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THE NEED FOR CONSTITUTIONAL PROTECTIONS FOR DEFENDANTS IN CIVIL PENALTY CASES*

Jonathan I. Charney†

It is well known that the Constitution affords persons accused of crimes certain protections. These protections, which are applicable to the federal government, are found in the fourth,¹ fifth,² sixth,³ and eighth⁴ amendments. Many of these protections are made applicable to the states through the fourteenth amendment.⁵ A recent Supreme Court opinion, *Argersinger v. Hamlin*,⁶ enumerates the rights of defendants in criminal prosecutions. The Court's list includes: (1) the right to a public trial,⁷ (2) the right of confrontation,⁸ (3) the right of compulsory process for obtaining

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¹ The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

² In the fifth amendment, additional protections are found:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

³ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

⁴ The eighth amendment mandates: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

⁵ The 14th amendment states that no "[s]tate [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Through the 14th amendment, many of the protections listed in the Bill of Rights are applicable to prosecutions brought by the states. *Pointer v. Texas*, 380 U.S. 400 (1965).

⁶ 407 U.S. 25 (1972).

⁷ *Id.* at 28; *In re Oliver*, 333 U.S. 257 (1948).

⁸ *Dutton v. Evans*, 400 U.S. 74 (1970); *Pointer v. Texas*, 380 U.S. 400 (1965).

witnesses in one's favor,⁹ (4) the right to a speedy trial,¹⁰ (5) the right to be informed of the nature and cause of the accusation,¹¹ (6) the right to a jury trial when the possible sentence exceeds six months,¹² and (7) the right to counsel if there is a possibility of incarceration.¹³

⁹ 407 U.S. at 28; *Washington v. Texas*, 388 U.S. 14 (1967).

¹⁰ 407 U.S. at 28; *Barker v. Wingo*, 407 U.S. 514 (1972); *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

¹¹ 407 U.S. at 28; *see* U.S. CONST. amend. VI; B. SCHWARTZ, CONSTITUTIONAL LAW 205 (1972).

¹² 407 U.S. at 28-30.

¹³ 407 U.S. at 30-40. *In re Gault*, 387 U.S. 1 (1967). The privilege against self-incrimination has long protected the criminal defendant; however, the Supreme Court has recognized that this privilege may also be invoked in civil litigation. *Id.* at 47-48.

The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects any disclosures which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*

Id., quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964) (White, J., concurring) (emphasis in original).

The list of rights accorded a criminal defendant also includes (1) the requirement that there be an official decision to prosecute made formally, explicitly, and with notice (*see Gideon v. Wainwright*, 372 U.S. 335 (1963)), (2) the right to have proof of guilt beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970)), (3) the right to a trial before an impartial trier of fact (*Tumey v. Ohio*, 273 U.S. 510 (1927)), (4) limitations on unreasonable searches and seizures and the use of illegally obtained evidence (*Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961)), and (5) prohibitions against double jeopardy. The doctrine of respondeat superior is inapplicable to the criminal law. *Commonwealth v. Koczwar*, 397 Pa. 575, 155 A.2d 825 (1959); *see Sayre, Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689 (1930). Recent cases indicate that the doctrine of respondeat superior may be applicable to misdemeanors or *mala prohibita* crimes, however. *United States v. Dotterweich*, 320 U.S. 277 (1943); *see United States v. Freed*, 401 U.S. 601 (1971).

The rights of a criminal defendant also include the right to be charged and tried in the state where the crime was alleged to have been committed. *See Hepner v. United States*, 213 U.S. 103 (1909). Similar to the right of a criminal defendant not to be tried extraterritorially is the right to be tried by federal courts if the charge is a violation of a federal statute. *Stearns v. United States*, 22 F. Cas. 1188 (No. 13,341) (Cir. Ct. 1827-40).

Some protections are accorded all criminal defendants while others are limited to defendants accused of special categories of crimes. Often, the protections increase as the potential maximum penalty increases. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). For example, the right to a jury trial is limited to cases in which the offense is considered serious. *Baldwin v. New York*, 399 U.S. 66 (1970) (distinction between petty and serious offenses drawn at six months' imprisonment for right to jury trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (crime with possible two-year sentence requires jury trial); *United States v. R.L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971) (maximum fine for conviction of petty offense without jury trial \$500).

Other rights are applicable only if the trial is in federal court. *Johnson v. Louisiana*, 406 U.S. 356 (1972) (unanimous jury verdict not constitutionally required in state courts).

However, certain rights are guaranteed in criminal proceedings regardless of the offense or penalty risked. *In re Oliver*, 333 U.S. 257, 273 (1948) (right to reasonable notice of charge and opportunity to be heard even though penalty 60 days imprisonment); District of

The protections granted to defendants in criminal actions impose burdens on the prosecutor which are not borne by the plaintiff in civil litigation. To escape these burdens, legislators and prosecutors have tried to devise various methods of circumventing the requirement of providing constitutional protections to criminal defendants. One increasingly popular technique to avoid this duty is to change the labels of the statutes under which individuals are prosecuted from criminal to civil.¹⁴ The defendants then are not tried criminally. Rather, they are subjected to administrative proceedings or civil actions, brought by the agency responsible for enforcement of the statute. In these proceedings, the defendants are accorded only the safeguards applicable in civil suits.¹⁵ The

Columbia v. Clawans, 300 U.S. 617 (1937) (right to cross examination when penalty could not exceed \$300 or 90 days imprisonment).

¹⁴ In recognition of the increasing use of this technique, the Administrative Conference of the United States requested Professor Harvey J. Goldschmid of Columbia University Law School to evaluate the use of civil penalties. In discussing the magnitude of the use of the civil penalty he states:

In 1967, for example, five executive departments and six independent agencies collected \$5,857,220 through the imposition of civil money penalties. By 1971, seven executive departments and eight independent agencies collected \$10,463,622 in 15,608 cases. All evidence points to a doubling or tripling dollar magnitude and a substantially increasing caseload within the next few years.

H. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, Nov. 1, 1972, at 2 (unpublished report on file at the *Cornell Law Review*) [hereinafter cited as Goldschmid Report]. Professor Goldschmid characterizes civil penalties as follows:

For purposes of the survey, no distinction was drawn between sanctions denominated "money penalties" and sanctions denominated "forfeitures" (e.g., in FCC legislation) and "fines" (e.g., in Postal Service legislation) so long as (i) the sanction was classified as *civil* and (ii) *money* was in fact subject to collection by an agency or a court. Excluded were situations involving penalties or liquidated damages assessed pursuant to the terms of a Government contract or sums withheld or recovered for failure to comply with the terms of a Government grant.

Id. app. A n.9. This Article adopts the preceding definition.

¹⁵ Below is a list of selected statutes authorizing the use of civil penalties or forfeiture penalties. 15 U.S.C. § 21(l) (1970) (monopolies and combinations); Securities and Exchange Act, *id.* § 78ff(b); Truth in Lending Act, *id.* § 1640; Tariff Act of 1920, 19 U.S.C. § 1615 (1970); Penalty for Settling on Indian Reservations, 25 U.S.C. § 180 (1970); INT. REV. CODE OF 1954, § 7268 (\$500 civil penalty for failure to produce records for IRS); *id.* §§ 7301-29 (subchapter C forfeiture); *id.* § 7341 (penalty for sales to evade tax); *id.* § 7342 (penalty for refusal to permit entry or examinations); 28 U.S.C. § 2461(a) (1970) ("Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action"); Marine Protection Reservations and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (Supp. 11, 1972); Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1223-27 (Supp. 11, 1972); 42 U.S.C. § 1857f-4 (1970) (penalty up to \$10,000 for each motor vehicle manufactured in violation of motor vehicle emission standards); *id.* § 1857(f)(6)(d) (1970) (civil penalty of \$10,000 per day for failure to comply with fuel content regulations of M.E.U.); 46 U.S.C. §§ 309-28 (1970) (penalties in case of foreign commerce activities); *id.* § 355 (civil penalty of \$500 for failure to deposit certain records with the United States consul located at

sanctions imposed under such statutes, usually fines, have come to be known as civil penalties.¹⁶

Civil penalties have found widespread use in the field of environmental protection. For example, the Federal Water Pollution Control Act of 1972¹⁷ provides for the establishment of standards for effluent limitations,¹⁸ water quality related effluent limitations,¹⁹ national standards of performance,²⁰ toxic and pre-treatment effluent standards,²¹ inspections and other procedures.²² For a violation of these requirements "civil penalties" ranging from \$5,000 to \$5 million may be imposed.²³

Similarly, the Marine Protection, Research, and Sanctuaries (Ocean Dumping) Act of 1972²⁴ regulates the dumping of materials in the ocean from United States sources and all dumping in the territorial sea and contiguous zone of the United States. Section 105(a) establishes a "civil penalty" of \$50,000 or less for dumping violations.²⁵

In view of the success of civil penalty prosecutions, the trend at the federal level is toward changing many criminal sanctions to civil penalties. One example is the recent amendment to the Inter-coastal Shipping Act,²⁶ the purpose of which is set out in its legislative history:

Penalties provided for violations of many of the provisions of the Shipping Act 1916, are criminal. Where there appears to have been a violation of one of these provisions it is necessary to conduct an investigation of the incident, to thoroughly document the violation and then to refer it to the Department of Justice for prosecution. Adequate documentation is time consuming, and considerable time can elapse between the commission of the offense and the actual referral to the Department of Justice.

foreign port); 47 U.S.C. § 503 (1970) (civil forfeiture for violation of certain laws, permits and regulations pertaining to radio and wire communication); 49 U.S.C. § 1(21) (1970) (civil penalty imposed on railroad carrier for failure to comply with ICC orders requiring safe and adequate facilities or extension of lines). For a complete list of statutes pursuant to which a civil penalty or civil forfeiture may be imposed, consult the Department of Justice.

¹⁶ See generally Goldschmid Report.

¹⁷ 33 U.S.C. §§ 1251-1376 (Supp. 11, 1972).

¹⁸ *Id.* § 1311.

¹⁹ *Id.* § 1312.

²⁰ *Id.* § 1316.

²¹ *Id.* § 1317.

²² *Id.* § 1318.

²³ *Id.* §§ 1319(d), 1321(b)(6), 1322.

²⁴ *Id.* §§ 1401-44.

²⁵ *Id.* § 1415(a).

²⁶ 46 U.S.C. §§ 814, 815, 817, 822, 831, 844 (Supp. 11, 1972), amending 46 U.S.C. §§ 814, 815, 817, 822, 831, 844 (1970).

Additional time and effort is expended by the Department in its review and evaluation of the offense. A further lapse of time occurs after the filing of a complaint before the case is assigned for trial. By the time the penalty is imposed, the courts frequently are inclined to impose a much lighter sentence than if the case had been prosecuted promptly. In such instances, no regulatory purpose is served, since the amount of the penalty is usually insufficient to deter the offender or others from further transgressions.

To change the penalties for violations of these provisions from criminal to civil should make the documentation of violation simpler, thereby expediting final consideration by the Commission, or the Department of Justice and the courts. Since proving a violation would be easier, the threat of imposition of the prescribed penalty should act as a more effective deterrent to further violations.²⁷

The legal question raised by these civil penalty statutes is whether a mere change of label, from criminal to civil, eliminates the need to extend to individuals prosecuted under them all the constitutional protections accorded defendants in criminal trials.²⁸ The answer, of course, is that criminal prosecutions masquerading in the guise of civil penalties will not be tolerated; the alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case.²⁹

The difficulty in insuring a triumph of substance over form in this area lies in the definition of criminal penalties as opposed to civil claims.³⁰ The Supreme Court has never satisfactorily defined

²⁷ S. REP. NO. 1014, 92d Cong., 2d Sess. 2-3 (1972).

²⁸ Except for a few unclear limitations, there is little doubt about the general propriety of civil penalties:

Although a few questionable state cases exist, the leading commentators and a number of Supreme Court decisions indicate that an administrative imposition system can surmount constitutional barriers. This report concludes that there are no significant constitutional impediments to such a system, even though agencies will, at times, be delegated functions traditionally exercised by Congress or the courts.

