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THE ADMINISTRATIVE CRIME, ITS CREATION AND PUNISHMENT BY ADMINISTRATIVE AGENCIES

*Edmund H. Schwenk**

THE application of the penal sanction in the field of administrative law involves mainly three problems: (1) the constitutionality of a statute which authorizes an administrative agency to issue rules and regulations enforceable by punishment and thus to create certain elements of crime; (2) the constitutionality of a statute which authorizes an administrative agency to create the penalty for the violation of its rules and regulations; and (3) the constitutionality of a statute which authorizes an administrative agency to impose a penalty upon the delinquent. Even if the first problem can be answered in the affirmative, two questions still remain: (a) what is the standard under which the legislature may authorize an administrative agency to create elements of crime? and (b) how far will the courts go in their scrutiny as to whether or not the administrative agency is authorized to issue the rules or regulations in a case where they are enforceable by punishment?

I

POWER OF ADMINISTRATIVE AGENCIES TO DECLARE AN ACT A CRIMINAL OFFENSE

A. Power to Create Elements of a Criminal Offense

1. Constitutional Problem of Delegation of Power

It has been maintained again and again¹ that the creation of a crime is an "exclusive" function of the legislature, and that, consequently, it cannot be delegated to an administrative agency. Since a crime consists of one or several elements as well as of the penalty, it would follow from this theory that the legislature can delegate neither the power of

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¹ *United States v. Matthews*, (D.C. Wash. 1906) 146 F. 306; *United States v. Louisville & N. R.R.*, (D.C. Ala. 1910) 176 F. 942; *Ex parte Cox*, 63 Cal. 21 (1883); *Dent v. United States*, 8 Ariz. 138, 71 P. 920 (1903); *In re Peppers*, 189 Cal. 682, 209 P. 896 (1922); *Stephensen v. Wood*, (Tex. Civ. App. 1930) 35 S.W. (2d) 794, certified questions answered 119 Tex. 564, 34 S.W. (2d) 246 (1931); *Feeman v. State*, 131 Ohio St. 85, 1 N.E. (2d) 620 (1936) (dictum); *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939), discussed in 14 *TULANE L. REV.* 291 (1940), 9 *FORD. L. REV.* 275 (1940).

creating the elements of crime nor that of prescribing the penalty. Is the power of creating a crime, in fact, an "exclusive" function of the legislature?

Undoubtedly, there is some basis for the theory that this function is "exclusively" vested in the legislature. One must not forget that not so long ago federal rules and regulations were not required to be published in an official register² and that in the states the publication of the rules and regulations is still not necessary.³ As a result, the public does not or even cannot know what rules are in force at any particular time.⁴ In addition, most, if not all, the regulations enforceable by punishment constitute "public welfare offenses" so that they do not require "mens rea."⁵ But even though they were not "public welfare offenses," knowledge of the punishability would not be an element of mens rea.⁶

There is another consideration which might also have supported the theory that the power of creating a crime is "exclusively" legislative. The power of creating either the elements or the penalty of a crime results in more serious consequences for the individual than the power to issue rules and regulations which are vested merely with civil or administrative liability. As the Supreme Court in the state of New York put it:⁷

² GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 263 (1940).

³ *Id.*; ANDREWS, *ADMINISTRATIVE LABOR LEGISLATION* 103-107 (1936); Jaffe, "Publication of Administrative Rules and Orders," 24 *A.B.A.J.* 393 at 397 (1938).

⁴ See Witte, "A Break for the Citizen," 9 *STATE GOVT.* 73 (1936); Carr, "Ignorance of the Law," *id.* 149; GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 263 (1940).

⁵ Professor Sayre, "Public Welfare Offenses," 33 *COL. L. REV.* 55 at 72-73 (1933), enumerates the following groups of offenses not requiring mens rea: "(1) Illegal sales of intoxicating liquors: (a) sales of prohibited beverages, (b) sales to minors, (c) sales to habitual drunkards, (d) sales to Indians or other prohibited persons, (e) sales by methods prohibited by law. (2) Sales of impure or adulterated food or drugs: (a) sales of adulterated or impure milk; (b) sales of adulterated butter or oleomargarine. (3) Sales of misbranded articles. (4) Violations of anti-narcotic acts. (5) Criminal nuisances: (a) annoyances or injuries to the public health, safety, repose or comfort; (b) obstruction of highways. (6) Violations of traffic regulations. (7) Violations of motor-vehicle laws. (8) Violations of general police regulations, passed for the safety, health, or well-being of the community."

⁶ Hall and Seligman, "Mistake of Law and Mens Rea," 8 *UNIV. CHI. L. REV.* 641 (1941); Perkins, "Ignorance and Mistake in Criminal Law," 88 *UNIV. PA. L. REV.* 35 (1939); Kohler, "Ignorance or Mistake of Law as a Defense in Criminal Cases," 40 *DICK. L. REV.* 113 (1936); Stumberg, "Mistake of Law in Texas Criminal Cases," 15 *TEX. L. REV.* 287 (1937).

⁷ *Barker v. People*, 3 *Cow. (N.Y.S.Ct.)* 686 at 704 (1824), quoted in *People v. Grant*, 242 *App. Div.* 310 at 311, 275 *N.Y.S.* 74 (1934), *affd.* 267 *N.Y.* 508, 196 *N.E.* 553 (1935).

"... It is a power to take life and liberty, and all the rights of both, when the sacrifice is necessary to the peace, order, and safety to the community. This general authority is vested in the legislature, and as it is one of the most ample of their powers, its due exercise is among the highest of their duties."

Finally, the doctrine of the "exclusive" power of the legislature to create the elements and penalty of a crime might have its source in a third consideration. There are no common-law crimes within the area of the federal government⁸ or within that of some states.⁹ Hence if an act is to constitute a crime, it must be created by a statute, and by a statute only.¹⁰

Are these arguments sound? The first argument,—that is, the lack of an official register for the publication of rules and regulations,—has undoubtedly persuasive force.¹¹ It is, however, no longer true in regard to federal agencies.¹² The states which have not followed the example of the federal government in creating an official register for the publication of rules and regulations often provide that the rules and regu-

⁸ *United States v. Hudson*, 7 Cranch (11 U.S.) 32 (1812); *United States v. Coolidge*, 1 Wheat. (14 U.S.) 415 (1816); *United States v. Miller*, (D.C. Wash. 1916) 236 F. 798; *Hamburg-American S.P. Co. v. United States*, 163 C.C.A. (2d) 79, 250 F. 747 (1918); *Steigleder v. United States*, (C.C.A. 8th, 1928) 25 F. (2d) 959; *Wilson v. United States*, (C.C.A. 8th, 1935) 77 F. (2d) 236; *Fulbright v. United States*, (C.C.A. 8th, 1937) 91 F. (2d) 210; *Norton v. United States* (C.C.A. 9th, 1937) 92 F. (2d) 753.

⁹ *People v. Whipple*, 100 Cal. App. 261, 279 P. 1008 (1929); *People v. Corder*, 306 Ill. 264, 137 N.E. 845 (1922); *Robertson v. State*, 207 Ind. 374, 192 N.E. 887 (1935); *State v. Campbell*, 217 Iowa 848, 251 N.W. 717 (1934); *State v. Snowden*, 174 La. 156, 14 So. 9 (1893); *State v. Sperry-Hutchinson Co.*, 55 Mont. 555, 179 P. 460 (1919); *Lane v. State*, 120 Neb. 302, 232 N.W. 96 (1930); *People v. Ingber*, 248 N.Y. 302, 162 N.E. 87 (1928); *State v. Huffman*, 131 Ohio St. 27, 1 N.E. (2d) 313 (1936); *Multnomah County Fair Assn. v. Langley*, 140 Ore. 172, 13 P. (2d) 354 (1932).

