument would potentially render nearly all civil presumptions constitutional, and it continues to be cited to this effect.[86]

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whether the deceased had been killed while in the commission of an assault, though leaving the ultimate burden of persuasion on the insured).

84. 277 U.S. 88 (1928).

85. *Id.* at 94-95 ("The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it.") In fact, Holmes had made similar arguments in earlier cases not involving proof burdens. *See, e.g.,* Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.").

86. *See, e.g.,* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 66 n.2 (2nd ed. 1987); MCCORMICK, *supra* note 7, at § 477 n.7. Holmes need not have used this shotgun to kill this fly: The statute in question provided that acceptance of deposits during insolvency would be "prima facie evidence of such knowledge and assent" by directors. *Ferry,* 277 U.S. at 93. Although the lower court's opinion leaves the procedural meaning of this provision somewhat murky, it seems to have entailed only a rule allowing the jury to infer knowledge and assent without further evidence by the plaintiff or at most a presumption shifting the burden of producing evidence to the defendant; the jury instructions leave the burden of persuasion on the plaintiff. *See* Ramsey v. Adams, 253 P. 416, 417, 420-21 (Kan. 1927). That device need not have presented a serious constitutional problem under the circumstances of the case. *See supra* note 67. Holmes may have felt compelled to use the blunter argument in order to affirm the lower appellate court's taking of the case from the jury, whose verdict had gone in favor of a director who may have been too ill to be able to know of or assent to the receipt of deposits while insolvent. *See Ramsey* 253 P. at 418-22 (characterization of evidence by majority of Kansas Supreme Court); *id.* at 422-23 (characterization by dissent); *Ferry,* 277 U.S. at 94 (Holmes's charac-

But Holmes's argument is highly suspect, both as a matter of procedural justice and as a matter of constitutional law. The moral point was made by Justice Sutherland, joined by Justices Butler and Sanford, in dissent in the *Ferry* case. In essence, they argued that the majority failed to honor the principle of civility:

> To me it seems clear that there is no rational relation between the fact of insolvency and the fact here presumed, namely, assent to the reception of a particular deposit. Rather, the rational presumption is the other way, since the law itself requires that an insolvent bank shall not receive deposits; and the assent of the director thereto would be an assent to a violation of law. I do not quarrel with the suggestion that it was within the constitutional power of the state to create an absolute liability against a director if, while solvent, the bank of which he is a director receive a deposit. But this the state did not do. Instead, it adopted a statue creating a liability only in case the director *assents* to the deposit; and I should have supposed the liability of the director must be measured by what the state has enacted and not by what it had the power to enact.[87]

Thus, the presumption should go with lawful conduct; and there is a big difference, which Holmes's argument ignores, between being bound to pay $X because you are liable for certain deposits *without fault*, and being bound to pay $X because you are presumed to have been at fault through your actions. The money may be the same, but the message is not. If the defendant is not

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terization of the illness); *id.* at 95 (Sutherland's dissenting characterization). Sometimes, hard cases do make bad law.

87. *Ferry*, 277 U.S. at 96-97 (emphasis in original). The last clause of this passage is curious. Sutherland was, of course, correct that the director's *liability* must be measured by what the state had enacted, but the issue before the Court was not how the *liability* was to be measured, it was how its *constitutionality* was to be measured. What Justice Sutherland presumably meant is that the *latter* must be measured by what is enacted rather than by what might have been enacted. Suppose, for example, the legislature imposed liability for knowing receipt of deposits, prescribing no presumptive device at all, but the evidence in the case showed clearly the absence of knowledge; imagine, if you wish, that the jury gives a special verdict of no knowledge. Suppose further, however, that the jury returns a verdict for the plaintiff, and judgment is entered thereon, even though no other theory of liability is available to support the result. Would it be a sufficient justification of this procedure, or a sufficient response to a Due Process challenge of it, to note that the state *could have* imposed liability regardless of knowledge? That it should not be follows from the simple, if not obvious requirement that the state be true to what it says. Though not covered by the civility principle as describe here, that is an additional moral constraint on government action that is not respected by Holmes's argument. *See* FULLER, *supra* note 8, at 81-82 (arguing that the internal morality of law requires congruence between official action and declared rule).

in fact at fault, then there is an injustice in the latter case that is not present in the former.[88]

As to constitutional law, although *Ferry* was not overruled as such, it is quite clear that Sutherland's view prevailed not only in the later *Henderson* case, a decision by a unanimous Court, but also in other cases decided after Holmes left the Court.[89] In more recent decades, the issue has resurfaced primarily in connection with the application of due process standards to the revocation of entitlement under welfare programs or other forms of government largess, or the termination of government employment. For example, where a legislature is constitutionally free to provide certain benefits or not, the Holmesian theory would suggest that such benefits could be granted on any terms the legislature believed appropriate. Yet the Supreme Court has articulated various due process constraints on the way such benefits are to be terminated.[90] Again, the same argument can be made with regard to termination of government employment for cause: Since the state is under no obligation to give someone a job, why cannot the state provide that the conditions of employment are that one may be terminated for cause without a pre-termination hearing? In this context, although the Holmesian suggestion has been taken seriously by a few members of the Court, it has been clearly rejected by the majority.[91] Thus, we may take the Holmesian theory to be unsound as a matter of constitutional law; certainly we can say that, whatever force the argument carries, it