Goldschmid Report 7; *see, e.g.*, *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lloyd Sabauda Societa v. Elting*, 287 U.S. 329 (1932); *Elting v. North German Lloyd*, 287 U.S. 324 (1932); *Ocean Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

²⁹ Nevertheless, this movement to substitute civil penalties for criminal penalties to avoid the difficulty of criminal law enforcement was given added support by a recent unanimous recommendation of the Administrative Conference of the United States. *See* 41 U.S.L.W. 2326, 2327 (Dec. 26, 1972).

³⁰ For the purpose of determining whether statutorily authorized or constitutionally mandated procedures are applicable to cases brought under various statutes courts have had to decide whether these statutes, which authorize the infliction of harm as a sanction, are civil or criminal in nature. In order to ascertain whether procedures which the legislature has designated as applicable to criminal prosecutions govern actions brought under a particular statute, a court must look to the intent of the legislature in enacting the statute. If

the term "crime."³¹ The closest the courts have come to a rational definition has been to say that "civil penalties" are not disguised criminal penalties when they are regulatory in nature.³²

This Article will explore the various approaches to solving this definitional problem, and in so doing, identify the key distinctions between civil and criminal actions. By focusing on the purposes for the separate existence of criminal and civil actions, a workable test for discriminating between the two forms of action may be developed.

I

PROCEDURAL RAMIFICATIONS OF CLASSIFICATION OF CIVIL PENALTY PROVISIONS

Civil penalties have been enacted to deny defendants the protections normally afforded in criminal prosecutions. However, the courts still have not determined which rights enjoyed by criminal defendants may be dispensed with in civil prosecutions. Indeed, there is authority to support both the grant and denial of a number of important rights to civil defendants.³³ Prosecutors often are unsure of the stance they are to take in civil penalty cases, and the alert defendant should assert each right separately in order to assure himself the maximum in protections and the greatest delay.

A. *Right to a Jury Trial*

Absent a knowing waiver of the right to a jury trial, a defendant in a criminal case may be convicted and sentenced for a

the legislature intended the statute to be criminal, then procedures applicable to criminal prosecutions govern the case. For example, whether a civil or criminal statute of limitations applies in a given case would be determined by this type of analysis. Whether *constitutionally required* protections apply in a given case is the question dealt with in this Article. It is doubtful that the intent of the legislature is relevant to this issue. See text accompanying notes 93-105 *infra*.

³¹ The impossibility of defining the term "crime" was recognized in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 553-54 (1943) (Frankfurter, J., concurring); see Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 431-33 (1958).

³² L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 266-73 (1965) and cases cited therein. The courts have recognized, however, that regulation may take the form of the exaction of monetary fines or property forfeitures. See, e.g., *Ft. Smith v. Gunter*, 106 Ark. 371, 154 S.W. 181 (1913) (license tax); *Seattle v. Rogers*, 6 Wash. 2d 31, 106 P.2d 598 (1940) (\$1,000 license fee).

The federal courts have attacked this problem by classifying monetary fines as "remedial in nature." *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9th Cir. 1960); *Colacicco v. United States*, 143 F.2d 410 (2d Cir. 1944).

³³ For an assortment of older cases on the subject, see Annot., 27 L.R.A. 739 (1910).

serious offense only upon trial by an impartial trier-of-fact.³⁴ The right to jury trial does not, however, extend to administrative proceedings, and the courts have held that administrative findings can be the basis for enforcement of civil penalties.³⁵ In the case of *Helvering v. Mitchell*,³⁶ the Supreme Court held that because Congress provided a distinctly civil procedure for the collection of an additional fifty percent penalty for fraudulently filing an income tax return,³⁷ it clearly "intended a civil, not a criminal, sanction. . . . Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury"³⁸ A similar result was reached in *Olshausen v. Commissioner*.³⁹ *Olshausen* involved the Internal Revenue Code provision for additions to income tax for failure to file a declaration of estimated tax. The court termed the additional tax a penalty, but decided that its imposition did not require a jury trial as mandated by the sixth amendment.⁴⁰ The penalties were found to be "civil or remedial sanctions rather than punitive" because "[t]hey [were] provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."⁴¹

Although several lower and state court cases have found that

³⁴ U.S. CONST. amend. VI; cf. *Dennis v. United States*, 339 U.S. 162 (1950). However, a jury is not required to be the trier of facts for all crimes. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 33 (1972). Even summary judgment is permissible in cases involving petty crimes. *Id.*

³⁵ In *Telephone News Systems, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd per curiam*, 376 U.S. 782 (1964), a three-judge district court permitted the Department of Justice to discontinue the plaintiff's phone service on the basis of the Justice Department's finding that the phone was being used in support of illegal gambling operations. See *Ocean Navigation Co. v. Stranahan*, 214 U.S. 320, 329, 342-43 (1909) (upholding statutory authorization of administrative assessment of monetary penalty without provision of judicial review of such assessment). See also *Walker v. United States*, 240 F.2d 601, 603-04 (5th Cir.), *cert. denied*, 354 U.S. 939 (1957); K. DAVIS, ADMINISTRATIVE LAW § 2.13 (1959).

³⁶ 303 U.S. 391, 402 (1938).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 273 F.2d 23 (9th Cir.), *cert. denied*, 363 U.S. 820 (1960).

⁴⁰ *Id.*

⁴¹ *Id.* at 27, quoting *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938).

It was held in *Hepner v. United States*, 213 U.S. 103 (1909), that penalties for administrative violations could be collected in a civil suit without a criminal jury trial because the United States in such cases is merely a creditor enforcing a debt. See *People v. Hoffman*, 3 Mich. 248 (1854) (defendant liable for civil penalty not entitled to jury trial at state's expense); *State v. Intoxicating Liquor*, 82 Vt. 283, 73 A. 586 (1909) (claimant not entitled to jury trial in forfeiture proceeding); Note, *The Concept of Punitive Legislation and the Sixth Amendment*, 32 U. CHI. L. REV. 290 (1965).

the right to a jury trial is mandated in litigation concerning civil penalties,⁴² the trend seems to be in the opposite direction. In the recent case of *McKeiver v. Pennsylvania*,⁴³ it was determined that a jury trial is not required by the due process clause as a matter of fundamental fairness in a juvenile delinquency proceeding, even though incarceration is a potential result. The Court noted that despite their punitive nature, such proceedings have never been classified as criminal trials.⁴⁴

B. *Right to Confrontation*

The right to be confronted with witnesses has been found inapplicable in civil penalty situations. Thus, in the case of *United States v. Zucker*,⁴⁵ a deposition of an absent witness for the government was permitted to be read into the record in a prosecution brought under the Customs Administrative Act of 1890⁴⁶ in which a fine of \$5,000 for each offense could have been levied. It even has been held that a penalty can be assessed without the presence of the defendants so charged.⁴⁷

C. *Double Jeopardy*

The fifth amendment provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."⁴⁸ The protection of the double jeopardy clause, however, has not been extended to the civil penalty situation. A person acquitted or convicted of a criminal charge can be subjected to a civil penalty for the same acts involved in the criminal action. Subsequent to either acquittal or conviction of a criminal charge, one can be subjected to a civil penalty for the same acts involved in the criminal action.⁴⁹ In the recent case of *One Lot Emerald Cut Stones & One Ring v. United States*,⁵⁰ an individual was acquitted of smuggling emeralds into the United States. The question then was

⁴² *United States v. Allen*, 24 F. Cas. 772 (No. 14,431) (C.C.D. Conn. 1816); *Rogers v. Alexander*, 2 Ia. (2 Greene) 443 (1850); *Kennedy v. Wright*, 34 Me. 351 (1852).

⁴³ 403 U.S. 528 (1971).

⁴⁴ *Id.* at 541.

⁴⁵ 161 U.S. 475 (1896).

⁴⁶ Act of June 10, 1890, ch. 407, § 9, 26 Stat. 131, 135; see *Moller v. United States*, 57 F. 490 (5th Cir. 1893) (deposition of witness introduced as evidence in civil penalty suit); *State v. Barrels of Liquor*, 47 N.H. 369 (1867).

⁴⁷ *Martin v. M'Night*, 1 Tenn. (1 Over.) 330 (1808).

⁴⁸ U.S. CONST. amend. V.

⁴⁹ *Helvering v. Mitchell*, 303 U.S. 391, 397-98 (1938).

⁵⁰ 409 U.S. 232 (1972).

whether the government could proceed against the emeralds under a statute providing for forfeiture of items illegally brought into the United States. The Court found in these provisions no violation of the double jeopardy clause or of the doctrine of *res judicata*. The Court observed that the conviction under the smuggling statute required a showing of intent to smuggle while the forfeiture statute required no such showing and that the burden of proof differed under the two statutes. The language of the Court was much broader, however:

If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."⁵¹

The Court distinguished *Coffey v. United States*⁵² in which it had been held that acquittal on a criminal indictment was a bar to forfeiture of property seized in connection with the criminal action. In *Coffey*, the same fraudulent acts, intents, and attempts to defraud also had to be shown in the forfeiture action.⁵³ This complete identity of proof between the civil and criminal actions was not present in *One Lot Emerald Cut Stones*.⁵⁴

The distinction between the civil and criminal actions in *One Lot Emerald Cut Stones* was that intent, a requisite of the criminal prosecution, was not an element of the civil forfeiture claim. Arguably, imposing the forfeiture penalty on a defendant is analogous to trying him for a lesser criminal offense. If the forfeiture proceeding were viewed as criminal, the double jeopardy clause would preclude another action for forfeiture after a criminal prosecution for smuggling had been completed.⁵⁵

⁵¹ *Id.* at 235-36, quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). Other cases permitting civil penalty suits following criminal suits include: *The K-5691*, 50 F.2d 180 (E.D.N.Y. 1931); *People v. Snyder*, 90 App. Div. 422, 86 N.Y.S. 415 (4th Dep't 1904).

⁵² 116 U.S. 436 (1886).

⁵³ *Id.* at 442.

⁵⁴ 409 U.S. at 234-35.

⁵⁵ *Mullreed v. Kropp*, 425 F.2d 1095 (6th Cir. 1970); *Elsberg v. United States*, 167 F.2d 380 (1st Cir. 1948).

It was noted by the Supreme Court in *One Lot Emerald Cut Stones* that the court of appeals had split on the application of double jeopardy to cases of this nature. 409 U.S. at 233. The Eighth Circuit, in *United States v. Two Hundred & One, Fifty Pound Bags of Furazolidone*, 52 F.R.D. 222 (8th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972), affirmed a summary judgment for the defendant on the basis of his previous acquittal of charges of violating the smuggling statute discussed in *One Lot Emerald Cut Stones*. A similar result was

D. *Standard of Proof*

The due process clause requires that the prosecution in a criminal proceeding prove guilt beyond a reasonable doubt.⁵⁶ In suits to enforce civil penalties, however, the prosecution need prove a violation of the statute only by a preponderance of the evidence.⁵⁷ In *Compton v. United States*,⁵⁸ for example, a truck alleged to be involved in transporting bootleg liquor in violation of the Internal Revenue Code was the subject of a forfeiture proceeding.⁵⁹ The court recognized that forfeiture is criminal in nature,⁶⁰ but held that the government's standard of proof was the preponderance of the evidence, not proof beyond a reasonable doubt.⁶¹ This view has been widely accepted.⁶² Some cases can be interpreted as going further, placing the burden on the person

reached in the case of *United States v. Chouteau*, 102 U.S. 603 (1880), in which the Court said "[t]he term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *Id.* at 611. The Court went on to hold that a compromise in a criminal charge placed the defendant in jeopardy once so that the later civil penalty could not be sought. *Id.* at 611-12; see *United States v. LaFranca*, 282 U.S. 568 (1931); *United States v. Shapleigh*, 54 F. 126, 133-34 (8th Cir. 1893); *United States v. McKee*, 26 F. Cas. 1116 (No. 15,688) (E.D. Mo. 1877). *Contra*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554-55 (1943) (Frankfurter, J., concurring). For cases on the effect of a conviction for criminal offense on a subsequent action to enforce a statutory penalty, see generally Annot., 11 L.R.A. (N.S.) 667 (1906).

⁵⁶ *In re Winship*, 397 U.S. 358 (1970).

⁵⁷ *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972); *United States v. Regan*, 232 U.S. 37 (1914).

⁵⁸ 377 F.2d 408 (8th Cir. 1967).

⁵⁹ INT. REV. CODE OF 1954, §§ 5205(a)(2), 5601(a)(12), 5604(a)(1), 7206(4), 7301, 7302.

