The Review of Politics 76 (2014), 635–659.
© University of Notre Dame
doi:10.1017/S0034670514000606

Constitutional, Criminal, Civil

Karen Orren

Abstract: With a view to elaborating a developmental theory of constitutionalism in the United States, this essay explores the relationship among constitutional, criminal, and civil law. It supports, with relevant case materials, a single proposition: *civil litigants are afforded contested constitutional protections in federal court to the extent that the judges attribute an aspect of criminality to the underlying facts or issues in question*. The essay tests this proposition in the areas of punitive damages, double jeopardy, and constitutional torts; discusses the mirroring of the stipulated pattern in legal maneuvering on constitutional issues; and briefly spells out its implications for the larger theory.

This essay explores the interplay among constitutional, criminal, and civil law. "Constitutional law" refers here to the legal provisions that authoritatively allocate rights (also referred to as "liberties" and sometimes "powers") among citizens and government officers, presumed to be enforceable in court regardless of the rank of the parties affected. This definition, and in particular the last clause, distinguishes constitutional provisions from rules and institutions associated with virtually all governments, whatever their political character.[1] "Criminal law" means the law that identifies acts deemed immoral or harmful to society and that punishes citizens and officers for their intentional performance, normally with fines and/or imprisonment. This definition, in turn, distinguishes criminal law from civil law. "Civil law" identifies torts (a legal term connoting "wrongs") and breaches of contract, which may or may not be deemed immoral or harmful to society, and redresses their damage, intentional or unintentional, usually with compensation to the injured party.

Karen Orren is Professor of Political Science, University of California, Los Angeles, 4289 Bunche Hall, Los Angeles, CA 90095-1472 (orren@ucla.edu).

Thanks to the referees and editor of this journal, John Compton, and Stephen Skowronek for criticisms and suggestions, and to Lucy Williams for research assistance.

[1]The definition would exclude, for instance, regimes discussed in Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100, forthcoming.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

The analysis is motivated by a larger project, which is to elaborate a developmental theory of the United States Constitution. "Developmental" denotes patterns of change over history, their timing with respect to one another, and their emergence and decline. The effort below concentrates on the first of these. Patterns of constitutional law do not express the entirety of constitutional structures, practices, and values, but at any given point in history they convey enough of the array to serve as a useful descriptor of change. The larger theory, in a nutshell, is this: constitutional development consists in the changing limits that constitutional law places on the definition and enforcement of criminal law. Among other things, the theory will explain the rationale of basic constitutional structures and account for major historical turning points in their respective authority.[2]

With this in mind, the aim of the following pages is to introduce, by means of a single pattern, a conception of what the Constitution "is" and, at least until now, has been from its framing. The pattern is not itself a theory; rather it contributes to a task required of all theories concerned with causes and effects, which is to distinguish the subject of interest from its environment. In this case, the pattern affects the changing boundaries of constitutional protection. Stated as a proposition to emphasize the need for additional data, the pattern is this: *civil litigants are afforded contested constitutional protection in federal court to the extent that the judges attribute an aspect of criminality to the underlying facts or issues in question*. By "civil litigants" I mean here parties on either side of suits at civil law. By "contested constitutional protections" I refer to protections claimed by one party and opposed by the other. I intend the verb "attribute" objectively, without reference to motivation. By "aspect of criminality" I mean some element in the facts or issues that invokes a criminal dispute—the penalty, the specific law at bar, a connected litigation, and so on—not inherent to the form of the civil suit. "To the extent that" suggests cases defined by the stated condition and not resolved by more general rules.

Analyzing the interplay among designated bodies of law follows a strategy recommended for political-development research broadly, which is that it begin at a "site" of the topic under study. A "site" is the tableau of public authority, past or present, which is impinged upon, reshaped, or displaced by new or emergent political structures and routines.[3] In this perspective, the relationship between the constitutional and criminal laws should be apparent. By far the older of the two and in full operation throughout the North

[2]See Karen Orren, "Doing Time: A Theory of the Constitution," *Studies in American Political Development* 26 (2012): 71–81; also "The Criminal Foundations of American Constitutional Development and How It Matters" (paper presented at the Annual Meeting of the American Political Science Association, Washington, DC, 2010, available from the author).

[3]Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004), 20–24.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

American colonies, the criminal law and its enforcement, both actual and feared, shaped the predicament and purposes of the framers. Panning backwards and forwards in time, this view captures major constitutional events from the Petition of Right and before to *Citizens United*.[4] Throughout this history, the scene displays a sustained moral contrast: punishment and its methods on the one side, protection and its designs on the other.

What of the civil law, also present at the Republic's creation? Compared to the criminal law, the historical relationship between the constitutional and civil laws is relatively benign. The civil law's principal jurisdiction is everyday social and economic intercourse, activity situated for the most part and by the original plan outside the Constitution's command. That said, the precise boundaries of this "outside," and of its correlative "inside" as well, have been ongoing subjects of constitutional controversy. Article III, the Seventh and Eleventh Amendments, and various individual clauses—for instance concerning commerce and patents—regulate disputes at civil law, as do the Fifth and Fourteenth Amendment requirements of due process and equal protection. Civil suits routinely provide the vehicles with which statutes and acts of individual government officers are tested for constitutionality.

The question arises of what might be learned from attending to the group as a threesome. Wading into this pond as a nonspecialist, one quickly becomes aware of the absence of any stable divisions in legal or academic usage between criminal and civil law.[5] The identical act can be legally both a crime and a tort, sometimes under the same name—as in criminal and civil trespass, criminal and civil fraud; sometimes under different names—theft and tortious conversion, murder and wrongful death. Classification may hinge variously on how punitive the remedy; the remedy's purpose; the seriousness or extent of the injury inflicted; whether an act is intentional

[4]The Petition of Right, issued by the British Parliament in 1628 and addressed to King Charles I, protests the imposition of criminal penalties, including death, dismemberment, and imprisonment, without benefit of the customs and laws of the realm; it also protests acts of criminality by officers of the king that have gone unpunished. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), struck down, on grounds of First Amendment freedom of speech, sections of the Bipartisan Campaign Reform Act of 2002 limiting independent political contributions by corporations, labor unions, and other associations.

[5]On this muddle there is wide scholarly consensus. See, for a range of works, J. Morris Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis," *Minnesota Law Review* 60 (1975–1976): 379; Carole S. Steiker, "Punishment and Procedure: Punishment and the Criminal-Civil Divide," *Georgetown Law Review* 85 (1997): 775; Peter L. Markowitz, "Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings," *Harvard Civil Rights–Civil Liberties Law Review* 43 (2008): 289; and Michael L. Rustad, "Does the World Still Need United States Tort Law? Or Did It Ever?," *Pepperdine Law Review* 38 (2011): 433.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

or negligent, required by or contrary to statute, performed by a government or private actor, to say nothing of combinations of these and other criteria.[6]

On the other hand, the stakes of the criminal-civil divide for constitutional law are both clear and high. Criminal defendants enjoy rights to publicly recompensed legal counsel, to more rigorous rules of discovery, to the confrontation of witnesses, to protection against double jeopardy and ex post facto laws; they may be convicted only upon evidence beyond a reasonable doubt; penalties are limited by the "cruel and unusual" provision of the Eighth Amendment; guilty verdicts in federal (though not in state) trials must be unanimous. Along with criminal defendants, parties in civil litigation enjoy rights against self-incrimination under the Fifth Amendment and to due process under the Fifth and Fourteenth but none of the others mentioned; this is the case even if they are punished by civil penalties, which may include fines but not imprisonment or capital punishment.