88. A hard case is presented if the legislature (or a court) announces that, in principle, liability should be fault based in the given context, and that its reason for creating strict liability *without* an affirmative defense of non-fault is solely or primarily to relieve plaintiffs of the difficulties of proving fault, a situation that is not altogether far from the pattern of development of strict liability for product defects. *See supra* note 66.

89. This is not to deny that Sutherland may have taken his argument too far in applying it to situations that present minimal issues of civility at all. *See, e.g.*, Heinere v. Donnan, 285 U.S. 312 (1932) (Sutherland, J., for the majority) (deciding a tax refund case in which the presumption at issue was that a gift made within two years of death was made in contemplation of death).

90. The seminal case is Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that due process requires hearing before termination of welfare benefits). *See generally* GASKINS, *supra* note 6, at 75-94 (discussing burden of proof on legislative facts surrounding due process decisions).

91. *Compare* Arnett v. Kennedy, 416 U.S. 134,154 (1974) (plurality opinion by Rehnquist, J., joined by Burger, C.J. and Stewart, J., arguing that employee must "take the bitter with the sweet") *with* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (White J., for the majority) (rejecting the "bitter with the sweet" approach in an opinion from which only Rehnquist, J. dissented). *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-12 (2nd ed. 1988) (arguing that this resolution is in tension with the Court's willingness to defer to legislative will in deciding whether the interest in question qualifies as "property" for the purpose of applying the Due Process Clauses).

does not necessarily override counterarguments, such as one based on civility, as it is apparently intended to do.[92]

However, the "greater includes the lesser" argument can be recast in a more modest, procedural form that does not offend the civility principle: *If* it is constitutional to place the burden of proof as to a certain proposition on *either* party, then it is constitutional to place the initial burden of proof on one but then use a presumption to shift a part or all of that burden to the other.[93] For example, in the *Henderson* context, if it were constitutional to impose "strict" liability on railroads for grade crossing accidents, subject to an affirmative defense of due care, then it should be constitutional to presume negligence by the railroad under a conventional fault-based system of liability. The latter arrangement is *no worse*, from a civility standpoint, than the former.[94] The problem, of course, is that the former arrangement *does* violate the civility principle, and it cannot be defended by observing that a system of strict liability *without* affirmative defense could constitutionally be imposed. *Henderson* is a case in point, since the statue in question there actually imposed strict liability with an affirmative defense of due care, although the trial court's instructions to the jury used the language of presumptions also found in the statute.[95]

92. As the discussion in the text makes clear, the Holmesian argument arises in many contexts other than those concerning burdens of proof about adjudicative facts. In the literature, it goes under the rubric of "unconstitutional conditions," referring to the unconstitutionality of the state's granting some benefit or performing some act conditionally, even though it has the power to grant or perform—or not—unconditionally. The most recent and extensive treatment is RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993).

93. *Cf.* MCCORMICK, *supra* note 18, § 348, at 492 (essentially the same argument made in criminal context).

94. Even as reconstructed, the Holmesian argument may be defective for its failures in ways that do not relate to civility, as defined here. For example, to the extent that this strict-liability-with-defense regime is chosen specifically to avoid the *appearance* of a fault-based liability, the choice may be considered duplicitous and condemned as such. *See supra* note 87.

95. *See Henderson*, 279 U.S. at 640-41. The trial court's use of presumption language, which was virtually prescribed by the statutory language ("the presumption in all cases being against the company"), may have affected the jury's prior odds in a way that a simple affirmative defense instruction would not, so it is just possible that a presumption approach can be tougher on the defendant than a simple affirmative defense approach, a further qualification that undermines even the narrowed Holmesian theory described in the text. Interestingly, the Supreme Court emphasized that even after the defendant's presentation of evidence of due care, the presumption was—under prevailing state court interpretations of the statute—to be considered as *evidence* of negligence. *Id.* at 641-42. *See supra* note 75.