¹⁰ See 35 HARV. L. REV. 952 at 955 (1922). A similar situation exists in Louisiana, where all the crimes must be statutory. See *State v. Maitrejean*, 193 La. 824, 192 So. 361 (1939). The same is true of California, Illinois, Indiana, Iowa, Montana, Nebraska, New York, Ohio, Oregon and Texas. See MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES 1074-1075 (1940).

¹¹ The lack of an official register for the publication of regulations has been mentioned in *United States v. Louisville & N.R.R.*, (D.C. Ala. 1910) 176 F. 942; *United States v. Matthews*, (D.C. Wash. 1906) 146 F. 306; *United States v. Minchew*, (D. C. Fla. 1935) 10 F. Supp. 906.

¹² Federal Register Act, 49 Stat. L. 500 (1935), 44 U.S.C. (1940), § 301 et seq.

lations shall be published in the way prescribed by the particular act.¹³ The argument that the power of creating a crime affects the individual more severely than that of creating civil or administrative liability is of psychological rather than legal nature. If the legislature may delegate power to administrative agencies to fill out the details of a legislative act, the nature of the sanctions should not bar them from doing so. The law-abiding individual is not concerned with the character of the sanction, but with the legislative command. Finally, the third argument seems to be a non sequitur. The fact that there are no common-law crimes within the jurisdiction of the federal government or within that of a state means merely that the accused must not be convicted without a legislative basis. Whether and to what extent the legislative basis must be furnished by the legislature rather than by an administrative agency is a different problem.

(a) *Attitude of the Supreme Court of the United States*

It was as early as 1835 that the Supreme Court of the United States for the first time was faced with the problem whether or not an administrative agency may issue a regulation which may be the basis of a conviction. In *United States v. Bailey*,¹⁴ the defendant was indicted for false swearing under the Acts of Congress of March 1, 1823 and March 3, 1825. The Act of March 1, 1823, provided that:

"If any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury."

The Act of March 3, 1825, section 13, declared:

"If any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon taking such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury...."

The oath was administered by a justice of the peace for Bath county, in the state of Kentucky, and taken with a view of obtaining money from the government. The Secretary of the Treasury, whose duty it was to decide on the claims, had issued a regulation prescribing that

¹³ *People v. Soule*, 238 Mich. 130, 213 N.W. 195 (1927). But see also *Goodlove v. Logan*, 217 Iowa 98, 251 N.W. 39 (1933); *State v. Retowski*, 6 W. W. Harr. (36 Del.) 330, 175 A. 325 (1934); *State v. Grimshaw*, 49 Wyo. 192, 53 P. (2d) 13 (1935), in all of which the absence of provision for adequate publication contributed to the invalidation of the statute involved.

¹⁴ 9 Pet. (34 U.S.) 238 (1835).

the claims should be substantiated by oath and that any justice of the peace of any of the states of the United States was authorized to administer an oath in such a case. The defense was that under the federal acts only a federal officer could administer that oath, so that the Secretary of the Treasury had no power to authorize a state justice of the peace to administer it. Although the controversy thus focused upon the question of authorization, the majority of the Court, in holding that the Secretary of the Treasury was authorized to issue the regulation, assumed the constitutionality of the acts which delegated to him the power of creating some element of perjury. Justice McLean, however, in his dissenting opinion said: "It is a power which belongs to the legislative department, and can nowhere else be exercised."¹⁵

Caha v. United States,¹⁶ a case similar to that of *United States v. Bailey*, was decided in 1893. Caha had been convicted of perjury under section 5392 of the Revised Statutes.¹⁷ The perjury was committed in a contest in a local land office in respect to the validity of a homestead entry, the oath having been administered by one of the land officers before whom the contest had been carried on.

By rules of the Interior Department, express provision was made for the contest before the local land officers in respect to homestead as well as pre-emption entries and for the taking of testimony before such officers and for regular, formal trials, with the right of appeal to the Commissioner of the General Land Office, and from there to the Secretary of the Interior. However, there was no statute in terms authorizing a contest before the local land office in respect to homestead entries, though there was a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of public land and also a specific act of Congress authorizing contests before the local land officers in case of pre-emption. Again, the controversy centered upon the authorization of the Interior Department to issue rules providing for the administration of oath before the local land officers in respect to homestead entries. As in *United States v. Bailey*, the Court, by answering the question of authorization in the affirmative, impliedly

¹⁵ Id. at 263.

¹⁶ 152 U.S. 211, 14 S. Ct. 513 (1893).

¹⁷ Section 5392 of the Revised Statutes reads as follows: "Every person who, having taken an oath before a competent tribunal, officer or person, in any case *in which a law of the United States authorizes an oath* to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . ." (Italics added.)

assumed the constitutionality of the delegation of power to the Interior Department.

For the first time, in *In re Kollock*¹⁸ the issue of delegation of power to create the elements of crime was argued by the parties. An act of Congress¹⁹ required retail dealers in oleomargarine to pack the oleomargarine sold by them in suitable wooden or paper packages, "marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." Kollock had disregarded the regulations of the Commissioner of Internal Revenue. His defense was that the statute was invalid, because it did not define what act done or committed should constitute a criminal offense, but delegated to the commissioner the power to determine them. The Court took the position that the penal sanction, which the act provided for the violation of regulations, did not take the case out of the general problem of delegation of power and that, therefore, the general principles of delegation of power applied. This is the language of the Court:

"The act... is on its face an act for levying taxes, and... its primary object must be assumed to be the raising of revenue.... [As such] the designation of the stamps, marks and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulation needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer."²⁰

When, then, *United States v. Grimaud*²¹ was submitted to the Supreme Court of the United States, the precedents of *United States v. Bailey*, *Caha v. United States*, and *In re Kollock* imposed the ruling upon the Court. The defendants in *United States v. Grimaud* were indicted for grazing sheep on the Sierra Forest Reserve without having obtained permission which the regulations of the Secretary of Agriculture required. They demurred on the ground that the Forest Reserve Act of 1891 was unconstitutional in so far as it delegated the power to make rules and regulations, a violation of which would be a penal

¹⁸ 165 U.S. 526, 17 S. Ct. 444 (1897).

¹⁹ 24 Stat. L. 209, c. 840 (1886).

²⁰ 165 U.S. at 536.

²¹ 220 U.S. 506, 31 S. Ct. 480 (1910). The case of *Light v. United States*, 220 U.S. 523, 31 S. Ct. 485 (1910), was decided at the same time and upon the authority of *United States v. Grimaud*.

offense.²² Thus, the only problem presented was whether the statute could authorize the Secretary of Agriculture to create the elements of crime. The Court answered the question in the affirmative. The fact that the rules or regulations furnish some element of crime was not considered to raise them from an administrative to a legislative character, since the violation was made a crime not by the administrative agency, but by the legislature. Said the Court:

"...But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."²³

And also:

"...A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty. . . . The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes 'contrary to the laws of the United States and the peace and dignity thereof.'"²⁴

Is it true that the violation of the regulations is made a crime by the act of the legislature rather than by the administrative agency?

The reasoning of the Supreme Court would be correct if the penalty were the only essential of a criminal offense. However, a crime consists of two components: the elements (objective and subjective) as well as the penalty.²⁵ Consequently, if the legislative act does not contain both, the criminal offense has not come into existence. The act which authorizes the agency to issue the rules and regulations to be

²² The act provides that the Secretary "may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided in" § 5388, p. 1044 of the Revised Statutes, as amended. 30 Stat. L. 35 (1897), amending 26 Stat. L. 1103 (1891).

²³ 220 U.S. at 521.

²⁴ *Id.* 522, 523.

