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Qui Tam Actions and the Rivers and Harbors Act

Qui tam actions — which are private lawsuits brought under penal statutes to recover fines provided therein — have been filed in recent months by conservationists under the Rivers and Harbors Act of 1899. In each case, however, the court has denied the *qui tam* action, holding that the Act does not authorize this mode of enforcement. This Note examines the decisions and shows that they ignore several legal principles that weigh in favor of the opposite result. The author makes an extensive analysis of *qui tam* actions in general and then concludes that *qui tam* actions should definitely be allowed under the Rivers and Harbors Act.

I. INTRODUCTION

THE STRUGGLE to halt the destruction and degradation of our environment and natural resources has prompted the enactment of a substantial quantity of protective legislation.¹ But two centuries of exponentially increasing industrialization have proven a formidable opponent. In many cases, the greatest strides in protecting the environment have come not from the legislative or executive

¹ Modern legislative enactments and administrative regulations designed to preserve and protect the environment and natural resources include, *inter alia*: Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-68(d) (1964); Wildlife Restoration Act, 16 U.S.C. § 669(a)-(j) (1964); Migratory Bird Conservation Act, as amended 61 U.S.C. § 715(a)-(s) (Supp. IV, 1969); Federal Power Act, 16 U.S.C. §§ 791(a)-823 (1964); Estuarine Study Act of Aug. 3, 1968, 16 U.S.C. § 1221 (Supp. IV, 1969); Federal Water Pollution Control Act, 33 U.S.C. § 466(a)-(k) (1964), as amended Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Appalachian Regional Development Act of March 9, 1965, 40 U.S.C. § 212 (Supp. IV, 1969); Water Resources Planning Act of July 22, 1965, 42 U.S.C. § 1962 (Supp. IV, 1969); National Water Commission Act of Sept. 26, 1968, 42 U.S.C. § 1962(a) (Supp. IV, 1969); Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91; National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Housing and Urban Development Act of Aug. 10, 1965, Pub. L. No. 89-117, § 702, 79 Stat. 451; Appalachian Regional Development Act of March 9, 1965, Pub. L. No. 89-4, § 212, 79 Stat. 5, 16; Bureau of Outdoor Recreation Act of May 28, 1963, Pub. L. No. 88-29, 77 Stat. 49; Delaware River Basin Compact Act of Sept. 27, 1961, Pub. L. No. 87-328, 75 Stat. 688; Exec. Order No. 11472, 3 C.F.R. 122 (1969 Comp.), as amended Exec. Order No. 11514, 3 C.F.R. 104 (1970 Comp.); Exec. Order No. 11288, 3 C.F.R. 127 (1966 Comp.), superseded by Exec. Order No. 11507, 3 C.F.R. 91 (1970 Comp.).

See generally H.R. REP. NO. 421, 91st Cong., 2d Sess. 1-18 (1970); CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF SENATE COMM. ON GOVERNMENT OPERATIONS, 91st Cong., 2d Sess., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS 10 (Comm. Print 1970); STAFF OF HOUSE COMM. ON PUBLIC WORKS, 91st Cong., 2d Sess., LAWS OF THE UNITED STATES RELATING TO WATER POLLUTION CONTROL AND ENVIRONMENTAL QUALITY *passim* (Comm. Print 1970); Defendant's Reply to Plaintiff's Brief, app. B, *Reuss v. Peter Cooper Corp.*, Civil No. 70-C-486 (E.D. Wisc. Feb. 23, 1971), consolidated and dismissed for failure to state a claim, *Reuss v. Moss-Am., Inc.*, 323 F. Supp. 848 (E.D. Wisc. 1971).

branches of the government, constrained as they are by pressure groups and self-interest, but rather from the judiciary. In order to combat the "mind-forged manacles of law" which "have become the favored shibboleths"² of government and corporate defendants, attorneys and conservationists have followed two complementary approaches in the courts. On the one hand, recent years have seen conservationists argue for the creation of new rights and far-reaching theories;³ on the other, they have argued for the expansion of existing theory, coupled with inventive statutory interpretations.⁴

Decades before man awakened to his crime of ecocide, the Congress of the United States enacted the Rivers and Harbors Act of 1899⁵ which modified several antecedent statutes and was intended primarily to protect commerce and trade by preventing the obstruction of navigable waterways.⁶ Section 13 of this Act broadly pro-

² J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION, xi (1971) (Introduction by Sen. George McGovern) (See especially chapters 4-6).

³ Various legal theories which have been advanced include: (1) the development of a constitutional right to a clean and decent environment, *see, e.g.*, *Environ. Defense Fund, Inc. v. Hoerner Waldorf*, Civil No. 1694 [1 E.R.C. 1640] (D. Mont. filed Nov. 13, 1968); *Fairfax County Fed'n of Citizens Ass'ns v. Hunting Towers Operating Co.*, Civil No. 4963-A (E.D. Va. filed Oct. 1, 1968); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970); (2) the refinement of the doctrine that citizens can force governmental agencies to meet procedural requirements, *see, e.g.* *District of Columbia Fed'n of Civic Ass'ns, Inc. v. Airis*, 391 F.2d 478 (D.C. Cir. 1968); and (3) the development of the public trust doctrine, Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). See generally Peterson & Lawrence, *The Challenge of Environmental Quality: An Outline of Remedies to Meet It*, 1 ENVIRON. LAW 72 (1970).

⁴ See *e.g.*, *Guthrie v. Alabama By-Products Co.*, 328 F. Supp. 1140 (1971) (Alleging, *inter alia*, an implied private right of action under section 13 of the Rivers and Harbors Act); *Ottinger v. Penn. Cent. Co.*, 68 Civ. 4353 (S.D.N.Y., filed May 13, 1970); *California v. Am. Cement Corp.*, Crim. No. 8262 (Just. Ct. filed May 13, 1970); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970).

⁵ Act of March 3, 1899, ch. 425, 30 Stat. 1151, *as amended*, 33 U.S.C. §§ 401-20 (1964) (originally entitled, the Rivers and Harbors Appropriations Act of 1899). Sections 9-20 of the original act were substantive law sections and are commonly referred to as the Rivers and Harbors Act. Sections 13, 16, and 17 of that Act, codified as 33 U.S.C. §§ 407, 411, 412, and 413, respectively, are the sections most often involved in litigation against polluters under the Act and are commonly designated by the title "Refuse Act." See HOUSE COMM. ON GOVERNMENT OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. DOC. NO. 917, 91st Cong., 2d Sess. 14-18 (1970); *Hearings on S. 3575 Before the Subcomm. on Energy, Natural Resources, and the Environment of the Senate Comm. on Commerce*, 91st Cong., 2d Sess., ser. 80, at 1 (1970).

⁶ The scant legislative history of the Act is best detailed in *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (note especially the dissenting opinion of Harlan, J., at 493, and the lower court decision in the court of appeals, 264 F.2d 289 (7th Cir. 1959)). See generally *Rivers and Harbors Act of 1890*, 26 Stat. 426; *Rivers and Harbors Act of 1882*, 22 Stat. 191; *Rivers and Harbors Act of 1880*, 21 Stat. 180; H.R. REP. NO. 1826, 55th Cong., 3d Sess. 3-4 (1899); H.R. DOC. NO. 293, 54th Cong., 2d Sess.

hibited any individual, corporation, municipality, or group from throwing, discharging, or depositing "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" into any navigable waters of the United States, or a tributary thereof.⁷ Then, in 1960, the Supreme Court affirmed what had become increasingly obvious, that an essential function of section 13 was to prevent the pollution of America's rivers and lakes.⁸ In the decade since that decision,

passim (1897); S. REP. NO. 224, 50th Cong., 1st Sess. 2 (1888); 32 Cong. Rec. 2296-98, 2923 (1899); 21 CONG. REC. 8603, 8608, 8685, 8691, 9558 (1890).

7. 33 U.S.C. § 407 (1964) provides as follows:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage or navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material, and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

⁸United States v. Republic Steel Corp., 362 U.S. 482 (1960); see Comment, *Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case*, 59 COLUM. L. REV. 1065 (1959). This decision is most notable as the first case to allow injunctive relief to the government under the Act, prohibiting the discharge of industrial solids which settled out of suspension and created a shoaling condition in the Calumet River. In deciding that the corporation's actions were not exempted by the phrase "refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state," found in section 13 (see note 7 *supra*), Mr. Justice Douglas stated:

The materials carried here are "industrial solids" as the District Court found. The particles creating the present obstruction were in suspension, not in solution. Articles in suspension, such as organic matter in sewage, may undergo chemical change. Others settle out. All matter in suspension is not saved by exception clause in § 13. Refuse flowing from "sewers" in a "liquid state" means to us "sewage." . . . The fact that discharges from streets and sewers may contain some articles in suspension that settle out and potentially impair navigability [footnote omitted] is no reason for us to enlarge the group to include these industrial discharges. We follow the line Congress has drawn and cannot accept the invitation to broaden the exception in § 13 because other matters "in a liquid state" might logically have been treated as favorable

the Supreme Court has been able to achieve a goal avoided by the nation's legislators — it has created a weapon for combating water pollution that is effective and expeditious.⁹ Unlike any of the laws which modern Congresses have been able to enact, the Rivers and Harbors Act contains specific enforcement provisions allowing for the prompt incarceration or penalization of violators.¹⁰

But not to be outdone, the executive branch of the government has attempted to render the Act impotent by a series of maneuvers ranging from a blatant refusal to enforce its provisions to an ingenious permit program which will ultimately remove corporate polluters from the ambit of the Act.¹¹ Conservationists, angered by the Gov-

as sewage is treated. We read the 1899 Act charitably in light of the purpose to be served. 362 U.S. at 490-91.

The Court's establishment in *Republic* of the need to interpret "refuse" in section 407 broadly has led to the eventual conclusion that nothing is exempted by that section save municipal sewage. See, e.g., *United States v. Standard Oil Co.*, 384 U.S. 224 (1966); *United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 631 (3d Cir. 1967); *United States v. Maplewood Poultry Co.*, 327 F. Supp. 696 (N.D. Me. 1971).

The Government's interpretation of this section is reflected in part by 33 C.F.R. § 209.130(d) (2) (1971 Comp.); see also 21 Op. Atty. Gen. 594 (1897).

The *Republic* Court's broad definition of refuse applies irrespective of whether navigation is impeded thereby or not. It was long ago decided that the phrase "whereby navigation shall or may be impeded or obstructed" does not modify the first clause of section 407 but rather only the second, which makes it unlawful to suffer material to be in any way deposited on the bank of any navigable river where it is liable to be washed into such water by tides, storms, floods, or otherwise. *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952); *La Merced*, 84 F.2d 444 (9th Cir. 1936). See *United States v. Federated Homes, Inc.*, 68 Crim. 574 (S.D.N.Y. Nov. 24, 1969); *United States v. Corp. of the Era*, 68 Crim. 903 (S.D.N.Y. Sept. 29, 1969). See also 1 N.R.D.C. Newsletter i-iii (1971).

⁹ One important source has stated this proposition as follows:

The usefulness of the Refuse Act [Rivers and Harbors Act] has been substantially increased by liberal judicial interpretation over the years together with the passage of many statutes and the issuance of Executive orders designed to minimize pollution, maximize recreation, protect esthetics, and preserve natural resources to enhance the public interest rather than private gain. It is apparent that the Refuse Act is a broad charter of authority and a powerful legal tool for preventing the pollution of all navigable waters. STAFF OF HOUSE CONSERVATION AND NATURAL RESOURCES SUBCOMM., 91ST. CONG., 2D SESS., *Qui Tam* ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS 10 (Comm. Print. 1970) (footnotes omitted).

See generally *Hearings on the Refuse Act Permit Program Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 7, at 1-219 (1971).

¹⁰ E.g., 33 U.S.C. §§ 406, 411 (1964).

¹¹ See Guidelines for Litigation Under the Refuse Act, reprinted in 1 BNA ENVIRON. REP., Current Devs. 288-90 (1970). The stated policy of the guidelines was: [T]o . . . encourage United States Attorneys to use the Refuse Act to punish or prevent significant discharges, which are either accidental or infrequent, but which are not of a continuing nature resulting from the ordinary operations of a manufacturing plant. Discharges of this last type, of course, pose the greatest threat to the environment — but it is precisely this type of discharge that the

ernment's negative attitude towards the Act, have searched for methods to utilize its dormant, but potentially powerful enforcement provisions. One answer has been the revival of citizens' *qui tam* lawsuits. The *qui tam* action, with roots extending back many centuries, is a civil action brought by a private informer under a penal statute to collect part of the pecuniary fine provided therein. The *qui tam* action was born of the necessity to prosecute minor, but hard-to-detect violations at a time when professional law enforcement was at a primitive level. Today, the *qui tam* mode of procedure still constitutes an effective and inexpensive method of prosecuting those who violate penal statutes. Perhaps even more important, *qui tam* actions fill the void left when the executive chooses to enforce the laws of the land in a lackadaisical fashion. The *qui tam* plaintiff, not subject to the demands of multi-million dollar lobbies and other pressure groups, is provided with an incentive to sue every

Congress created the Federal Water Quality Administration to decrease or eliminate, and it is to the programs, policies, and procedures of that Agency that we shall defer with respect to the bringing of actions under the Refuse Act. *Id.* at 288 (emphasis added).

Even though section 17 of the Rivers and Harbors Act directs United States attorneys to "vigorously prosecute," these Guidelines allow public attorneys to initiate civil or criminal action without authorization from the Department of Justice only where the alleged violator was not: (1) a state or municipality, or a person authorized by a state or municipality; or (2) a person or firm whose discharges were the subject of any non-federal government litigation (*e.g.*, litigation by a state, county, municipality, etc.). *Id.* at 289.

The reaction to these Guidelines was almost universally adverse, since they obviously eliminate many important categories of corporate polluters from the ambit of the Act. *See, e.g.*, Correspondence Between the Conservation Foundation and the Department of Justice on Enforcement of the Refuse Act, reprinted in 1 BNA ENVIRON. REP., Current Devs. 432 (1970). Some notable conservationists have documented a rather intriguing correlation between lax enforcement of the Act against large corporate polluters and contributions to the Republican Party. *See* Cleveland Press, Feb. 12, 1971, § G, at 8, col. 1.

The next major step taken by the Department of Justice to "clarify lines of authority" under the Act was the Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army, 33 C.F.R. § 209.120(d) (11) (Comp. 1971), and the Draft Guidelines for Litigation Under the Refuse Act Permit Program, reprinted in 1 BNA ENVIRON. REP., Current Devs. 1099 (1971), issued pursuant thereto. The net result of these later statements was to remove what vestige of authority the earlier guidelines had granted. *See* Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U.L. REV. 306, 337-42 (1971). The latest and most complete betrayal of the legislative mandate expressed in the Rivers and Harbors Act is the so-called Refuse Act Permit Program. Exec. Order No. 11,574, 3 C.F.R. 188 (1970 Comp.). *See generally* Hearings on the Refuse Act Permit Program Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 82d Cong. 1st Sess., ser. 7, *passim* (1971); 1 BNA ENVIRON. REP., Current Devs. 1097 (1971); Answers of the Environmental Protection Agency Regarding the Refuse Act Permit Program, reprinted in 1 BNA ENVIRON. REP., Current Devs. 1123-25 (1971); Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U.L. REV. 306, 329-31 (1971).

violator of a penal statute because he will receive a moiety of any fine or penalty imposed.