Unfortunately for the civility principle, the infirmity of the Holmesian argument does not guarantee the principle's continued constitutional stature in civil cases. The post-New Deal decision that is most embarrassing to my position is *Lavine v. Milne*,[96] decided in 1976. In that case, a welfare claimant was denied benefits under a provision that disqualifies, for a period of 75 days, any applicant who voluntarily terminates or reduces employment for the purpose of qualifying for or increasing the governmental aid in question. This rule was coupled with a provision that such terminations or reductions within the 75 day period are "deemed" to have been made "for the purpose of qualifying for such assistance or a larger amount hereof, in the absence of evidence to the contrary supplied by such person."[97] According to Justice White, writing for a unanimous Court, the effect of these provisions is a strict disqualification for 75 days with an exception for cases in which the termination or reduction in employment was not for the purpose of obtaining benefits, the burden of proof on all issues being on the claimant.[98] A three-judge district court held that the provision unconstitutionally imposed this burden on the claimant, but the Supreme Court reversed with the following comment:

> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the ligation or application. It may be that establishing the absence of an illicit motive—as § 131(11) requires appellees to do—is difficult, although as appellant argues, an applicant's motive should be best known by the applicant himself. However that my be, it is not for us to resolve the question of where the burden ought to lie on this issue. Outside the criminal area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.[99]

This was the right result, but for the wrong reason. There is a different, and better way to construe the provision in question. The disqualification itself could be construed as an affirmative defense to the claim for benefits, qualified by a rebuttable presumption about the claimant's purpose that arises upon the state's proof of termination within the 75 day period. This was

96. 424 U.S. 577 (1976).
97. *Id.* at 579-80
98. *Id.* at 582-85.
99. *Id.* at 585 (citations omitted).

apparently the construction of the statute by the lower court.[100] Had the Supreme Court taken this approach, it could easily have overruled the lower court by construing the rebuttable presumption as shifting only the burden of producing evidence and emphasizing the minimal showing necessary constitutionally to shift that burden alone.[101] But the Supreme Court would have none of this, rejecting the district court's construction of the statute for strikingly unconvincing reasons.[102]

If, nonetheless we take the Court's statutory construction at face value, we must still ask whether *Lavine* overrules *Henderson.* The *Lavine* Court avoided *explicitly* overruling *Henderson* by arguing that the earlier case was a presumption case, whereas the case *sub judice* involved simply an initial allocation of the burden.[103] As just argued, however, this is a very weak basis for distinction, at least if the suitably narrowed "greater includes the lesser" argument is valid. In addition, the Court's argument essentially ignores the fact that the statute in *Henderson did* create an affirmative defense. In fact, the logical structures of the two statutes, at least as the *Lavine* statute was construed by the Court, are essentially identical: Both couple an initial allocation of the burden with a largely redundant presumption to emphasize the allocation.[104] Whereas the *Henderson* statute used the word "presumption," the *Lavine* statute used the word "deemed." If there is a difference, it is hard to discern.

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100. The district court made no reference to the affirmative defense, but its characterization of the provision as involving a rebuttable presumption strongly suggests the interpretation given here: If the disqualification were not an affirmative defense to the claim, there would be no need to invoke a rebuttable presumption to shift a burden back to the claimant. The district court's opinion appears as Milne v. Berman, 384 F. Supp. 206 (S.D.N.Y. 1974).

101. *See supra* note 67. The district court's opinion failed to draw this distinction and applied an undifferentiated standard, drawn from criminal cases, with regard to the validity of all legislative presumptions. *See Milne,* 384 F. Supp. at 209.

102. *See Lavine,* 424 U.S. at 582-84 (arguing that the burden of persuasion on this issue was placed on claimant *ab initio*). The best evidence the Court could muster for this conclusion was another statutory provision stating, "Insofar as practicable, responsibility shall be placed upon the applicant for home relief to provide verified information concerning his previous maintenance, loss of income, and the extent and duration of current need." *Id.* at 583 n.7. If this is any kind of adjudicative burden allocation, it is at most an allocation of the burden of *production,* as is the language of the provision being interpreted. *See supra* text accompanying note 97.

103. In the same passage, however, the Court cast doubt on *Henderson* by noting that it drew the indicated distinction "[w]ithout examining whether such cases [viz. *Henderson*] would today be decided as they were". *Lavine,* 424 U.S. at 585 n.9.

104. I say "largely redundant" because of the subtlety already noted. *See supra* notes 74, 75 & 95 and accompanying text.

Moreover, it must be conceded that civility is implicated in this case. It might be argued that serious stigma would not attach to a denial of benefits under this section of the statute. After all, there is nothing necessarily immoral about posturing oneself to take best advantage of government benefits, and the state's rule may plausibly be seen as needed to protect public funds rather than to punish the applicant for any "wrongdoing." However, this mistakes the focus of the presumptive device: The applicant is "deemed" to have operated with a purpose that must generally be perceived as free-riding on the people's collective action designed to protect the needy. No doubt that is a major reason for the disqualification itself. Given the indirect and minimal effect on others, this may not be as serious a wrongdoing as negligently running someone down with a train, but it cannot be seen as entirely free of moral opprobrium. Note that both courts refer to the conduct in seriously pejorative terms.[105]

Still, the plausibly lesser degree of moral seriousness serves to reduce the weight of the civility principle, as stressed in connection with the corollary thesis. Also, the rational basis for the inference is plausibly stronger in the *Lavine* case, notwithstanding the doubts expressed on this score by the lower court. Applying for welfare within 75 days of voluntarily reducing one's earnings is itself a suspicious circumstance, though certainly not conclusive as to the claimant's purpose.[106] Further, the claimant is peculiarly well-situated to know of and evidence his purpose. Such states of mind are considerably more subjective and difficult to prove than the negligence at issue in *Henderson.* So the combination of weakened civility concerns, stronger inferential basis, and

105. The opinions refer not to a "disqualifying" motive, for example, but rather to a "wrongful" motive (*Milne,* 384 F. Supp. at 209), an "impermissible" motive (*Lavine,* 424 U.S. at 584), and an "illicit" motive (*id.* at 585).