²⁵ See authorities, cited in Schwenk, "Criminal Codification and General Principles of Criminal Law in Argentina, Mexico, Chile and the United States; A Comparative Study," 4 *LA. L. REV.* 351 at 357, note 31 (1942); see also Schwenk, "Criminal Codification and General Principles of Criminal Law in Germany and the United States—A Comparative Study," 15 *TULANE L. REV.* 541 at 550 (1941).

enforced by a penalty does not contain the final elements of the offense. If an indictment were based upon the violation of such an act, it would be quashed on the ground that the language of the act is too vague and indefinite and, therefore, violates the due process clause of the Constitution.²⁶ As a result, the existence of the regulations is necessary to eliminate the vagueness and indefiniteness of the criminal elements and thus to take the act out of the operation of the due process clause.²⁷ They are a *condicio sine qua non* for the validity of the criminal provision. Hence it can hardly be said that "the violation is made a crime not by the Secretary, but by Congress."

Though the reasoning of the Court appears to be questionable, the result is justifiable. Once it is admitted that the creation of a criminal offense is not the "exclusive" function of the legislature, there is no reason why the administrative agency may not participate in the creation

²⁶ *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298 (1921); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618 (1939); *United States v. Foote*, (D.C. Del. 1942) 42 F. Supp. 717. See also Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923); 45 HARV. L. REV. 160 (1931); 8 TEX. L. REV. 253 at 258-260 (1930). In *re Peppers*, 189 Cal. 682, 209 P. 896 (1922), the court said that the act itself is too vague and indefinite to be the basis for an indictment and that the regulations would make it certain and definite. In spite of the appreciation for the necessity of the regulations, the court declared them invalid on the ground that the legislature could not delegate the power to declare what acts or omissions on the part of an individual are unlawful.

²⁷ An excellent illustration for this point is presented by *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S. Ct. 42 (1932). The case involved § 8 of the Federal Food and Drug Act of 1906, 34 Stat. L. 768, as amended by 37 Stat. L. 732 (1913), which required that packaged goods be marked with their net weight subject to a proviso that "reasonable variations shall be permitted." The majority of the court took the position that the language alone would by reason of the vagueness render the statute, in this particular aspect, void for indefiniteness and lacking in due process. They found, however, that the language quoted was modified by a subsequent phrase, "by rules and regulations made in accordance with section 3 of this Act." Section 3 provided for joint uniform regulations by the Secretaries of Agriculture, Commerce, and Treasury "for carrying out the provisions of this Act." So construed, the statute was constitutional and not void for indefiniteness.

A like analysis was made in *In re Peppers*, 189 Cal. 682, 209 P. 896 (1922). Finally, however, the court held the statute invalid, because the legislature could not delegate the power to declare "what acts or omissions on the part of an individual are unlawful."

In *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S. Ct. 298 (1921), an indictment was based upon the Wartime Food Control or Lever Act. That act made it criminal to make any unjust or unreasonable rate or charge in handling or dealing with certain commodities, denominated "necessaries." Due to the fact that no regulatory power was provided for determining whether a charge was unjust or unreasonable, the act was said to result in such uncertainty as to be in violation of the due process clause of the Fifth Amendment.

See Lee, "Legislative and Interpretive Regulations," 29 GEO. L. J. 1 (1940).

of a criminal offense under the rules of delegation of power, i.e., in the event that the legislature has set a sufficient primary standard in the act. Whether this participation applies not only to the creation of the elements but also to the penalty seems to depend merely on whether or not it is possible to set forth a sufficient standard not only for the determination of the elements, but also for that of the penalty. As far as the creation of the elements of a criminal offense is concerned, the *Grimaud* case has definitely settled the problem.

In the case of *McKinley v. United States*²⁸ the issue was again raised by way of defense against the indictment. However, the Court rejected it, firmly relying on the *Grimaud* case.²⁹ Though the more recent cases of *Panama Refining Co. v. Ryan*,³⁰ *Schechter Poultry Co. v. United States*³¹ and *Opp Cotton Mills v. Administrator*³² also involved the validity of regulations enforceable by penalty, the power of the administrative agency to create the elements of a criminal offense was not drawn into the controversy.

(b) *Attitude of the State Courts*

In contrast with the Supreme Court of the United States, state courts have taken more literally the doctrine of the exclusive function of the legislature to create a criminal offense. Thus, the California

²⁸ 249 U.S. 397, 39 S. Ct. 324 (1918).

²⁹ The Court said, 249 U.S. at 399: "Congress having adopted restrictions designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in the statute under consideration, may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions. This is also well settled by the repeated decisions of this court."

³⁰ 293 U.S. 388, 55 S. Ct. 241 (1935). See also (all issued in 1935), 15 BOST. UNIV. L. REV. 324; 23 CAL. L. REV. 435; 35 COL. L. REV. 280; 4 FORD. L. REV. 341; 23 GEO. L. J. 320; 3 GEO. WASH. L. REV. 391; 48 HARV. L. REV. 798; 29 ILL. L. REV. 809; 10 IND. L. J. 343; 19 MINN. L. REV. 801; 1 MO. L. REV. 68; 12 N.Y. UNIV. L. Q. REV. 520; 9 ST. JOHN'S L. REV. 370; 8 SO. CAL. L. REV. 226; 13 TEX. L. REV. 364; 2 UNIV. CHI. L. REV. 632; 83 UNIV. PA. L. REV. 526.

³¹ 295 U.S. 495, 55 S. Ct. 837 (1935). See also (all issued in 1935), 49 HARV. L. REV. 332; 15 BOST. UNIV. L. REV. 777; 35 COL. L. REV. 934; 4 FORD. L. REV. 457; 33 MICH. L. REV. 1254; 20 MINN. L. REV. 86; 1 MO. L. REV. 68; 12 N.Y. UNIV. L. Q. REV. 667; Corwin, "The Schechter Case—Landmark or What?" 13 *id.* 151; 10 ST. JOHN'S L. REV. 119; Fuchs, "A Postscript—The Schechter Case," 20 ST. LOUIS L. REV. 297; 9 TEMPLE L. Q. 451; 14 TEX. L. REV. 101; 10 UNIV. CIN. L. REV. 106; 22 VA. L. REV. 92; 11 WIS. L. REV. 88.

³² 312 U.S. 126, 61 S. Ct. 524 (1941). For comments, see 29 GEO. L. J. 882 (1941); 10 GEO. WASH. L. REV. 219 (1941); 35 ILL. L. REV. 840 (1941); 25 MINN. L. REV. 785 (1941); 8 UNIV. CHI. L. REV. 548 (1941).

Supreme Court reached the conclusion that an administrative agency cannot be authorized to issue rules and regulations which constitute the elements of a criminal offense, the penalty of which is provided in the act of the legislature. Thus the case of *Ex parte Cox*³³ involved the California State Viticultural Act of March 4, 1881,³⁴ in which power was conferred upon the Board of State Viticultural Commissioners to issue quarantine rules and regulations.³⁵ The wilful violation of the quarantine regulations was declared a misdemeanor by the act. The petitioner for habeas corpus, having been convicted of the violation of those regulations, insisted upon the invalidity of the act on the ground that it delegated legislative power to the board, i.e., the power to create a misdemeanor. The court invalidated the act and issued the writ of habeas corpus.³⁶ In a similar case³⁷ involving the California Fruit and Vegetable Standardization Act,³⁸ the California court reached the same result.

In *Dent v. United States*³⁹ the Arizona Supreme Court declared the Forest Reserve Act of June 4, 1897,⁴⁰ invalid⁴¹ for the reason that the regulations of the administrative agency were vested with a crimi-

³³ 63 Cal. 21 (1883).

³⁴ Cal. Stat. (1881), p. 51.

³⁵ The act conferred power to declare and enforce "rules and regulations in the nature of quarantine, to govern the manner of, restrain, or prohibit the importation into the State, and the distribution and disposal within the State, of all vines, vine cuttings . . . [and] empty fruit boxes. . . ."

³⁶ It was said by the court, 63 Cal. at 21: "The legislature had no authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the State is vested in the Senate and Assembly. That power could not, as in the case before us, be delegated to the officer or board."