⁶⁰ 377 F.2d at 411; see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Boyd v. United States*, 116 U.S. 616 (1886).

⁶¹ 377 F.2d at 411. Forfeiture traditionally has served a dual purpose. In many statutes, it has been used strictly as a means for taking from private persons chattels that were used in the conduct of activities forbidden by the statute. *E.g.*, INT. REV. CODE OF 1954, §§ 5205(a)(2), 5601(a)(12), 5604(a)(1), 7206(4), 7301, 7302. In other instances, the word forfeiture has been used merely to identify the taking of money for a violation of a statute. *E.g.*, 47 U.S.C. §§ 14, 503 (1970). A distinction between a forfeiture of money and a civil penalty is of dubious validity. See note 14 *supra*. Forfeitures of chattels may be divided into two classes. A forfeiture of a chattel may be designed to penalize the owner of the chattel for violating a statute. Other chattel forfeitures, however, are intended to prevent further violations of the statute. For example, the forfeiture of a still would punish its owner and would prevent using that particular still in the future manufacture of liquor. For a discussion of the significance of this distinction, see notes 93-105 and accompanying text *infra*.

⁶² See *Utley Wholesale Co. v. United States*, 308 F.2d 157 (5th Cir. 1962); *United States v. Bryan*, 265 F.2d 698 (5th Cir. 1959); *D'Agostino v. United States*, 261 F.2d 154 (9th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959); *United States v. One 1955 Mercury Sedan*, 242 F.2d 429 (4th Cir. 1957); *United States v. Garrett*, 296 F. Supp. 1302 (N.D. Ga.), *aff'd*, 418 F.2d 1250 (5th Cir. 1969), *cert. denied*, 399 U.S. 927 (1970) (involving civil penalty provisions of 49 U.S.C. § 1471 (1970) relating to FAA regulations). See also *United States v. Regan*, 232 U.S. 37, 49 (1914); *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266-67 (1877).

resisting the forfeiture to prove that he did not violate a statute or regulation.⁶³ Only older cases have required the prosecution to sustain the criminal standard of proof in civil penalty cases.⁶⁴

E. Exclusionary Rule

The exclusionary rule prohibits the use of illegally obtained evidence in furtherance of a criminal prosecution.⁶⁵ In 1965, two decisions indicated that the exclusionary rule is applicable to civil penalty and forfeiture cases.⁶⁶ The Supreme Court's decision in *One 1958 Plymouth Sedan v. Pennsylvania*⁶⁷ applied the rule to the forfeiture of a motor vehicle. In the case of the *Incorporated Village of Laurel Hollow v. Laverne, Inc.*,⁶⁸ the court considered monetary penalties assessed for violations of building zone ordinances:

"The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil action or a criminal prosecution." . . . A suit for a penalty is within the constitutional rule excluding evidence unlawfully obtained.⁶⁹

⁶³ See *United States v. One 1949 Pontiac Sedan*, 194 F.2d 756 (7th Cir.), cert. denied sub nom. *Moses v. United States*, 343 U.S. 966 (1952); *Jackman v. United States*, 56 F.2d 358 (1st Cir. 1932); *United States v. Davidson*, 50 F.2d 517 (1st Cir. 1931); *United States v. 1,197 Sacks of Intoxicating Liquor*, 38 F.2d 822 (D. Conn. 1930).

⁶⁴ *Chaffee & Co. v. United States*, 85 U.S. (18 Wall.) 516, 544-45 (1873) (government must prove violation of statute imposing penalty by proof beyond reasonable doubt); *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682, 691 (1835) (forfeiture of ship); *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1893); *Atchison T. & S.F. Ry. v. People*, 227 Ill. 270, 81 N.E. 342 (1907); *Gunkel v. Bachs*, 103 Ill. App. 494 (1902); *Riker v. Hooper*, 35 Vt. 457 (1862).

⁶⁵ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶⁶ It was unlikely that the exclusionary rule was applied in any cases prior to 1961. Although the exclusionary rule was first articulated in *Weeks v. United States*, 232 U.S. 383 (1914), it was applicable only to federal prosecutions. In fact, it was explicitly held in *Wolf v. Colorado*, 338 U.S. 25 (1949), that the exclusionary rule was not implicit in the concept of ordered liberty and thus was not enforceable against the states through the due process clause of the 14th amendment. At that time two-thirds of the states opposed the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961). By 1961, one-half of the states had as a matter of state law implemented the exclusionary rule. *Id.* Sensing the trend of the law concerning the exclusionary rule, the Supreme Court in *Mapp v. Ohio*, *supra*, found the exclusionary rule applicable to state prosecutions.

⁶⁷ 380 U.S. 693 (1965). It has been argued that the exclusionary rule should be applied in welfare termination proceedings on the ground that such proceedings should be classified as penal in nature. See *Packard, Fair Procedure and Welfare Hearings*, 42 S. CAL. L. REV. 600, 621-22 (1969).

⁶⁸ 24 App. Div. 2d 615, 262 N.Y.S.2d 622 (2d Dep't 1965).

⁶⁹ *Id.*, 262 N.Y.S.2d at 624 (citations omitted). Despite this broad language the court did not classify the entire proceeding as criminal. Rather, the court held that summary judgment would be permissible notwithstanding that it normally is not allowed in criminal cases. *Id.*, 262 N.Y.S.2d at 623. Petty crimes, of course, may be disposed of by summary judgment. See note 34 *supra*.

Thus, it appears that the exclusionary rule applies whether the case is denominated civil or criminal so long as the sanction imposed is punitive.

F. *Self-Incrimination*

The privilege against self-incrimination enjoyed by the defendant in a criminal case has been granted to defendants in civil penalty and forfeiture cases.⁷⁰ The first case to so hold, *Bowles v. Trowbridge*,⁷¹ involved a suit by the administrator of the Federal Price Administration for an injunction and damages for alleged violations of the Emergency Price Control Act of 1942.⁷² In *Bowles*, the defendant objected to the administrator's interrogatories. The court held that the defendant could invoke his privilege against self-incrimination and refuse to answer the interrogatories.⁷³ In *Boyd v. United States*,⁷⁴ a case involving a statutory forfeiture of goods fraudulently imported in order to avoid import duties, it was adjudged that

suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature . . . that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.⁷⁵

G. *The Rule Requiring Narrow Construction of Criminal Statutes*

Another benefit that a defendant in a criminal case receives is the common law rule requiring narrow construction of criminal statutes. According to this rule, vague prohibitions which give the defendant inadequate notice are not enforced. In the recent case of *Mourning v. Family Publications Service, Inc.*,⁷⁶ the

⁷⁰ *United States v. United States Coin & Currency*, 401 U.S. 715 (1971).

⁷¹ 60 F. Supp. 48 (N.D. Cal. 1945). It is not clear whether the decision held that the privilege applied because the prosecution was criminal in nature or because there was a risk of a later criminal prosecution.

⁷² Act of Jan. 30, 1942, ch. 26, § 1, 56 Stat. 23.

⁷³ 60 F. Supp. at 48.

⁷⁴ 116 U.S. 616 (1886).

⁷⁵ *Id.* at 634. Similarly, the Court in *Lees v. United States*, 150 U.S. 476 (1893), held "though an action civil in form, [an action to recover a civil penalty] is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself." *Id.* at 480; see *Equitable Life Assur. Soc'y v. Commonwealth*, 113 Ky. 126, 67 S.W. 388 (1902).

⁷⁶ 411 U.S. 356, 374-75 (1973).

Supreme Court found that this doctrine of narrow construction was not applicable to civil penalty cases. *Mourning* involved enforcement of a civil penalty imposed for violations of the Truth in Lending Act.⁷⁷ This decision weakens the holding of *Corporation of Haverford College v. Reeher*,⁷⁸ in which a statute providing for administrative denial of student aid to a student who had been engaged in disruptive activities was narrowly construed.

H. Other Rights

In a number of other civil penalty cases, the courts granted to the defendant the protection against unreasonable search,⁷⁹ the right to introduce evidence of good character,⁸⁰ and the right not to be sued outside of the district where the offense is alleged to have been committed.⁸¹ In one case,⁸² the holding that the prosecution was criminal in nature was detrimental to the defendant. Because the action was quasi-criminal the court held that the defendant could be imprisoned until he paid an assessed fine and that such a sanction did not violate the prohibition against imprisonment for debt.⁸³ In still another case, removal from the state court to the federal district court was not allowed on the ground that the action was criminal in nature.⁸⁴ Removal, of course, is limited to civil actions.⁸⁵

In *State v. Thompson*,⁸⁶ the statute under which the action was brought provided for a civil suit, but the defendant was prosecuted under criminal procedures. The court found this to be reversible error.⁸⁷

⁷⁷ 15 U.S.C. § 1640 (1970); see *Winters v. New York*, 333 U.S. 506 (1948).

⁷⁸ 329 F. Supp. 1196 (E.D. Pa. 1971). Because of its vagueness and overbreadth, the statute also infringed first amendment freedoms. This factor loomed large in the court's decision.

⁷⁹ *Boyd v. United States*, 116 U.S. 616 (1886).

⁸⁰ *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1893).

⁸¹ *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888); see *Huntington v. Attrill*, 146 U.S. 657 (1892).

⁸² *Zito v. People*, 140 Ill. App. 611, *aff'd*, 237 Ill. 434, 86 N.E. 1041 (1908). *Contra*, *United States v. Younger*, 92 F. 672 (D. Wash. 1899).

⁸³ It is not clear whether the prohibition against imprisonment for debt is based upon the Federal Constitution (see *Reeves v. Crownshield*, 274 N.Y. 74, 8 N.E.2d 283 (1937)) or whether the prohibition is founded only on state statutes and constitutions. See Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306 (1957).

⁸⁴ *Iowa v. Chicago, B. & Q.R.R.*, 37 F. 497 (S.D. Iowa 1889). The question involved here is one of statutory interpretation and is not of constitutional dimensions.

⁸⁵ 28 U.S.C. § 1441(a) (1970).

⁸⁶ 10 La. Ann. 122 (1855). *Contra*, *Kansas City F. & S. & M. Ry. v. State*, 63 Ark. 134, 37 S.W. 1047 (1896); see note 84 and accompanying text *supra*.

⁸⁷ 10 La. Ann. at 122. In *Thomas*, the defendant was criminally charged with violation of

The above discussion shows clearly that suits to exact civil penalties are not treated as criminal actions for the purpose of affording the accused all the protections usually afforded defendants in criminal actions. Even on the availability of individual procedural safeguards there is split authority. This confusion is a product of many divergent theories which have been used to classify a proceeding as criminal or civil. There is no unifying thread running through either the theories or the cases in which they have been applied. Consequently, it is virtually impossible to find any order in the disparate treatment of defendants' rights discussed above.

II

ATTEMPTS TO DISTINGUISH CRIMINAL AND CIVIL PENALTIES

Instead of attempting to determine whether individual rights should be granted in a particular civil penalty case, a rule could be developed that would allocate rights and protections to a defendant according to the classification of his case as either criminal or civil. This approach has the advantages of both uniformity and simplicity. However, no satisfactory method of differentiating civil cases from criminal has been advanced.

There are numerous cases involving attempts to determine whether enforcement of a civil penalty provision is to be treated as criminal or civil. Many cases isolate individual factors that are determinative of the question.⁸⁸ Others, such as *Kennedy v. Mendoza-Martinez*,⁸⁹ consider a number of factors in resolving the issue. The factors which have been given attention by the courts are discussed below.

A. *Form of the Proceeding*

Some courts merely look to the form of the proceeding in ascertaining the nature of the action. Under this approach, if the action is commenced by an indictment, the proceeding is

an 1814 Louisiana statute requiring that a slave owner have a minimum of one white person for every thirty slaves. The defendant was arrested, arraigned, and tried. At trial, the defendant called his son to testify in his favor. The son was disqualified as an incompetent witness for his father in a penal proceeding. The Supreme Court of Louisiana reversed on the ground that the statute provided for a civil penalty, requiring civil procedures. Thus, the arrest, arraignment, and exclusions of testimony were in error.

⁸⁸ See notes 90-171 and accompanying text *infra*.