106. The district court believed that the limits of relief were so low that no substantial number of people would leave work merely to obtain welfare benefits and noted that the poor have "the same desire to work and to obtain the fruits of work as the non-poor." *Milne,* 384 F. Supp. at 210-11. That may well be true, but the disqualification need not have been intended to thwart the actions of a *large* number of claimants; even one claimant with the indicated purpose may justifiably be excluded, and the presumption at work in the statute could legitimately be designed to "smoke out" that one claimant. The disqualification need not be necessary for the sake of protecting the system from financial crisis. The district court also believed that the inference supporting the presumption was not "more likely than not," noting numerous reasons for terminating employment besides the purpose of obtaining government aid. *Id.* at 210-11. While this may also be true, the district court's reliance on criminal cases mandating the "more likely than not" standard was rightly rejected by the Supreme Court for civil cases. *See Lavine,* 424 U.S. at 585 n.10.

the claimant's peculiar access to evidence suggest a much stronger argument in support of the statute in *Lavine.*

To be sure, in the passage quoted above, Justice White seems to bypass such considerations by simply rejecting the constitutional significance of proof allocation decisions in civil cases, but his dodge is qualified by the word "normally." The continued status of *Henderson,* as giving constitutional dimension to civility in civil cases, therefore remains unclear. It is still possible to conclude, for example, that the burden of persuasion, as distinct from the burden of production, cannot constitutionally be imposed on a party, at least not without very good reason, if the fact in question relates substantially to the question of wrongdoing by that party. Or, a more variable standard could apply in which the strength of such reasons is weighted against the moral seriousness of the allegations. Narrowly construed, *Lavine* rules out only a constitutional standard precluding such imposition of the burden of persuasion regardless of the strength of the evidentiary showing, the seriousness of the allegation, or other applicable policies favoring that imposition.[107]

Moreover, even if *Lavine* does signal more broadly the demise of civility, as well as almost all other considerations, in the federal judicial evaluation of burden allocations in civil cases, that would not necessarily mean that civility has lost all constitutional standing in civil cases. It is quite plausible that this is the very kind of context in which the Supreme Court might eschew monitoring due process issues, content that legislatures and state courts will be sufficiently competent and motivated to give reasonable protection to the constitutional values at stake. Such choices may

107. Note that civility helps to explain judicial concern about the use of *conclusive* presumptions. *See, e.g.,* Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (invalidating employment restrictions on pregnant teachers when the system made no individualized determination of ability to continue working). The standard result-focused analysis is that conclusive presumptions are simply odd ways of expressing a modified substantive rule of law. *See* McCORMICK, *supra* note 18, § 342, at 451. Thus, a rule that a teacher unable to continue working must be terminated, coupled with a conclusive presumption that a teacher in the last months of pregnancy is unable to continue working, is thought to be equivalent to a rule that a teacher in the last months of pregnancy must be terminated. Thus, arguably, the constitutionality of the conclusive presumption is entirely a question of the constitutionality of the modified substantive rule, a question not of procedural due process but of substantive due process and equal protection. *See* 2 RONALD D. ROTUNDA ET AL., CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.6 (1986). But this argument loses its plausibility if the presumption is one imbued with fault and moral opprobrium. Thus, to revisit *Henderson,* a conclusive presumption of negligence would not be equivalent to strict, or non-fault liability, because of the stigma of wrongdoing attached to the person affected by the presumption, here without any means of denial short of denying the event upon which the presumption is based.

well be necessary to preserve judicial resources for other more pressing constitutional matters, including the monitoring of such due process issues in criminal cases, where not only are the stakes higher but the state might not be expected to maintain as well the necessary neutrality. The federal courts, and the Supreme Court in particular, need not be involved in all constitutional issues, and they do not cease to be constitutional issues just because the Supreme Court does not entertain them.[108] As *Lavine* demonstrates, however, there is a down side to this kind of explanation. One of the "costs" of the massive bureaucratic machinery necessary to run the relatively activist, welfare state we have come to inhabit may be a certain loss of judicial patience with claims of civility or other aspects of due process that may hamper administrative flexibility or, in the worst case, the raw exercise of bureaucratic power.[109]

B. *Criminal Cases*

So far I have concentrated on civil cases because the constitutional issue is both cleaner and more challenging in that context. Cleaner because the special solicitude accorded the criminal defendant may actually serve to obscure, because it may easily trump, the operation of the civility principle when the latter cuts *against* the defendant. More challenging because the force of constitutional law is more conspicuous in criminal cases when the interest of the defendant are *advanced* by a claim of civility. Now we follow the historical shift of emphasis by looking at civility in constitutional criminal procedure.