The discussion will provide evidence for the Proposition (for clarity, capitalized from here on) in several legal contexts and configurations, drawing mainly on contemporary materials. First, after an introductory demonstration, I will discuss the pattern as it operates in cases that are either ordinary civil disputes or cases known as "quasi-constitutional," that is, civil suits involving ordinary torts committed by government officers. To guard against circularity, I will avoid basing evidence on cases intrinsically linked to crime, for example, claims based on habeas corpus and the Fourth Amendment; and on cases that are, in the first instance, constitutional in nature, that is, which have the interpretation of existing constitutional provisions as their principal aim.[7] I will also briefly show how the pattern is reflected in legal maneuvering by adverse parties on constitutional issues. The concluding section will take up the implications of the evidence for the larger theory envisioned.

It will also be useful at the outset to prepare the reader who, like the author, has no special legal training, for an analysis that may well seem overly burdened with dry and technical law-talk. As commentators since Tocqueville have remarked, the United States is a decidedly legalized polity, where disputes about everything from drug dealing and real estate to presidential

[6]A half-century ago, the Supreme Court drew up its own checklist of "traditionally applied factors" to distinguish criminal and civil penalties. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Also see U.S. v. Ward, 448 U.S. 242 (1980). The list has been widely criticized and opportunistically applied.

[7]Both categories are subject to the basic argument, but they are historically complicated in ways beyond the scope of this essay. See note 3 above. One of the referees asked in his/her review how Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) and Windsor v. New York, 133 S. Ct. 2675 (2013) would fit into the pattern. Suffice to say here that racially integrated education was a criminally punishable activity under the Jim Crow laws during the 1950s, and state laws that DOMA was designed to reinforce were criminal statutes.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

war-powers must negotiate the same legal labyrinth. Constitutional change is a product of them all. For that reason, there can be no permanently evading the Constitution's nonconstitutional and sometimes arcane underpinnings. In fact, nonspecialists in law, who often search out wider worlds of constitutional understanding than specialists, must be all the more attentive to the intricate paths en route. The exertion may feel arduously legal; but the reward is constitutional and, eventually, political-theoretical.

Switches in Time

A case before the Supreme Court in 2010 supports the Proposition in its simplest form. *Padilla v. Kentucky* (130 S. Ct. 1473) decided for the first time that the Sixth Amendment right to the effective assistance of counsel was violated by an attorney's failure to provide vital information when advising a client to render a plea of guilty. In this instance, the client, who was a permanent legal resident, pled guilty to narcotics charges in return for a lesser sentence without having been advised of the virtual inevitability of his deportation by the Immigration and Nationalization Service as a consequence. The decision was unusual because the Sixth Amendment had generally been interpreted to shield only persons subject to criminal process, whereas immigration affairs are handled by civil proceedings. The Court acknowledged that deportation was only "collateral" to the principal charge, but it nonetheless held it was "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[8] This ruling, it said, was influenced by the punishment's "severity." In the Court's view, deportation was "the equivalent of banishment and exile," comparable to the life-or-death stakes a deportee might face upon return to her home country.[9] A person facing these circumstances, whatever the legal label attached, was protected by the Constitution.

The triad's play may also be seen in reverse, from out of the criminal column and into the civil, and with the opposite constitutional response. Consider, for instance, in 2012, *National Federation of Independent Business v. Sebelius* (132 S. Ct. 2566), upholding the Patient Protection and Affordable Health Care Act of 2011. Chief Justice Roberts rested his key ruling that the Act's mandate requiring individuals to purchase health insurance was constitutional on the fact that the enforcement provided for the mandate was by civil rather than criminal process. This allowed the Chief Justice to decide what Congress described as "financial penalty" was a "tax," thereby withstanding constitutional challenge in the way that other statutory "fees" and "surcharges" had done by being taxes. The Chief Justice opined the "constitutional question was not controlled by Congress's choice of

[8]Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).
[9]Ibid., 1486 and n11.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

label."[10] Had nonpurchase been a criminal offence, it would have to be legislated either as an exercise of Congress's commerce authority or its authority under the necessary and proper clause, neither of which constitutionally encompassed such an act.

Punitive Damages

The basic pattern can be seen to assume increasingly ornate configurations in successive areas of civil litigation. Consider, first, punitive damages. Punitive damages are monetary sums awarded in civil suits beyond the amount judged to compensate victims for their actual losses. The purpose is to punish wrongdoers and to deter them and others from repeating the illegal behavior. In the Court's punitive-damages decisions, a case's move from its treatment as purely civil into the constitutionally protected category is not based on its punitive nature as such but rather on its magnitude. Thus, in 2008, following the final appeal concerning the 1989 Exxon-Valdez oil spill, the Supreme Court, acting under its admiralty jurisdiction, upended the largest punitive damages in American history. The amount before the justices, $2.5 billion, was awarded as punitive damages to a group of plaintiffs that included commercial fishermen, local landowners, and Native Alaskans, to be paid by the Exxon Co. for polluting Alaska's Prince William Sound; this was in addition to the compensatory damages they received for their actual injuries. The punitive damages had already been cut in half by the Ninth Circuit Court of Appeals from the original jury award of $5 billion.[11] Deeming $2.5 billion still "excessive," the Supreme Court further reduced the amount to $509.5 million, roughly a tenth of the original. Justifying the change by the unpredictability of such awards, contrary to standards of fair notice required by the due process clause of the Fourteenth Amendment, the Court used the same amount as the jury awarded compensatory damages, and it announced that this ratio, 1:1 punitive to compensatory damages, would be applicable in all future maritime suits.

Previous to this decision, in three nonmaritime cases, the Court had likewise held punitive damages in violation of Fourteenth Amendment due process and remanded them to lower courts for reconsideration, but without itself changing the award. In 1996, a jury had awarded $4 million in punitive damages to accompany $4000 compensatory damages (a ratio of 1000:1) against BMW of North America for selling the plaintiff a car that, though advertised as new, had had its paint touched up after arrival from the factory. In remanding, the Supreme Court emphasized the disproportion

[10]National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2595 (2012).

[11]Exxon Shipping Co. v. Baker, 554 U.S. 471, 526 (2008).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

between the penalty imposed and the evil of the wrongdoing.[12] In 2003, a jury awarded $145 million punitive damages alongside $1 million compensatory damages against State Farm Mutual Auto Insurance for failing to pay the plaintiff's meritorious accident claim. Here the Court's opinion stressed the arbitrary size of the penalty and also the jury's inclusion of an amount to compensate hypothetical out-of-state policyholders.[13] In a third decision, in 2007, the Court remanded an award of $79.5 million in punitive damages added to $821,000 compensatory damages against Philip Morris USA to a widow who proved that smoking caused her husband's death. This time the Court rested its decision on procedural rather than substantive grounds: the jury had impermissibly increased the size of its award with the stated purpose of punishing Philip Morris for harm to unnamed people with no opportunity to defend against the charge.[14]

These decisions have been criticized for offering a less than crystalline stream of precedent.[15] They are entirely consistent with one another, however, in the skepticism they express toward the criminal-like dimensions of the punitive damages in question. In the BMW case, for example, Justice Stevens opines for the majority that the corporation's conduct was "not sufficiently egregious to justify a punitive sanction that is tantamount to a serious criminal penalty."[16] Justice Kennedy, in the suit against State Farm, warns that "great care must be taken to avoid the use of civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial."[17] In the Philip Morris case, Justice Breyer explains that if unidentified parties are punished for injuring nonparties, "fundamental due process concerns to which our punitive damages cases refer . . . will be magnified."[18] Finally, Justice Souter's Exxon-Valdez opinion likens punitive damages to criminal sentencing before the advent of federal guidelines, when both defendants and judges were left "'wandering in the deserts of uncharted discretion."[19]

[12]BMW Motors of North America v. Gore, 517 U.S. 559 (1996).

[13]State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[14]Philip Morris USA v. Williams, 549 U.S. 346 (2007).