⁸⁹ 372 U.S. 144 (1963).

criminal.⁹⁰ However, in numerous instances the statute which has been violated allows proceedings by either indictment or civil action.⁹¹ Accordingly, two defendants, each charged with violating the same statute, may be afforded different safeguards and may receive varying sanctions merely because the prosecutor decided to obtain an indictment in one action but not in the other. The possibility of statutory form ruling constitutional rights led the Supreme Court to reject this simplistic approach in *Trop v. Dulles*.⁹²

B. *Purpose of the Statute*

Similar to the test outlined above is the rule that courts and writers have derived from *Kennedy v. Mendoza-Martinez*.⁹³ In that case, the Supreme Court held invalid provisions permitting expropriation for draft evasion

because in them Congress [had] plainly employed the sanction of deprivation of nationality as a punishment—for the offense of

⁹⁰ See *Mitchell v. State*, 12 Neb. 538, 11 N.W. 848 (1882); *State v. McConnell*, 70 N.H. 158, 46 A. 458 (1900); *State v. Pate*, 44 N.C. (1 Busb.) 244 (1853); *accord*, *United States v. Southern Pac. Co.*, 162 F. 412 (N.D. Cal. 1908), *affd*, 171 F. 360, 364 (9th Cir. 1909) (look to intent of Congress not to civil or criminal burdens of proof); *Houlihan v. Raymond*, 49 N.J. Super. 85, 139 A.2d 37 (L. Div. 1958); *South Carolina State Highway Dep't v. Southern Ry.*, 239 S.C. 227, 122 S.E.2d 422 (1961) (whether penalty collected by civil or criminal procedure rests in discretion of legislature).

⁹¹ See *United States v. Stevenson*, 215 U.S. 190, 197-99 (1909); *Legislation—Statutory Penalties—A Legal Hybrid*, 51 HARV. L. REV. 1092, 1098 (1938).

⁹² 356 U.S. 86, 94-95 (1958); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 299 (1888); *Boyd v. United States*, 116 U.S. 616 (1886). The courts recognize that the constitutional limitations on penal sanctions do not stop at the door of Congress. One commentator has stated the test as follows:

It seems an easy task to determine whether a prosecution is criminal—at least, whether it is criminal in the view of the government. With federal criminal offenses created by Congress alone, one need only ask how Congress has labelled this offense. Yet permitting Congress to choose whether the accused enjoys the rights to a jury trial and to representation by counsel conflicts with the assumption that the first ten amendments were enacted to limit the powers of the federal government. In recognition of the restrictive purpose of the sixth amendment and the error of looking to congressional labels, the courts have turned to the form of sanction as the primary gauge of the criminal prosecution.

Note, *supra* note 41, at 291 (footnotes omitted).

This same theme was present in *United States v. Chouteau*, 102 U.S. 603 (1880), in which Mr. Justice Field said:

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . To hold otherwise would be to sacrifice a great principle to the mere form of procedure.

Id. at 611.

⁹³ 372 U.S. 144 (1963).

leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.⁹⁴

From this language, some commentators have argued that in determining whether a statutory sanction is criminal or civil in nature the focus should be on the explicit goals of the legislation as stated by Congress.⁹⁵ This interpretation has support in the *Kennedy* dissent, in which Mr. Justice Stewart said:

[T]here is nothing in the history of *this* legislation which persuades me that these statutes, though not in terms penal, nonetheless embody a purpose of the Congresses which enacted them to impose criminal punishment without the safeguards of a criminal trial.⁹⁶

These views have found their way into other recent decisions. In *One Lot Emerald Cut Stones & One Ring v. United States*,⁹⁷ the Court looked to legislative history to determine whether a forfeiture provision was meant to be criminal, saying that “the question of whether a given sanction is civil or criminal is one of statutory construction.”⁹⁸

Kennedy has likewise encouraged lower courts simply to examine a statute’s history to determine whether it is civil or criminal in nature. In *Telephone News System, Inc. v. Illinois Bell Telephone Co.*,⁹⁹ a three-judge court concluded:

The governing inquiry on the issue of the civil or penal character of a provision is whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question. . . . Congressional intent in this matter is to be established by the “objective manifestations of congressional purpose” as revealed by the legislative history of the act, and “Absent conclusive evidence of congress-

⁹⁴ *Id.* at 165-66. Judge Will, concurring in *Telephone News System, Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621, 640 (N.D. Ill. 1963), expressed a similar view: “The instant case illustrates clearly the circumvention of traditional constitutional guarantees by the civil versus criminal semantics which the earlier decisions have developed and which Judge Hoffman has quite accurately applied in his opinion.”

⁹⁵ See 61 MICH. L. REV. 1561 (1963). Mr. Justice Brennan, concurring in *Trop*, sought to divine the congressional intent which motivated the enactment of the statute involved. As he viewed it, “[t]he history of this provision, indeed, shows that the essential congressional purpose was a response to the needs of the military in maintaining discipline in the armed forces, especially during war time.” *Trop v. Dulles*, 356 U.S. 86, 107 (1958) (Brennan, J., concurring).

⁹⁶ 372 U.S. at 204.

⁹⁷ 409 U.S. 232 (1972).

⁹⁸ *Id.* at 237.

⁹⁹ 220 F. Supp. 621 (N.D. Ill. 1963).

sional intent as to the penal nature of a statute, . . . [certain] factors must be considered in relation to the statute on its face."¹⁰⁰

In the recent case of *United States v. Futura, Inc.*,¹⁰¹ the court quoted a Senate report referring to the previously enacted Economic Stabilization Act of 1970¹⁰² as evidence that Congress intended the sanctions provided by the Act to be criminal in nature.¹⁰³

This deference to legislative history in determining whether a sanction or a statute is criminal or civil is a gross abdication of the judicial role. Although such an approach appears to be an enlightened attempt to carry out congressional purpose through statutory interpretation, it avoids the substantive question of whether Congress has exceeded its constitutional authority. No amount of congressional labelling should determine that question.¹⁰⁴ When constitutional safeguards are involved, it is the function of the courts ultimately to decide whether and under what circumstances these protections apply.¹⁰⁵

¹⁰⁰ *Id.* at 630 (citations omitted).

¹⁰¹ 339 F. Supp. 162 (N.D. Fla. 1972).

¹⁰² Act of Dec. 22, 1971, Pub. L. No. 92-210, 85 Stat. 744.

¹⁰³ 339 F. Supp. at 165-66, quoting S. REP. No. 507, 92d Cong., 1st Sess. (1971).

¹⁰⁴ Reliance on legislative history has its risks because much legislative history is not made by the Congress as a whole but by individual congressmen or small groups interested in particular legislation. See, e.g., 37 TUL. L. REV. 831, 834 (1963):

[I]t is questionable whether the penal or regulatory character of an act should turn on the color it acquires as a result of congressional debate. A decision based on legislative labels can hardly be termed "judicial review;" nor, as is evident from the discordant opinions in the instant cases, can the subjective method be expected to achieve that ease of application found wanting under the objective tests.

See also Note, *supra* note 41, at 296; 112 U. PA. L. REV. 761, 763 (1964).

¹⁰⁵ Indeed, in other situations, the Supreme Court has expressed extreme reluctance to review congressional motives or purposes in order to make constitutional decisions. This was emphasized in *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court refused to speculate as to whether the purpose of Congress in prohibiting draft card burning was to suppress freedom of speech:

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Id. at 383-84 (footnote omitted).

C. *The Scierter Test*

One line of cases holds that if a statute requires scienter for conviction then it is criminal in nature but if scienter is unnecessary, the statute is civil in nature.¹⁰⁶ However, as pointed out by Professor Hart,¹⁰⁷ many statutory prohibitions which are clearly acknowledged as criminal, do not require scienter:

A large body of modern law goes far beyond an insistence upon a duty of ordinary care in ascertaining facts, at the peril of being called a criminal. To an absolute duty to know about the existence of a regulatory statute and interpret it correctly, it adds an absolute duty to know about the facts. Thus, the porter who innocently carries the bag of a hotel guest not knowing that it contains a bottle of whisky is punished as a criminal for having transported intoxicating liquor. The corporation president who signs a registration statement for a proposed securities issue not knowing that his accountants have made a mistake is guilty of the crime of making a "false" representation to the state blue-sky commissioner. The president of a corporation whose employee introduces into interstate commerce a shipment of technically but harmlessly adulterated food is branded as a criminal solely because he was the president when the shipment was made. And so on, *ad almost infinitum*.¹⁰⁸

The proliferation of statutes imposing absolute and vicarious liability on individuals wholly lacking *mens rea* renders the scienter test useless as a means of distinguishing criminal statutes and sanctions from civil.

¹⁰⁶ *Helwig v. United States*, 188 U.S. 605, 610-12 (1903); *United States v. Futura, Inc.*, 339 F. Supp. 162, 165 (N.D. Fla. 1972). This approach is consistent with the historical treatment of criminal law. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 218 (1972). Congress apparently makes the same distinction in the Federal Water Pollution Control Act when it imposes criminal penalties for intentional violations of the Act and civil penalties for unintentional violations. 33 U.S.C. §§ 1319(b), (c), (d) (Supp. II, 1972). See *The Truth in Lending Act*, 15 U.S.C. §§ 1611, 1640(c) (1970); *The Ports and Waterways Safety Act of 1972*, 33 U.S.C. §§ 1226, 1227 (Supp. II, 1972); *The Marine Protection, Research, and Sanctuaries Act of 1972*, 33 U.S.C. §§ 1415(a), (b) (Supp. II, 1972).

¹⁰⁷ Hart, *supra* note 31, at 422. This argument is buttressed by the fact that crimes are often defined as either *mala prohibita* or *mala in se*. *Mala in se* crimes are considered wrongs in themselves, inherently evil. *Mala prohibita* crimes are not inherently evil and are wrongs only because they are prohibited by legislation. W. LAFAVE & A. SCOTT, *supra* at 29. Under crimes that are classified as *mala prohibita*, one may be convicted without proof of any intent to violate a law or any other proof of *mens rea*. *Id.* at 30-31. Some examples of laws creating such crimes are those prohibiting driving over the speed limit, driving under the influence of an intoxicant, selling intoxicating liquors, public intoxication, hunting without permission, carrying a concealed weapon, firing a weapon in a public place, keeping slot machines, and passing through a toll gate without paying the toll. *Id.* at 30.

¹⁰⁸ Hart, *supra* note 31, at 422.

D. *Moral Condemnation*

Another line of reasoning distinguishes criminal laws from civil laws based upon whether there is moral condemnation of the wrongs. As Professor Hart argues “[w]hat distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”¹⁰⁹ The problem with this theory is that it presents a totally unworkable analytical framework. It is unclear where the courts should look in order to determine whether the punishment embodies moral condemnation. For example, in some circles, the acts of persons who pollute the water or the air in violation of the Federal Water Pollution Control Act¹¹⁰ and the Clean Air Act¹¹¹ are regarded as immoral, yet others believe that pollution is an inevitable byproduct of industrial and societal development—a necessary evil.

E. *Offense Against the Authority of the State*

An equally inadequate theory that has been advanced is that a criminal prohibition is a law which provides a penalty for offenses against the authority of the state. Support for this position can be found as early as 1892 in the Supreme Court’s opinion in *Huntington v. Attrill*.¹¹² There, the Court said: “Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State”¹¹³ The argument has emerged recently in *Morissette v. United States*,¹¹⁴ in which the Court uses the term “offenses against its authority” to define a criminal law.¹¹⁵

The important issue lies in defining “offense against the state.” Such offenses might be defined as those which violate requirements promulgated by the state in a statute. That definition would, of course, encompass criminal laws; however, also included would be prohibitions that give rise to clearly civil claims. For example, section 2-314 of the Uniform Commercial Code,¹¹⁶ in the absence of a disclaimer, imposes an implied warranty of merchantability on goods sold in the state. It is highly questionable that a violation of

¹⁰⁹ *Id.* at 404.

¹¹⁰ 33 U.S.C. §§ 1151-75 (1970).

¹¹¹ 42 U.S.C. §§ 1857-58 (1970).

¹¹² 146 U.S. 657 (1892).

¹¹³ *Id.* at 667.

¹¹⁴ 342 U.S. 246 (1952).

¹¹⁵ *Id.* at 256; see *United States v. Nash*, 111 F. 525, 528 (W.D. Ky. 1901).