As noted at the beginning of this part, the analogous issues in the criminal context have, not surprisingly, received much more extensive treatment by both courts and commentators. By the end of the 1960's, for example, it was fairly clear in regard to the Court's treatment of presumptions that the "greater includes the lesser" argument of Justice Holmes would not be accepted.[110] In

108. *See generally* TRIBE, *supra* note 91, § 3-4.

109. *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

110. *See, e.g.*, Romano v. United States, 382 U.S. 136, 144 (1965) (reversing conviction for possession of illegal still that relied on a presumption that a person present at an illegal still was in possession thereof);

> It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter.

1975, one year before the decision in *Lavine*, this was confirmed in a case that, in some respects, represents the high-water mark in constitutional civility jurisprudence, *Mullaney v. Wilbur*.[111] In an opinion by Justice Powell, a unanimous Court reversed a murder conviction that had entailed placing on the defendant, in the language of a presumption, the burden of persuasion on an excusing factor—heat of passion on sudden provocation—that could have reduced the severity of the conviction to manslaughter. Justice Powell emphasized that the determination of the factual issue in question directly affected both the punishment and stigma associated with the conviction.[112]

This stunning victory for civility was short-lived, however. Two years later, in *Patterson v. New York*,[113] a divided Court sustained a law that made "extreme emotional disturbance" an affirmative defense to reduce a conviction from murder to manslaughter. Interestingly, the majority opinion in *Patterson* was authored by Justice White, who had written for the Court in *Lavine*, and once again he avoided overruling the prior decision by relying on the distinction, of dubious constitutional significance, between a presumption and an affirmation defense.[114] Powell, joined by Justices Brennan and Marshall, dissented.[115] These two seemingly contradictory decisions, *Mullaney* and *Patterson*, reopened the entire question of the constitutional standing of civility in criminal cases, and commentators have once again debated the wisdom of the "greater includes the lesser" argument, as well as other theo-

Id. See also FED. R. EVID. 301, Advisory Committee's Note ("The rational connection requirement survives in criminal cases, [citation omitted], because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory . . . . The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required."). In an argument the validity of which is not limited to the analysis of presumptions nor to the analysis of criminal cases, two commentators suggested that the central defect in the Holmesian theory is that, by making reference to a law that the legislature has constitutional power to enact, but which it did not enact, the theory allows the legislature to circumvent the political process by approximating a rule of law that is not willing, and perhaps not politically able, to enact directly, despite its constitutional power to do so. *See* Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 177-79 (1969).

111. 421 U.S. 684 (1975).

112. *Id.* at 696-701.

113. 432 U.S. 197 (1977).

114. *Id.* at 212-16.

115. *Id.* at 216. Powell made clear, in particular, that the procedural due process requirements do not depend on whether the factual issue in question could be eliminated entirely from the substantive prohibition, thus explicitly rejecting the "greater includes the lesser" argument.

ries of proof burdens.[116] But the civility principle has figured only obliquely in this discussion. Perhaps this is because the issues raised in these two cases did not pose the question of civility starkly enough, since they did not involve the shifting of the burden to disprove *all* guilt to the defendant, but rather concerned the *reduction* in culpability arising from extenuating circumstances.[117]

A subsequent decision, however, triggered the principle in an unmistakable way. In *Martin v. Ohio*,[118] the Court faced a challenge to a scheme that made self-defense an affirmative defense to a charge of murder, thereby requiring the defendant to sustain the burden of persuasion on the facts necessary to establish self-defense. Here, the determination of the issue in question made the difference between conviction of a crime and complete exoneration. The Court, once again by way of Justice White, sustained the constitutionality of this scheme, in an opinion confirming the essentially "formalistic" position that the state must prove beyond a reasonable doubt only those elements that it chooses to include in the definition of the offense, as distinguished from an affirmative defense.[119] This is formalistic in the sense that it allows the state to choose what proof burden applies, to the point of being able to circumvent the constitutionally required proof burden even on traditional elements of an offense by simply redefining the crime to eliminate that element the state would rather not have to prove, instead defining its nega-

116. *Compare* Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977) (criticizing *Mullaney* using the Holmesian theory) *with* Barbara D. Underwood, *The Thumb on The Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977) (arguing against the Holmesian approach). *See also* Ronald J. Allen, *The Restoration of* In Re Winship: *A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30 (1977) (replying to Professor Underwood at 43 n.60). Also *compare* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980) *with* Charles R. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1582-84 (1981) (criticizing the Holmesian theory insofar as it allows the state to inject irrationality into the adjudicative process).