[15]See, for instance, Amir Nezar, "Reconciling Punitive Damages with Tort Law's Normative Framework," *Yale Law Review* 121 (2011): 678; Thomas B. Colby, "Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages," *Yale Law Review* 118 (2008): 392; N. William Hines, "Marching to a Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damage Awards?," *Catholic University Law Review* 62 (2013): 371.

[16]*BMW*, 517 U.S. at 585.

[17]*State Farm*, 538 U.S. at 428.

[18]*Phillip Morris USA*, 549 U.S. at 354.

[19]*Exxon Shipping Co.*, 554 U.S. at 505, quoting Marvin Frankel, *Criminal Sentences: Law without Order* (New York: Hill & Wang, 1973), 7–8.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

Anxiety to this degree is relatively recent. As these and other of the Court's opinions recount, often at great length, punitive damages, awarded by juries entirely according to their own lights, have a pedigree as old as Hammurabi, have been present in Anglo-American common law since time out of mind, came over on the Mayflower, and were never rejected by any federal or state authority in the United States either before or after the adoption of the Fourteenth Amendment. On the contrary, parties' appeals to overturn punitive-damage awards on due process grounds were, throughout American history, repeatedly rebuffed. In 1983, dissenting justices took to referring to punitive damages as "quasi-criminal," but to no evident constitutional effect; not long afterwards the Court held that civil remedies are unaffected by the cruel-and-unusual-punishment clause in the Eighth Amendment.[20] From then until the Exxon-Valdez litigation, the Court gave intermittent warnings against award sizes it said could be "jarring" to its "constitutional sensibilities"; but it offered only due-process-friendly "guideposts" by which juries might more prudently exercise their still virtually untrammeled discretion.[21]

The prescribed ratio of 1:1 punitive to compensatory damages, then, represented a decisive break, a "bright line" against the long-running punitive-damages regime in existence to that point. Only when punitive damages were promoted by virtue of their "enormity" from an untouchable pool of civil awards into the sea of being what Justice Stevens called a "serious criminal penalty," might defendants be constitutionally protected against unbridled discretion.[22] In the language of rights, defendants are by that means afforded a constitutional right overcoming the ordinary (common law) right of judges and juries to decide punitive damages at will. Nothing in the Court's holding or reasoning or the precedents on which it relied suggested the Exxon-Valdez approach would be confined to maritime cases. It has already surfaced in other venues.[23]

[20]Smith v. Wade, 461 U.S. 30, 59 (1983), citing Huber v. Teuber, 10 D.C. 484, 490 (1877) on punitive damages as "quasi-criminal"; the Eighth Amendment decision is Browning-Ferris Industries v. Kelco, 492 U.S. 257 (1989).

[21]That the Court might be "jarred" is in Pacific Mutual Life v. Haslip, 499 U.S. 1, 18 (1989); a set of "guideposts" may be viewed in *BMW*, 517 U.S. at 574–75.

[22]See Stevens above and *Exxon Shipping*, 554 U.S. at 492–93. Trial court judges have the authority to modify jury awards under highly restrictive conditions.

[23]Izzarelli v. R. J. Reynolds Tobacco Co., 767 F. Supp. 2d 324 (2010); Ellis v. La Vecchia, 567 F. Supp. 2d 601(2008); Mejias v. Roth (In re Bayside Prison Litig.), 331 Fed. Appx. 987 (2009); Sallitt v. Stankus, 720 F. Supp. 2d 645 (2010); Blasic v. Chugach Support Servs., 2010 U.S. Dist. LEXIS 86022 (2010) ; United States EEOC v. AutoZone, Inc., 822 F. Supp. 2d 824 (2011); Berardi v. Vill. of Sauget, 2008 U.S. Dist. LEXIS 54863 (2008); Thompson v. Lied Animal Shelter, 2009 U.S. Dist. LEXIS 96383 (2009).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

Double Jeopardy

To attribute a criminal quality to punitive damages might seem an easy test of the hypothesis—they are called "punitive," after all. I would argue the opposite, given the many decades the Court held out against an unrelenting assault by the defense attorneys' bar, Republican politicians, lobbyists, and think tanks affiliated with the tort-reform cause. Either way, it is important that the account not leave too pat an impression of how the Constitution is changed. As future events unfold it may turn out that Congress and not the Court will have the last word as to where the line against impermissible awards will settle. Any leeway Congress provides above the Court's 1:1 ratio would satisfy the constitutional requirement of fair notice, and the Court has a track record of deferring to legislation on statutory penalties. Outside of capital punishment, only once has a Court majority disallowed any criminal penalty for being cruel and unusual.[24]

It will be useful, then, to observe a different area of civil litigation—double jeopardy—that has been governed largely by legislation. Under the double jeopardy provision of the Fifth Amendment and, by incorporation, the Fourteenth, officers of government, federal and state, are prohibited from subjecting anyone to trial twice for the "same offence." This has been interpreted by the Supreme Court to mean both two criminal trials for the same act and multiple punishments for the same conviction. Until 1989, for a period of two centuries, no civil penalty, however harsh or draconian, was ever held by a US court to affect a double jeopardy finding. This fact must be appreciated against the burgeoning of public agencies at every level of government,

[24]The exception is Solem v. Helm, 463 U.S. 277 (1983). The defendant was sentenced under a South Dakota statute to life in prison without possibility of parole for writing a bad check for $100. In another Eighth Amendment case, Harmelin v. Michigan, 501 U.S. 957, 965 (1991), Justice Scalia's opinion for a fragmented Court declared *Solem* "was simply wrong; the Eighth Amendment contains no proportionality guarantee." He was joined in this view only by Chief Justice Rehnquist. Four decades earlier, in Trop v. Dulles, 356 U.S. 86 (1958), the Court decided in a plurality opinion that the removal of a citizen's passport for conviction of desertion in a court martial was unconstitutional. Four members of the Court held this was cruel and unusual contrary to the Eighth Amendment. With respect to state penalties, the Court has struck down certain penalties without having ruled them out categorically. For instance, in Skinner v. Oklahoma, 316 U.S. 535 (1942), it struck compulsory sterilization for two or more felony convictions for crimes of "moral turpitude," on equal protection grounds. The reason given was that the penalty applied to fraud but not to embezzlement, which the Court said was intrinsically the same crime. More recently, it struck life sentences for juveniles without the possibility of parole when disproportionately applied to crimes not involving murder (Graham v. Florida, 560 U.S. 48 [2010]), and when sentences are mandatory (Miller v. Alabama, 132 S. Ct. 2455 [2012]).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

especially since the New Deal, and the cacophony of civil fines, forfeitures, commitments, deportations, and taxes this has entailed.

Because double jeopardy applies only to criminal and not civil penalties, the typical case is one in which one or more civil penalty is provided alongside possible or actual criminal punishment within the same statutory scheme. The leading modern case is *Helvering v. Mitchell* (303 U.S. 391) decided in 1938. In *Helvering*, the US Commissioner of Internal Revenue sued a taxpayer for attempting fraudulently to withhold taxes. The suit sought, in addition to the amount owed, a 50 percent statutory fine for tax evasion. Because the taxpayer had already been earlier indicted, tried, and acquitted of the crime of evading the same taxes, he now claimed the fine was punishment in violation of his right against double jeopardy. For a unanimous Court, Justice Brandeis disagreed, opining that whether the fine was criminal for constitutional purposes was "one of statutory construction." Likening the fine to the "revocation of a privilege voluntarily granted," Brandeis wrote that Congress's intention was remedial rather than punitive, its purposes being to safeguard the public revenue and to reimburse the government for the cost of its investigation. Since both purposes pertained to administrative proceedings, the fine constituted civil enforcement, to which criminal protections like double jeopardy had no application.[25] This rationale remains the law today. If a statute designates a penalty as "civil" or "administrative," or if a given penalty in an analogous statute or at common law has traditionally been regarded as "civil," then it eludes protection under the constitutional right against double jeopardy.[26]

Of interest for our discussion are the exceptions, the few double jeopardy decisions that, consistent with the Proposition, have broken this mold. In the first, in 1989, the Court upheld a double jeopardy claim by a doctor, already convicted of the crime of defrauding the government of a total of $585 in medical fees, who was afterwards sued civilly for fines for each of the sixty-five separate instances of overcharging for which he had been indicted.[27] The second decision, in 1994, concerned a family of marijuana growers

[25]Helvering v. Mitchell, 303 U.S. 391, 399, 401 (1938). Justice Brandeis compares the action to the deportation of an immigrant, notable in light of *Padilla v. Kentucky*, discussed above.