In order for a *qui tam* action to lie, there must be: (1) a penal statute which provides a pecuniary penalty; (2) a provision within the statute that a part of the penalty shall go to the informer; and (3) some evidence of a legislative intent that the informer may sue to recover his share of the penalty.¹² Section 16 of the Rivers and Harbors Act contains enforcement provisions which have been the impetus for *qui tam* actions. This section reads:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of [sections 13, 14 and 15] of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.¹³

It is the last part of section 16, the clause giving the moiety to the informer, which has been the focus of the *qui tam* proponents. Section 16 is one of several enforcement provisions in the Act, but it is the only one with a clause even mentioning an informer. The critical question in deciding whether *qui tam* actions are authorized under the Act is the legislative intent surrounding this informer provision.

In no case under the Rivers and Harbors Act has a *qui tam* ac-

¹² See, e.g., *Williams v. Wells Fargo & Co. Express*, 177 F. 352 (8th Cir. 1910); *Miami Copper Co. v. State*, 17 Ariz. 179, 149 P. 758 (1915). Another formulation defines the *qui tam* action as:

An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution . . . because the plaintiff states that he sues *as well* for the state as for himself. BLACK'S LAW DICTIONARY 1414 (4th ed. rev. 1968).

See also 3 W. BLACKSTONE, COMMENTARIES* 160; 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 138 (1957).

A common informer is defined as:

[A] person who habitually ferrets out crimes and offenses and lays information thereof before the ministers of justice, in order to set a prosecution on foot, not because of his office or any special duty in the matter, but for the sake of the share of the fine or penalty which the law allots to the informer in certain cases. BLACK'S LAW DICTIONARY 919 (4th ed. rev. 1968).

One court that extolled the virtues of informers' actions stated: "prosecutions conducted [by private persons acting under the stimulus of greed] compare with the ordinary methods as the enterprising privateer does to the slowgoing public vessel." *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885), *aff'd* 30 F. 762 (D. Ore. 1887).

¹³ 33 U.S.C. § 411 (1964).

tion yet been allowed. But the reluctance to permit these citizen suits seems to stem primarily from a failure to understand the history and the legal theory of actions *qui tam*. The primary objective of this Note is to evaluate the Rivers and Harbors Act in light of *qui tam* theory. But first, to avoid the difficulties which have been occurring in the courts, an historical and legal survey of *qui tam* actions will be made. Finally, after completing the interpretation of the relevant portions of the Act, several of the decisions which have denied *qui tam* actions will be examined.

II. THE HISTORY AND LEGAL THEORY OF *Qui Tam* ACTIONS

An analysis of the recent decisions which have dismissed informer actions filed under section 16 of the Rivers and Harbors Act, reveals that today's courts have a poor understanding of both penal statutes and *qui tam* actions.¹⁴ No recent case faced with the issue has provided either a logical framework for deciding the *qui tam* question or persuasive support for its conclusions. Only one of about a dozen decisions has even attempted to grapple with legislative intent¹⁵ and none of the courts have adequately confronted the many cogent arguments favorable to the *qui tam* action. In order to reverse this cursory treatment of the issue, it is best to begin by discussing the basic theory and rules applicable to any *qui tam* action, and then to look at the Rivers and Harbors Act specifically. The history of the action not only reveals the reasons for its growth and acceptance in England and then in America, but also elucidates the purpose of the *qui tam* mode of recovery. With this background, it will be possible to make a comprehensive assessment of the *qui tam* question under the mandate of section 16 that the informer receive one-half of any fine imposed.¹⁶

¹⁴ See *Gerbing v. ITT Rayonier, Inc.*, ___ F. Supp. ___ [2 ERC 1801] (M.D. Fla. 1971); *Connecticut Action Now v. Robert Plating Co.*, ___ F. Supp. ___ [2 ERC 1731] (D. Conn. 1971); *Bass Anglers Sportsman's Soc'y. v. Scholze Tannery*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Enquist v. Quaker Oats*, 327 F. Supp. 347 (D. Neb. 1971); *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971); *United States v. Florida-Vanderbilt Dev. Corp.*, 326 F. Supp. 289 (S.D. Fla. 1971); *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970); *Bass Anglers Sportsman's Soc'y. v. United States Steel Corp.*, 324 F. Supp. 412 (S.D. Ala.), *aff'd* ___ F. 2d ___ [3 ERC 1065] (5th Cir. 1971); *Bass Anglers Sportsman's Soc'y. v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971); *Reuss v. Moss-Am., Inc.*, 323 F. Supp. 848 (E.D. Wisc. 1971).

¹⁵ *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971).

¹⁶ 33 U.S.C. § 411 (1964). Several courts have held that an informer can recover a

A. *The English and American Histories of Qui Tam Actions*

Since its earliest appearance the *qui tam*¹⁷ action has maintained a close, symbiotic relationship with the criminal branch of Anglo-Saxon law.¹⁸ This relationship originated primarily with two factors, both of which also played an important role in the creation of the *qui tam* action. First, only a rudimentary and inadequate prosecutorial administration existed before the appearance of professional police forces. To discover and prosecute criminal or statutory offenses, Parliament often found it a "common expedient to give the public-at-large an interest in seeing that a statute was enforced by giving to any member of the public the right to sue for the penalty imposed for its breach, and allowing him to get some part of that penalty."¹⁹ The second factor contributing to the creation of the action *qui tam* was Parliament's lack of confidence in the Crown's propensity to enforce the law expressed by certain statutes. During "an age when the authorities could be suspected of refusing, out of favouritism or fear to prosecute a particular kind of person, it [was believed very wise to have the] machinery of the common informer to secure that in proper cases a man would be brought to book."²⁰

The rationale of the *qui tam* action in reckoning with these problems was quite simple:

Under [*qui tam*] statutes, financial incentives were provided, the purpose of which was to create and keep active a vast number of "voluntary policemen," who were to be paid on the results achieved by their own zeal and enterprise. They were not enlisted into regular service. . . . Yet it was hoped that they would be of great assistance in the administration of criminal justice, solely because of the spur provided by the offer of reward.²¹

moiety of the penalty for information that was supplied leading to conviction, although the point is not settled. Compare *United States v. Transit-Mix Concrete Corp.*, ___ F. Supp. ___ [2 ERC 1074] (S.D.N.Y. 1970) with *Shipman v. United States*, 309 F. Supp. 441 (E.D. Va. 1970).

¹⁷ The phrase was "*qui tam pro domino rege, etc. quam pro se ipso in hac parte sequitur*," 3 W. BLACKSTONE, * *supra* note 12, at 160, which translated literally reads "who sues as well for the King as for himself."

¹⁸ See generally Annot., 53 L. Ed. 739 (1909); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1924); J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883); J. STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND (1928) (G. Cheshire, ed.); L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW (1957).

¹⁹ 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355 (1924).

²⁰ 171 PARL. DEB., H.L. (5th ser.) 1052 (1951) (Viscount Simon speaking in the House of Lords during debate on the Common Informers Bill).

"The Government were thought to be less keen on enforcing [various penal statutes] than Parliament wished them to be." 483 PARL. DEB., H.C. (5th ser.) 2092 (1951).

²¹ 2 L. RADZINOWICZ, *supra* note 12, at 145-46.

The moiety to the informer was clearly intended as a reward, but it was intended as well to reimburse the informer for the expenses of detecting and prosecuting the action.²² The moiety came not from the government for information, but from the successful prosecution of a *qui tam* action. While the detection of serious crimes was stimulated by rewards, the common informer was stimulated merely by his share in the penalty.²³

From the outset, the *qui tam* action was viewed as an excellent mode for enforcing criminal laws and it quickly grew in acceptance and scope. "Much reliance [became] placed upon common informers to secure the enforcement of laws affecting public order and safety."²⁴ Throughout the 18th and 19th centuries, many statutes authorizing *qui tam* actions were passed, so widening the activities of the common informer "that an important section of the criminal law came to depend upon them for its enforcement."²⁵ *Qui tam* statutes were especially popular in dealing with non-indictable offenses or misdemeanors, particularly those involving trade or commerce violations.²⁶ Many leading and influential figures of the time approved of the informer's action, and hope was expressed "to extend [its] usefulness and vigilance to all the lesser infringements of the law."²⁷

Even after police enforcement techniques reached a level of relative sophistication and professional police forces were more adequately manned, the common informer remained thoroughly entrenched as an adjunct of criminal justice.²⁸ Because the *qui tam* action was so valuable in ferreting out and prosecuting minor, but hard-to-detect offenses, the number of *qui tam* statutes expanded constantly.

²² See *Southern Express Co. v. Virginia ex rel. Walker*, 92 Va. 59 (1895).

Professor Radzinowicz writes, after discussing the different types of rewards that were available for crime detection, that the *qui tam* action was used primarily for lesser infringements of the law since "[c]housands of these were committed everyday, and although most of them were non-indictable offenses or misdemeanors, they had nevertheless considerable social significance." 2 L. RADZINOWICZ, *supra* note 12, at 146. Thus, the moiety of the appointed penalty was clearly designed as an incentive for prosecution, not merely for detection.

²³ The detection of the more serious crimes was stimulated by rewards, pardons, or Tyburn tickets. See 2 L. RADZINOWICZ, *supra* note 12, at 33-138, 155-61.

²⁴ *Id.* at 143.

²⁵ *Id.* at 142.

²⁶ 4 W. HOLDSWORTH, *supra* note 18, at 355; 2 L. RADZINOWICZ, *supra* note 12, at 146-47.

²⁷ 2 L. RADZINOWICZ, *supra* note 12, at 142.

²⁸ *Id.* at 155.

The incentive of the "moiety of the appointed penalty" was not confined to a few isolated penal statutes selected at random. It formed part of the deliberate and consistent policy of the legislature and pervaded the entire body of the criminal law. It acquired the character of a regular system in process of continual expansion. The result was a social situation in which the common informer was expected to act as a policeman, and as a protector of the community against a vast mass of delinquency.²⁹

Despite this expansion of the *qui tam* mode of action, English opinion eventually became critical and all *qui tam* statutes were repealed in 1951.³⁰ The compelling reason for their repeal, however, was not a dissatisfaction with the *qui tam* action per se. The difficulty was actually with the kinds of substantive laws that had been made enforceable by *qui tam* actions. At one point, common informers were allowed to sue villages that tolerated vagrants. The informers received the traditional part of the penalties imposed on the villages, and they were also given the convicted pauper for a period of two years to do with as they pleased.³¹ For the most part, the problem with the English *qui tam* was the absurd ways in which the action was used, rather than a defect in the action itself.³²

²⁹ *Id.* at 146-47.

³⁰ Common Informers Act, 14 & 15 Geo. 6, c. 39 (1951). A schedule of statutes which were repealed by the enactment of the Common Informers Act is attached thereto.

³¹ Vagabond's Act, 1 Edw. 6, c. 3 (1547). See 2 L. RADZINOWICZ, *supra* note 12, at 139-40 and authorities cited therein.

³² The effectiveness of the *qui tam* mode of procedure is evidenced by the widespread dislike for it amongst those who violated penal statutes. No doubt, the abandonment of *qui tam* enforcement in England was partially a result of the actions of certain informers, as well as the kind of substantive law provisions involved. The utilization of avarice as a motivation for prosecuting statutory violations, coupled with the large number of trivial statutes which authorized penal actions led to the creation of professional informers.

[T]here arose a small but ruthless and unprincipled group of people who, from time to time, interested themselves in particular sets of statutes the enforcement of which would provide them with easy and appreciable profit. Some Acts, indeed, came to be known as "theirs." These were the Acts under which they could reap a remarkably abundant harvest, either from the penalties appointed by the legislature or by means of their own technique of blackmail and extortion. 2 L. RADZINOWICZ, *supra* note 12, at 147.

Sir Edward Coke, who referred to informers as "that viperous vermin" described their activities thusly: "The vexatious informer who, under the reverend mantle of law and justice, instituted for the protection of the innocent and the good of the commonwealth, doth vex and pauperise the subject and community of the poorer sort, for malice of private ends and never for love of justice." See 171 PARL. DEB., H.L. (5th ser.) 1053-54 (1951).

In fact, however, the only abuse which could be traced directly to the nature of *qui tam* actions was a technique known as "compounding." An offender subject to liability under a penal statute would simply oblige a friend to institute prosecution as an informer, and then either settle or dismiss the action. Since *qui tam* actions are normally alternate remedies to criminal prosecution, the institution of either method of recovery barred the other. The result of compounding was to bar a later bona fide prosecution. See 4 W. HOLDSWORTH, *supra* note 18, at 357-58. This practice was declared illegal in

Largely because of a more judicious use of *qui tam* statutes, the American legal attitude towards this mechanism of enforcement has remained positive.³³ Only a few anomalous cases — including some recent decisions on the Rivers and Harbors Act — have expressed a somewhat hostile attitude. *United States ex rel. Marcus v. Hess*³⁴ illustrates the typical liberal American reception of *qui tam* suits. In reversing a court of appeals, the Supreme Court explicitly rejected the lower court's restrictive and unfavorable approach to *qui tam* statutes. The defendant had argued that *qui tam* actions were alien to American jurisprudence and, in any event, were unavailable where the only important information provided by the informer was copied verbatim from a Government indictment.³⁵ The Court of Appeals for the Third Circuit³⁶ agreed, holding that an action would not lie in favor of the plaintiff. The lower court suggested that *qui tam* actions had "always been regarded with disfavor" by the courts and so were to be construed "with utmost strictness."³⁷ The Supreme Court disagreed with this notion in an opinion by Mr. Justice Black: "We cannot accept *either the interpretative approach or the actual decision* of the court below. *Qui tam* suits have frequently been permitted by legislative action and have not been without defense by the courts."³⁸ Justice Black then cited several illustrative cases and statutes.³⁹ In particular he noted language in *Marvin v. Trout*⁴⁰

England by 18 Eliz., c. 6 (1562) and made perpetual by 27 Eliz., c. 10 (1585). These two statutes, followed by 34 Eliz., c. 5 (1593), were aimed at restricting unscrupulous activities by informers, mainly by interjecting refinements and technicalities into the procedures surrounding *qui tam* actions. See 4 W. BLACKSTONE, COMMENTARIES* 136; 2 L. RADZINOWICZ, *supra* note 12, at 138-39. In America, the same result was achieved by merely restricting an informer's right to discontinue a *qui tam* action without the approval of the proper public prosecuting official. See, e.g., *United States v. Griswold*, 24 F. 361 (D. Ore. 1885), *aff'd* 30 F. 762 (D. Ore. 1887); *Burley v. Burley*, 6 N.H. 200 (1833). After curing that evil, the only remaining problem with informers' actions in England were the statutes which Parliament allowed them to enforce.

³³ Not only is there no significant evidence of any kind of abuse, but recent years have seen the introduction of many statutes to expand the citizens' role in protecting the environment. See notes 204-05 *infra*.

³⁴ 317 U.S. 537; see also the companion case *United States ex rel. Ostrager v. Associated Gen. Contractors, Inc.*, 317 U.S. 562 (1943).

³⁵ It was this precise point, that information copied from public sources was enough to sustain a successful *qui tam* conviction, which was legislatively overruled by the enactment of 31 U.S.C. § 232 (E) (1) (1964). See *United States ex rel. Bayarsky v. Brooks*, 110 F. Supp. 175 (1953), *aff'd* 210 F.2d 257 (1954).

³⁶ 127 F.2d 233 (3d Cir. 1942).

³⁷ *Id.* at 235.

³⁸ 317 U.S. at 541 (emphasis added).

³⁹ Among federal statutes authorizing a *qui tam* action by an informer are the following: Act of February 26, 1885, § 3, 23 Stat. 332, 333 (importation of alien labor); Act of July 8, 1870, § 39, 16 Stat. 198, 203 (later 35 U.S.C. § 50, since repealed) (falsely mark-

where the Supreme Court had commented on *qui tam* actions: "Statutes for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." Through-out, the *Marcus* opinion recognizes this historical importance and evinces a very receptive attitude towards *qui tam* actions.