³⁷ *In re Peppers*, 189 Cal. 682, 209 P. 896 (1922).

³⁸ California Fruit and Vegetable Standardization Act, Cal. Stat. (1921), p. 1234, § 10, provides that "Oranges shall be considered unfit for shipment when frosted to the extent of endangering the reputation of the citrus industry, if shipped." Sec. 15 declares that "The Director of Agriculture is empowered to define, promulgate and enforce all such rules and regulations, as may be deemed necessary to carry out the provisions of the act." Sec. 16 provides that "The Director of Agriculture and his duly appointed agents or employees may investigate and certify to shippers and other interested parties the quality and condition of fruit, vegetables and other farm products under such rules and regulations as he may prescribe."

³⁹ 8 Ariz. 138, 71 P. 920 (1903).

⁴⁰ Act of June 4, 1897, 30 Stat. L. 33.

⁴¹ The court declared, 8 Ariz. at 147: "Whether or not in all cases the authority of the several heads of the departments of the federal government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of law-

nal sanction, and in *Feeman v. State*⁴² the Supreme Court of Ohio expressed language to the effect that if the elements of the criminal offense fixed in the regulations had not been also contained in the act, no indictment could have been brought against the violator of the regulations.⁴³ In a rather recent case, *State v. Maitrejean*,⁴⁴ the Supreme Court of Louisiana took a definite stand for the doctrine of the "exclusive" power of the legislature to create the elements of a criminal offense. In the old-fashioned way the court concluded from the separation of power provided in the Constitution of Louisiana⁴⁵ that the state legislature could not delegate the power of creating a criminal offense. There is no more strength to this theory than there is to the fact that the Constitution of Louisiana expressly provides for certain administrative agencies to which legislative power may be delegated⁴⁶ or that all the crimes in Louisiana must be statutory.⁴⁷

Fortunately, the majority of state courts⁴⁸ have not blocked the path for progress in the field of administrative law by adhering to an unfounded principle, but they have followed the rule of *United States v. Grimaud*.

making power, vested by the constitution, not in such official, but in Congress alone, and as such is unconstitutional."

⁴² 131 Ohio St. 85, 1 N.E. (2d) 620 (1936).

⁴³ Said the court, 131 Ohio St. at 88: "Had the state boards adopted a regulation making some act unlawful which the Legislature did not define as being unlawful, there would be reason for the contention that such a regulation would constitute a delegation of legislative power."

⁴⁴ 193 La. 824, 192 So. 361 (1939), discussed in 14 TULANE L. REV. 291 (1940) and 9 FORDHAM L. REV. 275 (1940).

⁴⁵ Art. II, § 1, of the Constitution of Louisiana of 1921 declares that "The powers of the government of the State of Louisiana shall be divided into three distinct departments—legislative, executive, and judicial." Art. III, § 1, reads as follows: "The legislative power of the State shall be vested in a Legislature, which shall consist of a Senate and a House of Representatives."

⁴⁶ The Louisiana Public Service Commission is given power by the Constitution of Louisiana both to punish for contempt and to provide penalties for violation of its regulations. La. Const. (1921), Art 6, §§ 4-6. See *State ex rel. Milling v. Louisiana Public Service Commission*, 154 La. 752, 98 So. 175 (1923); *Louisiana Public Service Commission ex rel. Yazoo & M.V.R.R. v. Johnson Motors Freight Lines*, (La. Pub. Serv. Comm.) P.U.R. 1929C 122. See 14 TULANE L. REV. 291 (1940).

⁴⁷ *State v. Gaster*, 45 La. Ann. 636, 12 So. 739 (1893), Crimes Act of May 4, 1805, Orleans Terr. Laws (1805), C.50. See Marr, "The Necessity of a Criminal Code for Louisiana," 4 TULANE L. REV. 18 (1929). Cf. notes 9 and 10, supra.

⁴⁸ *State v. Normaud*, 76 N.H. 541, 85 A. 899 (1913); *State v. Dixon*, 335 Mo. 478, 73 S.W. (2d) 385 (1934); *Marsh v. Bartlett*, 343 Mo. 526, 121 S.W. (2d) 737 (1938); *Kryder v. State*, 214 Ind. 419, 15 N.E. (2d) 386 (1938); *State v. Strayer*, 230 Iowa 1027, 299 N.W. 912 (1941); *Tuttle v. Wood*, (Tex. Civ. App. 1931) 35 S.W. (2d) 1061; *Howard v. State*, 154 Ark. 430, 242 S.W. 818 (1922).

2. *Standard for the Delegation of Power*

It is the settled law that an act of the legislature which delegates regulatory power to an administrative agency must set forth a sufficient primary standard so that it will be canalized within banks that will keep it from overflowing.⁴⁹ The sufficiency of the standard is the crucial problem and has given rise to a great deal of litigation. Do courts apply a stricter test for the standard if the rules and regulations are vested with a penal sanction? In the cases preceding the *Grimaud* case⁵⁰ the question had not even been argued before the Supreme Court. In the *Grimaud* case the Supreme Court tested the sufficiency of the primary standard by reference to cases in which either civil or administrative liability was attached to the violation of the regulations.⁵¹ This fact indicates that the Supreme Court applies the same test in a case where the legislative act provides for the issuance of regulations enforceable by penal sanction as it does in a case where the regulations are sanctioned by civil or administrative liability. However, in the case of *Panama Refining Co. v. Ryan*,⁵² the criminal sanction of the regulations issued by the President undoubtedly contributed to the invalidation of section 9(c) of the National Recovery Act. The Court found that a finding of facts by the President should have been required by the N.R.A. all the more since the citizen was exposed to punishment upon violation of those regulations. This is what the Court said:

“... If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if

⁴⁹ *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241 (1935); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 61 S. Ct. 524 (1941); *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 311 U.S. 642, 61 S. Ct. 317 (1941). See also Weeks, “Legislative Power versus Delegated Legislative Power,” 25 *Geo. L.J.* 314 (1937); Cheadle, “The Delegation of Legislative Functions,” 27 *YALE L.J.* 892 (1918).

⁵⁰ *United States v. Bailey*, 9 Pet. (34 U.S.) 238 (1835); *United States v. Eaton*, 144 U.S. 677, 12 S. Ct. 764 (1891); *Caha v. United States*, 152 U.S. 211, 14 S. Ct. 513 (1893); *In re Kollock*, 165 U.S. 526, 17 S. Ct. 444 (1897).

⁵¹ Reference is made to *Interstate Commerce Commission v. Illinois Central R.R.*, 215 U.S. 452, 30 S. Ct. 155 (1910); *Interstate Commerce Commission v. Chicago, R.I. & P. R.R.*, 218 U.S. 88, 30 S. Ct. 651 (1910); *St. Louis, I.M. & S. R.R. v. Taylor*, 210 U.S. 281, 28 S. Ct. 616 (1908); *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U.S. 301, 23 S. Ct. 692, 24 S. Ct. 860 (1902).

⁵² 293 U.S. 388, 55 S. Ct. 241 (1935).

that authority depends on determinations of fact, those determinations must be shown.”⁵³

In the *Schechter case*⁵⁴ weight was also given to the penal character of the “Live Poultry Code” set up under section 3 of the N.R.A. In holding that section unconstitutional, Chief Justice Hughes said for the Court:

“... If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade industry.”⁵⁵

In the case of *Opp Cotton Mills v. Administrator*,⁵⁶ which upheld the authority of the Administrator of the Wage and Hour Division of the Department of Labor to fix minimum wages, neither the petitioner for the injunction nor the Court paid attention to the penal sanction of the regulations⁵⁷ which the administrator had issued in conformance with the power delegated by the act. Evidently, the safeguards provided in the act were so strong that even the penal sanction of the regulations could not lead to any other result.