[26]The leading contemporary case, United States v. Hudson, 522 U.S. 93, 105 (1997), concerned three small-town bankers assessed civil fines and debarred from participation in the banking industry for making self-serving loans by the federal Office of the Controller of the Currency. Subsequently, they were indicted on twenty-two counts of conspiracy and misapplication of funds for the same transactions. The Court, applying various tests from earlier opinions, decided that the fines were not so grossly disproportionate to the costs incurred by Government as to be nonremedial, that the details of the law indicated Congress intended "civil" penalties, and there had been "very little showing that money penalties and debarment sanctions are criminal."

[27]United States v. Halper, 490 U.S. 435 (1989).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

who, after pleading guilty to drug charges, were subsequently assessed $900,000 in state taxes for the possession and storage of drugs.[28] These decisions proceeded on the awkward formula of affording constitutional protection based on the specific facts of the particular case, including, as in these two, whether the original setting of the dispute—drug-dealing and not lawful commerce—entailed, by their nature, criminal acts.

This standard was soon repudiated, based on reasons strongly indicative of the Court's discomfort at being pulled in opposite directions. For instance, the leading Court decision today, decided in 1996, holds that the forfeiture of a home or other personal or corporate property used in connection with traffic in illegal drugs is noncriminal for purposes of double jeopardy.[29] That decision reversed contrary rulings by the Sixth and Ninth Circuits which, relying on the two Supreme Court precedents discussed in the paragraph just above, overturned the conviction of defendants for, respectively, drug manufacture and money laundering, whose property had already been forfeited in civil actions on the same evidence.[30] The Supreme Court rested the reversal on the ancient rule that forfeiture was a procedure *in rem*, not *in personam*, and therefore engaged the legal fiction that guilt adhered to the house and not the owner. Because, at least in recent centuries, a house could not be punished, forfeiture was by definition noncriminal. The Court's opinion distinguishes between forfeiture as punishment for purposes of the excessive fines clause in the Eighth Amendment and forfeiture for purposes of the double jeopardy clause in the Fifth; and between case-by-case balancing in the case of civil fines, but not in the case of civil forfeitures. The opinion also ponders whether the Court's own recent deviations from older doctrine actually "purported to overrule" the well-established law and whether the provisions under which the forfeitures at bar served important nonpunitive goals "while perhaps having certain punitive aspects."[31]

These gyrations are perhaps not surprising, given the requirement in double jeopardy claims that the justices navigate not one but two actions, tacking among two penalties that in different settings have been variously said to be punitive, nonpunitive, and "quasi-punitive."[32] The complexity may also explain why double jeopardy cases have so far withstood due-process interference more effectively than the punitive damage cases. But both show the pattern of established rules giving way to constitutional protection at the criminal-civil boundary.

[28]Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994).

[29]United States v. Ursery, 518 U.S. 267 (1996).

[30]United States v. $405,089.23 United States Currency, 33 F.3d 1210 (9th Cir. 1994); United States v. Ursery, 59 F.3d 568 (1995).

[31]*Ursery*, 518 U.S. at 282, 290.

[32]On "quasi-punitive," see in addition to *Smith v. Wade*, already discussed, United States v. Two Tracts of Real Property with Bldgs., 998 F. 2d 204, 213 (1993); and United States v. Menominee Tribal Enterprises, 601 F. Supp. 2d 1061, 1067 (2009).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

Constitutional Torts

The decisions of the last two sections involved civil and criminal actions brought against citizens by other citizens or government officers. The next group consists of actions brought against government officers by citizens. Known as "constitutional torts," these are a hybrid consisting of actions for damages (or, less often, injunctions) that are compensated only if the injury is found to violate a constitutional right. Because government employers often indemnify their officers against lawsuits, and because in some circumstances suits may be brought against state entities directly, constitutional torts frequently involve large sums.[33] Constitutional torts are also an important vehicle for changing state policy.

The great majority of these suits, including those I will discuss below, arise under Section 1983, Title 42, Chapter 21 of the United States Code, providing for civil actions against state officers who violate federal laws and rights protected by the Fourteenth Amendment.[34] Their establishment in their present form in *Monroe v. Pape* (360 U.S. 167) in 1961 was among the most comprehensive steps of the Warren Court in the "rights revolution" of the post–World War II era.[35] *Monroe* expanded the reach of an 1871 statute intended to hold state officers accountable for civil rights violations to citizens' injuries more broadly, including under an ever widening due process clause, and despite procedures that might exist under state law to discipline employees or provide citizens redress. With this decision, the Court would provide access to federal courts for suits against the entire range of state officers from governors and policemen to welfare workers and museum directors, for rights violations across an apparently unlimited definition of constitutional guarantees.

The largest number of 1983 actions to be heard on the merits—that is, not dismissed on summary judgment at the start of proceedings for reasons of

[33]That municipalities might be sued was the holding in Monell v. Department of Social Services of New York City, 436 U.S. 658 (1978).

[34]A parallel but far more limited right is provided against injury by federal officers in Bivens v. Six Unknown Narcotics Officers, 403 U.S. 388 (1971).

[35]Monroe v. Pape, 360 U.S. 167 (1961). The statute today reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

officer immunity—are those that involve, first, acts in which the actor intended to bring about the result that occurred, that is, not accidental or random; and second, injuries not regarded by the judge as so trivial (known in law as *de minimis*), amounting to harm of such minor proportions or consequence, as not to be worth the expenditure of resources required for litigation.[36] The first indicator, relating to the actor's state of mind, is the earmark of the criminal act. In the setting of constitutional law, as we will see shortly, the state-of-mind test is not uncontroversial. In general, except when paired with a *de minimis* injury or with an injury that boasts a well-established noncriminal pedigree, state of mind is usually determinative of the outcome. In some instances, judges employ a test of magnitude, similar to that seen in the punitive-damages decisions, in which case the extent or "seriousness" of harm can make up for the absence of intention and qualify the injury for constitutional protection.[37]

For two decades following the decision in *Monroe*, this form of litigation flourished. Then, in 1981, in *Parratt v. Taylor* (451 U.S. 527), the Court altered course. In *Parratt*, an inmate sought damages from prison officers for the waylaying of his mail-order hobby kit, claiming it constituted a deprivation of his property without due process, contrary to the Fourteenth Amendment. The Court held that injuries caused by officers to rights that are "procedural" in nature would be ineligible for 1983 remedies in situations where, as in this instance, the state itself had existing procedures for redress, even if that redress was not the same as available in a federal court. By "procedural" rights was meant those not based on an express provision of the Constitution or rights under the Fourteenth Amendment that the Court designated as "substantive"—rights to vote, to a first trimester abortion, to same-sex marriage, rights against actions that "shock the conscience," and a few others. According to this reasoning, the availability of state procedures for redress not proven to be inadequate precluded claims that an alleged injury had occurred in the absence of "due process." To decide otherwise, Chief Justice Rehnquist said for the majority, would mean there would be

[36]In a series of decisions, the Court held state and federal officers have "qualified immunity," that is, are not liable to civil suit, "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." See, for example, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Prior to that, officers were held immune only when they acted within the necessary discretion commensurate with their authority or for reasons of public policy. See Scheuer v. Rhodes, 416 U.S. 232 (1974), and Butz v. Economou, 438 U.S. 478 (1978).