Sutton v. Phillips,⁴¹ decided in 1895, is indicative of the legal community's view towards *qui tam* actions at the time the Rivers and Harbors Act was passed. *Sutton* was a suit by an informer to recover his moiety of the penalty under a penal statute. The defendant contended that informer statutes were disfavored by the courts and that statutes awarding a part of the penalty to informers were easily repealed by implication by subsequent legislative enactments. The Supreme Court of North Carolina rejected this restrictive philosophy and extolled the merits of the *qui tam* action.

From time immemorial in the English law, it has been found that *qui tam* actions . . . were an efficient, and indeed, sometimes an indispensable means of enforcing the law in many cases . . . and Parliament in England and legislative bodies in this country have freely enacted statutes for the enforcement of laws by such actions.⁴²

The court went on to say that there had been no agitation for the repeal of such statutes⁴³ and that virtually every North Carolina Legislature had enacted informer statutes.⁴⁴ The court concluded that it would be a radical departure to follow a restrictive course of construction and declare these acts impliedly repealed by other legislation.

ing articles as patented); Act of March 2, 1863, § 4, 12 Stat. 696, 698 (codified in 31 U.S.C. §§ 231-33) (defrauding the Government); Act of Aug. 5, 1861, § 11, 12 Stat. 292, 296 (collectors of revenue); Act of August 30, 1852, § 41, 10 Stat. 61, 75 (regulation of steamboats); Act of March 22, 1794, §§ 2, 4, 1 Stat. 347, 349 (codified in 46 U.S.C. §§ 1351-56 (slave traders)); Act of March 3, 1791, § 44, 1 Stat. 199, 209 (collection of duties on liquor). See also STAFF OF HOUSE CONSERVATION AND NATURAL RESOURCES SUBCOMM., 91ST CONG., 2D SESS., *Qui Tam* ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS 3-4 (Comm. Print 1970).

⁴⁰ 199 U.S. 212, 225 (1905).

⁴¹ 116 N.C. 502, 21 S.E. 968 (1895).

⁴² *Id.* at 507, 21 S.E. at 969 (emphasis added).

⁴³ *Id.* See United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); notes 204-05 *infra*.

⁴⁴ "Scarcely a single Legislature since the Convention of 1875 [at which the Constitution of the State of North Carolina was adopted], has passed, which did not recognize the power and duty of the Legislature in this particular by enacting or amending statutes conferring the whole or a part of penalties upon persons suing for the same." *Sutton v. Phillips*, 116 N.C. 502, 506, 21 S.E. 968, 969 (1895).

Other decisions contemporaneous with the passage of the Rivers and Harbors Act expounded a similar philosophy. For example, *Southern Express Co. v. Virginia ex rel. Walker*⁴⁵ involved an informer's action that was met by a challenge like that raised by the defendant in *Sutton*. The *Walker* opinion upheld the penal statute involved and spoke favorably of the wisdom of informer actions. The court emphasized the value of the *qui tam* action in promoting law enforcement and noted the longevity of its role in American law: "[I]t has been the practice of the legislature, for a hundred years or more . . . to provide, with the view of stimulating prosecutions in such cases, that an informer should be entitled to a part of [a] forfeiture or fine."⁴⁶

Thus, the American experience with *qui tam* actions allows several conclusions to be drawn. First, civil actions by *qui tam* plaintiffs have been recognized as necessary and expeditious adjuncts of criminal law enforcement, as they were in early England. Second, the *qui tam* mode of enforcement has been used most commonly to prosecute minor but hard-to-detect statutory offenses, which have often involved trade or commerce. Also, the payment to the informer is intended as compensation for the costs of prosecution, as well as a reward for his vigilance. But unlike the recent English hostility towards *qui tam* actions, the American attitude is still one of liberal acceptance and receptiveness.

B. *The Legal Rationale of the Qui Tam Action — A Civil Action to Collect a Debt*

Although the action *qui tam* is closely related to the criminal law, and although the action is a statutory proceeding grounded on a penal statute, it is a civil action both in form and substance.⁴⁷ A firm appreciation for its civil nature is essential to understand the legal status of the *qui tam* action, particularly when considering the Rivers and Harbors Act. The right of action is always statutory in origin — it is a mode of procedure which in some way must be granted by the legislature. But the remedy pursued — once the

⁴⁵ 92 Va. 59, 22 S.E. 809 (1895).

⁴⁶ *Id.* at 63, 22 S.E. at 810.

⁴⁷ See, e.g., *Miami Copper Co. v. State*, 17 Ariz. 179, 149 P. 758 (1915). The action is civil regardless of whether the offense is labeled a crime. "[T]here is no distinction better known than the distinction between civil and criminal law, or between criminal prosecutions and civil actions. Mr. Justice Blackstone and all the modern writers upon the subject distinguish between them. Penal actions were never yet put under the head of criminal law, or crimes." *Adams, qui tam v. Woods*, 6 U.S. (2 Cranch), 336, 338 (1805) (quotation from Solicitor General's brief).

right of action is established by statute — is the common law remedy of an action in the nature of a debt. This common law remedy is used to recover the penalties provided under certain penal statutes.⁴⁸

The debt is grounded upon the following rationale. Where an act prescribes a forfeiture of a sum of money, or a fine or penalty, an action of debt lies because the statute creates a direct debt and a consequent duty.⁴⁹ The theory for the recovery of the debt is on a contract implied in law. The action is founded upon that implied contract which every person enters into with the state to obey the laws.⁵⁰ In other words, the recovery of the debt is dependent only upon the existence of an implied contract, between individual and state, that is effected by a penal statute.⁵¹ One authority explains this relationship by emphasizing the implied, rather than express nature of the contract:

⁴⁸ See 3 W. BLACKSTONE,* *supra* note 12, at 158-61.

⁴⁹ *Id.*

⁵⁰ The following passage written by Blackstone elucidates the logic behind this premise:

From these *express* contracts the transition is easy to those that are only *implied* by law, which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his nonperformance.

Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath before-hand contracted to discharge. . . .

The same reason may with equal justice be applied to all penal statutes, that is, such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the Legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party aggrieved, or else to any of the king's subjects in general. . . .

But more usually these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person *qui tam pro domino rege, etc., quam pro se ipso in hac parte sequitur* (who prosecutes this suit as well for the king, etc., as for himself). 3 W. BLACKSTONE,* *supra* note 12, at 158-60 (footnotes omitted).

⁵¹ See, e.g., *Stearns v. United States*, 22 F. Cas. 1188 (No. 13,341) (D. Vt. 1835).

[T]here are some things in action which cannot properly be said to have [an expressly contractual] origin, and the withholding of which will nevertheless constitute a wrong or injury, viz. such debts as result from the obligation to pay money pursuant to . . . an enactment of the legislature . . . of that class called penal statutes, [wherein] a pecuniary forfeiture is inflicted for committing some specified offense, and such forfeiture is made recoverable . . . by the crown, or the party aggrieved, or by a common informer. . . . This obligation or liability to pay a specific sum of money constitutes . . . a *debt*, so that the party . . . who transgresses the penal statute is immediately owing to the crown, the party aggrieved, or the common informer, as the case may be, the amount of the penalty. The remedy for the recovery of such debt . . . is by action of debt . . . on the penal statute [and] this remedy is generally designated as a penal action, or, where one part of the forfeiture is given to the crown, and the other part to the informer, a . . . *qui tam* action.⁵²

In summary, the law presumes that every man impliedly contracts with the government to obey and discharge all liabilities reasonably imposed by penal statutes. Where a penal statute demands a penalty for its violation, that penalty instantly becomes a debt owed by the violator which may be sued for and collected by any properly designated person.

A penal statute, under which such a debt can arise, is a statute which prohibits an act and imposes a penalty for the commission of it. The statute imposes a fine, penalty, or forfeiture for the commission of an offense against the public or a wrong committed against the state.⁵³ The purposes of the statute are to punish the wrongdoer, to deter future violations, and to indemnify the public for the ills caused by the transgression.⁵⁴ Of all the areas of confusion surrounding *qui tam* actions — particularly in decisions under the Rivers and Harbors Act⁵⁵ — none is more important or perplexing as that caused by the definition of a penal statute.⁵⁶ Never-

⁵² 3 H. STEPHENS, NEW COMMENTARIES ON THE LAWS OF ENGLAND 535-36 (1928).

⁵³ See BLACK'S LAW DICTIONARY 1290 (4th ed. rev. 1968).

⁵⁴ See generally *Meeker v. Lehigh Valley Ry. Co.*, 236 U.S. 412 (1915); *Brady v. Daly*, 175 U.S. 148 (1899); *Huntington v. Attrill*, 146 U.S. 657 (1892); *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903); *State v. Chicago, Mil. & St. P. Ry. Co.*, 122 Iowa 22, 96 N.W. 904 (1903) and authorities cited therein; *Commonwealth v. Am. Express Co.*, 167 Ky. 685, 181 S.W. 353 (1916); *McNeely v. Natchez*, 148 Miss. 268, 114 S. 484 (1927); *Marter v. Repp*, 80 N.J. 530, 77 A. 1030 (1910); *Silberman v. Skouras Theatres Corp.*, 11 N.J. Misc. 907, 169 A. 170 (C.P. Union County 1933); *Smith Engineering Works v. Custer*, 194 Okla. 318, 151 P.2d 404 (1944) and authorities cited therein; *Gawthrop v. Fairmount Coal Co.*, 74 W. Va. 39, 81 S.E. 560 (1914).

⁵⁵ See the recent decisions cited in note 14 *supra*.

⁵⁶ Much of the earlier confusion involving *qui tam* actions was caused by a subtle definitional change. In England, penal actions were separate and distinct from popular or

theless, if one relies on the basic definitions, there should be little confusion in actual application.

Over 75 years ago, the Supreme Court was called upon to resolve the problem of defining a penal statute and it relied on Blackstone's universally accepted classification to express a simple and workable rule: "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual . . ." ⁵⁷ If the wrong is to the public, then the law is penal; if the wrong is to an individual, then the law is remedial. ⁵⁸

The penalty [provided by a penal statute] is not imposed or given as a redress for mere private wrong[s] to property, but in furtherance of a broad public policy within the police powers of the State [to punish wrongdoers and deter others]. Action for the penalty is not meant for the vindication of private rights. . . . Nor does it preclude separate action for that. The penalty does not accrue to one out of his property, but out of the vindication of the public weal. It is not given as damages in relation to the former, but as punishment in relation to the latter. ⁵⁹

Because the term "penal" is much broader, in its generic sense, than "criminal," the act proscribed by a penal statute may or may not be a crime. ⁶⁰ The actions available to recover the sum provided in the statute may be either a criminal action, a penal action, or

qui tam actions. BLACK'S LAW DICTIONARY 1289 (4th ed. rev. 1968), in discussing this change, notes that originally "[a] penal action or information [was] brought by an officer, and the penalty [went] to the king. 1 Chit. Gen. Pr. 25, note; 2 Archb. Pr. 188. But in American law, the term includes actions brought by informers or other private persons, as well as those instituted by governments or public officers." See also 4 W. BLACKSTONE, * *supra* note 12, at 308-09.

⁵⁷ *Huntington v. Attrill*, 146 U.S. 657, 668 (1892).

⁵⁸ *Id.* If the wrong done is to the individual, the statute which grants a private right of action is remedial rather than penal notwithstanding the designation of the sum to be recovered as a "penalty." *Id.*; *Diversey v. Smith*, 103 Ill. 378 (1882). "Where a statute is both penal and remedial, as where it is penal in one part and remedial in the other, it should be considered as a 'penal statute' when it is sought to enforce the penalty, and as a 'remedial statute' when it is sought to enforce the remedy." *Collins v. Kidd*, 38 F. Supp. 634, 637 (D.C. Tex. 1941).

⁵⁹ *Gawthrop v. Fairmont Coal Co.*, 74 W. Va. 39, 81 S.E. 560, 561 (1914). See also *Iowa v. Chicago, Mil. & St. P. Ry. Co.*, 122 Iowa 22, 26, 96 N.W. 904, 905 (1903) where the court stated:

The purpose of the [penal] 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 is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused.

⁶⁰ See, e.g., *Marter v. Repp*, 80 N.J. 530, 77 A. 1030 (1910); BLACK'S LAW DICTIONARY 1289 (4th ed. rev. 1968).

both.⁶¹ A penal action is one founded solely upon a penal statute. The only object of a penal action is the recovery of a fine, penalty, or forfeiture, imposed as a punishment for the commission of the proscribed offense. It is not intended to indemnify the person injured by the violation nor to correlate the amount of the penalty to the actual damages caused.⁶² In some jurisdictions, the character of a penal action as to whether it is civil or criminal is determined by the form of proceeding which is adopted,⁶³ while in other jurisdictions, the proceeding is regarded as quasi-criminal.⁶⁴ In any event, a penal action does not necessarily have to be a criminal prosecution, notwithstanding that it is a suit to punish an offense against the public.⁶⁵

Once it is decided that a statute is penal, rather than remedial, the only question remaining is how the statute may be enforced. If the proscribed conduct is not a crime, then the statute can be enforced only by a civil action, brought either by the state or on its behalf. If the offense is designated a crime, then the statute may be enforceable by either a criminal prosecution,⁶⁶ a civil action by or on behalf of the state,⁶⁷ or both.⁶⁸ If the penal statute declares the offense a felony, or declares the punishment something other than a fine, penalty, or forfeiture, then the statute can only be enforced by a criminal prosecution.⁶⁹ But if the offense is declared a misdemeanor and if the punishment is a pecuniary sum, it may be recovered by a civil action in the nature of debt, at least in the absence of a provision in the statute to the contrary.⁷⁰ This rule applies whether or not the sum may also be collected in a proceeding which is criminal, since the two methods of enforcement are used to com-

⁶¹ See 36 AM. JUR. 2d, *Forfeitures and Penalties* §§ 1-14 (1968); Annot., 53 L. Ed. 739 (1909).

⁶² See, e.g., *Smith Engineering Works v. Custer*, 194 Okla. 318, 151 P.2d 404 (1944); *Gawthrop v. Fairmount Coal Co.*, 74 W. Va. 39, 81 S.E. 560 (1914) and authorities cited therein.

⁶³ See, e.g., *State v. McConnell*, 70 N.H. 158, 46 A. 458 (1900).

⁶⁴ See, e.g., *Wiggins v. Chicago*, 68 Ill. 372 (1873); BLACK'S LAW DICTIONARY 446 (4th ed. rev. 1968).

⁶⁵ See, e.g., *Stout v. State ex rel. Caldwell*, 36 Okla. 744, 130 P. 553 (1913).

⁶⁶ See, e.g., *McNair v. People*, 89 Ill. 441 (1878).

⁶⁷ See, e.g., *United States v. Zucker*, 161 U.S. 475 (1896); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871).

⁶⁸ See, e.g., *Hepner v. United States*, 213 U.S. 103 (1909); *Miami Copper Co. v. State*, 17 Ariz. 179, 149 P. 758 (1915); *State ex rel. Kemp v. Hannibal & St. J. Ry. Co.*, 30 Mo. App. 494 (1888).

⁶⁹ See, e.g., *United States v. Claffin*, 97 U.S. 546 (1878).