In the states the penal character of the rules and regulations of an administrative agency has also been used as an additional argument to invalidate an act of the legislature on the ground that it lacks a sufficient primary standard. Thus, in *Darweger v. Staats*,⁵⁸ followed by *People v. Greenbaum*,⁵⁹ the New York Court of Appeals, in determining the constitutionality of the New York “baby N.R.A.,”⁶⁰ ruled that the act

⁵³ 293 U.S. at 432.

⁵⁴ *Schechter Poultry Co. v. United States*, 295 U.S. 495, 55 S. Ct. 837 (1935).

⁵⁵ 295 U.S. at 537-538.

⁵⁶ 312 U.S. 126, 61 S. Ct. 524 (1941).

⁵⁷ The violation of the regulation of the minimum wages issued by the administrator is punishable according to the Fair Labor Standards Act, 52 Stat. L. 1062 (1938), §§ 16 (b), 6 (a) (4), 21 U.S.C. (1940), §§ 216 (b) 206 (a) (4).

⁵⁸ 267 N.Y. 290, 196 N.E. 61 (1935), discussed in 4 BROOKLYN L. REV. 458 (1935); 20 CORN. L.Q. 504 (1935); 10 ST. JOHN'S L. REV. 124 (1935); 20 MINN. L. REV. 311 (1936).

⁵⁹ 244 App. Div. 778, 280 N.Y.S. 771 (1935).

⁶⁰ N.Y. Laws (1933), c.781. It provided, as paraphrased in the headnote, 267 N.Y. 290, that “upon filing with the Secretary of the State of certified copies of each code, agreement, license, rule or regulation, approved by the President and in effect pursuant to title 1 of the National Industrial Recovery Act (48 Stat. L. 195), such code, agreement, license, rule or regulation shall be the standard of fair competition within this State for the trade or industry to which it pertains as to transactions intrastate in character.”

was unconstitutional for complete want of a primary standard, adding:

"...The delegation of its [the legislature's] power is even more extreme, for it makes it a misdemeanor for any citizen to violate any rule or regulation hereafter made by these authorities."⁶¹

To summarize, the cases decided by the federal, as well as by the state courts, suggest that the test for the standard within which administrative agencies may issue rules and regulations does not change, even though these rules and regulations are enforced by criminal rather than by civil or administrative liability. However, once the inadequacy of the standard is established on the basis of general principles of delegation of power, the courts are readily inclined to consider the criminal sanction of the rules and regulations as an additional argument for the invalidation of the legislative act.

3. *Statutory Authorization*

Aside from the two constitutional issues (admissibility of creating the elements of a criminal offense and sufficiency of primary standard), a third problem may arise as soon as the administrative agency has availed itself of the power to issue rules and regulations. It is self-evident that the rules and regulations must not exceed the authority set forth in the legislative act. However, the authority provided in the act is nothing but a statutory provision, and, therefore, subject to statutory interpretation. In the event the rules and regulations are not vested with a penal sanction, the general principles of interpretation apply. However, if a criminal liability attaches to them, stricter rules of interpretation might be called for.

Strangely, in the first case in which this problem was involved, *United States v. Bailey*,⁶² the Supreme Court of the United States showed an extremely liberal attitude in spite of the penal nature of the sanction with which the regulation was vested. The case involved the validity of a regulation by the Secretary of the Treasury authorizing any justice of the peace of any of the states to administer the oath required for a claim against the federal government.⁶³ There was no express authority in any legislative act for this regulation. However, the Supreme Court contented itself with the existence of an implied authority, when it said:

"...It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate

⁶¹ *Darweger v. Staats*, 267 N.Y. 290 at 307, 196 N.E. 61 (1935).

⁶² 9 Pet. (34 U.S.) 238 (1835).

⁶³ The facts are more fully stated at note 14, *supra*.

means are given. It is the duty of the secretary to adjust and settle these claims, and in order to do so, he must have authority to require suitable vouchers and evidence of the facts, which are to establish the claim."⁶⁴

Again, in *Caha v. United States*,⁶⁵ there was no express authority for the Secretary of the Interior to provide for the administration of an oath before the local land office in respect to homestead entries, though there was a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land and there was a specific act of Congress authorizing contests before the local land officers in respect to pre-emption. Upon the authority of *United States v. Bailey*, the Court thought that an implied authority was sufficient.⁶⁶ In both cases, the Court established the theory that any express authority carries with it a "necessary and proper authority" to reach the purpose of the legislative act.

On the other hand, in *United States v. Eaton*,⁶⁷ the Supreme Court took the opposite position. The regulation of the Commissioner of Internal Revenue imposed upon wholesale dealers in oleomargarine the duty to keep a certain book and make monthly returns.⁶⁸ The act itself provided for such a duty only in regard to manufacturers of oleomargarine,⁶⁹ though it authorized the Commissioner of Internal Revenue to issue all needful regulations for the carrying into effect of the act⁷⁰ and provided for punishment for a violation of any of his regulations.⁷¹ Undoubtedly the Court could have found that the regu-

⁶⁴ 9 Pet. at 255.

⁶⁵ 152 U.S. 211, 14 S. Ct. 513 (1893), facts stated supra at note 16.

⁶⁶ There was no statute in terms authorizing a contest before the local land office in respect to homestead entries, though "the validity of such contest had been again and again expressly recognized by Congress." The Court said, 152 U.S. at 220: "All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of Section 5392."

⁶⁷ 144 U.S. 677, 12 S. Ct. 764 (1891).

⁶⁸ The regulation provided: "*Wholesale dealers* in oleomargarine will keep a book (Form 61) and make a monthly return on Form 217, showing the oleomargarine received by them. . . ."

⁶⁹ Sec. 5 of the Act of August 2, 1886, 24 Stat. L. 209, c. 840, provided: ". . . every *manufacturer* of oleomargarine . . . shall keep such books and render such returns of materials and products . . . as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require."

⁷⁰ Sec. 20 stated: "The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act."

⁷¹ Sec. 18 declared: "If any *manufacturer* of oleomargarine, any *dealer* therein or any *importer* or *exporter* thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or

lation under consideration was covered by the "necessary and proper authority" that empowered the commissioner to "make all needful regulations for the carrying into effect of the act." Instead, the Court held that the act expressly imposed the duty of keeping books and making returns upon manufacturers only, and that it could not be construed as imposing a like duty upon wholesale dealers by inference from the necessary and proper authority clause.

In the states, courts have followed the approach in *United States v. Eaton* rather than that in *United States v. Bailey* and *Caha v. United States*. In numerous cases, they have taken pains in examining whether the regulation in question is inside or outside the statutory scope of authority. Thus, in *Reims v. State*,⁷² an Alabama case, the statute⁷³ empowered the State Live Stock Sanitary Board to make rules or regulations affecting "quarantined stock" on "quarantined places." Regulation 8, the basis of the indictment in the case, went further and imposed certain duties without regard to the fact whether the cattle or places were quarantined. Consequently, the court held the regulation outside the granted authority and invalid. No consideration was urged or given for an "implied necessary and proper clause" broadening the authority of the administrative agency.

In the Delaware case of *State v. Retowski*,⁷⁴ the court emphasized with particular clarity that the existence of a penal sanction as a means of enforcement of the regulations requires an especially accurate scrutiny as to whether or not the order falls within the scope of the authority conferred by the statute. Said the court:

"...it is...the duty of the courts...to scrutinize the case with especial care, for it must clearly appear that the order is one which falls within the scope of the authority conferred. . . .

"The rule in question is legislative in character, not administrative. Even if considered administrative, it is unreasonable, and 'outside the circle' of that which the act treats as unlawful if done. It adds to and amends the Act, and accordingly must be held to be void..."⁷⁵

This scrutiny reached a climax in the Kentucky case of *Bloemer v. Turner*,⁷⁶ where a statute regulated the manufacture and sale of con-

ducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act... he shall pay a penalty of one thousand dollars. . . ."

⁷² 17 Ala. App. 128, 82 So. 576 (1919).