[37]For instance, a prisoner's 1983 suit for injury to his Eighth Amendment right against cruel and unusual punishment was upheld by the Court upon evidence of severe and prolonged physical pain inflicted by medical officers who acted unintentionally but with "reckless disregard" (Estelle v. Gamble, 429 U.S. 97 [1976]). This decision remains good law today.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

no stopping point, that the Fourteenth Amendment would become—here quoting an earlier case that had denied Section 1983 relief—"a font of tort law" imposed on remedies already administered by the states.[38]

Parratt was a major, some say devastating, curtailment of what until then was thought firmly established doctrine. Its insistence that injured parties resort to state procedures for redress, often less generous than federal and more difficult to obtain, has been criticized variously as incoherent and disrespectful of precedent.[39] Had the opinion ended there it would comport easily with the Proposition: the package was not lost intentionally, thus the facts lacked the criminal element required to trigger constitutional protection; story ended. But it goes farther, to adopt the position that 1983 suits do not entail "any express requirement of a particular state of mind," a statement that on its face offers a significant challenge: the leading decision at a major intersection between civil and constitutional law appears to elude the principal indicator of the criminal element that I argue should determine the presence or absence of constitutional protection. The anomaly is all the more striking considering that all four justices who concur in the majority view indicate they decided as they did in part because the injury was or may have been unintentional.[40] As for the second indicator, *de minimis*, no judge mentioned it, although the prisoner's hobby kit was valued at $23.50.

Perhaps because unraveling existing constitutional protections for citizens is a more delicate operation for the Court than expanding them, a careful uncovering is required to reach *Parratt*'s full rationale. The job is well worth doing. At least up to and including the change in rules, the opinion for the Court upon closer inspection supports the Proposition, but from a different point of departure; as such, its reading lends further dimension, in a landmark case, to the constitutionally decisive distinction argued for, between no-crime and crime-by-another-name. In *Parratt*, this is signaled mid-way, when Justice Rehnquist explains that a common-law system, unlike the civil-law system, cannot decide cases according to a "single, general principle." Instead, he avers, the Court must be guided by a "complex interplay of the Constitution, statutes, and the facts," among which is the fact that "at an early period in the history of this Nation, it was held that there was no

[38]Parratt v. Taylor, 451 U.S. 527, 550 (1981); quoting Paul v. Davis, 424 U.S. 693, 701 (1976).

[39]A good discussion is Richard H. Fallon Jr., "Some Confusions about Due Process, Judicial Review, and Constitutional Remedies," *Columbia Law Review* 93 (1993): 309.

[40]Justice Blackmun, with whom Justice White joins, *Parratt*, 451 U.S. at 545–46; Justice Powell, id. at 548; Justice Marshall (dissenting in part), id. at 556. Also see Justice Stewart's doubts as to the constitutional rights protected against negligent acts, id. at 544. *Parratt*'s state-of-mind disclaimer was formally withdrawn in Daniels v. Williams, 474 U.S. 327 (1986), but it carries on. See for instance, in the context of a 1983 suit for injuries under the Fourth Amendment, Hudson v. New York City, 271 F.3d 62 (2d Cir. 2001).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

federal common law of crimes" applicable to all fifty states.[41] Besides offering this history lesson with no criminal allegation to be decided, the opinion chimes with the Proposition through the precedents upon which *Parratt* relies.

The first of these, *Board of Regents v. Roth* (408 U.S. 564), decided in 1972, was itself a watershed, beginning the "entitlement" approach to property rights under the Fourteenth Amendment, benefits created by positive state law.[42] *Roth* had held that denial of further employment at a state university without a formal hearing was not, in the absence a statute requiring such process, an unconstitutional taking without compensation under the Fourteenth Amendment. Rehnquist quotes the *Roth* majority (which he had joined): property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[43] Note, with reference to the Proposition, that taking someone's property without compensation in private circumstances normally would be chargeable as a crime. That by "existing rules" Chief Justice Rehnquist himself has in mind criminally enforceable rules becomes clearer when we look closely at other authority in *Parratt*.

The source for *Parratt*'s "font of tort law" language is *Paul v. Davis* (424 U.S. 693), decided in 1976. *Paul* concerned damages sought in a Section 1983 action brought by a newspaper photographer against the chief of police of Louisville, Kentucky, for preparing a flyer of "active shoplifters" that contained the plaintiff's photograph and was distributed to local merchants. In fact the photographer had been arrested for shoplifting the previous year, but after he pled not guilty the charge was left open for possible reinstatement in the future. The *Paul* majority, reversing the decision of the court below and remarking that a tort remedy was available for defamation under Kentucky law, held that an injury to reputation alone was not an injury upon which, "without more," that is, without damage to some more tangible interest, one might maintain a Section 1983 action.[44] The denial of redress for defamation "without more" comprises the usual summation of *Paul*'s legal importance. More significant for our purposes is Rehnquist's comment that "Kentucky law does not extend to respondent any legal guarantees of present enjoyment of reputation which has been altered as a result of petitioners' actions."[45]

[41]*Parratt*, 451 U.S. at 531; cite to United States v. Hudson & Goodwin, 11 U.S. 32 (1812).

[42]Board of Regents v. Roth, 408 U.S. 564 (1972). This approach was repudiated in Castle Rock v. Gonzales, 545 U.S. 748 (2005).

[43]*Parratt*, 451 U.S. at n1 quoting *Roth*, 408 U.S. 564, 577 (1972).

[44]Paul v. Davis, 424 U.S. 693, 708 (1976).

[45]Ibid., 711–12.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

Defamation is the wrong of communicating a statement that attributes a negative image or character to a person, group, or other entity and either implies or asserts the attribution is factual. It has an unusual history. At the time of the Constitution's framing, defamation was treated in English law as both a crime and a tort.[46] In seventeen of the fifty American states, defamation is indictable as a crime as well as being actionable as a tort; in the other thirty-three it is actionable as a tort but not indictable as a crime. Only where defamation is indictable must intent always be proved; where it is a tort alone and where defamation is referred to as "quasi-intentional," it depends upon the circumstances. Kentucky, where the incident in *Paul* occurred, is in the latter, nonindictable, group. That being the case, when Chief Justice Rehnquist opines that the police chief's action does not alter any legal guarantees, it is a reasonable inference that he refers to the fact that the police chief's action in itself has offended no criminal law of Kentucky.[47]

Justice Rehnquist further supports the Proposition—that is, constitutional protection determined by the presence or absence of a criminal equivalence—when in *Paul* he distinguishes his holding from Court decisions in which similar due process claims were made. Some were against officers of the federal government, in which venue defamation has never been a crime; in those, no relief was granted despite the acknowledgment of a "stigma" to reputation.[48] By the same token there were three suits in which relief for unconstitutionality was granted; all were in states—Oklahoma, Louisiana, and Wisconsin—that criminalize defamation.[49] The most prominent of these, *Wisconsin v. Constantineau* (400 U.S. 433), decided five years before *Paul*, struck down a state law that permitted, upon the initiative of a spouse or diverse local officers, without notice or hearing, flyers to be posted in liquor stores forbidding the sale or gift of intoxicating beverages to the person named. In that case, Justice Douglas wrote for the Court: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be

[46]See R. C. Donnelly, "History of Defamation," *Wisconsin Law Review* (1949): 99–126.