⁷⁰ See, e.g., *United States v. Regan*, 232 U.S. 37 (1914); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871).

plement one another.⁷¹ Because these various methods of enforcement can coexist under one penal statute, the sole inquiry must be the legislative intent behind the promulgation of the statute. It is meaningless to perfunctorily hold a statute criminal, and therefore exclusive of civil *qui tam* recoveries — as has been done in Rivers and Harbors decisions⁷² — since this exclusiveness is not a necessary, or even common, consequence under Anglo-American law.

III. THE LEGISLATIVE INTENT BEHIND SECTIONS 16 AND 17 OF THE RIVERS AND HARBORS ACT

Where a penal statute expressly grants an informer the right to prosecute, or the right to maintain an action of debt, there is no question but that a *qui tam* action will lie. Yet many penal statutes fail to contain any such express authorization, but do include sufficient evidence of legislative intent to allow the implication of an informer's right to prosecute.⁷³ Section 16 of the Rivers and Harbors Act does not contain an express grant of authority to sue, but does include a clause giving one-half of the recovery to the informer. In order to decide whether a *qui tam* action is authorized by section

⁷¹ See, e.g., 31 U.S.C. §§ 231-34 (1964).

⁷² See, e.g., *Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302 (S.D. Tex. 1971).

⁷³ In *United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co.*, 250 F. 939 (2d Cir. 1918) (opinion by L. Hand, J.), suit was instituted in admiralty to recover a fine for the alleged violation of section 5 of the Carriage of Goods by Sea Act which provided:

For a violation of any of the provisions of . . . this title the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding \$2,000. . . . One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. 46 U.S.C. § 194 (1958).

The plaintiff in *Pressprich* had brought the action in personam. Judge Learned Hand, speaking for a unanimous court, held that the court below did not have admiralty jurisdiction in personam, but refused to dismiss the action, stating:

[W]e have no doubt that the fine might be collected by a *qui tam* action in the District Court . . . and that the jurisdiction of the District Court over the subject matter was, therefore complete. . . . [O]ur decision in *United States v. Atlantic Fruit Co.*, [206 F. 440 (2d Cir. 1913)], is to be taken as holding that the United States has the option in such cases of suing in what would have been in earlier times an action of debt, despite the unliquidated character of the recovery. We see no reason to make a distinction between an action by the United States to collect the fine and an action *qui tam* like that at bar. 250 F. at 941.

The *Pressprich* court specifically stated that a *qui tam* action would lie under a statute not granting express authority for the informer to sue. The statute in *Pressprich*, like section 16, refers to a fine. The fact that the moiety was to go to the party injured rather than to an informer was not determinative, for Judge Hand specifically mentioned that the plaintiff's action for damages still remained.

16, a court must use some test or guideline to discover whether the legislature intended this penal statute to be enforced by a civil *qui tam* action; the court must decide whether the mention of an informer, the granting to him of half the pecuniary recovery, and a failure to prohibit him from suing are sufficient evidence of a legislative intent to authorize *qui tam* actions.

None of the many recent decisions which have confronted the *qui tam* issue under section 16 have proffered any standards or guidelines that could be used in arriving at a decision. In fact, only a few of these courts even mention legislative intent.⁷⁴ Several others have erroneously concluded that the designation of the recovery as a "fine," rather than a "penalty," and similar semantic attributes of section 16 imply that civil actions will not lie.⁷⁵ Other courts have relied upon the argument that the section 17 requirement that a criminal proceeding, if brought, must be diligently prosecuted negates any implication that a *qui tam* action is authorized under section 16.⁷⁶ In these instances, the courts have implicitly conceded that section 16 would establish the right to bring an informer action if it were standing alone, but because it does not stand alone, they have gone on to hold that section 17 overrides that implication.

Surprisingly, no court has systematically analyzed section 16 with a view to discovering the legislative intent behind that provision. Such an analysis is best accomplished through a bifurcated examination of the issue. First a court must decide whether the grant of authority to launch criminal prosecutions was intended to be the

⁷⁴ See e.g., *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971). The court discussed the intent of the legislature in enacting the Rivers and Harbors Act. It dismissed the argument that Congress intended section 16 to allow *qui tam* actions by pointing to their abuse and final prohibition in England. Although the court mentions that the 1899 Congress could not know that five decades later England would prohibit *qui tam* actions, the court believed that *qui tam* abuses had been so notorious that Congress could not have intended to expand its scope of application in this country. *Id.* at 91.

The court's arguments are unconvincing. The court does not discuss the many penal statutes that expressly authorize *qui tam* actions and were passed by Congress after 1899, nor do they consider the many statutes under which *qui tam* actions have been implied. The court further does not discuss the fact that few instances of abuse occurred in this country, the factor which primarily contributed to the statute's repeal in England.

⁷⁵ See, e.g., *Connecticut Action Now v. Roberts Plating Co.*, ___ F. Supp. ___ [2 E.R.C. 1731] (D. Conn. 1971); *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1971).

⁷⁶ See, e.g., *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (S.D. Ala.), *aff'd* ___ F.2d ___ [3 ERC 1065] (5th Cir. 1971). This decision stated the proposition that "even where some statutory language seems to grant a private right of action, if the same or a related statute also clearly places enforcement in the hands of governmental authorities the right of action is exclusively vested in such governmental authority." *Id.* at 415. The court then went on to rely on section 17 as such an explicit vesting of exclusive authority.

sole method of enforcing a violation of the Act, or merely one of several alternative modes of procedure. If the court concludes that criminal prosecution was not intended to be the sole remedy, then it must decide whether informer actions are a part of the scheme of remedies intended by Congress.⁷⁷

This section will discuss the guidelines courts have most commonly used to decide whether a *qui tam* action is impliedly authorized by a statute. But in order to avoid the errors made in the recent Rivers and Harbors decisions, this section will first discuss certain semantic aspects of section 16 and the importance of section 17 (and criminal enforcement generally) to the overall *qui tam* question under the Act.

A. Semantic Aspects of Section 16

Some recent decisions under the Rivers and Harbors Act have

⁷⁷ Alternatively, one could attack the problem by showing, first, that civil actions in the nature of debt can be brought to recover the penalty prescribed by section 16, and, second, that a citizen can also bring the action in debt. It will be shown below, notes 136-41 *infra* & accompanying text, that section 16 allows some type of civil proceedings. But in addition, federal law specifically provides that an action in the nature of debt should lie under section 16. See 28 U.S.C. § 2461 (a) (1964). Section 2461 (a) provides: "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." This provision was added to the Judicial Code in the 1948 revision, supplemented by the following explanation by the code revisors:

Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. Numerous sections in the United States Code prescribe civil fines, penalties, and pecuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof. . . .

A civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action. United States *ex rel.* Marcus v. Hess *et al.*, 317 U.S. 537, . . . Hepner v. United States, 213 U.S. 103, . . . and cases cited therein. *Reviser's Note* to 28 U.S.C.A. § 2461 (1964).

The Congress of the United States thus feels that where a statute fails to expressly specify a mode for recovering a penalty, a civil action will lie in the nature of debt in favor of the Government. This contention is historically sound and is in fact, merely a codification of earlier law. This was the precise holding of *Adams, qui tam v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805), which stated: "In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie." And the Rivers and Harbors Act presents such a case, for no *exclusive* mode of procedure is prescribed to recover the penalty in section 16. See notes 142-82 *infra* & accompanying text.

Because the informer has the right to one-half of the penalty in section 16, one can then argue that the citizen as well as the government can bring the action in debt. "It cannot be that whether an action of debt is maintainable or not depends on who is the plaintiff." Hepner v. United States, 213 U.S. 103, 106 (1909); accord *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 542 (1871). Where an action of debt lies, *i.e.*, whenever a statute declares a pecuniary penalty, that penalty may be recovered in an action of debt by either the United States or a private informer unless specifically prohibited by the language of the statute. See 213 U.S. at 106-07.

pointed to the terminology of section 16 as the primary justification for denying *qui tam* actions.⁷⁸ They have reasoned that certain words in this section are incompatible with a legislative intent to allow common informers to bring suit. But a close analysis will show that this result is not justifiable and that a technical interpretation of a few isolated terms in section 16 cannot be dispositive of the legislative intent question.

In section 16, the punishment is labeled a "fine," as opposed to a "penalty" or "forfeiture." The cases attributing importance to the use of the word "fine" have concluded that its use implies that Congress intended that criminal prosecution alone should be used to enforce the Act, because "fine" presumably has a more punitive and criminal connotation. Had "penalty" been used, then the statute would apparently have appeared more civil. But this reasoning is specious and the fact that the punishment is labeled a "fine" weighs as much in favor of recovery by a *qui tam* action as it does in favor of exclusively criminal proceedings. The purpose of a *qui tam* action under a penal statute is to apprehend and prosecute those who have harmed the public by violating legislative enactments; the purpose of criminal statutes is similarly to punish the wrongdoer.⁷⁹ Because these purposes are the same, there is no basis for concluding that the use of "fine" implies a legislative intent to permit criminal proceedings to the exclusion of *qui tam* actions. The courts that have so concluded, however, give no more cogent a reason than this punitive connotation of "fine." Indeed, it is no less valid to argue that the more a statute intimates punishment and the vindication of public rights, the more likely the legislature intended a *qui tam* action to lie, for the *qui tam* action is a perfect vehicle to fulfill those objectives.

In part, the confusion seems to stem from the term "penalty," which is subject to several meanings. It can be read as inclusive of all kinds of punishment or pecuniary liabilities, but it can also be read more narrowly, as a civil liability specified for the violation of a statute, excluding "fines" and even "forfeitures."⁸⁰ Quite clearly,

⁷⁸ See, e.g., *Connecticut Action Now v. Roberts Plating Co., Inc.*, ___ F. Supp. ___ [2 ERC 1731] (D. Conn. 1971), wherein the court inexplicably states: "Plaintiffs in the instant case were unable to cite any case which sustained a *qui tam* action to collect a criminal fine or penalty. And the court has been unable to find such a case." ___ F. Supp. at ___ [2 ERC at 1732].

⁷⁹ See notes 53-71 *supra* & accompanying text.

⁸⁰ *Wilentz v. Hendrickson*, (Equity) 133 N.J. 447, 33 A.2d 366 (1943), *aff'd* (Equity) 135 N.J. 244, 38 A.2d 199 (1944); see 36 AM. JUR. 2d *Forfeiture and Penalties* §§ 2-5 (1968); B'ACK'S LAW DICTIONARY 1289 (4th ed. 1968).

the use of one particular term where another might have been used cannot be dispositive of legislative intent, where, as here, the word chosen may have different definitions, at least one of which coincides with the term not chosen.

In any event, there seems to be no support for the position that the label affixed to the punishment is determinative of whether a *qui tam* action is authorized. The traditional cases construing *qui tam* statutes (*i.e.*, nearly all those not associated with the Rivers and Harbors Act) have not deemed the specific designation of the pecuniary recovery conclusive as to the intended mode of procedure. For example, in *Adams, qui tam v. Woods*⁸¹ the Court considered the use of a criminal statute of limitations⁸² as a defense in a *qui tam* action. In holding the statute of limitations applicable, Chief Justice Marshall wrote that “[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt”⁸³ The *Adams* case is important because the Court allowed the criminal statute of limitations to govern a penal statute employing the word “forfeiture” (which is almost exclusively associated with civil recovery⁸⁴), rather than “fine.” Conversely, then, the use of “fine,” rather than “penalty,” should not be determinative of the mode of procedure under the Rivers and Harbors Act. But even more important, Chief Justice Marshall used the terms “fine” and “forfeiture” as equivalents to “penalty,”⁸⁵ which can only mean the label assigned to the punishment is irrelevant in determining what modes of enforcement are authorized.

⁸¹ 6 U.S. (2 Cranch) 336 (1805).

⁸² Act of April 30, 1970, § 32, 1 Stat. 119.

⁸³ 6 U.S. (2 Cranch) at 341.

⁸⁴ See 36 AM. JUR. 2d *Forfeitures and Penalties* §§ 1, 3-5 (1968).

⁸⁵ The Chief Justice is obviously using the terms “fine” and “forfeiture” as synonymous or as equivalent to “penalty” since, if the words were read with their narrow, mutually exclusive connotation, the clause would be inherently contradictory. The *Adams* result then is that almost every penalty provided by a penal statute, whether it is labeled a fine or forfeiture, is recoverable both by a civil action in debt and by a criminal information. See *Hepner v. United States*, 213 U.S. 103, 106 (1909); *Lees v. United States*, 150 U.S. 476, 479 (1893).

This interpretation of *Adams* is fully consistent with the basic theory behind the use of *qui tam* actions. The purpose of the civil *qui tam* action was to augment criminal prosecution, not to replace it. The several times when the obverse arguments have been made, that a penal statute contemplates solely civil recovery and consequently excludes criminal prosecution, courts have often allowed both remedies, implying the right of criminal prosecution unless expressly prohibited by the statute. See *United States v. Stevenson*, 215 U.S. 190 (1909), where the court quotes the applicable rule: “In *Lees v. United States*, 150 U.S. 476, 479, the doctrine was laid down that a penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action for debt.” *Id.* at 198.

In addition to the "fine"- "penalty" problem, some courts have pointed to other language in section 16 to hold that criminal proceedings alone were intended to be authorized.⁸⁶ The title of the section begins "Penalty for wrongful deposit of refuse"⁸⁷ and the remainder of the section contains the terms "knowingly aid," "guilty," "misdemeanor," "conviction," "punished," "fine," and "imprisonment." But to hold that this terminology precludes a *qui tam* action is no more valid than to predicate the same holding on the use of the word "fine," for the problem is conceptually identical. Because the purpose of *qui tam* actions is punishment and deterrence, it is natural that such terms be included in a statute that creates a *qui tam* action. In particular, because *qui tam* actions were used to prosecute certain violations (none more onerous than a misdemeanor),⁸⁸ the fact that the statute allows the conviction of whoever commits the specified offense is not at all inconsistent with the theory of *qui tam* recovery. Also, the statute mentions imprisonment "in the case of a natural person," but the civil *qui tam* plaintiff seeks only a monetary reward and such provisions are merely ignored when the action is civil.⁸⁹ And finally, section 16 — unlike any of the other enforcement provisions of the Rivers and Harbors Act — contains a provision for the moiety to the informer, thus indicating a legislative intent that the informer play some significant role in enforcing the Act.

Thus, a logical analysis of section 16 cannot support the position that criminal proceedings alone were authorized merely because the statute has factors indicating that criminal proceedings were one intended method of enforcement. Non-criminal actions often co-exist with criminal proceedings under the same act. Moreover, an examination of cases construing other statutes with wording similar to that of section 16 reaffirms the conclusion that civil actions are au-

⁸⁶ Most decisions single out the phrases "guilty of a misdemeanor," "on conviction thereof," and "or by imprisonment" as evidence of criminality. See *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 414 (S.D. Ala. 1971); *Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 305 (S.D. Tex. 1971). Yet each of these phrases is found in cases allowing civil actions. See *United States v. Regan*, 232 U.S. 37 (1914) (misdemeanor); *United States v. Zucker*, 161 U.S. 475 (1896) (conviction); *Commonwealth v. Am. Express Co.*, 167 Ky. 685, 181 S.W. 353 (1916) (imprisonment).

⁸⁷ 33 U.S.C. § 411 (1964).

⁸⁸ Although an offense is labeled a "misdemeanor," it does not prevent a civil action in the nature of debt from being an alternative mode of prosecution. *United States v. Regan*, 232 U.S. 37, 46-47 (1914).