¹¹⁶ UNIFORM COMMERCIAL CODE § 2-314.

the implied warranty provisions of the UCC would be considered a criminal act. But the sale of unmerchantable goods would violate this section of the UCC, the law in forty-nine states, and thus could be considered an offense against the state.

F. *Lack of Compensation*

Another doctrine places controlling significance on the type of damages sought. Under this approach, if an action is authorized by statute in order to compensate for damages or loss it is not criminal. But if suit can be brought to punish the defendant it is criminal in nature. This distinction is favored by LaFave and Scott:

Criminal law and the law of torts (more than any other form of civil law) are related branches of the law; yet in a sense they are two quite different matters. The aim of the criminal law, as we have noted, is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered. With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages With crimes, as we have seen, there is emphasis on a bad mind, on immorality. With torts the emphasis is more on "the adjustment of the conflicting interests of individuals to achieve a desirable social result," with morality taking on less importance.¹¹⁷

This view also has some judicial support. In 1836, a state court analyzed a case along lines similar to those drawn by LaFave and Scott, stating that the basic purpose for the civil proceeding is remedial when the action is brought by an injured party seeking compensation for a wrong inflicted upon him.¹¹⁸ The problem

¹¹⁷ W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 11 (1972).

¹¹⁸ *Reed v. Northfield*, 30 Mass. (13 Pick.) 94, 100-01 (1832):

In the present case, we think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty, operate to a certain extent as punishment; but the distinction is, that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner.

Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity.

This is one of the rationales which Professor Goldschmid uses to support his proposal to expand the use of civil penalties. See note 136 *infra*.

with this rule is that any criminal statute providing for the payment of a fine can be viewed as compensatory to the government. For example, in *People v. Briggs*,¹¹⁹ the court, discussing a statute enacted to prevent deception in dairy products which imposed fines and punishments up to \$500, stated:

The purpose of the action is not the punishment of the defendant, in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused.¹²⁰

Because the theory outlined above ultimately turns on the purpose of the statute as specified by the legislature, statutory history or a legislative finding would be sufficient to designate a statutory penalty as compensatory, making the compensatory-

¹¹⁹ 114 N.Y. 56, 20 N.E. 820 (1889).

¹²⁰ *Id.* at 65, 20 N.E. at 823. See *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972). In *One Lot Emerald Cut Stones*, the Court reached a similar conclusion:

The § 1497 forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses.

Id. at 237; see *Rex Trailer Co. v. United States*, 350 U.S. 148, 151-54 (1956) (liquidated damages provisions in government contracts, if not unreasonable, civil in nature); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-50 (1943); *Olshausen v. Commissioner*, 273 F.2d 23 (9th Cir.), *cert. denied*, 363 U.S. 820 (1960) (exaction of additional income tax for failure to file statement of estimated tax held noncriminal on ground that it reimburses government for investigatory expenses); *United States v. Shapleigh*, 54 F. 126, 129 (8th Cir. 1893); *People v. Briggs*, 114 N.Y. 56, 20 N.E. 820 (1889).

This distinction is also made in *Atchison, T. & S.F. Ry. v. United States*, 172 F. 194, 197 (7th Cir. 1909):

Indeed, apart from authority, but upon principle, we do not see how any other conclusion can be reached. Though the Safety Appliance Law is primarily in the interest of employees in interstate commerce, its protection is not limited to them, but extends to all persons who without fault are injured in person or property by reason of the railroad's failure to provide the statutory safeguards. The penalty recovered is not money coming to the government as something that is its own; nor money a part of which is the government's own, as in the violation of Revenue Statutes (and even here the proceeding is held to be in the nature of a criminal prosecution); nor money coming to the government in the exercise of its power, *patriae parens*, for the protection of a class; but is the punishment that the government, in its capacity as protector of society, inflicts upon the carrier who has violated the protective measures thus provided—the fine collected going into the treasury of the government simply because it must go somewhere, and, as in other criminal cases, there is no other appropriate place to direct it.

Contra, *State Highway & Pub. Works Comm'n v. Cobb*, 215 N.C. 556, 2 S.E.2d 565 (1939).

punitive distinction superfluous.¹²¹ This problem might be resolved by arguing that a statutory prohibition that triggers an exact monetary fine may be civil in nature *if* the legislature has expressly designated the sanction as civil in nature and the fine is reasonably related to the damage caused by the wrongdoer.¹²²

Usually, when a fine is sought to be imposed, the government is required to sustain a substantially greater burden of proof than it would have to meet in an ordinary tort action, and the defendant is entitled to greater protections than in a tort action. The government, however, has no burden of proof on the question of the amount of the fine. If, on the other hand, a civil penalty action is seen as a proceeding in tort, the plaintiff, usually the government, is placed in a substantially better position in the litigation than it would occupy even in a normal tort action. Not only are the procedural protections and burdens of proof different, but if causation is found, an adverse finding of the damages element, the fine, is mandated by statute. In the normal tort action the plaintiff at least has the burden of proving damages. In the case of a civil penalty, however, the government promulgates the statute giving it, as plaintiff, an advantageous position in the litigation. Such a prerogative is not explicitly found in the Constitution and is likely to be forbidden as an unwarranted conclusive presumption in violation of due process.¹²³

A suit can be viewed as compensatory only if property is transmitted to an identifiable individual or group of individuals and the value of that property is actually determined by estimating the value of the interests lost by the recipient as a result of the actions of the defendant.¹²⁴ Any less rigorous standard permits the

¹²¹ Even the taking of significant amounts of money pursuant to a statute could be justified as compensatory under the cost of enforcement rule set out in *Olshausen v. Commissioner*, 273 F.2d 23 (9th Cir.), *cert. denied*, 363 U.S. 820 (1960). Under this approach, a fine of \$5,000 might be considered a civil sanction if it is levied only to cover the costs of government overhead.

¹²² For example, assume that the total loss to the United States from water pollution is \$1 billion for a particular year. If there were an average of 100,000 polluters in the country, the average loss per polluter would be \$10,000. It might then be argued that a civil penalty of \$10,000 levied against each polluter, regardless of how much he pollutes, would compensate the public.

¹²³ *Leary v. United States*, 395 U.S. 6, 29-52 (1969); *United States v. Provident Trust Co.*, 291 U.S. 272 (1934); *Heiner v. Donnan*, 285 U.S. 312 (1932).

The question of punitive damages is discussed below. See notes 152 & 153 *infra*.

¹²⁴ Professor Herbert L. Packer defines compensation "as making another person whole following the infliction upon him of an actual or threatened injury." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 23 (1968). Continuing, he states that "[i]t is the absence of this

government to obfuscate, to its own benefit, the distinction between compensatory and punitive actions.

G. *Parallel Criminal Statutes*

Another test for ascertaining whether a civil penalty statute is criminal in nature is whether the activities which give rise to the civil penalty also give rise to a criminal punishment. This test can be derived from the holdings in *Boyd v. United States*¹²⁵ and *United States v. Shapleigh*.¹²⁶ In the latter case, the federal government had a choice of bringing either a criminal suit or a civil suit for violation of a statute which prohibited the filing of a fraudulent claim against the government. Under the civil suit the defendant could have been assessed \$300,000, which was far in excess of the penalty that could have been exacted by a criminal prosecution. The court held that the civil suit was in fact a criminal prosecution.¹²⁷ The court refused to be controlled by labels, and its reference to the companion criminal statute indicates that the criminal statute was properly criminal and that the civil penalty was substantially similar. However, this approach did not address the basic problem of identifying the qualities which comprise the substance of a criminal prosecution. In holding that the proceeding was criminal in nature, the court relied on the fact that the suit involved an offense against the state and that the government had brought the prosecution.¹²⁸

The parallel statutes test was explicitly dealt with in the recent case of *United States v. Futura, Inc.*¹²⁹ In that case, the Economic Stabilization Act of 1970¹³⁰ was held to allow two suits for violations of orders and regulations issued under the Act. One provision of the Act imposed a civil penalty while another imposed a fine. The court found the fine to be a criminal penalty, relying partially on the theory that Congress would not have created two similar civil remedies and must have intended to have one criminal remedy and one civil remedy. Since the civil remedy was clearly labelled, the fine was seen as criminal.¹³¹

The recent Supreme Court opinion in *One Lot Emerald Cut*

factor of benefit to identifiable individuals that serves primarily to distinguish between compensation and regulation." *Id.* at 24.

¹²⁵ 116 U.S. 616 (1886).

¹²⁶ 54 F. 126 (8th Cir. 1893).

¹²⁷ *Id.* at 129.

¹²⁸ *Id.*

¹²⁹ 339 F. Supp. 162 (N.D. Fla. 1972).

¹³⁰ Act of Dec. 22, 1971, Pub. L. No. 92-210, 85 Stat. 744.

¹³¹ 339 F. Supp. at 165-66.

Stones seems to take a similar view when the statute provides both civil and criminal punishments for substantially the same actions.¹³² Moreover, the civil forfeiture in *One Lot Emerald Cut Stones* differed from a criminal sanction because the forfeiture was permitted even though, unlike the criminal offense, intent to smuggle was not an element of the violation. Despite all the other similarities, the Court found the forfeiture provisions to be civil in nature.¹³³

Not only does the parallel statutes test lead to inconsistent results, it lacks usefulness since in most instances civil penalty provisions do not have companion criminal sanction provisions.¹³⁴ Additionally, the test involves judicial deference to congressional intent.

H. Nature of the Penalty

1. Type of Penalty

There is some support for the proposition that the type of penalty imposed should determine the degree to which the defendant in a civil penalty case enjoys the rights accorded his counterparts in criminal proceedings.¹³⁵ According to this theory, criminal law extends only to those cases in which the sanctions of imprisonment, torture, and death are at stake.¹³⁶ Sanctions which

¹³² 409 U.S. 232 (1972).

¹³³ *Id.* at 236.

¹³⁴ See, e.g., 15 U.S.C. § 21(l); *id.* § 1399 (1970); 16 U.S.C. § 1433 (1970); 33 U.S.C. § 1322(j) (1970); 47 U.S.C. § 14 (1970).

¹³⁵ See *United States v. Illinois Cent. R.R.*, 170 F. 542, 544 (6th Cir. 1909). This case also supports the proposition that a factor which distinguishes a criminal sanction from a civil penalty is the gravity of the offense for which the penalty is imposed. Thus, grave violations of the law would be criminally punishable, but minor violations would not. Petty offenses are, however, criminally punishable. *United States v. R.L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971). The difficulty inherent in quantifying the difference between grave and petty offenses renders the gravity of the offense approach somewhat unworkable. Basing the criminal-civil distinction on the gravity of the penalty as discussed in the text is the more functional approach.

¹³⁶ One of the rationales which Professor Goldschmid cites for the expansion of civil penalties includes the argument stated in the text.

This result (*i.e.*, the imposition of money penalties, for regulatory offenses, without an alleged offender being afforded the safeguards surrounding criminal prosecutions) may be justified on the following grounds:

- (i) only money is at stake;
- (ii) civil penalties for "*malum prohibitum*" offenses do not open an alleged offender to disgrace and other disabilities associated with criminal conviction; and
- (iii) at times, the penalty may indeed roughly approximate a proportionate reimbursement for monies lost (or damages suffered) by the Government and/or the cost of the enforcement system.

Goldschmid Report 19; see *Legislation—Statutory Penalties—A Legal Hybrid*, *supra* note 91, at 1100.

One commentator has utilized the characterization of criminal statutes outlined in the

involve forfeitures of property would, according to this theory, be civil and not criminal in nature.

It is unlikely that this distinction will receive much judicial support. In *United States v. The Brig Burdett*,¹³⁷ the Supreme Court implicitly rejected the theory by requiring proof beyond a reasonable doubt in a case involving forfeiture of a vessel for violations of the internal revenue laws. In a unique case, *Wisconsin v. Pelican Insurance Co.*,¹³⁸ the Supreme Court again found that a suit for a monetary penalty was a criminal action under the Constitution. In that case, the State of Wisconsin sought to invoke the Supreme Court's original jurisdiction over controversies "between a State and citizens of another State."¹³⁹ In a previous state action, Wisconsin had secured a \$15,000 penalty against a Louisiana corporation for violating a Wisconsin statute. Wisconsin sought the Supreme Court's enforcement of the judgment in an action for debt. The Court found that its original jurisdiction was limited to civil actions and that the instant action was penal. Thus, it declined jurisdiction despite the fact that the action was only for money.¹⁴⁰

text in discussing procedural safeguards for criminal defendants:

Indeed with one recent dramatic exception, the Supreme Court has never endorsed expansion of the sixth amendment beyond the historically defined criminal sanctions of imprisonment, torture and death. That sole exception came in the 1962 decision of *Kennedy v. Mendoza-Martinez*.