⁷³ Ala. Code (1907), § 763.

⁷⁴ 6 W. W. Harr. (36 Del.) 330, 175 A. 325 (1934).

⁷⁵ 36 Del. at 335.

⁷⁶ 281 Ky. 832, 137 S.W. (2d) 387 (1939).

centrated commercial feeding stuff. It required the percentage of nutritious qualities of concentrated commercial food to be printed on the label or tag of each package. It also authorized the Director of the Agriculture Experiment Station to adopt standards for concentrated commercial feeding stuffs and make the necessary regulations. The director ordered the printing of the percentage of water of such food on the label, although the statute spoke only of the percentage of fat and protein. Again, the strict interpretation of the authority in compliance with the language of the statute gave rise to the invalidation of the regulation as a statutory *ultra vires* act.

The same was true of *People v. Ryan*⁷⁷ and *People v. Grant*,⁷⁸ in which the Alcoholic Beverage Control Law of the state of New York was the subject matter of linguistic scrutiny in order to determine whether the administrative agency transcended the statutory authority. The law prohibited the sale of beer, liquor, or wine on Sundays between three A.M. and noon. None of the statutory provisions dealt with minors. However, the statute authorized the State Alcoholic Beverage Control Board,

“...to adopt rules and regulations and issue such orders for the control and regulation of the manufacture, sale and distribution of liquors and wines, including...the hours and days and conditions of their sale, as will effectively ensure temperance in the consumption of liquors and wines in the state and promote obedience to law and order.”

The statute further provided:

“Violation by any person of any rule of the state board shall be a misdemeanor if such rule so provides and if such rule shall be published in a manner prescribed by such board.”⁷⁹

Upon this authority the board issued various rules. One of them prohibited the sale of liquors on Sundays until after two P.M. and declared the violation a misdemeanor. Another rule prohibited the sale of beer or wine to a minor actually or apparently under the age of sixteen years. The violation of this rule was also declared a misdemeanor. Ryan was indicted for the violation of the first mentioned and Grant for that of the latter regulation. Both accused men attacked the validity of the regulations for the reason, among others, that they were statu-

⁷⁷ 267 N.Y. 133, 195 N.E. 822 (1935), reversing 242 App. Div. 813, 275 N.Y.S. 630 (1934).

⁷⁸ 267 N.Y. 508, 196 N.E. 553 (1935), affirming 242 App. Div. 310, 275 N.Y.S. 74 (1934).

⁷⁹ N.Y. Laws (1933), c.819, § 132-a (3) (e), c.180, § 197.

tory ultra vires acts. Whereas in the *Ryan* case the New York Court of Appeals declared the statute unconstitutional as a delegation of legislative power,⁸⁰ the language of the *Grant* case suggests that the court considered the regulations as being outside the statutory authority and therefore invalid,⁸¹ though it relied upon the authority of the *Ryan* case.

The theory of the Supreme Court in *United States v. Eaton* and of the state courts following it invokes strong criticism. If a general authority in terms of a "necessary and proper clause" competes with specific grants of power in a legislative act, should the specific grant of power indeed prevail over the general grant upon the doctrine of "*expressio unius est exclusio alterius*?" No doubt, the enumeration of specific powers may express the wish of the legislature to limit the powers to those enumerated in the act. But it also may mean a desire of the legislature that at least the powers expressly provided in the act shall be available to the administrative agency. The existence of a general authority in form of a "necessary and proper clause" suggests the latter interpretation. What would be the purpose of such a clause, if the administrative agency cannot avail itself of it? The Constitution of the United States also contains a "necessary and proper clause"⁸² in addition to the specific grants of power conferred upon the federal government.⁸³ Though the authority granted in the Constitution is of much greater importance and consequence than that of a statutory act, it has always been held that the necessary and proper clause of the Constitution bestows certain (or rather uncertain) powers in addition to those expressly enumerated.⁸⁴

⁸⁰ Under reference to the broad power conferred by the statute the court said, 267 N.Y. at 137: "The attempt thus to commit to the unrestrained volition of an administrative board so essentially a legislative function as the definition of a substantive criminal offense was quite obviously without effect."

⁸¹ After having referred to the regulation providing that "no beer or wine shall be sold to any minor, actually or apparently under the age of 16 years," "a violation of the rule shall be a misdemeanor," the court said, 267 N.Y. 508: "There is nothing in chapter 180 of the Laws of 1933 declaring such a sale unlawful."

⁸² U.S. Constitution, Art. I, §8, cl. 18.

⁸³ *Id.*, cl. 1-17.

⁸⁴ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819); *United States v. Hall*, 98 U.S. 343 (1878); *Legal Tender Cases*, 110 U.S. 421, 4 S. Ct. 122 (1884); *Logan v. United States*, 144 U.S. 263, 12 S. Ct. 617 (1893); *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1331 (1941); *Pittman v. Home Owners' Loan Corporation of Washington, D.C.*, 308 U.S. 21, 60 S. Ct. 15 (1939); and numerous cases in connection with the power of the federal government to regulate interstate commerce and with other federal powers.

B. *Power of Administrative Agencies to Create the Penalty of a Criminal Offense*

1. *Power to Declare Whether the Violation of a Regulation Shall be Punishable*

While it seems to be established that a statute may delegate to an administrative agency the power to determine the elements of a criminal offense if a sufficient primary standard exists, is the same true of the other component of a criminal offense, i.e., of the penalty?

Suppose the statute leaves discretion to the administrative agency to determine whether the violation of its rules and regulations shall be punishable. This can be done either in the form of an affirmative discretion or in the form of the dispensing and suspending power. If the draftsman of the statute chooses the latter method, the statute will be upheld where there is a sufficiently definite primary standard for the exercise of the discretion.⁸⁵ Even an implied standard for the exercise of the discretion might do.⁸⁶ If, however, the draftsman puts the discretion into the affirmative form, the statute will be invalidated.⁸⁷ Thus, in *Frend v. United States*,⁸⁸ a joint resolution of Congress prohibited display, within five hundred feet of an embassy, legation or consulate in the District of Columbia, of any banner or other device designed to bring any foreign government into public odium, or to harass any diplomatic representative, except in accordance with a permit issued by the superintendent of police of the district. The accused challenged the validity of the resolution on the ground that it unlawfully granted power to the superintendent to declare whether or not the act condemned by the resolution should be punishable. But the Court of Appeals for the District of Columbia sustained the resolution due to the fact that the resolution itself declared certain elements to be a crime and gave "merely" power to the superintendent to suspend the operation of the resolution in a particular case. Though the resolution did not indicate under what circumstances the superintendent may suspend the operation of the resolution by the issuance of a permit, the court found "a definite standard for the exercise of the suspending power" upon the purpose which the resolution was intended to serve.

⁸⁵ *Frend v. United States*, (App. D.C. 1938) 100 F. (2d) 691. See also *Davis v. Massachusetts*, 167 U.S. 43, 17 S. Ct. 731 (1897). On the general subject of the dispensing and suspending power as a matter of valid delegation of power, see 87 UNIV. PA. L. REV. 201 (1938); GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 225-227 (1940).

⁸⁶ *Frend v. United States*, (App. D.C. 1938) 100 F. (2d) 691.

⁸⁷ *People v. Grant*, 242 App. Div. 310, 275 N.Y.S. 74 (1934), *affd.* by the Court of Appeals on another ground in 267 N.Y. 508, 196 N.E. 553 (1935).

⁸⁸ *Frend v. United States*, (App. D.C. 1938) 100 F. (2d) 691.