⁸⁹ See the authorities cited in note 86 *supra*.

thorized under this section. In *Stockwell v. United States*,⁹⁰ for example, the Supreme Court allowed the United States to bring a civil action to enforce the alleged violation of a statute which read:

[I]f any person or persons shall receive, conceal or buy any goods, wares, or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise, so received, concealed or purchased.⁹¹

This statute was found to support a civil action although clearly requiring knowledge and a conviction. Likewise, in *United States v. Zucker*⁹² the Supreme Court held that the Government could maintain a civil action under a similar statute which provided, *inter alia*:

[I]f any . . . importer . . . shall make . . . any entry of imported merchandise by means of any fraudulent or false invoice, . . . such merchandise or the value thereof, to be recovered from the person making the entry, shall be forfeited, . . . and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.⁹³

In sum, courts which have accepted the argument that certain words in section 16 preclude a civil action have ignored equally cogent counterarguments, and they have also ignored a consistent body of case law which allows civil actions under statutes of similar wording. An accurate analysis of the terminology of section 16 raises no obstacle to a *qui tam* action. *Stockwell* and *Zucker* stand as a further affirmation of the premise that the intent of Congress cannot be found by mechanically relying on the use of certain terminology.

B. *The Criminal Mode of Procedure and Section 17*

Many of the Rivers and Harbors decisions have concluded that criminal prosecution is the sole method authorized to enforce section 16. And to support this conclusion, two distinct rationales have been used in addition to the semantic arguments discussed above. First, some courts have held that section 16 does not, either by itself or in conjunction with any other provision of federal law, authorize civil proceedings. Second, some courts have held that section 17

⁹⁰ 86 U.S. (13 Wall.) 531 (1871).

⁹¹ Act of March 3, 1823, ch. 58, § 2, 3 Stat. 781.

⁹² 161 U.S. 475 (1896).

⁹³ Customs Administration Act, ch. 407, § 9, 26 Stat. 131, 135 (1890) (repealed 42 Stat. 898).

of the Act (which requires that criminal proceedings by the United States to enforce the Act must be vigorously prosecuted) overrides any implication in section 16 that civil actions are permissible.⁹⁴ In this section, these two rationales will be scrutinized and it will become clear that the courts which have held that criminal proceedings alone are authorized are in error. Their conclusions are contrary to both general legal principles and the decisions under the Rivers and Harbors Act as well.

The decisions which have adopted the first rationale — that section 16 authorizes only criminal actions — usually begin by concluding that “criminal statutes cannot be enforced by civil actions,” and cite *United States v. Jourden*⁹⁵ as support for this proposition. In *Jourden* a citizen had brought a civil action under a statute prohibiting the sale of liquor without a license. The statute read:

Anyone engaged in the sale of intoxicating liquor . . . , who is required . . . to have a license, . . . without first having obtained a license to do so . . . , or any person who shall engage in such sale . . . where the sale thereof is prohibited, upon conviction thereof, shall be fined not less than \$100 nor more than \$2,000 or be imprisoned for not less than one month nor more than one year.⁹⁶

In dismissing the civil action, the *Jourden* court stated:

It is the general rule . . . that where a statute provides for the payment of a license fee as the condition of doing any specified business, and also provides that a violator of the act shall, upon conviction, be punished by fine or imprisonment, the remedy by prosecution and punishment so prescribed by the statute is exclusive, *unless there is some special provision of law which permits the prosecution of a civil action to recover the license fee.*⁹⁷

As noted by the court, the statute involved in *Jourden* did not contain any civil attribute whatsoever nor did it support any inference that civil actions were authorized. The court merely pointed to the obvious — that where all indications are that the legislature intended to permit only criminal proceedings, then the only possible conclusion is that criminal prosecution is the sole mode of proceeding.⁹⁸

⁹⁴ See, e.g., *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 416 (S.D. Ala. 1971).

⁹⁵ 193 F. 986 (9th Cir. 1912).

⁹⁶ CARTER'S ANN. CODE CRIM. P., Alaska § 472 (1910).

⁹⁷ 193 F. at 987-88 (emphasis added and citations omitted).

⁹⁸ The court made it quite clear that there was absolutely no civil aspect to the statute: The present action is not one to recover a tax imposed upon the performance of an act which all persons are permitted to perform, and which in itself is not in any way regulated or restricted, but it is an attempt to recover a fee which the law prescribed as one of the conditions upon which might be obtained the

The court specifically stated that there was no "special provision" indicating authorization for the maintenance of a civil action.⁹⁹ Section 16, however, does contain a clause giving a moiety of the pecuniary recovery to the informer. In providing such a distribution of the penalty, Congress obviously might have contemplated an informer action.¹⁰⁰ And, at the very least, Congress might have believed that civil actions were appropriate under the Act, whether brought by individuals or the Government. Moreover, there are other factors that indicate broader enforcement than criminal prosecution alone is authorized by the Act.¹⁰¹ Thus, the problem in using *Jourden* is that the case only expresses a truism — if a statute is purely criminal, then civil proceedings will not lie thereunder. But *Jourden* does not provide any guidance in deciding whether a penal statute is purely criminal. To decide whether section 16 authorizes civil proceedings, and *qui tam* proceedings in particular, a method of analysis must be used which is not found in *Jourden*.

Along with *Jourden*, the Rivers and Harbors decisions have cited to dictum from *United States v. Claflin*.¹⁰² *Claflin* involved an action of debt by the United States under a statute which prohibited the purchase of illegally imported merchandise.¹⁰³ The statute provided:

[I]f any person or persons shall receive, conceal, or buy any goods, wares, or merchandise, knowing them to have been illegally imported into the United States . . . such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise so received, concealed, or purchased.¹⁰⁴

The court discussed this section, which required both knowledge and a conviction, and concluded that if it had been in force when the

permission to engage in a specified business which is declared by law to be unlawful without that license. The fee is not a tax imposed upon the business of selling liquor. . . . Nor do the statutes confer upon the district attorney the power to legalize an illegal traffic, and to declare that, after the law had been broken, the lawbreaker shall pay the government the license for doing that for which no license has been given. 193 F. at 988.

⁹⁹ *Id.*

¹⁰⁰ In fact, the term "informer" was often included by Parliament in a statute as a "shorthand" device to indicate authorization for *qui tam* actions, without completely and expressly making that authorization clear. 2 L. RADZINOWICZ, *supra* note 12, at 147-55.

¹⁰¹ Principal among these is the legislative intent behind the statute. As the Supreme Court has reconstructed this intent, it includes a wide range of implied enforcement mechanisms. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

¹⁰² 97 U.S. 546 (1878).

¹⁰³ Act of March 3, 1823, ch. 58, § 2, 3 Stat. 781.

¹⁰⁴ *Id.*

illegal importations in the case were made, a civil action would have been allowed. The issue in *Clafin*, however, was whether the statute was actually in force when the alleged violations had occurred. The Court held that the statute was not in force, and had been repealed by the enactment of a later statute. The later statute,¹⁰⁵ like the statute in *Jourden*, contained no evidence whatever of a congressional intent to allow civil proceedings. There certainly was no mention of informers, nor was there a provision providing that a moiety of the fine go to a citizen.

The key to both *Jourden* and *Clafin* is twofold. First is their failure to establish any method for deciding when a particular statute allows only criminal prosecution, rather than civil and criminal proceedings together. Once it is decided that a statute is purely criminal, it is not difficult to hold that the legislature did not authorize civil proceedings as well. But *Jourden* and *Clafin* supply only this truism and no more; they are worthless in deciding what enforcement mechanisms are proper under a particular penal statute. Second is the total absence in the statutes involved in these cases of any factor upon which to base a conclusion that civil actions were authorized. Where a penal statute does contain some evidence of civil intent, courts do allow actions in debt regardless of the fact that criminal prosecution is also allowed. In *United States v. Zucker*,¹⁰⁶ for example, the United States had filed a civil action of debt against importers under a statute which read in part:

[I]f any owner, importer, consignee, agent, or other person shall . . . be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties or any portion thereof, accruing upon the merchandise . . . such merchandise or the value thereof . . . shall be forfeited . . . and such person shall, upon conviction, be fined for each offence a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court.¹⁰⁷

The Government had attempted to introduce a deposition into evidence and the defendant objected, contending that the action against him for violation of the statute was exclusively criminal and that the sixth amendment granted him the right to confront the witnesses against him. But the Court concluded that the penal statute involved was not purely criminal, and consequently allowed the use of the deposition:

¹⁰⁵ Act of July 18, 1866, ch. 201, § 4, 14 Stat. 179.

¹⁰⁶ 161 U.S. 475 (1896) (opinion by Harlan, J.).

¹⁰⁷ Act of June 10, 1890, ch. 407, § 9, 26 Stat. 131, 135 (Customs Administration Act) (emphasis added).

A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment, a witness against an "accused" in a criminal prosecution The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.¹⁰⁸

These three decisions, *Jourden*, *Clafin*, and *Zucker*, show that — although statutes having no civil features at all contemplate criminal enforcement exclusively — where a statute does contain civil attributes or evidence of congressional intent that civil actions are authorized, such actions are allowed even though criminal prosecution is clearly possible under the same statute. Section 16 does contain something not found in a purely criminal statute; it contains a clause for informers. A court cannot ignore that fact and treat the clause as nonexistent. Moreover, a court must reckon with other factors that weigh in favor of civil recovery and which will be discussed below. Once there exists some evidence that criminal prosecution might not have been intended as the sole mode of procedure, a court must search for the legislative intent behind that evidence to decide whether or not a civil action will lie. *Jourden* and *Clafin* are of no help in that investigation.

Some courts denying *qui tam* actions under the Rivers and Harbors Act have relied upon section 17,¹⁰⁹ rather than the *Jourden-Clafin* argument. These courts have implicitly acknowledged the possibility of civil actions under section 16, but have held that section 17 negates the possible inference that Congress intended to allow private citizens to sue under section 16. Section 17 provides, in part:

[T]he Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of [sections 13 and 16] . . . ; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated¹¹⁰

In disallowing *qui tam* actions, the courts have read the two sections

¹⁰⁸ 161 U.S. at 481. The court further stated that an action could not be criminal if only a judgment for money was sought. *Id.*

¹⁰⁹ See *Gerbing v. ITT Rayonier, Inc.*, ___ F. Supp. ___ [2 ERC 1801] (M.D. Fla. 1971); *Bass Anglers Sportsman's Soc'y v. Scholze Tannery*, 329 F. Supp. 339 (E.D. Tenn. 1971); *Enquist v. Quaker Oats Co.*, 327 F. Supp. 347-48 (D. Neb. 1971); *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87, 91-92 (D. Minn. 1971).

¹¹⁰ 33 U.S.C. § 413 (1964).

together and have held that section 17 establishes that Congress authorized criminal prosecution as the sole method of enforcement for the entire Act. A close analysis, however, will show that section 17 has essentially no relevance when looking to section 16 for *qui tam* authorization. Section 17 obviously authorizes the government to prosecute criminally, but the question is whether Congress intended that mode of enforcement to be exclusive, and not simply whether the Government can criminally prosecute.

In *United States v. Griswold*¹¹¹ a situation existed very similar to that under sections 16 and 17. An informer had sued under the Informers Act of March 2, 1863 to recover the penalty proscribed therein.¹¹² In separate sections, the Informers Act established two modes of enforcement, one a criminal prosecution¹¹³ and the other an action by an informer.¹¹⁴ Two other statutes involved in *Griswold*, one of a specific and the other of a general nature, directed each United States District Attorney to be diligent in enforcing the substantive statute¹¹⁵ and to prosecute "all civil actions in which the United States [was] concerned."¹¹⁶ The defendant in *Griswold* moved to vacate the writ of arrest on the grounds that these latter statutes mandated the Federal Government alone to prosecute, to the exclusion of *qui tam* informers. The *Griswold* court held that neither statute could support the inference that criminal prosecutions were the only means of enforcement contemplated.¹¹⁷

The fact that the district attorney is [specifically] required to be diligent to enforce the statute against persons violating it, does not make him the attorney of the United States in that action [Nor] does the [general provision] which makes it the duty of the

¹¹¹ 26 F. Cas. 42 (No. 15,266) (D. Ore. 1877).

¹¹² REV. STAT. §§ 3490-93, 5438, Act of March 2, 1863, ch. 67, §§ 1, 3-6, 12 Stat. 698, *codified as* 31 U.S.C. §§ 231-34 (1964).

¹¹³ REV. STAT. § 5438, Act of March 2, 1863, ch. 67 §§ 1, 3, 12 Stat. 696, 698, *codified as* 31 U.S.C. § 231 (1971).

¹¹⁴ REV. STAT. § 3493, Act of March 2, 1863, ch. 67, § 6, 12 Stat. 698, *repealed by* Act of Dec. 23, 1943, ch. 377, § 2, 57 Stat. 609.

¹¹⁵ REV. STAT. § 3492, Act of March 2, 1863, ch. 67, § 5, 12 Stat. 698, *codified as* 31 U.S.C. § 233 (1971).

¹¹⁶ REV. STAT. § 771 *revised and codified as* 28 U.S.C. 507 (1971). In construing section 771, the court said: "This action is general in terms and necessarily qualified and restrained by the sections above cited, which relate to the commencement and conduct of this particular action." 26 F. Cas. at 44.

¹¹⁷ Responding to defendant's contention that, since the United States was entitled to part of the penalty, and since government attorneys were commanded to prosecute, a private plaintiff could not enforce the statute, the court stated: "[A] *qui tam* action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere with the conduct of it, except as specifically provided by statute" 26 F. Cas. at 44.

"district attorney to prosecute in his district . . . all civil actions in which the United States are concerned," authorize or require him to act as attorney for the plaintiff in this action . . .¹¹⁸

Moreover, because the United States was "concerned" in all *qui tam* actions under federal penal statutes, the court noted that to read provisions authorizing criminal prosecution as authorizing criminal prosecution alone would undercut *qui tam* provisions in general, and this result was completely unsupportable and undesirable.

The similarity between *Griswold* and the Rivers and Harbors situation is compelling. The Informers Act instructed district attorneys "to be diligent in inquiring into *any* violation . . . and to cause violators to be proceeded against," language quite similar to that used in section 17. Thus, in allowing the *qui tam* action, the *Griswold* court laid down an important guiding principle. The court recognized that if a *qui tam* action was authorized, then any other mode of procedure specified was cumulative and did not supercede the civil action. Accordingly, the language of section 17 should be ignored in deciding whether a *qui tam* action is authorized under section 16. The language of section 17 should be treated, under the *Griswold* approach, not as the specification of an exclusive mode of procedure, but a mere legislative direction that criminal prosecutions can be maintained in addition to any other method of enforcement authorized under the Act.

There are other cases where courts have taken language which might imply that a particular mode of procedure was intended and have held that, in fact, no special procedure was intended. Traditional judicial doctrine has been reluctant to give such restrictive readings to the provisions of penal statutes that control the *enforcement* mechanisms, as opposed to the substantive provisions.¹¹⁹ In *Adams, qui tam v. Woods*,¹²⁰ for example, the Court was faced with a statute that provided that each violator would pay "one moiety [of the fine] to the use of the United States, and the other moiety to the use of him or her who shall sue for and prosecute the same."¹²¹ This statute provided no express authorization for criminal proceedings. Nevertheless, Chief Justice Marshall stated that "either debt or information [would lie because] the statute which [created] the

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

¹²⁰ 6 U.S. (2 Cranch) 336 (1805).

¹²¹ Act of March 22, 1794, § 2, 1 Stat. 347. In responding to the plaintiff's argument that the criminal statute of limitations, 1 Stat. 119, did not apply, Chief Justice Marshall commented:

forfeiture [did] not prescribe the [exclusive] mode of demanding it"¹²² The statute in *Adams* is certainly less capable of being read as authorization for several methods of enforcement than are sections 16 and 17. Applying the *Adams* result to the Rivers and Harbors Act, section 17 cannot, a fortiori, limit section 16 and establish the exclusive remedy of criminal proceedings.