Note, *supra* note 41, at 294. In fact, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), was not an exception to this theory. In that case, the sanction was loss of United States citizenship. The Supreme Court has indicated that such a loss of citizenship, which is likely to result in deportation, could amount to loss of life and liberty. In *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922), the Court stated:

To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.

But see *Legislation—Statutory Penalties—A Legal Hybrid*, *supra* note 91, at 1100:

Today in a proceeding in which neither the life nor freedom of the defendant—who may now have the aid of counsel—is threatened, there seems no justification for giving him these added protections. An action for penalty is little different from any other action for damages. The defendant stands to lose only a pecuniary sum. The fact that the act of the defendant may also form the basis of a criminal complaint is not material, since in many civil actions a criminal act of the defendant must be established. Furthermore, many acts for which a penalty is provided are not the type of prohibited conduct generally considered criminal.

It has been found that persons subject to statutorily imposed fines should be granted the protections of the sixth amendment. *Lloyd Sabaudo Societa v. Elting* 287 U.S. 329 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

¹³⁷ 34 U.S. (9 Pet.) 681 (1835).

¹³⁸ 127 U.S. 265 (1888).

¹³⁹ U.S. CONST. art. III, § 2.

¹⁴⁰ 127 U.S. at 300.

The Supreme Court has held that property forfeitures are criminal proceedings, entitling the defendants in such cases to the protections embodied in the fourth and fifth amendments.¹⁴¹

The Supreme Court has recently considered whether property forfeitures are per se civil sanctions in *Argersinger v. Hamlin*.¹⁴² In *Argersinger*, it was held that a defendant has a right to counsel at trial and at all pretrial proceedings if he faces a risk of incarceration.¹⁴³ At the prodding of the concurring justices, Mr. Justice Powell and Mr. Justice Rehnquist, the Court left open the possibility that the constitutional protections accorded criminal defendants would be granted to defendants in cases in which there was a risk of property loss only. Mr. Justice Powell stated his point succinctly: "When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process."¹⁴⁴

It appears very likely that in criminal cases involving large monetary penalties the court will find the right to counsel applicable. Taking a seemingly uncharacteristic activist stance, the more

¹⁴¹ *Boyd v. United States*, 116 U.S. 616, 634 (1886).

¹⁴² 407 U.S. 25 (1972).

¹⁴³ *Id.* at 37.

¹⁴⁴ *Id.* at 48 (Powell, J., concurring).

Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail. . . .

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. . . . It would be illogical—and without discernible support in the Constitution—to hold that no discretion may ever be exercised where a nominal jail sentence is contemplated and at the same time endorse the legitimacy of discretion in "non-jail" petty offense cases which may result in far more serious consequences than a few hours or days of incarceration.

The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. Nor does the majority deny that some "non-jail" penalties are more serious than brief jail sentences.

Id. at 48-52. The majority replied tersely:

Mr. Justice Powell suggests that these problems are raised even in situations where there is no prospect of imprisonment. *Post*, at 48. We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail.

Id. at 37.

"conservative" members of the Court, Justices Powell and Rehnquist, are arguing that a person facing the loss of property requires the protections afforded a criminal defendant. The other members of the Court, those in the majority in *Argersinger*, are also likely to recognize the right to counsel for the protection of property. The two camps of justices disagree only on their assessments of the burden that such a rule would place on the courts. The concurring opinion suggests that this problem should be solved by a discretionary rule.¹⁴⁵ In fact, the Supreme Court indicates in *One Lot Emerald Cut Stones* that property sanctions might be considered criminal in nature.¹⁴⁶

2. *Amount of Penalty and Value of Property Forfeited*

Yet another proposition advanced is that the value of the property taken determines whether a prosecution is criminal. In *One Lot Emerald Cut Stones*, the Supreme Court captures the essence of this theory, stating that the forfeiture was not "so unreasonable or excessive that it transform[ed] what was clearly intended as a civil remedy into a criminal penalty."¹⁴⁷

The rule that distinguishes criminal from civil suits based on the value of the property lost or risked is too rigid. Taken to its logical extreme it would mean that the protections extended to criminal defendants would be called into play in any suit involving large amounts of money. Providing these protections in suits on government contracts and in other cases involving nonprosecutorial activities of the government would greatly impair the efficiency of the government.

On another level, it would be impractical to divide criminal from civil litigation on the basis of the amount of the fine or the value of the forfeiture involved. The gravity of the sanction and

¹⁴⁵ *Id.* at 65 (Powell, J., concurring).

¹⁴⁶ 409 U.S. 232, 237 (1972).

¹⁴⁷ *Id.* In somewhat stronger language, Judge Will, concurring in *Telephone News Systems, Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621, 643 (N.D. Ill. 1963) stated: It seems to me that where the forfeiture of property will be fatal to the business life of the party involved and substantially greater and more severe than the maximum punishment which could have been imposed in a direct criminal proceeding, labelling it preventive and non-penal is a sophistry which hardly warrants the abrogation of the Constitutional protections which are the keystones of American criminal justice.

In this case, the maximum criminal penalty would have been a \$500 fine for the first offense and \$1,000 for each subsequent offense. *Id.* The civil penalty resulted in the disconnection of the telephone of a man whose business involved the giving of information by telephone. His livelihood was thus destroyed. *See Corporation of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971).

the extent of actual loss must be considered in light of the position of each defendant, for the effect of a \$500 loss would be substantially more onerous to a man of modest means than it would be to someone with great wealth.¹⁴⁸ Furthermore, there are certain areas of regulation which should not be classified as penal in nature even though the government regulation does inflict great harm.¹⁴⁹

I. *State as Plaintiff*

Although never considered as the sole test for distinguishing criminal from civil litigation, the identity of the plaintiff is relevant to such a determination. As early as 1893, in *United States v. Shapleigh*,¹⁵⁰ the court said that the controlling reason for the requirement of proof beyond a reasonable doubt in a criminal case is

the inequality of the parties in power, situation, and advantage in criminal cases where the government, with its unlimited resources, trained detectives, willing officers, and counsel learned in the law stood arrayed against a single defendant, unfamiliar with the practice of the courts, unacquainted with their officers or attorneys, often without means, and frequently too terrified to make a defense if he had one, while his character and his life, liberty, or property rested upon the result of the trial.¹⁵¹

¹⁴⁸ The difficulty of applying the value of property taken test is exemplified by *Corporation of Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971), which involved a challenge to the constitutionality of a state statute that denied financial assistance to students involved in demonstrations. The court applied the criminal standard of statutory interpretation to the statute to find it unconstitutionally vague. The court focused on the consequences of the enforcement of the statute in determining that it imposed a criminal sanction:

[W]e think the better view is that which finally bases that determination on the seriousness of what is at stake under the statutory scheme. The Third Circuit has adopted the view . . . that expulsion or suspension from school "may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding." . . . The loss of financial aid eligibility may have an even more drastic effect than expulsion or suspension and its deterrent effect on students must be as great as that of many criminal statutes. At the same time, we must recognize that loss of financial aid does not carry the onus of a criminal conviction and may present only a financial hardship. We conclude therefore that the potential deterrent effect of the risk that exercise of protected activity will result in loss of financial aid is substantial; however, it is not so great as it would be if the threatened penalty were criminal conviction resulting in a multi-month imprisonment and/or a stiff fine.

Id. at 1203.

Nevertheless, the Sixth Circuit has used the gravity of the penalty test to determine whether the right to a jury trial existed in a criminal prosecution. *United States v. R.L. Polk & Co.*, 438 F.2d 377 (6th Cir. 1971).

¹⁴⁹ See notes 160-65 and accompanying text *infra*.

¹⁵⁰ 54 F. 126 (8th Cir. 1893).

¹⁵¹ *Id.* at 129. A similar theme recurs in *In re Gault*, 387 U.S. 1, 36 (1967):

These considerations, however, also apply to civil suits brought by the government against an individual, and the *Shapleigh* reasoning would seem to require that almost all government suits be prosecuted under criminal procedure.

Basing the determination of an action as criminal or civil solely on whether the government is the plaintiff would preclude classification of privately brought actions as criminal.¹⁵² Because the same inequality that exists between the government and an individual might be found in suits between private individuals, the government as plaintiff factor is of limited usefulness in demarking criminal and civil actions.¹⁵³

J. Conclusion

Thus, all of the factors previously relied upon to distinguish criminal litigation from civil are unsatisfactory. Even in combination these factors do not yield a useful test.

A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.

¹⁵² Such actions include those brought to collect punitive damages and *qui tam* suits. Dean Prosser found the concept of punitive damages to be an anomalous invasion of the field of torts by the criminal law. W. PROSSER, *LAW OF TORTS* 9 (4th ed. 1971). *Qui tam* actions have been found to be both civil and criminal. The distinction appears to be predicated on whether the authorizing statute requires the action to be commenced by a criminal information. See *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (D. Ala. 1971), *aff'd*, 447 F.2d 1304 (5th Cir. 1971).

¹⁵³ In *Bowles v. Trowbridge*, 60 F. Supp. 48 (N.D. Cal. 1945), the court found that a suit for treble damages brought by the Administrator of the Emergency Price Control Act was a suit for a "penalty." The court said:

The damages for which he sues are usually based upon an accumulation of sales to a number of customers, and are many times greater than the amount of damages the buyer may ordinarily claim. . . . The relatively short period within which the buyer may exercise his right to damages under this provision indicates that the true purpose of the section is to aid in the enforcement of the Act by providing an additional means of punishing offenders, and is not primarily to provide a remedy to private parties who are injured by violations of the Act. . . . Treble damages are assessed, therefore, to punish willfulness or carelessness, rather than to remedy the wrong caused to an individual or sovereign, for the injury would be the same whether the violations were voluntary or involuntary.

. . . Almost any crime or offense which involves money or property affects the national economy, and both the public and the Government in its sovereign capacity benefit directly or indirectly from the punishment of the offender. So far as recoupment by the Government of its own damages caused by inflation is concerned, unless it purchases goods in excess of ceiling prices from the offender himself, I think the violation of the [A]ct by an individual has too remote an effect on the price of commodities purchased by the Government to be considered a basis for civil damages.

Id. at 49-50.

III

THE LIMITED LOSS TEST

The preceding discussion has focused upon the major techniques used by the courts to distinguish criminal penalties from civil penalties. Some of these devices are useless; others are partially helpful but leave many questions unresolved. Accordingly, this Article will propose a new approach which will attempt more rationally to determine when the criminal defendant's protections are to be afforded to a litigant.

A. A Per Se Test

There are two approaches to the creation of a rule for determining when the protections granted a criminal defendant should be extended to a litigant in a civil penalty case. A case-by-case and issue-by-issue approach could be used, with the applicability of each constitutional protection determined in the context of each case. Alternatively, a per se approach could be adopted, and each case could be categorized as either criminal or civil in nature, with the rights and protections flowing from that threshold decision. The author puts forth a per se approach to the question for a variety of reasons. First, it appears that there does exist an identifiable distinction between civil and criminal penalties. Second, a per se rule does not eliminate all flexibility with respect to the allocations of criminal protections. Although there are certain fundamental criminal defendant's rights that the Supreme Court has required to be available in all criminal cases, there are others available only on a case-by-case basis.¹⁵⁴ Thus, the per se rule would merely assure the protections of certain fundamental rights, such as the right to proof beyond a reasonable doubt, the right to notice and a fair hearing, and the protection against double jeopardy. Third is the inherent difficulty of determining the right to each protection on a case-by-case basis.