The New York cases of *Pepole v. Ryan*⁸⁹ and *People v. Grant*⁹⁰ involved a statute which was phrased in the affirmative form providing that "violation by any person of any rule of the state board shall be a misdemeanor if such rule so provides..." Whereas the court of appeals in the *Grant* case condemned the statute as a statutory ultra vires act,⁹¹ the lower court found it unconstitutional, because it delegated power to the board to determine whether the violation of its rules should be a criminal offense. The holding of the New York Appellate Division in the *Grant* case seems to be in accordance with the dictum in the *Grimaud* case. In that case, the Court expressly stated that the administrative agency cannot determine whether a violation of a regulation shall be punishable. Said the Court:

"...The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself."⁹²

The *Frend* case is easily distinguishable from the *Grant* case on account of the form in which the discretion of the administrative agency was put by the statute: in the *Grant* case, it was affirmative discretion, and in the *Frend* case, it was suspending power. However, substance should prevail over form, or in the words of Justice Miller:⁹³

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

There seem to be other distinctions between the cases. In the *Frend* case, the power was conferred upon a municipal agency, whereas in the *Grant* case it was given to a state agency. Furthermore, in the *Frend* case, there was a definite standard for the determination of the agency, or at least the court found so, whereas in the *Grant* case there was no standard whatsoever upon which the determination of the agency depended. It was entirely free in deciding whether a violation of its rules should be punishable.

The fact that the statute provides for the maximum penalty in the event that the administrative agency declares the violation of its rules punishable seems to be of no importance. In the California case of

⁸⁹ 267 N.Y. 133, 195 N. E. 822 (1935), reversing 242 App. Div. 813, 275 N.Y.S. 630 (1934).

⁹⁰ 267 N.Y. 508, 196 N. E. 553 (1935), affirming 242 App. Div. 310, 275 N.Y.S. 74 (1934).

⁹¹ See supra, at note 81.

⁹² *United States v. Grimaud*, 220 U.S. 506 at 523, 31 S. Ct. 480 (1910).

⁹³ *Henderson v. Mayor of New York*, 92 U.S. 259 at 268 (1875). See also *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 at 443, 61 S. Ct. 246 (1940).

Gilbert v. Stockton Port District,⁹⁴ the defendant was indicted under a statute which conferred power upon the Stockton Port District "to prescribe fines, forfeitures and penalties for the violation of any provision of any ordinance, but no penalty shall exceed \$500.00, or six months imprisonment, or both." The court declared the statute invalid upon the authority of *In re Werner*,⁹⁵ where Justice McFarland, concurring, stated that "The Constitution does not contemplate that the state should be overrun and overloaded with innumerable legislative bodies, each having power to make laws under which citizens may be sent to jail." And in *Board of Harbor Commissioners v. Excelsior Redwood Co.*,⁹⁶ the court clearly said that fixing the maximum of the penalty does not cure the invalid delegation:

"The act of the legislature in fixing the maximum of such penalty is of no avail; the vice of the whole matter is in not itself fixing of the penalty, and in delegating such legislative power to the plaintiff."

Consequently, it seems that power cannot be delegated to an administrative agency to determine freely whether the violation of its rules shall be punishable, though it might be admissible to reach the same effect by use of the suspending power.

2. *Power of Municipal Corporations to Declare Whether the Violation of an Ordinance shall be Punishable*

It is not a novelty that delegation to municipal corporations may be broader than to administrative agencies, whatever the reason therefor may be.⁹⁷ Consequently, it is not surprising that municipal corpora-

⁹⁴ 7 Cal. (2d) 384, 60 P. (2d) 847 (1936).

⁹⁵ 129 Cal. 567, 62 P. 97 (1900).

⁹⁶ 88 Cal. 491 at 493, 26 P. 375 (1891).

⁹⁷ *Stoutenburgh v. Hennick*, 129 U.S. 141, 9 S. Ct. 256 (1888); *State v. Noyes*, 30 N.H. 279 (1855). See also WILLIS, *CONSTITUTIONAL LAW* 137-138 (1936); GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 207-209 (1940). On the reasons why municipal corporations may exercise a power broader than administrative agencies there is a split of opinion. The following theories have been advanced: (1) municipal corporations have an inherent right of self-government, so that no legislative act is necessary to confer that broad power upon them. See Eaton, "The Right to Local Self-Government," 13 HARV. L. REV. 441, 570, 638 (1900); 14 *id.* 20, 116 (1900); 1 McQUILLIN, *MUNICIPAL CORPORATIONS*, 2d rev. ed., §§ 68, 91, 185, 188 (1940); (2) municipal corporations derive their power from delegation of power by the legislature, but the legislature may delegate to them even legislative functions. This is justifiable upon (a) "immemorial practice," *Fox v. McDonald*, 101 Ala. 51, 13 So. 416 (1892); (b) "expediency amounting almost to necessity," *Brodline v. Revere*, 182 Mass. 598, 66 N.E. 607 (1903); (c) "necessity," GELLHORN, *supra*, 209 (1940).

tions have even an implied power to provide for the enforcement of their ordinances by reasonable and proper fines.⁹⁸ The implication is based upon the fact that an ordinance without a penalty would be nugatory.⁹⁹ However, in order to punish the violation of an ordinance with forfeiture, express power must be given to the municipal corporation, either by the charter or by state law.¹⁰⁰ Express power must also be conferred upon the municipal corporation where it creates a penalty for an offense against the state as distinguished from a municipal offense.¹⁰¹ This limitation of implied power of creating penalties is due to the fact that it refers only to the local and internal affairs of the municipality.¹⁰²

What fines are proper and reasonable so that they can be created even without express grant by the legislature for the violation of an ordinance depends upon the nature of the offense and the circumstances.¹⁰³ The penalty by imprisonment cannot be inflicted, unless the power is expressly given to the municipal corporation.¹⁰⁴

Due to the special treatment of municipal corporations, it is clear

⁹⁸ *Goldsmith v. Huntsville*, 120 Ala. 182, 24 So. 509 (1898); *Mobile v. Yuille*, 3 Ala. 137 (1841); *Chambers v. Barnesville*, 89 Ga. 739, 15 S.E. 634 (1892); *Korah v. Ottawa*, 32 Ill. 121 (1863); *Detroit v. Fort Wayne & B. I. Ry.*, 95 Mich. 456, 54 N.W. 958 (1893); *Bellerive Inv. Co. v. Kansas City*, 321 Mo. 969, 13 S.W. (2d) 628 (1929); *Fisher v. Harrisburg*, 2 Grant Cas. (Pa.) 291 (1854); *Trigally v. Memphis*, 6 Coldw. (46 Tenn.) 382 (1869); *Winooski v. Gokey*, 49 Vt. 282 (1877). See also 2 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 610, p. 952 (1911).

⁹⁹ *Winooski v. Gokey*, 49 Vt. 282 (1877).

¹⁰⁰ *Mobile v. Yuille*, 3 Ala. 137 (1841); *New Hampton v. Conroy*, 56 Iowa 498, 9 N.W. 417 (1881); *Varden v. Mount*, 78 Ky. 86 (1879); *Taylor v. Carondelet*, 22 Mo. 105 (1856); *New York v. Ordrenan*, 12 Johns. (N.Y.) 122 (1815); *Kneedler v. Norristown*, 100 Pa. St. 368 (1882). See also 3 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 923, p. 32 (1928); 2 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 617, p. 956 (1911).

¹⁰¹ 3 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 923, p. 32 (1928), and cases cited there; 2 DILLON, MUNICIPAL CORPORATIONS, 5th ed., § 630, p. 965 (1911). A difficult situation arises where an offense is a state offense and a municipal offense as well, so that it may be punished eventually under state and municipal law. On this problem see 3 McQUILLIN, *id.*, § 924, p. 34 (1928); 2 DILLON, *id.*, § 632, p. 967.

¹⁰² 3 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 923, p. 33 (1928).

¹⁰³ *Mobile v. Yuille*, 3 Ala. 137 (1841) (a penalty, although small, fixed on every stroke of the hammer which an unauthorized person uses in his trade of a goldsmith, is unreasonable); *New York v. Ordrenan*, 12 Johns. (N.Y.) 122 (1815).