In contrast to the traditional doctrine typified by *Griswold* and *Adams*, courts dismissing section 16 *qui tam* actions have typically cited the following proposition: "[E]ven where some statutory language seems to grant a private right of action, if the same or a related statute also clearly places enforcement in the hands of governmental authorities the right of action is exclusively vested in such governmental authority."¹²³ Courts which assert this proposition invariably cite as authority *Williams v. Wells Fargo & Co.*¹²⁴ and *Rosenberg v. Union Iron Works*¹²⁵ and they point to section 17 of the Rivers and Harbors Act as such an explicit vesting of exclusive authority.¹²⁶ A careful analysis leaves no doubt that this approach is spurious.

The proposition of "exclusive vesting" was originally written in *Allen v. Craig*¹²⁷ and, in fact, never specifically appeared in either *Williams* or *Rosenberg*. It is not hard to understand why *Allen* is never cited directly because it deals only with whether a *qui tam* plaintiff must sue in his own name or in the name of the government when none of the recovery is earmarked for his use,¹²⁸ a totally separate issue from whether he can sue at all.¹²⁹ Moreover, a perusal of *Williams* and *Rosenberg* shows that, in both, the situation was far clearer and more precise than that under section 16, as far as deter-

[T]o declare that the information was barred, while the action of debt was left without limitation, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive, if one distinct member of the sentence were expunged from it. 6 U.S. (2 Cranch) at 341.

¹²² 6 U.S. (2 Cranch) at 341.

¹²³ *E.g.*, *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala.), *aff'd* ___ F.2d ___ [3 ERC 1065] (5th Cir. 1971).

¹²⁴ 177 F. 352 (8th Cir. 1910).

¹²⁵ 109 F. 844 (N.D. Cal. 1901).

¹²⁶ *See, e.g.*, *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (S.D. Ala.), *aff'd* ___ F.2d ___ [3 ERC 1065] (5th Cir. 1971). *Reuss v. Moss-Am., Inc.*, 323 F. Supp. 848 (E.D. Wis. 1971).

¹²⁷ 102 Ore. 254, 201 P. 1079 (1921).

¹²⁸ *Id.* at 258-60, 201 P. at 1081.

¹²⁹ *See generally* Annot., 50 AM. ST. REP. 557 (1896).

mining legislative intent is concerned. Consequently, there is no guidance available from these cases for the more equivocal situation under sections 16 and 17.

In *Williams*, one statute provided: "[A]ll penalties and forfeitures imposed for any violation of law affecting the Post Office Department, its revenues or property, shall be recoverable one half to the use of the person informing and prosecuting for the same . . . unless a different disposal is expressly prescribed . . ."¹³⁰ A later statute was passed which mandated that "[t]he Sixth Auditor [of the Treasury] shall superintend the collection of . . . all penalties and forfeitures imposed for any violation of the postal laws . . ."¹³¹ The court in *Williams* had no choice but to obey this clear expression of legislative intent and allow the Auditor alone to act; to allow the civil action would have rendered the entire second statute meaningless.

In *Rosenberg* the statute contained language from which the authority to bring a *qui tam* action could have been inferred. The only language that could have weighed against a *qui tam* action appeared in the concluding sentence of the statute, which stated that "[i]t shall be the duty of the district attorney . . . to prosecute every such suit at the expense of the United States."¹³² But even more important than this inconsistency was an amendment to the statute which read:

[The Secretary of the Treasury shall] pay to an informer who furnishes original information that the law has been violated such share of the penalties recovered as he may deem desirable and just, not exceeding fifty per centum, when it appears that the recovery was had in consequence of the information thus furnished.¹³³

As in *Williams*, the only alternatives open to the court were to dismiss the civil action or to render the amendment meaningless. No interpretation could have rendered the statute and the amendment compatible, but no such situation arises under the Rivers and Harbors Act. *Williams* and *Rosenberg* are completely irrelevant in the present situation because sections 16 and 17 do not present such a simple clash. Section 17 does not become irrelevant if section 16 were read to allow *qui tam* actions because it would still serve as the authorization for the government prosecutions.¹³⁴

¹³⁰ Act of June 8, 1872, ch. 335, 17 Stat. 292, 325 (emphasis added).

¹³¹ REV. STAT. § 292, codified as 31 U.S.C. § 109, repealed by Act of Aug. 17, 1950, ch. 735, § 10(a) (2), 64 Stat. 462 (emphasis added).

¹³² Act of Feb. 26, 1885, § 1, 23 Stat. 332, as amended Act of Oct. 19, 1888, 25 Stat. 565 (emphasis added).

¹³³ Act of Oct. 19, 1888, 25 Stat. 565.

¹³⁴ There is no mandate in section 17 that all or every prosecution be handled by

Rosenberg, in fact, weighs more in favor of *qui tam* proponents than against. Because the amendment in *Rosenberg* was enacted a mere two years before the Rivers and Harbors Act was passed, Congress clearly knew how to differentiate between a reward for information — which some contend is all that the section 16 informer provision authorizes¹³⁵ — and authority to sue. If a reward was all that was intended, it would have been an easy matter to phrase it similar to the statute in *Rosenberg*. Since Congress used the language it did, rather than the *Rosenberg* type of language, the case for *qui tam* actions under section 16 is strengthened.

Thus, there seems to be no legal doctrine supporting the position that section 16 should be read, alone or in conjunction with section 17, as permitting nothing other than criminal proceedings. But the most compelling reason for rejecting this position comes from Supreme Court decisions under the Rivers and Harbors Act which specifically hold that section 16 authorizes more than criminal proceedings. In *Wyandotte Transportation Co. v. United States*¹³⁶ the Government sued for injunctive relief in two cases of libel¹³⁷ arising out of the negligent sinking of vessels in navigable waters in violation of section 10 of the Act.¹³⁸ The defendant contended that section 16 declared criminal prosecution the only acceptable remedy, exclusive of all civil actions. The Court strongly disagreed and wrote:

Petitioner's interpretation of the Rivers and Harbors Act of 1899 would ascribe to Congress an intent at variance with the purpose of that statute. Petitioner's proposal is, moreover, in disharmony with our own prior construction of the Act, with our decisions on analogous issues of statutory construction, and with a major maritime statute of the United States. . . . [O]ur reading of the Act does not lead us to the conclusion that Congress must have intended the [express] statutory remedies and procedures to be exclusive of all others. . . . We therefore hold that the remedies and procedures specified by the Act for the enforcement of section 15 were not intended to be exclusive.¹³⁹

Government prosecution; only the command that where certain specified government officials act as complainants, *see* 33 U.S.C. § 413 (1964), or where public prosecutors act on information provided by the public at large, *see* *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969), then criminal proceedings brought to enforce violations of section 16 must be controlled by the Justice Department.

¹³⁵ *See, e.g.*, *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala.), *aff'd* ___ F.2d ___ [3 ERC 1065] (5th Cir. 1971).

¹³⁶ 389 U.S. 191 (1967).

¹³⁷ *See, e.g.*, *United States v. Cargill, Inc.*, 1964 A.M.C. 1742, *rev'd*, 367 F.2d 971 (1966), *aff'd* 389 U.S. 191 (1967).

¹³⁸ 33 U.S.C. § 409 (1964).

¹³⁹ 389 U.S. at 200-01.

In granting the injunction and allowing a civil action under the Act, the Court summarized the situation and stated that "the inadequacy of the criminal penalties explicitly provided by section 16 of the Rivers and Harbors Act is beyond dispute."¹⁴⁰

It is difficult to understand how the lower courts have been able to boldly state that sections 16 and 17 prescribe criminal proceedings as the sole remedy in the face of such contrary authority. It is also interesting that these courts take the strictest approach (holding that criminal proceedings are the sole authorized remedy), rather than the compromise one (holding that civil actions are allowed, but only when instituted by the Government). The latter approach would no longer be incompatible with *Republic Steel*, but the reason for shunning it in favor of the untenable strict position becomes apparent when one extends the logic of the compromise position. Once it is admitted that civil actions can be brought by the Government, the exclusive-proceedings arguments are completely deflated because they depend upon the preclusion of *all* civil actions. When some civil actions are allowed, the *Jourden* and *Claffin* cases are totally inapposite, and the section 17 argument meets a similar fate. To read section 17 as prohibiting civil actions by citizens can be done consistent with the language of that section only if civil actions by the Government are prohibited as well. The lower courts have apparently realized that their rationales become even more tenuous when they abandon the strictest approach, and they have instead chosen to ignore the statements in *Republic Steel*.¹⁴¹

Thus, section 17 can play no legitimate role in deciding whether section 16 authorizes *qui tam* suits. There is no basis whatsoever for holding that criminal proceedings are deemed exclusive by section 17 and section 16 must be considered alone in looking for the con-

¹⁴⁰ *Id.* at 202. One of the more interesting features of this decision is the concurring opinion of Mr. Justice Harlan who had dissented in all the other major opinions involving the construction of the Rivers and Harbors Act. *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966) (Harlan, J., dissenting); *United States v. Republic Steel Corp.*, 362 U.S. 482, 493 (1960) (Harlan, J., dissenting). In *Wyandotte* Mr. Justice Harlan wrote:

In reaching these conclusions, I have not been unmindful of the view stated by me in dictum in my dissenting opinion in *United States v. Republic Steel Corp.*, 362 U.S. 482, 493, to the effect that the courts are precluded from supplying relief not expressly found in the Rivers and Harbors Act. Insofar as that dictum might be taken to encompass the present case, where, contrary to my view in *Republic Steel*, I do believe that the [injunctive] relief afforded by this Court is fairly to be implied from the statute, candor would compel me to say that the dictum was ill-founded. 389 U.S. at 211.

¹⁴¹ The most obvious anomalies are the recent decisions under the Rivers and Harbors Act.

gressional intent to permit or prohibit *qui tam* actions. Although the *Jourden* and *Clafin* cases are of no legitimate value in ascertaining the congressional intent, the next section will show that well-established methods are available for pursuing this inquiry.

C. *The Rules of Construction Applicable to Section 16*

The foregoing discussion has resolved several important points necessary to a determination of whether a *qui tam* action is authorized under section 16. First, the language used in the section is not indicative of whether or not a *qui tam* action is permitted. In particular, this language — which includes “fine,” and “misdemeanor” — does not support the inference that criminal proceedings alone are authorized. Second, section 17, which relates to government enforcement of the Act, is not germane in considering *qui tam* actions under section 16. And finally, criminal proceedings are not the sole mode of enforcing section 16.

Given these preconditions, there is one particular test that can be used to ascertain the legislative intent under section 16 that is consistent with almost all *qui tam* case law. This test dictates that, if a penal statute (1) imposes a pecuniary penalty, (2) labels the offense less than a felony,¹⁴² (3) allows proceedings other than criminal prosecutions as enforcement mechanisms, and (4) provides that some portion of the recovery goes to an informer, then the informer will be allowed to prosecute an alleged violator in a *qui tam* action to collect his share of the recovery, unless expressly prohibited by statute. One of the more obvious values of this test is the certainty with which it can be applied¹⁴³ and relied upon by legislatures.¹⁴⁴ Applying it to section 16, it is evident that each of the four requirements are satisfied. The following discussion will establish that this test is thoroughly consistent with the general history of the informer action and the legal doctrine surrounding its statutory authorization.

Probably the most obvious feature of this test is its liberal atti-

¹⁴² There is no reason in American law why an offense labeled a felony could not be the subject of a *qui tam* action. But no such case has been uncovered, which simply reflects the tradition that minor offenses were the subjects of *qui tam* actions.

¹⁴³ One of the problems of the decisions dismissing section 16 *qui tam* actions is their clear failure to provide an alternative test that has some degree of predictability. The opinions in these cases generally reflect ad hoc conclusions, unsupported by legal doctrine.

¹⁴⁴ It will be shown in the following discussion that this test antedated the Rivers and Harbors Act. See notes 157-70 *infra* & accompanying text. Consequently, to apply another test would frustrate the effort to elucidate the intent of Congress.

tude towards *qui tam* actions. The test does not require that the legislature expressly authorize *qui tam* actions and, instead, the action is held to be impliedly authorized whenever the several specified conditions are present. This liberal attitude should not be surprising, for it is entirely compatible with general Anglo-American legal doctrines. It is a traditional rule of statutory construction that the *substantive* provisions of penal statutes be narrowly construed,¹⁴⁵ but no such restrictive approach has ever been applied when reading the *enforcement* provisions of penal statutes. The rationale for reading substantive provisions narrowly is simple — to do otherwise and go beyond what is reasonably apparent from the face of a statute is unfair because an individual could not have known before the decision that his conduct was proscribed.¹⁴⁶ But this rationale is inapplicable when considering technical differences in enforcement mechanisms because the substantive provisions alone prescribe which conduct is permitted and which is prohibited. There is no apparent injustice in broadly construing the remedial, or enforcement provisions of a statute because the defendant has, with fair notice, conducted himself outside the laws. A liberal reading of the enforcement provisions is especially unobjectionable, from the defendant's viewpoint, where the only issue is the *type of proceeding* that may be used to collect a pecuniary fine. The *qui tam* question under section 16 is solely whether a citizen can bring suit, in addition to the Government. Allowing a *qui tam* plaintiff to sue would not subject a defendant to any kind of punishment to which he is not otherwise subject.

Throughout its development, the *qui tam* mode of enforcing penal statutes has been an important adjunct of criminal law,¹⁴⁷ and it is incumbent upon the courts to recognize this historical relationship in construing enforcement provisions. Every reasonable presumption in favor of an efficacious method of enforcement is imperative if the substantive provisions of penal statutes are to be of the value intended by the legislatures. This liberal interpretative ap-

¹⁴⁵ See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

Even when not dealing with penal statutes, the courts have been careful to decide *substantive* issues in a way that does not create "unfair surprise." A classic illustration of such an approach to primary duties is found in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902). This same rationale is behind the principle that substantive statutory enactments are prospective whereas procedural ones are retroactive.

¹⁴⁶ As such, the principle of narrowly construing substantive provisions is arguably a requirement of due process. Cf. *Cardiff v. United States*, 344 U.S. 174 (1952).

¹⁴⁷ See notes 18-31 *supra* & accompanying text.

proach has been widely accepted in *qui tam* actions, as will be shown below, if only because a more restrictive one would be less compatible with the apparent legislative intent.

Throughout the legal history of the United States, courts and commentators have suggested that a *qui tam* action is impliedly authorized by the mere mention of an informer in a proper penal statute¹⁴⁸ when coupled with the failure of the legislature to restrict enforcement to criminal prosecution.¹⁴⁹ The most recent enunciation of this doctrine by the United States Supreme Court is contained in Justice Black's opinion for the Court in *United States ex rel. Marcus v. Hess*.¹⁵⁰ *Marcus* involved a suit by an informer to recover penalties for the alleged violation of the Federal False Claims Act.¹⁵¹ In both *Marcus* and a companion case,¹⁵² the Government had previously investigated the activities of the respective respondents and indicted them for conspiracy to defraud the United States. The respondents chose not to contest the averments in the complaint and pleaded *nolo contendere*, resulting in the imposition of heavy fines. While these criminal actions were still pending, the petitioner and several others commenced *qui tam* actions in which the allegations in their complaints were substantially copies of the Government's criminal indictments. A hostile appellate court held that the defendant could not be prosecuted in a civil action by an informer who had done no more than copy a criminal indictment, even though the defendant had concededly defrauded the government.¹⁵³ The appellate court went on to support its conclusion by stating that *qui tam* actions had "always been regarded with disfavor" by the courts.¹⁵⁴ The Supreme Court reversed, holding that it could not "accept either the interpretative approach or the actual decision of the court below."¹⁵⁵ After noting that *qui tam* actions were in fact an important part of America's legal heritage, and were not the object of opprobrium by the judiciary, Justice Black stated the inter-

¹⁴⁸ A "proper" penal statute is used here simply to mean one which meets the other criteria listed above. See notes 53-71 *supra* & accompanying text.