B. Elements of the Test

Preliminarily, it is necessary to analyze the distinctions between clear cases of civil and criminal litigation in order to fashion a rule that will guide the courts in cases in which the distinction is not so obvious. A distinction must first be drawn between privately caused losses of life, liberty, or property and those authorized by the

¹⁵⁴ See note 13 *supra*.

government. Losses of life, liberty, or property caused by the actions of a private person are not criminal penalties imposed upon the victim because the infliction of such losses is not sanctioned by the government. Governmental authorization of a loss and the government's power to coerce compliance with an ordered deprivation distinguish the criminal sanction.¹⁵⁵

The fundamental difference between criminal and civil procedures for determining the sanction imposed in a particular action is also an important element of the test. In civil litigation, the plaintiff is required actually to prove his individual loss, and only that loss is compensated to make him whole.¹⁵⁶ On the other hand, criminal law procedure requires no proof or quantification of such an identifiable loss to the plaintiff or any other person.¹⁵⁷ In fact, the

¹⁵⁵ Losses authorized by the government and to which the individual has consented are not criminal penalties. These include penalties for failure to perform properly growing out of contracts between the government and individuals.

Of the criminal defendant's rights listed above (*see* notes 1-13 and accompanying text *supra*) only three are not obviously based on the need to protect innocent persons from the unfair imposition of criminal sanctions. These are: (1) the right to a speedy trial, (2) the protection against unreasonable searches and seizures, and (3) the protection against double jeopardy. These are not unique to the criminal system. Thus, the limitation on searches or seizures is not constitutionally limited to criminal actions. Double jeopardy and principles of *res judicata* overlap to some extent. However, the additional protection against double jeopardy and the right to speedy trial are best justified on the basis of a policy to minimize the injury inherent in being subjected to the criminal procedure itself.

¹⁵⁶ *See* text accompanying note 117 *supra*.

¹⁵⁷ *See* text accompanying note 117 *supra*. Professor Herbert L. Packer defines and contrasts four terms—compensation, regulation, treatment, and punishment—and in so doing, brings out the distinction between the civil and criminal methods for computing the harm inflicted on an individual:

[Compensation] . . . the making of another person whole following the infliction upon him of an actual or threatened injury. . . . It is the absence of this factor of benefit to identifiable individuals that serves primarily to distinguish between Compensation and Regulation. . . .

[Regulation] . . . the control of future conduct for general purposes excluding the interests of identifiable beneficiaries. It is public rather than private. It differs from Compensation also in that it is typically administered by agencies of government. . . .

[Treatment] The primary purpose of Treatment is to benefit the person being treated. The focus is not on his conduct, past or future, but on helping him. . . . Typically, this involves the imposition of short-run detriment, such as the loss of liberty, in the interest of a long-run benefit, such as personal security and, on occasion the improvement or elimination of the disabling condition. . . .

[Punishment] . . . has one or both of two justifying aims: the prevention of undesired conduct, and retribution for perceived wrongdoing. But whichever it involves, or in whatever proportion it may combine the two, the focus is on the offending conduct.

. . . The point at which the notions of Treatment and Punishment come very close to each other is in the rehabilitative claims for Punishment (or treatment) that constitute a predominant feature of modern thinking on the subject. . . . The difference is that in the case of Punishment we are dealing with a person because he

criteria for determining the sanction in criminal law is based on another set of standards, *i.e.*, a determination by the courts or legislature of the amount of harm that must be inflicted on an individual either to deter him from committing the offense in the future or to satisfy the community's desire for retribution.

The burden of proof and the finite, tangible marketplace limitations on the civil judgment are not present in criminal litigation. Except for the prohibition against cruel and unusual punishments there is no limitation on the sanction that might constitutionally be imposed in a criminal trial. Unaccountability in the imposition of a criminal sanction is the evil identified by the eighth amendment¹⁵⁸ and the evil from which defendants in criminal prosecutions are to be protected.¹⁵⁹

Accordingly, one part of a test distinguishing between criminal and civil litigation must take account of whether the judgment which may be rendered is procedurally limited by compensation criteria found in civil actions. If it is not, the loss might be a criminal sanction.

If the amount of the loss that the government allows to be inflicted is not based on the need to compensate, there are four other bases for determining the amount of the loss. The loss may be based on the necessities of retribution, deterrence, or treatment, or it may be the incidental result of a directly regulatory action authorized by the government.

Because retribution is the essence of the criminal action, any loss inflicted on that basis must be classified as a criminal sanction.

A sanction based on deterrence, although close to the essence of a criminal action, must be analyzed a bit more closely. If deterrence is defined as any governmentally permitted action that encourages an individual to take a different course of action, anything the government does would be classified as a deterrent.

has engaged in offending conduct; our concern is either to prevent the recurrence of such conduct, or to inflict what is thought to be deserved pain, or to do both. In the case of Treatment there is no necessary relation between conduct and Treatment; we deal with the person as we do because we think he will be "better off" as a consequence.

H. PACKER, *supra* note 124, at 23-26. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 2.2, 4.1-4.6, 5.1, 5.2 (1970). Frankel, *Lawlessness in Sentencing*, 41 CINCINNATI L. REV. 1 (1972). That the value of a penalty has no reasonable relationship to the harm caused by the defendant has been the basis for finding a monetary exaction penal. *Child Labor Tax Case*, 259 U.S. 20, 38-43 (1922); *Helwig v. United States*, 188 U.S. 605, 610-12 (1903).

¹⁵⁸ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁵⁹ See Frankel, *supra* note 157, at 4-6.

Every government action is aimed at ordering the society and thus, to some extent, deters certain types of individual action.

The distinction between general and specific deterrence determines when a sanction is criminal or civil. An injury inflicted on an individual or group of individuals as a result of previous actions of those individuals and aimed at preventing a recurrence of those actions by those individuals serves a specific deterrent function. A loss inflicted on a person or group of persons in order to control, by example, future conduct of all persons in the society regardless of past actions of the group serves as a general deterrent.¹⁶⁰ If imposition of the loss is triggered by the undesired conduct, it is criminal in nature. However, when the loss is inflicted merely to mold future actions and the group suffering the loss is rationally classified, then the loss is not a criminal sanction.

This line between criminal and civil losses becomes even more difficult to identify when treatment and directly regulatory actions of the government are analyzed. Although the rehabilitation of an individual does not always constitute a criminal sanction, it is impossible to determine whether the loss is disguised punishment or is actually intended to improve the individual.

Similarly, the government acts in the public interest in furtherance of numerous responsibilities authorized by the Constitution, *e.g.*, the regulation of interstate commerce, the conduct of foreign relations, and taxation. Actions in furtherance of these authorized goals may cause losses to individuals either directly or incidentally. But whether and to what extent these losses are criminal in nature is not readily discernible. Some of these losses are direct takings, which are compensated. Such takings, when compensated, result in no net loss, and therefore, are not criminal sanctions. To ascertain the nature of uncompensated losses a factual inquiry into the reason for the loss might be necessary. However, a rule requiring such an inquiry to distinguish criminal from civil losses would be unmanageable.

A conceptual approach would be more workable and preserve the constitutional character of the issue. In developing such an approach, the judiciary must strike the proper balance between the government's interest in acting on behalf of the public and the individual's interest in being free from loss. Both of these interests must be accommodated to allow their maximum exercise. By testing the circumstances under which the loss was incurred to determine whether it was merely incidental to the government

¹⁶⁰ An example is a gasoline purchase tax, reducing gasoline consumption.

action and no greater than necessary for the accomplishment of the government's goal, these interests can be adjusted.¹⁶¹ If the uncompensated loss is found to be a reasonable, necessary, and incidental effect of government action, the loss is not a criminal sanction.¹⁶²

¹⁶¹ *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946) (FTC orders relating to deceptive names on products "should not be ordered if less drastic means will accomplish the same result"); see *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) (revocation of broadcast license); Marx, *Comparative Administrative Law: Exercise of Police Power*, 90 U. PA. L. REV. 266, 283 (1964) (rule of the mildest means). A similar requirement is found in cases involving first amendment rights. Any government action which affects such rights must be fashioned narrowly in order to minimize the infringement. *United States v. O'Brien*, 391 U.S. 367, 381 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁶² The relationship between governmental action and an indirect loss is illustrated by Professor Goldschmid's proposed limitations on civil penalties:

Money penalties designated "civil" by Congress should be beyond serious challenge if they:

- (1) are rationally related to a regulatory (or revenue collecting) scheme;
- (2) do not deal with offenses which are *mala in se* (i.e., homicide, rape, robbery and other crimes which are traditionally and widely recognized outrages and threats to common security);
- (3) may be expected to have a prophylactic or remedial effect.

Goldschmid Report 18.

Significantly, Goldschmid leaves "remedial effect" undefined. This gives a good deal of latitude to those responsible for enforcement of laws for the violation of which a civil penalty may be levied. Almost any action which has some coercive effect could be viewed as remedial. But this broad reading of the term "remedial effect" is consistent with the basic thrust of Goldschmid's thesis, which is that civil monetary penalties may be administratively imposed. It is this author's view that money penalties cannot be "prophylactic or remedial," but rather, that they are punitive in nature.

The direct effect of the governmental action as opposed to its indirect effect is a crucial factor in differentiating noncriminal regulatory actions from criminal prosecutions. Only if the direct effect of the governmental action furthers a governmental goal will the injury be deemed incidental and not penal.

The distinction between direct and indirect action was made in two recent Supreme Court decisions. In *S. v. D.*, 410 U.S. 614 (1973), the Court made a direct-indirect distinction when dealing with the question of standing. In that case, a mother sought an injunction requiring the district attorney to prosecute her child's father under a criminal statute imposing a jail penalty for nonsupport of the child. The Court found that the mother had no standing because the mother's interest was not direct:

Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will at least in the future result in payment of support can, at best, be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.

Id. at 618. A similar distinction was made in the context of an equal protection question in *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533-38 (1973).

Although this author believes that a workable distinction can be made between direct and indirect governmental actions, this view is not shared by all. Mr. Justice Story used the term "directly affect" in discussing the extraterritorial effect of state court decisions. J. STORY, COMMENTARY ON THE CONFLICT OF LAWS 19, 457 (1834). In commenting on the term "directly," Professor Hazard labels it a "weasel word" because of its alleged undefinability. Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 260.

Some support for the proposition asserted in the text is found in three civil penalty

An example of this relationship between the loss and the governmental goal was recently demonstrated in the Supreme Court opinion in *YMCA v. United States*.¹⁶³ In that case, the United States military occupied the plaintiff's property during the 1964 riots in Panama. The property was used as a base of operations and sustained substantial damage during the fighting. The plaintiff sought compensation on the ground that this occupation and use of its property was a taking which required compensation. No compensatory taking was found because the troops were acting primarily to protect the property from damage by the rioters.¹⁶⁴ The Court's test for determining whether the government should have been liable for a taking was "whether the government involvement in the deprivation of private property is sufficiently direct and substantial to require compensation under the Fifth Amendment."¹⁶⁵

Considering the purposes for and limits on various types of sanctions, the following rule can be formulated for determining when a particular loss should be treated as criminal or civil. An involuntary and uncompensated loss of life, liberty, or property must be classified as a criminal penalty if the loss is authorized or allowed by the government, the procedure for the determination of the nature and amount of the loss does not limit the loss to that required to compensate another for a previous wrong, the loss is inflicted not merely for purposes of general deterrence, and it is determined on the basis of retribution or is an unreasonable or unnecessary incidental effect of governmental action.

C. Policy Considerations—The Criminal Label

One of the arguments in favor of the imposition of civil penalties is that the person found guilty of a violation of a civil

cases. One of the factors to be considered in distinguishing civil from criminal sanctions according to the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is "whether [the loss] appears excessive in relation to the alternative purposes assigned to it." *Id.* at 169. In *One Lot Emerald Cut Stones*, the Court said: "The . . . forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States . . ." 409 U.S. at 237. Similarly, the direct effect of removing the plaintiff's telephone which was used for the transmission of illegal gambling information was a contributing cause for the court in *Telephone News System, Inc. v. Illinois Bell Tel. Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), to label the loss as civil.

¹⁶³ 395 U.S. 85 (1969).

¹⁶⁴ *Id.* at 90.