[47]Justice Brennan, who writes the *Paul* dissent, makes intentionality the gist of the officer's abuse of power. Moreover, in comparing acts undertaken by a private person and an officer, he describes entry of a private home, the manacling and threatening of the owner, and searching the home in the course of a robbery and a narcotics investigation, respectively (*Paul* 424 U.S. at 716).

[48]In order of discussion: United States v. Lovett, 328 U.S. 303 (1946); Joint Anti-Fascist Refugee Comm. v. McGrath , 341 U.S. 123 (1951); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959).

[49]In addition to *Constantineau*, these are Wieman v. Updegraff, 344 U.S. 183 (1952), in Oklahoma; Jenkins v. McKeithen, 395 U.S. 411 (1969), in Louisiana.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

heard are essential."[50] Two dissenters, who said they preferred the decision be postponed until the state had an opportunity to rule on its own statute, agreed that the plaintiff's constitutional right against defamation stood on its own footing.[51]

Because of the similar facts, *Constantineau* is the precedent most vehemently asserted by the critics of *Paul*. Justice Rehnquist's own explanation in *Parratt*—that *Constantineau* was treated differently from *Paul* because in *Paul* officers interfered with a right of the complainant to purchase or receive gifts permitted other citizens—has been regarded as flimsy even by those inclined to find justification for the result on other grounds.[52] As if to prove our argument, Justice Stewart, who in the meantime authored the opinion in *Board of Regents v. Roth* saying the constitution required an independent source of law for the interests asserted, was the single justice who switched sides, voting with the majority for relief in *Constantineau*, and with the majority against relief in *Paul*. The Proposition holds: only in states where defamation is a crime is Fourteenth Amendment protection afforded. In Wisconsin defamation is a crime; in Kentucky it is not.

It remains to be explained why in *Parratt* Justice Rehnquist announced the "no-particular-state-of mind" position. I have largely eschewed the subject of motives, but it is worthwhile underscoring that his, as well as judges' in other cases, could be various. Perhaps he wanted to stick as closely as possible to the original 1871 wording of the statute, which makes no mention of intention. Perhaps he sought to adhere to precedent, as he was able construe it. Perhaps he sought mainly to hold back the tide of 1983 ligation. Since, in his reading, previous decisions hinged not on state of mind per se, but rather on the existence of defamation's enforceability as a crime, in which case intent would need to be proven only subsequently, on the merits, his statement would have stemmed 1983 suits in the lower courts without materially violating the Court's previous decisions. Manifestly, different justices will seek "state-of-mind" and other criminal aspects by their own lights. The criminal law is not a beacon, fixed on results; rather it guides from deep in constitutional foundations.

[50]Wisconsin v. Constantineau, 400 U.S. 433 (1971). Douglas's opinion would seem to afford no importance to defamation's noncriminal status. At 437, he quotes: "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society" (Anti-Fascist Committee v. McGrath , 341 U.S. 123, 168 [Frankfurter, J., concurring]).

[51]*Constantineau*, 400 U.S. at 444.

[52]See, for example, Rodney A. Smolla, "The Displacement of Federal Due Process Claims by Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company," *University of Illinois Law Review* (1982): 840. Also see, generally, John C. P. Goldberg, "The Constitutional Status of Tort Law: Due Process and a Right to a Law for Redress of Wrongs," *Yale Law Journal* 115 (2005): 524.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

Tort-Law Workarounds

A final set of examples will illustrate how parties in and out of courtrooms take advantage of the relatively benign constitutional role of the civil law in order to ward off legal challenges by interests adverse to their own. The activists and other lawmakers below endorse the Proposition, as it were, with their feet. Aware of the constitutional implications of the criminal law, they devise civil-law means of avoidance.

One example is found in the legal maneuvering surrounding the law of abortion. In 1973, *Roe v. Wade* (410 U.S. 113) declared it impermissible under the Fourteenth Amendment for any state to criminally punish women or their doctors for procuring or performing abortions during the first trimester of pregnancy.[53] Imagine, however, that with rights to receive and perform abortions clearly established, a state contrived to discourage abortions without using criminal penalties, without even imposing extremely high and therefore "colorably criminal" civil penalties. Would such an attempt be constitutional? The answer seems to be yes, if so far only by default. In 1999, Louisiana passed a statute creating the right of any woman who has had an abortion to seek unlimited damages for injuries to her or her fetus from persons who performed it. The action is allowable for a period of up to three years after the injury is discovered and ten years after the abortion is performed. The aim of the law is to make it virtually impossible for any physician in the state willing to perform abortions to obtain malpractice insurance.

The law is what is called "self-enforcing": unlike a criminal statute or administrative penalty, where a state officer must perform some act that can be enjoined by a court or redressed through a suit for damages after the fact, or, in the case of actual arrest, tested by a writ of habeas corpus, here there is no overt enforcement that can be challenged. If a mother were to sue a doctor for damages to herself or her fetus, the presiding judge would be immune from suit. Put differently, the legal situation is a lot like the facts presented in *Roe v. Wade*, but without Wade: that case was heard because Wade, who was the attorney general of the Texas county in which Roe and her physicians were about to violate the criminal law, could be enjoined against its enforcement by the district court.[54]

As it happened, individual physicians, health clinics, and others intending to perform abortions in Louisiana did sue the governor and attorney general of the state, asking a federal court to declare the law unconstitutional. But in

[53]Roe v. Wade, 410 U.S. 113 (1973).

[54]Precedent from 1908 provides that parties about to suffer injuries by a state enforcement action may seek a federal injunction; this holding constitutes an exception to the Eleventh Amendment that forbids legal action against a state or its officers without its permission: Ex Parte Young, 209 U.S. 123 (1908).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

this instance, the Fifth Circuit Court of Appeals found that because there was no enforcement contemplated, there was no imminent "injury-in-fact" required to continue the suit; it also denied that the plaintiff established a sufficiently close connection with the generalized duty of the defendants to enforce Louisiana law to overcome the Eleventh Amendment's ban on suits against the state or to qualify for an injunction.[55] After a similar attempt failed in the Louisiana state courts, the situation remained in constitutional limbo for another five years, during which time no suitor emerged with a requisite injury to test the law. In 2007, abortion providers again sought to have the statute declared illegal on equal protection grounds by suing a state agency that provides backup malpractice insurance for procedures other than abortion. This time, the providers were able to establish injury to overcome the Eleventh bar, but failed on the merits.[56] The law remains in force today.

Or, consider a different tort-law workaround, affecting Title VII of the Civil Rights Act, which prohibits discrimination in education or employment on the basis of race or gender. In 1996, the California electorate passed Proposition 209, prohibiting both discrimination and preferential treatment in public employment, education, or contracting, to any person for reasons of sex, color, ethnicity, or national origin. The initiative provided for enforcement through the civil remedies of injunction and monetary damages in amounts that mirror other civil rights statutes "then-existing."[57] Seeking a court order to restrain or redress race-neutral state action would be an inherently awkward legal petition in both state and federal venues. How then might Proposition 209 be challenged for its constitutionality?

Had the law provided criminal penalties, a state prosecutor would have been able to indict another state officer for its violation, in which case a conviction could be appealed as unconstitutional.[58] But because the absence of criminal penalties prevented that course, opponents adopted a more

[55]Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (en banc). At 410, plaintiffs argued the law imposed an "undue burden" on the mother, contrary to Planned Parenthood v. Casey, 505 U.S. 833 (1992). See Maya Manian, "Privatizing Bans on Abortion: Eviscerating Constitutional Rights through Torts Remedies," *Temple Law Review* 80 (2007): 123.

[56]The court considered only a subsection of the law that concerned the backup insurance agency and found that constitutional: K. P. v. LeBlanc, 729 Fed. 3d. 427 (2013).