117. To be sure, at least Justice Powell understood this point well, as evidenced by his rejection of the state's argument that the strict proof requirement ought not to apply where the act in question did not make the difference between conviction and acquittal; Powell replied that "the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Mullaney*, 421 U.S. at 697-98.

118. 480 U.S. 228 (1987).

119. *Id.* at 233-36. For the standard interpretation, see MCCORMICK, *supra* note 18, § 347, at 483-84.

tion as an affirmative defense.[120] In his dissent, Justice Powell, joined by Justices Brennan and Marshall, reiterated his earlier argument against such a deferential constitutional attitude.[121]

How does civility speak to these cases? The answer is somewhat more complex than Justice Powell's opinions indicate. As already discussed in connection with civil cases, the claim of self-defense shifts the focus of civility to the victim, since it entails an allegation of serious wrongdoing on his part.[122] To exonerate the defendant entails accepting her accusation against the victim and, in an admittedly rough way, sanctioning after the fact a kind of punishment of the victim for his assault. If, however, we were to honor fully the apparent implications of civility by imposing a beyond-a-reasonable-doubt burden on the *defendant*, then there would be a dangerously high risk that the defendant would be convicted though innocent. A plausible compromise of the rights of the defendant and the increasingly popular "victim's rights," recognizing the issue of access to evidence present in many such cases, is to place a preponderance-of-the-evidence burden on the defendant, as Ohio did. The civility principle thus helps to explain the result in *Martin*, which otherwise seems pitifully defended by the formalism of the majority opinion. To the extent that states are constitutionally permitted to take civility into account, as indeed they frequently do, an allocation like that of Ohio's becomes more justifiable and therefore more plausibly constitutional.

However, this argument is ultimately unconvincing, because the focus of the criminal law is much more specifically on the defendant's guilt than it allows. In particular, self-defense is made out even if the victim did not in fact attack the defendant, so long as the defendant honestly (and sometimes reasonably) believed in the danger.[123] Of course, the reality of the situation

120. While it is true that in *Patterson*, Justice White had stated that there are constitutional limitations upon the state's authority to create affirmative defenses, 432 U.S. at 210, this dictum has not borne fruit, and is not really expected to. *See* McCormick, *supra* note 18, § 348, at 489-92.

121. *Martin*, 480 U.S. at 242-43. Powell also added an argument against the Ohio statute, joined additionally by Justice Blackmun, based on the idea that even if the state is generally free to move elements from the prima facie case to an affirmative defense, it must not do so where the overlap between the state's case and the affirmative defense is so serious as to create confusion for the jury in applying the proof burdens. *Id.* at 236-42.

122. The defendant's claim in *Martin* was that she was the victim of an assault by the person whom she shortly thereafter killed, her husband. *Id.* at 230-31.

123. *See, e.g., id.* at 230 (articulating Ohio's self defense rule as consisting of the following elements: "(1) the defendant as not at fault in creating the situation giving rise to the

in the overwhelming majority of self-defense claims is that the defendant asserts a serious, morally wrongful assault by the victim. Nevertheless, the tribunal is not truly called upon to pass judgment on the victim's conduct, and civility as to the victim can be satisfied by interpreting a verdict for the defendant as involving an honest and perhaps reasonable mistake by the defendant.[124] This reinforces the proposition that the defendant's risk from an erroneous verdict is substantially greater than the victim's (or his survivors') risk from an erroneous verdict, as reflected in the nearly unanimous modern rule placing the beyond-a-reasonable-doubt burden of persuasion for the self-defense issue on the prosecution.[125] If the civility principle does have constitutional status, it does not support the result in *Martin.* The same can be said about the cases raising the provocation and passion issue: Even though a determination favorable to the defendant would not exonerate him completely, an unfavorable finding certainly increases both the punishment and the stigma associated with his act, factors that are indicative of the social judgment about the seriousness of the defendant's alleged wrongdoing.[126]

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argument; (2) the defendant had an honest belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was in the use of such force; and (3) the defendant did not violate any duty to retreat or avoid danger."). Notice how, even in the articulation of the defense, the focus is on the defendant's fault. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7 (1986).

124. The civility argument for placing the burden on defendant virtually disappears in those unusual cases where the defendant is prepared to concede that her victim was not *in fact* the aggressor, relying only upon her actual, but admittedly erroneous belief to the contrary. In such cases, the ultimate focus is unequivocally and entirely on defendant's wrongdoing.

125. *See Martin,* 480 U.S. at 235-36 (noting common-law rule placing burden of proving self-defense on defendant and modern contrary trend, with only Ohio and South Carolina still retaining the common-law allocation). The issue is much closer in the civil context, because of the fact that an erroneous judgment for the plaintiff means money in the pocket of someone who very likely was an aggressor. Still, the same argument can be made in the civil context, unless one is prepared to alter the substantive law to be more in accord with the historical allocation of the proof burden to the defendant. This could be accomplished, for example, by making the justification of self-defense depend not on defendant's absence of fault, but rather on the plaintiff's fault in creating a situation where the belief in the necessity of harming in self-defense would be reasonable. In fact, there is ambivalence on this point. *See* PROSSER & KEETON ON TORTS, *supra* note 28, § 19, at 125.