¹⁶⁵ *Id.* at 93. Similarly, the distinction between the police power to zone and a taking requiring compensation is whether the actions impose restrictions that are "unnecessary and unreasonable" upon the use of private property or on the pursuit of useful activities. *Washington ex rel. Seattle Title Co. v. Raberge*, 278 U.S. 116, 120 (1928).

penalty statute has not been found guilty of a criminal offense, and therefore, he is not tainted with the stigma of criminality.¹⁶⁶ Whether this reason alone should permit the imposition of punitive sanctions without constitutionally required protections was considered in *In re Gault*.¹⁶⁷ The state's argument was that by classifying the defendant as a "juvenile delinquent" and not as a "criminal" the civil disabilities and stigmatization that accompany a criminal conviction were avoided. Because the defendant was classified as a juvenile delinquent and was not subjected to the rigors of a criminal prosecution, the state contended that he was not entitled to many of the constitutional protections accorded a criminal defendant. The Court soundly rebuked this argument in the following terms:

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.¹⁶⁸

Accordingly, the label applied to a particular proceeding has little to do with the substance of the rights granted to the defendant.¹⁶⁹ Many of the fifth and sixth amendment guaranties recognized as applicable to criminal defendants should therefore be extended to defendants in civil penalty proceedings through the fifth and sixth amendments or through the due process clauses of the fifth and fourteenth amendments.¹⁷⁰ Under either approach it

¹⁶⁶ See *People v. Briggs*, 114 N.Y. 56, 20 N.E. 820 (1889). Professor Goldschmid advances this argument in support of civil penalties. See note 136 *supra*.

¹⁶⁷ 387 U.S. 1 (1967).

¹⁶⁸ *Id.* at 49-50.

¹⁶⁹ *But see* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

¹⁷⁰ Concurring in *Gault*, Mr. Justice Black expressed dislike for the incorporation of these rights through the due process clause. He favored classification of juvenile cases as

appears unnecessary to append a criminal offense label to the violations in order to justify extension of these constitutional protections to defendants in civil penalty cases.¹⁷¹

IV

APPLICATION OF THE RULE

The clearest example of a civil penalty that is in fact a criminal sanction is found in the Intercoastal Shipping Act Amendments of 1972.¹⁷² Prior to the 1972 amendments, criminal sanctions were imposed for violations of the statute; civil penalties are now assessed for violations of the same provisions.¹⁷³

The Act is directed toward the shipping of goods by water between the states and between states and United States territories. Individuals and businesses are liable including persons not in the shipping business who seek to induce carriers to do prohibited acts.¹⁷⁴ The character of the civil penalties provided for in the Act can be determined by applying to them the four part test outlined above.

The government has sanctioned the loss. The procedure for

criminal proceedings under the Constitution to avoid the uncertainties of the fundamental fairness test of the due process clause. 387 U.S. at 61 (Black, J., concurring).

¹⁷¹ The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. It should be noticed that the words "crime" or "criminal case" as found in the fifth amendment, "criminal prosecutions" in the sixth amendment, or "crime" in the thirteenth amendment, which limit the application of the rights contained in portions of those amendments to criminal proceedings, are absent from the eighth amendment. See U.S. CONST. amends. V, VI, XIII. Accordingly, it could be argued that the protections of the eighth amendment are not confined to criminal prosecutions. In the case of excessive bail this is well established. Bail is available for civil incarceration, *e.g.*, civil contempt. From the failure of the eighth amendment to limit the terms "fine" and "punishment" to a criminal context, constitutional approval of noncriminal fines and penalties could be inferred. Such an inference is faulty in two respects, however. First, the amendment is a limitation on governmental power and not a grant of authority. Second, because of the need to ensure bail for certain types of civil incarceration, *e.g.*, imprisonment for debt or civil contempt, part of the amendment necessarily dealt with noncriminal prosecutions. The failure to limit the amendment should not, therefore, be viewed as an authorization of noncriminal fines or punishments. If, however, the eighth amendment is found implicitly to authorize noncriminal fines and punishments, the same protections available to criminal defendants should be available to defendants in civil penalty cases as a matter of due process. The rationale of *In re Gault*, 387 U.S. 1 (1967), would sustain such an approach.

¹⁷² 46 U.S.C. §§ 814, 815, 817, 831, 844 (Supp. II, 1972), amending 46 U.S.C. §§ 814, 815, 817, 831, 844 (1970).

¹⁷³ 46 U.S.C. §§ 814, 815, 817, 831, 844 (1970), as amended, 46 U.S.C. §§ 814, 815, 817, 831, 844 (Supp. II, 1972).

¹⁷⁴ 46 U.S.C. §§ 831, 835 (Supp. II, 1972).

determining the amount of the penalty is unrestricted except for certain violations.¹⁷⁵ Because the loss is imposed for a previous wrong, it does not serve as a general deterrent. The apparent basis for computation of the amount of the penalty is retribution or specific deterrence. Clearly, the government is not exerting direct control over intercoastal shipping by this fine, but rather, is using the incidental result of the fine to encourage compliance with the statutes, orders, rules, and regulations involved. Accordingly, this series of civil sanctions should be classified as criminal penalties.

Similarly, the Federal Water Pollution Control Act Amendments of 1972,¹⁷⁶ impose monetary assessments on persons who violate the water quality standards set out in the statute or established by regulation.¹⁷⁷ Consistent with the analysis presented above, these sanctions are actually criminal penalties, and the constitutional protections normally granted to defendants in criminal cases must be guaranteed in cases brought under the Act.¹⁷⁸ Similar provisions in the Marine Protection Research and Sanc-

¹⁷⁵ See *id.* §§ 814, 815, 817, 831, 844.

¹⁷⁶ 33 U.S.C. §§ 1251-1376 (Supp. II, 1972).

¹⁷⁷ See *id.* §§ 1319(c), (d), 1321(B)iii(aa).

¹⁷⁸ There have been no reported cases relating to whether constitutional protections apply to civil penalty actions brought pursuant to the Federal Water Pollution Control Act Amendments of 1972. *Id.* In 1972, Congress passed the Ports and Waterways Safety Act, 33 U.S.C. §§ 1223-27 (Supp. II, 1972), which is aimed at promoting safety and protecting the environmental quality of the United States' ports and waters. The Coast Guard has stated "[i]ts [the law's] emphasis is on prevention of pollution and it provides for civil penalty assessment for violations of either the Act or the regulations pursuant to the Act which the Coast Guard is presently developing." Letter from U.S. Coast Guard to Jonathan Charney, Sept. 27, 1972 (on file at the *Cornell Law Review*). The constitutionality of the civil penalties provided for in the Act was debated by the Justice Department as the bill wended its way through Congress. See Memorandum from Shiro Kasbiwa, Assistant Attorney General, to Deputy Attorney General Richard Kleindienst, July 29, 1971 (on file at the *Cornell Law Review*). The position apparently adopted by the Department of Justice was set forth as follows:

Except where a penalty is clearly punitive, such as forfeiture of citizenship by remaining abroad to evade compulsory military service (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)), under the above mentioned decisions Congress seems free to decide whether a penalty for a violation should be criminal, *i.e.*, punitive, or civil, *i.e.*, remedial in the public interest. In our view, under these decisions the Due Process Clause does not require that the quoted civil penalty provision be revised to provide for notice and opportunity to be heard before administrative assessment, of mitigation or remission, and collection of the specified penalty.

The quoted provision authorizes the Attorney General to institute an action in the federal district court to collect an unpaid penalty. In our view, such an authorization would not require a specification of procedure at the judicial level.

Memorandum from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, to Deputy Attorney General Richard Kleindienst, Aug. 20, 1971 (on file at the *Cornell Law Review*).

tuaries Act of 1972¹⁷⁹ must also fail since they impose monetary penalties solely for punitive purposes.

Of course, efficient enforcement of these environmental protection laws is not precluded. But the direction of enforcement must be modified if extension of criminal procedures to defendants in environmental litigation is to be avoided. Enforcement through directly regulatory actions and orders may be the most efficient and effective way of bringing about compliance with the requirements of the statutes, yet such orders may be even more onerous than the penalties. For example, the establishment of procedures for licensing all persons seeking to pollute the waters would be directly regulatory. Denying a license because of the undesirable effects of the substances likely to be introduced into the waters would be a noncriminal procedure for protecting the environment, even though the result of the denial of the permit might require the polluter to cease its business entirely.¹⁸⁰

CONCLUSION

A rule must be adopted requiring courts to consider primarily the direct effects of the privations imposed in ascertaining whether a statutory action is to be treated as criminal or civil and in determining what protections will be afforded the person threatened with a loss under the statute. Although other tests utilized to make such a determination may have partial validity, only the "limited loss" test can operate effectively when the issue of the criminal nature of civil monetary and regulatory penalties is under consideration. Congress and the courts must review the existing civil penalty laws with an eye toward revising those which are criminal in nature by requiring the extension to those who run

¹⁷⁹ 33 U.S.C. § 1415 (Supp. II, 1972).

¹⁸⁰ Such nonprosecutorial actions could include regulations, statutes, administrative orders, court orders, or actual government action. Actions resulting in the denial or revocation of licenses to practice a profession or trade, the deportation of aliens or the forfeiture of goods could be considered civil if the result minimizes improper actions in the future. On the other hand, additional taxes, fines, penalties, punitive and multiple damages, and statutorily set liquidated damages would necessarily be classified as criminal sanctions. *See, e.g.,* Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958); Sacher v. Association of the Bar, 347 U.S. 388 (1954); Hawker v. New York, 170 U.S. 189 (1898); Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951); Atchison, T. & S.F. Ry. v. United States, 172 F. 194 (7th Cir. 1909); United States v. Shapleigh, 54 F. 126 (8th Cir. 1893); *see* La Franca v. United States, 37 F.2d 269 (5th Cir. 1930); Prawdzik v. Grand Rapids, 313 Mich. 376, 21 N.W.2d 168 (1946). *Contra*, Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973).

afoul of such provisions all of the protections normally afforded the defendant in a comparable criminal prosecution.¹⁸¹

¹⁸¹ It has been argued that the decision as to which actions are criminal and which are civil for purposes of determining when constitutional guaranties are available to the defendant should, to a great extent, depend on the burden that the extension of such protections would impose on the courts. Note, *The Availability of Criminal Jury Trials Under the Sixth Amendment*, 32 U. CHI. L. REV. 311 (1965). With respect to tax penalties one commentator has stated:

[W]ere severity the exclusive touchstone, great damage might be done to the ability of government to sustain itself through revenues and to carry out programs of public concern. If tax penalties for failure to file were deemed severe, jury trials would be required for their assessment and the consequences would be devastating. In a recent year delinquent filings for which penalties could be imposed numbered one and one-third million. The Commissioner proceeded against nearly one million taxpayers. In contrast, only 7,000 criminal cases of all sorts were instigated by IRS. Making jury trials available for one million assessments would nullify the few sanctions that make self-assessment effective and thus strike at the heart of our voluntary tax system. Other examples of impairment of administration are equally apparent.

Id. at 331.

Similarly, Professor Goldschmid argues that civil penalties should not even be imposed by the courts because they are already overburdened. Goldschmid Report 28. He reaches this conclusion despite his assessment that the present civil penalty system is unfair to the alleged offender in three respects: (1) procedural protections are lacking; (2) an impartial forum is lacking; and (3) the defendant may be forced to acquiesce in an unfair settlement because of court crowding. *Id.* at 26. Professor Goldschmid recommends improvement of the administrative procedures of the agencies imposing the penalties to remedy these defects in the present system. *Id.* at 30.

It is difficult to believe that meaningful reform of agency procedures is possible in view of the bias that will necessarily be developed by administrative hearing officers, employed by the agency itself, continually reviewing penalty cases. That ultimate review of agency decisions reposes in the head of the agency is cause for further skepticism about the efficacy of internal reform. Allowing de novo review by the courts in order to comply with due process requirements does not meet the objections to administrative imposition of monetary penalties. Only the most persistent alleged offender with maximum resources is able to pursue judicial review. *Id.* at 4. The initial imposition of an administrative fine should discourage the defendant from further litigating the matter. The lack of cases now in the courts challenging civil penalties evidences this proposition. Court crowding, a purely administrative problem, is a tenuous justification for the denial of the protections of the Bill of Rights to defendants in civil penalty cases. The protections of the Constitution are very empty if the failure of the legislature to allocate funds for effective prosecution and trial is a sufficient reason for the denial of constitutional protections to civil penalty defendants. Recently, the Supreme Court has begun to respond to the problem of court crowding. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court held that court crowding was an insufficient reason for denying a criminal defendant his right to a speedy trial. Indirectly denying constitutional protections to defendants in civil penalty cases because of the burden that extension of such guaranties would place on the courts is equally defective. See also *Argersinger v. Hamlin*, 407 U.S. 25, 34-37 (1972).