¹⁴⁹ In England, Parliament resorted to simply interjecting the word "informer" into statutes to indicate that *qui tam* actions were allowed — rather than explicitly stating that such an action could be brought. See 2 L. RADZINOWICZ *supra* note 12, at 146 n.49.

¹⁵⁰ 317 U.S. 537 (1943).

¹⁵¹ 31 U.S.C. §§ 231-34 (1964).

¹⁵² *United States ex rel. Ostrager v. Associates Gen. Contractors, Inc.*, 317 U.S. 562 (1943) (affirmed on the basis of *Marcus*).

¹⁵³ 127 F.2d 233 (1942).

¹⁵⁴ *Id.* at 235.

¹⁵⁵ 317 U.S. at 541.

pretative approach that should be used in determining whether informer's actions are authorized under a particular statute: "Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue . . ." ¹⁵⁶ This statement clearly recognizes the presumption in favor of allowing the *qui tam* mode of procedure to enforce a penal statute; a presumption that stands unless the legislature clearly specifies that *qui tam* actions are not permissible means of enforcement.

Further evidence of the favorable judicial attitude towards *qui tam* actions is found well before passage of the Rivers and Harbors Act, in *Adams, qui tam v. Woods*.¹⁵⁷ The informer in *Adams* charged the defendant with violating a statute which provided that every violator would "forfeit and pay the sum of \$2,000, one moiety thereof to the use of the United States, and the other moiety to the use of him or her who shall sue for and prosecute the same."¹⁵⁸ The defendant argued that the criminal statute of limitations was applicable because either criminal or civil prosecution could arise under the provision involved. Chief Justice Marshall agreed with the defendant, stating that "[a]lmost every fine or forfeiture under a penal statute may be recovered by an action of debt, as well as by information In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently either debt or information would lie."¹⁵⁹

Some of the recent decisions under the Rivers and Harbors Act have erroneously assessed Chief Justice Marshall's comment, holding that it is mere dictum because the statute clearly prescribed a mode of civil prosecution and the instant proceeding was a civil *qui tam* action.¹⁶⁰ But in order to hold the criminal statute of limitations applicable in *Adams*, the Court had to infer that criminal prosecution was a possible remedy. By stating that no particular remedy had been prescribed, the Chief Justice was pointing to the crucial dis-

¹⁵⁶ *Id.* at 541 n.4. The specific holding of *Marcus*, that the mere copying of a previously filed government indictment was sufficient to grant the informer a right to sue, was reversed in 1943 by the enactment of 31 U.S.C. § 232(E)(1). See *Bayarsky v. Brooks*, 110 F. Supp. 175 (1953), *aff'd* 210 F.2d 257 (1954).

¹⁵⁷ 6 U.S. (2 Cranch) 336 (1805).

¹⁵⁸ Act of March 22, 1794, § 2, 1 Stat. 347. (An Act to prohibit the carrying on of the slave trade from the United States to any foreign place or country).

¹⁵⁹ 6 U.S. (2 Cranch) at 341.

¹⁶⁰ See, e.g., *Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 306 (S.D. Tex. 1971); *accord*, *United States ex rel. Matson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971).

inction between a statute which suggests a mode of prosecution and a statute which the legislature intended could only be enforced by the suggested mode of prosecution. In the former instance, either criminal or civil prosecution is authorized; in the latter, only the mode particularly stated may be pursued. The point alluded to by the Chief Justice is that in the vast majority of cases the difference is found only in the intent behind the language used. Recognizing the difficulty involved in discovering that intent, the *Adams* Court stated the simple and general rule that almost every fine or forfeiture under a penal statute was recoverable by a civil action of debt, as well as by a criminal prosecution — thus holding that the two alternative methods of enforcement (criminal prosecutions and *qui tam* actions) were presumed to coexist.

Stocking v. United States,¹⁶¹ decided near the time of passage of the Rivers and Harbors Act, provides another illustration of the judicial inclination to allow *qui tam* actions as a mode of enforcing penal statutes. In *Stocking* the United States had proceeded by indictment against the defendant for allegedly violating an act prohibiting reentry into Indian territory after removal had been ordered.¹⁶² The enforcement provision provided that "all penalties which shall accrue under this act shall be sued for and recovered in an action of debt in the name of the United States . . . one half to the use of the informer, and the other half to the use of the United States . . ." ¹⁶³ The defendant argued that an indictment would not lie because an action of debt was the only expressly authorized mode of procedure. But the court disagreed since Congress had not *expressly* excluded criminal prosecution as a mode of enforcement. The *Stocking* court discussed the test used to ascertain whether *qui tam* actions are authorized under particular statutes and concluded:

Under the provisions of [the enforcement section], an informer is entitled to one-half of the penalty sued for . . . Any words of a statute which show that a part of the penalty named therein shall be for the use of an informer will entitle him to maintain an action therefor. . . . While there is no express provision of the Revised statutes . . . which gives an informer any part of the penalties [provided], the provisions of [the enforcement section] impliedly give him one-half of the said penalties. . . . [Thus] this section gives him . . . the right to sue therefor in the name of the United States.¹⁶⁴

¹⁶¹ 87 F. 857 (D. Mont. 1898).

¹⁶² Act of June 30, 1834, § 10, 4 Stat. 730, as amended Act of August 18, 1856, § 2, 11 Stat. 80.

¹⁶³ Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733.

¹⁶⁴ 87 F. 861-62.

The *Stocking* decision held that the provision providing for a moiety to the informer — which is remarkably similar to the language of section 16 — impliedly created the right to sue in a *qui tam* action. *Chicago & Alton Railway Co. v. Howard*¹⁶⁵ serves as a final useful illustration of the presumption in favor of *qui tam* actions, because here again the sole indication in the statute that *qui tam* actions were authorized was the mention that the informer would receive one-half of the penalty.¹⁶⁶ To read penal statutes in a way that makes them as efficacious as possible, and hence to give them the effect most likely intended by the legislatures, the courts have almost without exception followed this liberal attitude in allowing the *qui tam* mode of enforcement.

Nowhere is this presumption in favor of *qui tam* actions better evidenced than in a compendium of the case law made over 50 years ago.¹⁶⁷ The author concluded that an informer could bring a *qui tam* action in his own name to recover a statutory penalty, unless the statute expressly prohibited him from doing so; otherwise the penalty could be sued for only by the state.¹⁶⁸ The author went on to discuss contrary authorities, several of which have been used in recent decisions dismissing *qui tam* actions under the Rivers and Harbors Act:¹⁶⁹

In some jurisdictions, the courts, relying upon common-law cases, adhere to the common-law rule, that a common informer cannot maintain an action *qui tam* to recover a penalty, unless express power is given to him for that purpose, by the statute . . . [T]hese cases are contrary to the general rule.¹⁷⁰

Thus, both the case law and the commentators generally support the rule stated above — that *qui tam* actions are allowed if part of a pecuniary penalty is specified for an informer, unless the statute expressly prohibits this method of enforcement. The development of this liberal rule is not surprising because of the attitude towards remedial and enforcement provisions that prevails throughout American law. But even were this rule not a statement of the general law, there are cogent reasons why it would at least apply in inter-

¹⁶⁵ 38 Ill. 414 (1865).

¹⁶⁶ Ill. Act of November 5, 1849, § 38.

¹⁶⁷ Annot., *supra* note 129.

¹⁶⁸ *Id.* at 558.

¹⁶⁹ See, e.g., *United States ex rel. Mattson v. Northwest Paper Co.*, 327 F. Supp. 87 (D. Minn. 1971).

¹⁷⁰ Annot., *supra* note 129, at 558. For cases improperly using the rule, see *McDaniel v. Gate City Gas Light Co.*, 79 Ga. 58 (1887); *Smith v. Look*, 108 Mass. 139 (1871).

preting section 16 of the Rivers and Harbors Act. First, the Supreme Court has consistently made an expansive, liberal interpretation of the Act's enforcement provisions, holding that such an approach is necessary to effectuate its substantive purposes. And second, because of the nature of its substantive provisions and the enforcement problems under the Act, it is a perfect example of the kind of law which Parliament and the American legislatures have deemed enforceable by common informers. Consequently, a liberal attitude towards *qui tam* actions under section 16 is especially likely to reflect Congress' intent, and is especially unlikely to effect injustices or thwart the intended scheme of enforcement.

The history of the Rivers and Harbors Act is dominated by broad construction of all its provisions. In 1966 the Supreme Court indicated its attitude towards the Act in *United States v. Standard Oil Co.*¹⁷¹ when it stated:

This case comes to us at a time in the nation's history when there is greater concern than ever over pollution — one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe Section 13 of the Rivers and Harbors Act in a vacuum. Nor can we read it as Baron Parke would read a pleading.¹⁷²

Thus, the Supreme Court has noted the obvious environmental problems in the nation and has declared that the Rivers and Harbors Act is going to be read liberally, enabling it to become one vehicle to deal with these problems. In every instance in the last decade where the Court has been asked to narrowly construe the Act, it has refused.¹⁷³

In particular, the Court has expanded the enforcement mechanisms well beyond criminal prosecution, which is the only mechanism expressly authorized in the Act. Enforcement mechanisms will be provided when they are appropriate and are suggested by the Act, even if not clearly provided for in the Act. In the words of the

¹⁷¹ 384 U.S. 224 (1966).

¹⁷² *Id.* at 225-26.

¹⁷³ The treatment of the Rivers and Harbors Act by federal courts is detailed in Note, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 58 CAL. L. REV. 1444 (1971); Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U.L. REV. 304 (1971); Tripp & Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALBANY L. REV. 60 (1970).

Court, "Congress has legislated and made its purpose clear; it has provided enough federal law [in the Act] from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation."¹⁷⁴ Taking Justice Holmes' philosophy of an earlier age that a "river is more than an amenity, it is a treasure,"¹⁷⁵ the Court has time and again admonished that the Act must be read "charitably in light of the purpose to be served."¹⁷⁶

Given the Court's liberal attitude towards the Rivers and Harbors Act, one could cogently argue that *qui tam* actions are justified under section 16, irrespective of the rule of construction that favors the authorization of informers' actions. In effect, the Act has been read to allow a particular enforcement mechanism if it is an efficacious way of carrying out the substantive provisions, and if the text of the Act infers that such a mechanism might have been within the intent of Congress. Obviously, this approach would allow *qui tam* actions under section 16. The textual references are sufficient to support an inference that Congress' intent was such, and the efficacy of the *qui tam* mode of enforcement in the kind of substantive areas regulated by the Rivers and Harbors Act is unquestionable.

Qui tam actions arose because official forces were inadequate to detect and prosecute certain statutory violations and because the executive was indifferent towards enforcement of certain statutes. Informer actions were particularly salutary when the violations were minor and not easily detectable by normal police activity.¹⁷⁷ Each of these difficulties clearly pertains under the Rivers and Harbors Act. Among the primary purposes of the Act was the goal of maintaining unobstructed waterways, which in turn would allow the free use of rivers for transportation.¹⁷⁸ Today, the Act has evolved largely into an anti-pollution law,¹⁷⁹ but in either case, the reasons for allowing *qui tam* actions are compelling. The offenses are usually minor, in comparison to crimes of physical violence, and the police and prosecutorial staffs are presently reluctant to allocate much of

¹⁷⁴ *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960).

¹⁷⁵ *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

¹⁷⁶ *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966); *accord*, *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960).

¹⁷⁷ See notes 18-31 *supra* & accompanying text.

¹⁷⁸ This purpose is evident throughout the Act by the very language used. For example section 13 prohibits certain activities "whereby navigation shall or may be impeded or obstructed . . ." 33 U.S.C. § 407 (1964).

¹⁷⁹ See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967). See also materials cited in note 8 *supra*.

their time or resources to such problems.¹⁸⁰ In addition, the stated policy of the executive branch is one of blatant apathy¹⁸¹ despite a Congressional mandate to "vigorously prosecute all offenders . . ." ¹⁸² It is precisely these difficulties that *qui tam* actions were designed to remedy.

Thus, whatever approach is taken, section 16 should be read to allow *qui tam* actions. The courts, for a variety of reasons, have generally applied a liberal test in deciding whether a particular statute authorizes *qui tam* actions. This test leads immediately to the conclusion that an informer action is appropriate under the Rivers and Harbors Act. As in the general case, the application of this test under section 16 provides the most reasonable mechanisms to enforce the substantive aspects of the Act, thus ensuring that the purposes of Congress are carried out. Moreover, the liberal approach raises no possibility of injustice because the *qui tam* issue is solely one of who can bring suit, and not one of new substantive liabilities or obligations. But notwithstanding this rule that allows *qui tam* actions that seem impliedly authorized by a statute, but are not expressly authorized, the Supreme Court's decisions under the Rivers and Harbors Act require the same result. The *qui tam* method of enforcement is an efficacious, if not absolutely necessary method of enforcing the substantive provisions of the Act. Thus, applying the Court's traditionally permissive reading of this law to the practicalities of the situation, it again seems that the inference in section 16 should be read liberally to allow the actions to be maintained.

IV. DECISIONS IN THE COURTS

Every argument that has been raised in the recent Rivers and Harbors decisions has been analyzed in detail in the preceding sections. Accordingly, there would be no value in scrutinizing each of the cases individually in order to show where they fail. Instead, this section of the Note will briefly comment on a few of the deci-

¹⁸⁰ An excellent discussion of the role of the police in society is contained in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967). See also Address by Attorney General John Mitchell, Attorney General's Conference On Crime Reduction in Washington, D.C., Sept. 9, 1971.

¹⁸¹ See note 11 *supra*. It is especially important to note the political favoritism that has characterized the Executive's enforcement of the Act. See Cleveland Press, Feb. 12, 1971, § G, at 8, col. 1. Such flagrantly discriminatory behavior would seem to create an even stronger case for *qui tam* actions than a practice of complete non-enforcement.

¹⁸² 33 U.S.C. § 413 (1964).

sions; for the most part, the reasoning in the other cases offers nothing that is not illustrated by these examples.

On July 9, 1970, Marvin B. Durning and his wife filed the first *qui tam* action of record under section 16 of the Rivers and Harbors Act.¹⁸³ The complaint alleged that the defendant was responsible for continuous discharges of waste material from its Port Angeles Mill into navigable water of the United States in violation of section 13 of the Act. Defendant, I.T.T. Rayonier, Inc., moved for dismissal of the action contending that the plaintiff had failed to state a claim upon which relief could be granted. In perhaps the shallowest decision rendered on the subject, Judge Goodwin granted the defendant's motion in a short memorandum opinion, finding that the plaintiffs had no standing to sue. Judge Goodwin read section 16 as authorizing solely criminal prosecutions:

This Court concludes that Congress in enacting this criminal statute intended to reward an informant for information leading to the conviction of a wrongdoer and not to provide a means by which an informant may proceed to recover against the violator of the criminal statute the amount he might otherwise receive from a fine which "might" be imposed after conviction of the defendant in a criminal proceeding.¹⁸⁴

In the first place, the court cited no authority whatsoever for this conclusion. It did not mention *Marcus*, which was cited in both briefs,¹⁸⁵ nor any other authority which discussed the nature of *qui tam* actions. The court did not even bother to explain why it thought the statute was solely criminal. By initially assuming that the statute was criminal and not penal, the court restricted itself to the holding that public prosecution was the sole method of enforcement.