126. In such cases there will once again generally be accusations of fairly serious misconduct by the victim that need not technically be found true in order to reduce the severity of the sanction. *See* LAFAVE & SCOTT, *supra* note 119, § 7.10(b) (acts constituting reasonable provocation).

Thus, a careful consideration of the relevance of civility leads one to support the constitutional imposition of the burden of proof on the prosecution in these cases, provided the principle has constitutional standing at all.[127] Two factors suggest that it does. First, whatever constitutional standing civility has in civil cases, it ought to be stronger in criminal cases, where the imputation of wrongdoing is quite generally more severe.[128] More importantly, the civility principle is needed to fill out or qualify the only viable theories available as alternatives to the Court's apparent formalism. A brief comment will illustrate why this is so.

One competing theory allows the legislature control over the proof burdens as to any element that could constitutionally be eliminated entirely from the law of the crime in question.[129] Even if this theory can be rescued from its Holmesian excesses, it requires a constitutionalization of substantive criminal law that cannot ignore the seriousness of the alleged wrongdoing and the consequent stigma and punishment that results from a conviction.[130] The somewhat more plausible competing theory imposes the burden of proof beyond a reasonable doubt on the prosecution for each element of significance to the incidence or severity of punishment.[131] But this theory potentially imposes such a proof burden as to issues that affect the incidence of punishment but not the stigma associated with defendant's acts, issues such as the bar of the statue of limitations. Even proponents of this theory recognize that this result is to be avoided, if only for the sake

127. As I have emphasized throughout, civility is not an invariably determinative consideration. But the most likely competing considerations are not particularly strong. One, noted in connection with the civil law, is the relative access to evidence. This consideration, if applied consistently in the criminal context, threatens to engulf much of the criminal trial, but it need not be implemented by placing the burden of persuasion on the defendant; an adequate response to the problem of generating the best available evidence is to place a burden of production on the defendant, to the extent this can be done consistent with the Fifth Amendment privilege against self-incrimination. *See* Underwood, *supra* note 116, at 1333-36.

128. The exception, problematic in the criminal law, is for so-called "regulatory" offenses. *See* Underwood, *supra* note 116, at 1373-76.

129. Professor Allen has been the most dedicated advocate of this view. *See supra* note 116. *See also* John C. Jeffries & Paul B. Stephan III, *Defenses, Presumptions and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325 (1979).

130. For some, the seriousness of the wrongdoing would figure in an Eighth Amendment proportionality of punishment inquiry with respect to the hypothetically expanded criminal prohibition. *See* Allen, *supra* note 116, at 295-301; Allen, *supra* note 116, at 36-53. For others, it would figure in a boarder substantive due process determination of the limits of the criminal sanction. *See* Jeffries & Stephan, *supra* note 129, at 1365-69.

131. *See, e.g.*, Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457 (1989); Underwood, *supra* note 116.

of political acceptability.[132] The civility principle provides a more principled basis for such a distinction, by focusing on elements that morally warrant—at least in the contemplation of the penal code—the punishment and stigma to be imposed.[133]

The example of the statute of limitations, as well as other "technical" bars to conviction such as double jeopardy, prejudicial preindictment delay, and failure to provide a speedy trial, also illustrate why it is that the incidence of punishment, in the sense of loss of liberty, property, or other material sanction, is a less reliable index to the demands of civility than stigma. To be sure, in many contexts the severity of punishment is a very good indicator of the seriousness of the offense in the eyes of the legislature, so the effect of a given element on the level of punishment is an important factor to be considered, but only as it indicates moral opprobrium. Stigma is more precise; indeed, it is not readily discernible apart from the seriousness attributed to the offense by the state. Though seriousness of the offense will, in most contexts, be a test that is less mechanically applicable than severity of punishment, it is clearly what civility points to as the crucial factor, and its use as a standard ought not to present

132. *See e.g.*, Sundby, *supra* note 131, at 505-06 (noting that limits are politically necessary). The problem here is simply the need to recognize that there is a notion of moral culpability that is reflected in the law, even if the law's version thereof does not correspond to what you or I, or the courts, would believe moral culpability demands; Underwood, *supra* note 116, at 1342-43 (explaining that issues such as statute of limitations relate not to culpability but to appropriateness of forum for trial, but then rejecting culpability as the test of constitutional proof requirement because of the imperfect match between moral culpability and legal culpability).