[57]See the discrimination suits described and information about the law as it operated after passage in Cynthia C. Jamison, "The Cost of Defiance: Plaintiffs' Entitlement to Damages under the California Civil Rights Initiative," *Southwestern University Law Review* 33 (2004): 521.

[58]It is instructive to compare the strategic situation here with that facing opponents in the case of the issuance of marriage licenses in San Francisco in 2004 to same-sex couples, in violation of the California State Family Code. There, the attorney general sued to enjoin city officials from continuing to violate their duty. Had the injunction

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

complex strategy. On the day following the election, a broad coalition of labor, racial-minority, and civil-liberties groups, and individuals successfully brought suit in federal district court for a temporary restraining order against the governor, attorney general, two other state officers, and the organizational backers of the referendum. The claim was that implementation of the act would violate the Constitution by "substantially burdening" women and minorities through the elimination of various localized programs that benefited them. Part of their argument was based on what is known as "political structure" discrimination. Political structure discrimination is a doctrine established in a series of Court decisions holding unconstitutional special elections that made antidiscrimination laws illegal or changed election rules to make antidiscrimination laws more difficult to obtain. The coalition argued that enforcement of Proposition 209 would dismantle local-level affirmative-action programs advantageous to women and minorities and obtained through their political organization and influence, forcing them to appeal to a more distant state government and a wider electoral constituency in order to overcome its effects.[59]

The Ninth Circuit vacated this judgment. Reviewing the two possible standards for finding an equal protection violation, the court concluded, first, that a law prohibiting the State from classifying individuals by race or gender does not a fortiori classify individuals by race or gender. Second, in response to the plaintiffs' political-structure argument that the law reallocated electoral influence in a discriminatory way, the court decided that a California electoral majority consisting demographically of women and minorities could not reasonably be said to have packed "the political deck against itself." Therefore, the plaintiffs demonstrated no imminent irreparable harm to anyone to justify the injunction.[60]

Civil-law strategies to circumvent constitutional pitfalls are nothing new. There is some evidence to suggest a reason behind the largely inexplicable Seventh Amendment to the Constitution, providing civil jury trial for cases at common law above a specified dollar amount in dispute, which is that

petition failed, these same persons were subject to criminal penalties for abuse of office. See Lockyear v. City and County of San Francisco, 33 Cal. 4th 1055 (2004).

[59]Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, 1506–1510 (1996). Precedents cited were Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School District No. 1, 458 U.S. 457 (1982); and Romer v. Evans, 517 U.S. 620 (196l).

[60]Coalition for Economic Equity v. Wilson, 122 F.3d 692, 704 (9th Cir. 1997). Reviewing a similar ballot measure in Michigan in 2012, the Sixth Circuit decided to the contrary, and found for the plaintiffs on the merits on equal protection grounds: Coalition to Defend Affirmative Action v. Regents of University of Michigan, 701 F.3d 466 (6th Cir. 2012 [en banc]). When the Sixth Circuit decision reached the Supreme Court, it was reversed: Schuette v. Coalition to Defend Affirmative Action (BAMN), 188 L. Ed. 2d 613 (2014).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

persons cognizant of English history were aware of kings from an early time circumventing the more rights-encumbered criminal trial with civil process when seizing property and absolving debt.[61] Today a wide range of noncriminal sanctions, those already discussed plus preventive detention and many others, have been branded as civil with essentially the same government motive.[62] In the widest perspective, the Court's own long constitutional tolerance of these, albeit with one or another institutional or instrumental justification, may be seen as another version of the same ploy.

Concluding Remarks

Conclusions resting on evidence that is as limited as the above must be drawn with caution. That said, the results reported are consistent with the Proposition offered: settled rules of constitutional protection in civil suits are expanded when judges perceive a criminally associated element in the case. This was shown with regard to the rules governing punitive damages and double jeopardy. Contrariwise, where judges perceive a criminal element to be "missing," constitutional protection may be contracted. This was shown in the decisions culminating in *Parratt*. Granted these findings are sound only as far as they go, the question then arises whether the Proposition might be stretched to include other areas of constitutional provision besides those considered. Put differently, does the Proposition have "legs"?

Let us begin the answer with *Parratt* and its roundabout argument through state defamation statutes. I believe the Proposition will show legs to other torts actionable only in combination with additional, criminally associated features. A less "positive-law" example than defamation in state statutes is from recent 1983 litigation, involving the constitutional tort of malicious prosecution. Malicious prosecution is the intentional bringing of a civil or criminal action against another without probable cause and for some purpose other than accomplishing justice. It seems to have been always and everywhere a noncriminal offense, redressed only by damages. In suits against government

[61]See Lysander Spooner, *An Essay on the Trial by Jury*, Google Books, 112–23. I was made aware of this source by "Developments in the Law: the Civil Jury," *Harvard Law Review* 110 (1997): 1418. On the mysteries of the Seventh Amendment see Edith Guild Henderson, "The Background of the Seventh Amendment," *Harvard Law Review* 80 (1966): 289. At early common law, victims of serious crimes had the alternative of either criminally prosecuting or suing perpetrators at civil law for damages. See David J. Seipp, "The Distinction between Crime and Tort in the Early Common Law," *Boston University Law Review* 17 (1996): 59.

[62]See Donald Dripps, "The Exclusivity of the Criminal Law: Toward a 'Regulatory' Model of, or 'Pathological' Perspective on, the Civil-Criminal Distinction," *Journal of Contemporary Legal Issues* 7 (1996): 199.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

officers, the Court permits 1983 actions for malicious prosecution only when the facts of the case can be linked to a deprivation of liberty under the Fourth Amendment, regulating searches and seizures. What is more, the tort and its adjudication must also have caused the actual physical confinement of the plaintiff, something that in keeping with my argument here would be a crime if done by a private individual. These circumstances are distinguishable from others that, for instance, resulted only in orders to the plaintiff that she remain available for court appearances, in which event an action based on malicious prosecution has not been allowed.[63]

The Proposition can stride further, reaching civil cases in which there is a wider gap between the injury claimed at bar and the criminal element that decides the case. For instance, consider the history of federalism jurisprudence and the puzzling fact of the foreshortened impact of *Shelley v. Kraemer* (334 U.S. 1 [1948]). *Shelley v. Kraemer* was a damage suit for breach of contract that ended in the piercing of the veil surrounding restrictive racial covenants in private real estate contracts. Previous to Shelley, contracts of sale of this kind were ruled beyond the Constitution's purview. Now the Court reasoned that the enforcement of the covenant by an ordinary court of law would be "state action" protected against by the Fourteenth Amendment, and it reversed an injunction of the lower court.[64] Applauded by civil-rights activists and their supporters as a dramatic breakthrough, the decision has had scant effect on parallel types of discrimination, a result usually explained by "private" versus "state" action and courts' unwillingness to further dissolve the distinction.

Our analysis would direct attention instead to the "conspiratorial" nature of the racial covenant and to the Court's fear in *Shelley* that moving to prevent its breach would amount to participation in a federal crime under US code Title 18, Section 241, which is the criminal complement to the 1871 statute that later became Section 1983. It declares it to be punishable by up to life imprisonment for two or more persons to agree to injure rights guaranteed by the US Constitution or laws.[65] Notably, suits in which federal judges

[63]Albright v. Oliver, 510 U.S. 266 (1994); compare Handler v. Mayhew, 841 F. Supp. 2d 443 (2012).

[64]Shelley v. Kraemer, 334 U.S. 1 (1948).