Other aspects of the *Durning* opinion show no better analysis of the *qui tam* problem. For example, the court observed:

If plaintiff's contention is correct, the Court would be in the awkward position of determining priority between a criminal prosecu-

¹⁸³ *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970).

¹⁸⁴ *Id.* at 447. Judge Goodwin's emphasis on the word "might" in the quoted passage implies that the phrase "in the discretion of the court" in section 16 may modify the clause following it, which provides for the moiety to the informer, rather than the clause preceding it, which provides for a fine, imprisonment or both. This contention, contrary to both common sense and the rules of legislative interpretation, was deemed erroneous in *United States v. St. Regis Paper Co.*, ___ F. Supp. ___ (W.D. Wis. 1971). See 33 C.F.R. § 209.170(f) (2) (Comp. 1971).

¹⁸⁵ See Plaintiff's Memorandum in Support of Complaint and in Opposition to Motion to Dismiss at 4, 8, 16, 19 and Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss Action at 6, *Durning v. ITT Rayonier, Inc.*, 325 F. Supp. 446 (W.D. Wash. 1970).

tion by the United States through the United States Attorney and a civil suit under the same section by an informant. It would be unreasonable to conclude that a Court would entertain both actions simultaneously or consecutively.¹⁸⁶

This statement typifies the general lack of knowledge which has characterized the *qui tam* decisions under section 16. A full understanding of *qui tam* actions leaves no room for such fear of interference between the Government and private plaintiffs. First, the *Durning* position ignores the settled mechanics of *qui tam* actions. "[T]he rule of law is, and the practice has always been, that a *qui tam* action is the action of the party who brings it, and the sovereign, however much concerned in the result of it, has no right to interfere with the conduct of it, except as specially provided by statute."¹⁸⁷ Second, the potential for interference is irrelevant to the issue to be decided — which is whether Congress intended to authorize *qui tam* actions. And in any case, the problem is wholly illusory in actual practice. The Justice Department guidelines outlining the official policy for prosecution under the Act state that "United States Attorneys should take no position with respect to, or seek to intervene or appear as *amicus curiae*, in any *qui tam* action which may be brought under the supposed authority of the Refuse Act."¹⁸⁸ Thus, the Justice Department has adopted a hands-off policy with respect to citizens' *qui tam* actions. Apparently the Government does not envision that *qui tam* actions will hamper its "plans" to prosecute. Moreover, the proper government officials have been informed of the alleged violations in almost all the cases and have refused to act. For example, Mr. Durning had submitted the information he eventually used in his suit to the Seattle District Attorney several months earlier, but the Government failed to prosecute.¹⁸⁹ Third, and perhaps most important, the fear of interference expressed by the *Durning* court could be used just as easily to deny *qui tam* actions even if the legislature clearly authorized their use. This untenable conclusion proves the fallacy of the *Durning* rationale. The only ques-

¹⁸⁶ 325 F. Supp. at 447.

¹⁸⁷ *United States v. Griswold*, 26 F. Cas. 42, 44 (No. 15,266) (D. Ore. 1877).

¹⁸⁸ Guidelines for Litigation Under the Refuse Act, reprinted in 1 BNA ENVIRON. REP., Current Devs. 288-90 (July 17, 1970).

¹⁸⁹ Plaintiff had revealed all the evidence regarding defendant's alleged violations of the Act as early as April, 1970. *Seattle Post-Intelligence*, April 14, 1970, at 1, col. 2. Federal authorities often react slowly to information provided by *qui tam* plaintiffs. See, e.g., Plaintiff's Complaint at 8, app., *Jacklovich v. Interlake, Inc.*, Civil No. 70-C-2905 (N.D. Ill., filed Nov. 28, 1970), wherein the plaintiff maintains that he had informed officials of the defendant's alleged violation over one year prior to the initiation of his informer action.

tion before the court was whether section 16 of the Rivers and Harbors Act was a penal statute which impliedly authorized suit by an informer.¹⁹⁰

The decisions following *Durning* have failed in similar ways to analyze *qui tam* theory. For example, in *Bass Anglers Sportsman's Society v. United States Steel Corp.*,¹⁹¹ the court found that "section [13] established a crime and section [16] established criminal sanctions to be imposed for its violation," and that "criminal statutes cannot be enforced by civil actions."¹⁹² Although at first glance the court seems to have met the issue, it must be remembered that no one contends that criminal actions are not allowed by the statute, nor that criminal statutes can be enforced by civil actions. The questions are whether, in addition to possible criminal prosecution, civil actions can be brought under the Rivers and Harbors Act and whether section 16 is a penal statute. The Alabama *Bass Anglers* court did not say that criminal prosecution was the sole method of enforcement, a fact which would have indicated an understanding of the issue. Instead, the opinion elaborated on the problem in a fashion that shows only confusion about the nature of a penal statute. For example, it spoke of the penalty as a "criminal fine" and asserted that only "civil penalties or forfeitures" could be collected by a *qui tam* action.¹⁹³ But it has been shown that this proposition is completely inapposite to a resolution of the question.¹⁹⁴ Moreover, this statement is simply incorrect. The historical relationship between *qui tam* actions and criminal law — specifically crimes labeled misdemeanors — establishes that fines were definitely recoverable by this action.¹⁹⁵ And finally, like the court in *Durning*, the *Bass Anglers* court ignored *United States ex rel. Marcus v. Hess*.¹⁹⁶ *Bass Anglers* relied instead on the untenable argument that section 17 specifies a sole mode of procedure.¹⁹⁷

In another case brought by the Bass Anglers Society, the opinion did mention the *Marcus* decision.¹⁹⁸ But the court felt unrestrained

¹⁹⁰ See 325 F. Supp. at 447.

¹⁹¹ 324 F. Supp. 412 (S.D. Ala.), *aff'd* ___ F.2d ___ [3 ERC 1065] (5th Cir. 1971).

¹⁹² *Id.* at 415.

¹⁹³ *Id.*

¹⁹⁴ See notes 80-93 *supra* & accompanying text.

¹⁹⁵ See notes 18-31 *supra* & accompanying text.

¹⁹⁶ 317 U.S. 537 (1943).

¹⁹⁷ 324 F. Supp. at 416.

¹⁹⁸ *Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 305-06 (S.D. Tex. 1971).

by Justice Black's statement and held that the *Marcus* test would apply in certain circumstances, but not in construing section 16 of the Rivers and Harbors Act. Neither legal authority nor convincing reasoning was given to justify this ad hoc limitation of *Marcus*. Like its predecessors, the court relied solely on an inference that section 17 specified an exclusive mode of procedure.¹⁹⁹

V. CONCLUSION

None of the cases which have dismissed *qui tam* actions under the Rivers and Harbors Act is sufficiently well-reasoned to finally dispose of the *qui tam* issue. Each opinion has committed one or more of the errors discussed in this Note. Perhaps because of the expansive reading already given to the Rivers and Harbors Act, or perhaps because of the fear of permitting what is today a relatively uncommon form of action, the lower federal courts have been wary of giving the Act additional impact in areas of environmental concern. Nevertheless, there are compelling reasons, founded upon general legal doctrine, policy, and Supreme Court decisions under the Rivers and Harbors Act which seem to require that section 16 be read to allow *qui tam* actions.

The Rivers and Harbors Act is precisely the kind of statute that *qui tam* actions were most commonly used to enforce. The *qui tam* action, with roots deep in Anglo-Saxon criminal law, was generally used to enforce violations of laws dealing with minor, hard-to-detect offenses, such as trade or commerce violations, which were often misdemeanors. The *qui tam* action was used as an alternative mode of enforcement to criminal prosecution in order to compensate for the inability or unwillingness of public officials to properly enforce laws which the legislature had passed. The Rivers and Harbors Act is designed to protect trade and commerce and to prevent pollution. It makes violation of the Act a misdemeanor, and is only selectively and sporadically enforced by a Justice Department which does not have the staff or funds to monitor violators, on the one hand, and on the other is largely unwilling to enforce its provisions. The Act meets all the requirements necessary to find a *qui tam* action: it is a penal statute; it punishes offenses which wrong the public and it does not correlate the recovery to the amount of damages wrought by the violation, as does a remedial statute; and the offense is labeled a misdemeanor. The clause giving a moiety to informers appears only in section 16 although the Act has several other enforce-

¹⁹⁹ *Id.* at 305.

ment provisions. And finally, *qui tam* actions have been implied under statutes worded similarly to section 16.

The fact that the Rivers and Harbors Act can be enforced by criminal prosecution is not dispositive of whether it can be enforced by any other mode of procedure. The traditional test used to ascertain legislative intent, as stated in *United States ex rel. Marcus v. Hess*,²⁰⁰ clearly would allow a *qui tam* action to be implied under section 16 since the informer is not expressly prohibited from bringing suit. Moreover, section 17 does not cloud the inference that *qui tam* actions are authorized under the preceding section. More than what appears in section 17 is required before it could be held that only a single mode of procedure is authorized. This section does not encompass "all" or "every" action brought under the statute and, in fact, is virtually identical to the statute in *United States v. Griswold* which was held not to specify an exclusive mode of procedure.²⁰¹ In cases that have allowed only one mode of procedure, there was no logical way to read the provisions involved harmoniously and still allow alternative modes.²⁰² But sections 16 and 17 can be read harmoniously if the former is read as authorizing civil and the latter as referring only to criminal prosecution.

Aside from the legal requirements for *qui tam* actions and the theory under which they can be implied, the Supreme Court has invariably read the Rivers and Harbors Act broadly and has refused every attempt to limit its application, scope, or effectiveness. In expanding the ambit of the Act, the Court has done so in every instance on the premise that a liberal reading was necessary to the effective fulfillment of the purpose of protecting the environment. The Court has particularly noted, in this connection, the inherent weakness of the criminal penalties provided in the Act and has authorized injunctive relief, though not expressly granted by any of its provisions. The approach of the Court in both expanding the Rivers and Harbors Act and in favoring the use of *qui tam* actions, coupled with the solid legal base from which the authority for such actions are implied, clearly justify a finding that *qui tam* proceedings are compatible with the language and the purpose of the Act.

Finally, apart from the legal rationales that support *qui tam* actions under section 16, there are persuasive policy reasons that weigh

²⁰⁰ 317 U.S. 537 (1943).

²⁰¹ 26 F. Cas. 42, 44 (No. 15,266) (D. Ore. 1877).

²⁰² See, e.g., *Williams v. Wells Fargo & Express Co.*, 177 F. 352 (8th Cir. 1910); *Rosenberg v. Union Iron Works*, 109 F. 844 (N.D. Cal. 1901).

in favor of the same conclusion. Recent years have seen an increasing awareness within the judiciary of both the problems of pollution and the need for members of society to participate in the solutions to those problems. Far-thinking legislators and capable jurists have voiced concern over the hiatus between modern government and the governed and have advocated whole-hearted and responsible citizen involvement in areas directly concerning them.²⁰³ Few areas are of such direct and immediate concern to such a large number of people as the environment. Many states²⁰⁴ and the Federal Government²⁰⁵ have enacted, or are considering, a number of bills designed to enhance the participation of the citizenry in the decisions of government concerning pollution control. Many courts have also recognized the need for private actions to offset government recalcitrance, ineffectiveness or incapacity and, accordingly, have allowed for an increase in the role of the individual in matters of environmental concern. Particularly notable is the willingness of modern courts to entertain far-reaching new legal theories and to allow citizens to act as private attorneys general to enforce the policies of anti-pollution statutes.²⁰⁶ To accomplish these ends, courts have used varying rationales, often taking great liberties with traditional concepts. The notions of standing, for example, have

²⁰³ See, e.g., J. SAX, DEFENDING THE ENVIRONMENT, A STRATEGY FOR CITIZEN ACTION *passim* (Introduction by Sen. G. McGovern); *Hearings on the Refuse Act Permit Program Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 7, 1-219 (1971).

²⁰⁴ Statutes allowing suits by individuals and groups to protect the environment have been introduced in Massachusetts, New York, Colorado, Pennsylvania, Tennessee, Michigan, and Ohio. *Hearings on S. 3575 Before the Subcomm. of Energy, Natural Resources, and the Environment of the Senate Comm. on Commerce*, 91st Cong., 2d Sess., ser. 80, at 9 (1971) (Statement by Sen. G. McGovern).

²⁰⁵ See S. 3575, 91st Cong., 2d Sess., (1971) (Introduced by Senators Phillip Hart and George McGovern) ("An Act to Promote and Protect the Free Flow of Interstate Commerce Without Unreasonable Damage to the Environment, To Assure that Activities which Affect Interstate Commerce will not Unreasonably Injure Environmental Rights; To Provide A Right of Action For Relief For Protection of the Environment From Unreasonable Infringement By Activities Which Affect Interstate Commerce, And to Establish the Right of All Citizens to the Protection, Preservation, and Enforcement of the Environment."); H.R. 16436, 91st Cong., 2d Sess. (1971) (Introduced by Rep. Morris Udall; reintroduced in the 92d Cong. as S. 1032). Letter from Leonard Bickwit, Jr., a copy of which is on file at the *Case Western Reserve Law Review* Office. Congressman Michael J. Harrington has introduced several bills to strengthen the Rivers and Harbors Act, one of which would amend the Act to expressly allow citizen *qui tam* actions and to increase the pecuniary penalties which would be recoverable thereby. 1 BNA ENVIRON. REP., Current Devs. 368-69 (1971).

²⁰⁶ See, e.g., Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

been greatly expanded to include a much larger class of aggrieved persons.²⁰⁷

The federal government, through a series of political machinations, has evinced a consistent and unrelenting refusal to enforce the Rivers and Harbors Act effectively and has stated its intention to hamper or dissuade attempts to effectively enforce the Act. The Justice Department has gone so far as to publish guidelines stating when and against whom the Act was to be selectively enforced and has exempted those most obviously guilty from the possibility of prosecution. In its latest attempt, the Justice Department, in league with a White House largely strangled by corporate interests, has announced an ingenuous program whereby the nations' polluters are to submit applications for permits under the Act, rather than be prosecuted, supposedly in order that their rape of the environment might be monitored and eventually controlled.²⁰⁸ But there is little evidence that this questionable program has prodded big business to even bother to apply for a permit, the bare minimum which would exempt them from prosecution.²⁰⁹ From experience, the corporations have no reason to fear that the Act will be exercised against them by the Government.

The attempts in the legislatures to enact statutes providing for citizen involvement in the protection of the environment illustrate that many view individual participation in the law as welcome, at least in the area of pollution. Many leaders have recognized that this is a time in history when men's juices boil over the assaults by a few on their homes and surroundings. The failure of the administration to harness and channel the great resource of human energy offered by friends of the environment deserves the disrespect of all. Citizens have continually expressed a willingness to shoulder the fallen burden and to help in every way to save our resources from destruction. Under the Rivers and Harbors Act, it is up to the judiciary, through reasonable legal analysis and sensitive construction, to provide a vehicle for fulfilling this goal.

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²⁰⁷ See, e.g., Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 734 (1970); Willner, *Who Has Standing in Oregon to Defend the Environment?*, 1 ENVIRON. LAW 44 (1970).

²⁰⁸ See the authorities cited in note 11 *supra*.

²⁰⁹ As of July 14, 1971, two weeks after the official deadline, less than 15,000 applications had been received by the Corps of Engineers. 1 BNA ENVIRON. REP., Current Devs. 303, 455 (1971). The Corps had expected, at a minimum, approximately three times this number on the basis of the number of companies who operate in violation of the Act.