133. Justice Powell, in his dissents, reemphasized punishment and stigma, though he also made it clear that an historical importance test is to be applied, presumably in order to prevent his otherwise expansive theory of the prosecution's constitutional burden from becoming a disincentive for legislatures to experiment with new excusing elements that would soften the criminal sanction. *See Patterson*, 432 U.S. at 225-32 (explaining that an historical test will limit effect of the punishment and stigma test to only a "few factors" and will not impede creation of new ameliorative affirmative defenses); *Martin*, 480 U.S. at 242-43 (reaffirming suggested test). The connection between Powell's punishment and stigma test and the civility principle answers objections that have been made to the former as being "conceptually schizophrenic" for its mixture of procedural and substantive issues. *See* Jeffries & Stephan, *supra* note 129, at 1362-63. The civility principle, though it makes reference to the substance of moral seriousness, nonetheless finds its place within the family of procedural theories of due process. As to the historical part of Powell's test, commentators have disagreed about the effects on reform and otherwise doubted the wisdom of an historical test. *See, e.g.*, Jeffries & Stephan, *supra* note 129, at 1363-64; Sundby, *supra* note 131, at 507. I reject the historical test for a different reason, one that illustrates the procedural nature of the theory advanced here. So long as the restraints of *substantive* due process, proportionately, etc. are satisfied, there is no warrant for the suggestion that the Court should interpret procedural due process so as to deter, encourage, impede or facilitate softening of the substantive criminal law.

insuperable practical problems.[134] Indeed, it is one that coheres well with the development of constitutional criminal procedure in other areas where the court has emphasized the distinction between those issues concerning moral guilt or innocence and those issues arising from various public policies militating against punishment even of the guilty.[135]

CONCLUSION

Despite the social disintegration we may experience from time to time, the law represents the most serious moral standards upon which we are able to reach agreement, if only a majoritarian one. Its authoritative statement by legislatures, courts, and other recognized law-making institutions gives the law's morality a cohesiveness all its own; at least we should strive to see that this is so.[136] But as we do, we should not forget that the moral order that the law endorses carries with it certain obligations concerning its application, one of which is the obligation to presume compliance with legal duties, at least to the extent they represent a consensus about serious moral duties. Whatever the resolution of the constitutional issues, my main point is simply that the law has long honored the principle of civility. Even if that principle has lost its constitutional luster, the very fact that it has attained such status, off and on over the years, is evidence of the weight the law accords it. "A presumption of innocence" applies quite generally, though not of course with perfect uniformity, in both civil and criminal cases.

When one moves away from legal adjudications, lawyers may rightly be outraged by attempts, common enough in the media, to deflect criticism or other negative reactions with respect to the

134. Professor Robinson for example, usefully groups together the following public policy defenses as not relating to culpability: statute of limitations; double jeopardy; diplomatic immunity; testimonial immunity; plea-bargained immunity; governmental immunities; incompetency to stand trail; and use of the exclusionary rule. *See* Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 229-32 (1982). Elsewhere, in discussing how his classification relates to allocations of the burden of persuasion, he notes that, "To the extent that any common ground exists, it is the view that the burden of persuasion on issues that do not "touch upon guilt or innocence" may properly be allocated to the defendant." *Id.* at 261 (footnotes omitted).

135. The example I have in mind is double jeopardy law. *See, e.g.*, United States v. Scott, 437 U.S. 82 (1978) (double jeopardy prohibition does not prevent retrial of defendant whose first trial was erroneously terminated on grounds of unconstitutional preindictment delay). Whether or not this is the *right* distinction upon which to base the protection of the Double Jeopardy Clause, it nonetheless indicates a willingness and capacity to articulate such a distinction.

136. *See generally* RONALD M. DWORKIN, LAW'S EMPIRE (1986).

alleged wrongdoings of politicians, performers, nominees to the bench, and so on. For frequently, such attempts use the rhetoric of criminal adjudication in order to suggest that its rigorous strictures on the imposition of public punishment and stigma should apply to *any* decision on account of the allegation relating to the "accused," whether it is the decision to vote the politician out of office, to deny the performer some aspect of a lucrative celebrity status, or to refuse confirmation of the appointee. Nonetheless, stripped of the rhetorical excess, there is *something* to the arguments being made, and we should not leave the many non-criminal, indeed non-adjudicative, arenas to be administered without due regard for the principle of civility. Civility, in the law and elsewhere, is one manifestation of our commitment to a sense of community and the respect for its members that such a commitment entails.

Finally, to place the foregoing argument in context, it should be noted that we have addressed only one aspect of civility. We have considered the principle as it relates to the assumption and determination of disputed factual questions. More specifically, we have addressed what, in the legal context, is called disputes over "adjudicative" facts, that is the facts upon which turn the application of moral norms that, for the present purposes, may be taken as given. There are, of course, disputes about both the norms that are to apply and, relatedly, about the "legislative" facts that go into deciding the norm that is to be applied.[137] Civility may also speak to these latter disputes, but consideration of such issues will have to await another occasion.

137. Considerable attention is directed to these disputes in Richard Gaskins' book. *See* GASKINS, *supra* note 6.