[65]First legislated in 1871, Title 18, Section 241 makes it unlawful for two or more persons to agree together to injure, threaten, or intimidate a person in any state, territory, or district in the free exercise or enjoyment of any right or privilege secured to him/her by the Constitution or the laws of the United States. The offense is punishable by a range of imprisonment up to a life term or the death penalty, depending upon the circumstances of the crime, and the resulting injury, if any. Section 242 of Title 18 makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

declined to apply *Shelley* and enforced the contract challenged did not include this prospect.[66]

This reading of *Shelley* places it in a series with *Screws v. United States* (325 U.S. 91), decided just three years earlier. *Screws* was an appeal by local police officers who had been convicted in federal court for conspiring to murder an African-American man "under color of state law," also violating Title 18, Section 241. The officers claimed the statute was unconstitutionally vague, having the effect of turning every state tort into a criminal violation of rights under the Fourteenth Amendment. The Court disagreed, but it ordered a new trial in which the jury was instructed that the deprivation of rights must be intentional, something Section 241 did not specify. *Screws* is pertinent to our argument here, because in his opinion for the majority, Justice Douglas wondered aloud whether, without imputing "willingly" (a word it did not include) to the statute, law-enforcement officers, including judges, might not, despite the best of motives, be guilty in hindsight of crimes on a regular basis for which they might be sent to the penitentiary. *Twining v. New Jersey* (211 U.S. 78), a 1908 Court decision cited as precedent by both *Shelley* and *Screws*, had endorsed the idea that legal proceedings that ended in criminal conviction were "state action" for purposes of the Fourteenth Amendment.[67]

Proliferation of cases in this manner is instructive, but only to a point. If the pattern stipulated is to amount to more than a coincidence, or even an odd regularity that another scholar might interpret differently, it must be explained by a larger theory of constitutional change, within which, in turn, the pattern provides reciprocal support. Put differently, the more important

[66]Cf. Edwards v. Habib, 397 F. 2d, 687 (1968); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); United Egg Producers v. Standard Brands, Inc., 44 Fed. 3d 940 (1995). A good review of interpretations in the aftermath of *Shelley* is in Mark D. Rosen, "Was *Shelley v. Kraemer* Incorrectly Decided? Some New Answers," *California Law Review* 95 (2007): 451.

[67]Screws v. United States, 325 U.S. 91 (1945); Twining v. New Jersey, 211 U.S. 78 (1908). *Twining* held that while certain rights enumerated in the Bill of Rights might apply to the states under the due process clause of the 14th Amendment, the right against self-incrimination under the Fifth Amendment is not incorporated. *Screws* 325 U.S. 91 held that the victim in the case had been murdered "under color" of state law, albeit by law enforcement officers acting unlawfully, so that a prosecution under the federal civil-rights statute in federal court was permissible. The Douglas musing referred to is at 97. *Twining* is cited in *Shelley*, 334 U.S. at 15 and in *Screws*, 325 U.S. at 95. Judges are presently immune to civil suit, but not to criminal prosecution. Clues yet to be followed but which possibly point in this direction include *McGhee v. Sipes*, upholding a racial covenant a year before *Shelley* and decided in the same Supreme Court case as *Shelley*. In *McGhee*, the (same) Michigan court distinguished real estate from other settings—public education and accommodations—that as a matter of "public policy" were protected against discrimination under the state's penal code (316 Mich. 614, 624 [1947]).

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

question is not whether the Proposition has legs but whether it has "arms." Can it support a broader interpretation of constitutional law that embraces other patterns as well to offer a convincing account of constitutional development overall? I will venture a few brief remarks.

Starting from the idea that constitutional law acts as a restraint on the operations of the criminal law, it follows that the criminal law can be understood conceptually as the "bedrock" law, upon which not only the constitutional law but also the civil law is historically constructed. I believe what little is known about the early history of Anglo-American legal institutions can be mustered on behalf of this account. The idea accords with kings' early moves to take absolute control over English criminal law; with the early substance of legal provisions, many of them the same felonies recycled and redressed through history; with the high public stakes placed on the law's obedience and the harshness of early penalties for even petty violations; with the procedures by which penalties were meted out, which still form the backbone of criminal law today. If, as I have suggested, constitutional law from its earliest stirrings stood for a mitigation of the excesses of that law, then juxtaposing the two suggests nothing more startling than a prolonged approach, beginning in Anglo-American history in the twelfth century, taking flight in the late seventeenth, and reaching something of an apogee in the late eighteenth.

The wild card of the ensemble is, again, the civil law. The civil law can be positioned analytically as a buffer, between the criminal and constitutional laws, avoiding the disadvantages inherent in both extremes. In the example of the tort of malicious prosecution just discussed, for instance, historians report it was a device that after much experimentation succeeded in satisfying law enforcement's requirement of popular assistance, on the one hand, and the avoidance of unjust prosecutions, on the other.[68] Put in the terms of this essay, the first objective proceeded from the criminal law, bent on law and order, the second from what we might call protoconstitutional law, anticipating by centuries the full-blown protection implied by constitutionalism. The point is not that the tort of malicious prosecution cannot be interpreted as incorporating other motives. Relevant lawmakers may have worried that too many prosecutions would discourage popular assistance; the tort's protective effect may have emerged only as a byproduct.[69] Likewise, *Parratt* can be read to conserve judicial resources above all—certainly a preoccupation of judges during the 1980s—or as a class-based reflection of judges' bias against prisoners.[70] Similarly, double jeopardy can be subjected to alternative as

[68]See Fowler V. Harper, "Malicious Prosecution, Defamation, and False Arrest," *Texas Law Review* 15 (1937): 169ff.

[69]Indeed, this would fit the model of an inward, self-regarding "officist" criminal law. See Orren, "Criminal Foundations" (note 2 above).

[70]In this vein, see Lee Epstein, Christopher M. Parker, and Jeffrey A. Segal, "Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press

well as parallel readings; in fact it has been, as has punitive damages before *Parratt* and as has also the root of all tort law, trespass.[71] The ancestor of the 1983 suit against officers was, by the reign of Edward I in the thirteenth century, available across the full spectrum of English government; it might itself be plausibly attributed to the goal of easing strains caused by the ongoing processes of royal centralization.[72]

Civil law, then, with its flexible edges, has allowed lawmakers through the ages to experiment, to mitigate the costs and deficiencies of the criminal law without abandoning the underlying law-and-order ground altogether. The civil law decisions discussed in the essay can be understood as readjustments, both where existing civil law was found to be insufficiently mitigating, or where, for one reason or another, it was seen to be overindulgent of criminal aims. If this intuition is correct, then it should be possible to observe tort-law workarounds—civil law invented or deployed to meet new situations—throughout constitutional history. Clearly, a great deal of study will be required to vindicate the larger apparatus. Many variables can be expected to intervene, foremost among them perhaps the changing salience in the public's mind of particular crimes charged, both against citizens and government officers, and the justice of their enforcement.

Amendment" (revised paper originally presented at the 2013 APSA meetings, Chicago, IL).

[71]See, for instance, David S. Rudstein, "A Brief History of the Fifth Amendment Guarantee against Double Jeopardy," *William and Mary Bill of Rights Journal* 14 (2005): 205–8; and "Punitive Damages for Deterrence, When and How Much?," *Alabama Law Review* 40 (1988–89): 1143. On the difficulty of sorting out judges' motives see Nancy Frank, "From Civil to Criminal Penalties in the History of Health and Safety Laws," *Social Problems* 5 (1983): 535. On defamation, and for an interpretation of trespass in keeping with the perspective here, see Florence Frances Cameron, "Note: Defamation Survivability and Demise of the Antiquated 'Actio Personalis' Doctrine," *Columbia Law Review* 85 (1985): 1833.

[72]An excellent historical treatment remains Louis L. Jaffe, "Suits against Governments and Officers: Sovereign Immunity," *Harvard Law Review* 77 (1963): 1.

https://doi.org/10.1017/S0034670514000606 Published online by Cambridge University Press