¹⁰⁴ *Dodd v. Peak*, (App. D.C. 1931) 47 F. (2d) 430; *Ex parte Montgomery*, 64 Ala. 463 (1879); *Ex parte Slatery*, 3 Ark. 484 (1841); *Ex parte Green*, 94 Cal. 387, 29 P. 783 (1892); *Kinmundy v. Mahan*, 72 Ill. 462 (1874); *Low v. Evans*, 16 Ind. 486 (1861); *Burlington v. Kellar*, 18 Iowa 59 (1864); *State ex rel. Schroeder v. Baton Rouge*, 40 La. Ann. 209, 3 So. 541 (1888); *Bozemann v. Merrill*, 81 Mont. 19, 261 P. 876 (1927); *Brown v. Jarvis*, 36 Wyo. 406, 256 P. 336 (1927). See also 2 McQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., § 752, p. 848 (1939).

that authorities in this field cannot be used as a general proposition of administrative law. Thus, in *Smallwood v. District of Columbia*,¹⁰⁵ a Congressional statute was sustained which authorized the Director of Traffic:

"...to prescribe within the limitations of this act reasonable penalties of fine, or imprisonment not to exceed ten days in lieu of or in addition to any fine, for the violation of any such regulation."

The court was aware of the fact that the case presented a special situation, since the power was given to an official of the District of Columbia and since the District of Columbia is regarded as "a body corporate for municipal purposes."¹⁰⁶ In fact, the court decided the case by reference to *Smithson v. District of Columbia*,¹⁰⁷ where the same issue had been decided by reference to Dillon's *Treatise on Municipal Corporations*.

The different treatment of municipal corporations from that of administrative agencies is usually justifiable on the ground that municipal agencies are more familiar with local affairs than federal or even state agencies. However, where such a familiarity is of no importance, it seems entirely legitimate to raise the question why there should be a difference between the law of municipal corporations and that of general administrative law.¹⁰⁸

3. *Power to Prescribe a Penalty for the Violation of Their Rules and Regulations*

Assuming that a statute clearly declares an act punishable, but delegates to an administrative agency the power to determine the particular penalty for the violation of its rules, is it valid?¹⁰⁹

The statute may or may not provide for the maximum penalty. Where the statute prescribes the maximum of the penalty which the agency may fix for the violation of its rules and regulations, leaving

¹⁰⁵ 57 App. D.C. 58, 17 F. (2d) 210 (1927). See also *People on Complaint of Jones v. Sagat*, 204 App. Div. 485, 198 N.Y.S. 449 (1923).

¹⁰⁶ *Stoutenburgh v. Hennick*, 129 U.S. 141, 9 S. Ct. 256 (1888); *Barnes v. District of Columbia*, 91 U.S. 540 (1875). See also 1 McQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., § 134, p. 401 (1940).

¹⁰⁷ 42 App. D.C. 184, 92 F. (2d) 549 (1914).

¹⁰⁸ Foster, "The Delegation of Legislative Power to Administrative Officers," 7 ILL. L. REV. 397 at 398 (1913); GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 209 (1940), citing *Welch v. Swasey*, 193 Mass. 364, 79 N.E. 745 (1907), affd. 214 U.S. 91, 29 S. Ct. 567 (1909).

¹⁰⁹ Hyneman, "Administrative Adjudication: An Analysis," 51 POL. SCI. Q. 383, 516 (1936); Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 at 293-295 (1935).

the particular penalty to the agency might be desirable. It is established that the penalty of a criminal offense must have a substantial relationship to its elements.¹¹⁰ The legislature is not in a position to recognize that relationship if the elements of the criminal offense are finally created by the administrative agency in the form of rules and regulations. But the fixing of a primary standard by the legislature does enable it to provide for a maximum penalty. On the other hand, in fixing the penalty it seems that the agency has no guide except the degree to which a particular regulation is important for the carrying out of the legislative policy.

There is little law on the problem. In *Zuber v. Southern Railroad*,¹¹¹ the Georgia court took a firm stand for the validity of a statute prescribing a maximum penalty.¹¹² It also explained elaborately its desirability with these words:

"As to some subjects it might be easy for the legislature not only to declare that a delinquency should be redressed by civil or criminal penalty, but also for it justly to assess and fix upon the exact amount of the penalty, or at least to set certain limits. As to other subjects, the determination of the amount of the penalty or of the basis on which it justly should be laid may involve such an amount of investigation and a consideration of so many particular exigencies as to make the fixing of the amount of the penalty only quasi-legislative and predominantly administrative in character...and it may readily be seen that the fixing of a just penalty for a violation of the rule in question is a subject which the commission might very naturally have dealt with by entering into the field of particularization and classification. For instance...it [the commission] might have said that the penalty for failing to furnish fruit cars should be \$4 per day, sand cars \$1 per day, and so on, or that the roads of one class should pay one penalty for delinquency, and that the roads of another class differently situated should pay a different amount."¹¹³

¹¹⁰ Ex parte Page, 19 Cal. App. (2d) 1, 298 P. 178 (1931) hearing dismissed, 214 Cal. 350, 5 P. (2d) 605 (1931); In re Palmer, 19 Cal. App. (2d) 5, 298 P. 179 (1931), hearing dismissed, 214 Cal. 792, 5 P. (2d) 608 (1931).

¹¹¹ 9 Ga. App. 539, 71 S.E. 937 (1911).

¹¹² "The legislature may authorize an administrative body or officer to make regulations and may declare it to be punishable for any person to violate those regulations; but, unless the legislature itself gives its sanction, at least in general terms, to the imposition of punishment, or of civil redress in the nature of punishment, for an act or general class of acts, no merely administrative board can provide for the punishment of that act or class of acts and supply the details of how and when the penalty or punishment shall be imposed." 9 Ga. App. at 545.

¹¹³ 9 Ga. App. at 546-547.

The opinion of the Georgia court on the permissibility and desirability of a statute which confers power on an administrative agency to fix the penalty for the violation of its rules and regulations up to a maximum penalty is merely dictum. In making this dictum, the court is aware that it would be "somewhat of an extension of the doctrine so ably set forth by Mr. Justice Lamar in the Grimaud case, but it is an extension which may be justified by the nature of the subject matter of the penalty."¹¹⁴

A simpler situation arises if the statute confers power upon the administrative agency to fix a penalty for the violation of its rules and regulations without providing for a maximum penalty. Such a statute would not be valid even under the *Zuber* case. Furthermore, a penalty is essential to the creation of any statutory crime.¹¹⁵

4. *Distinction between Penal and Civil Sanctions*

Due to the fact that the legislature may not delegate to an administrative agency the power to create a penal sanction for the violation of its regulations, but may authorize it to prescribe a civil sanction such as compensation, it becomes important to determine when a sanction is penal and when civil in its nature.¹¹⁶

In a group of cases,¹¹⁷ statutes conferred power upon a commission to issue regulations concerning the storage, wharfage, demurrage, and so forth, and to fix a "penalty" within a certain maximum amount for

¹¹⁴ *Id.* at 546.

¹¹⁵ It has been held that denouncement of an act or acts necessary to constitute a crime do not make the commission of such act or acts a crime unless a punishment is annexed, for punishment is necessary to constitute a crime as its exact definition. *United States v. Seibert*, (D.C. W.Va. 1924) 2 F. (2d) 80; *Holmes v. United States*, (C.C.A. 5th, 1920) 267 F. 529; certiorari denied 254 U.S. 640, 41 S. Ct. 13 (1920); *Johnston v. State*, 100 Ala. 32, 14 So. 629 (1893); *State v. Schoepf*, 5 Ohio N.P. (N.S.) 161 (1907); *Horak v. State*, 95 Tex. Cr. 474, 255 S.W. 191 (1923); *Hannabass v. Maryland Casualty Co.*, 169 Va. 559, 194 S.E. 808 (1938); *State v. Truax*, 130 Wash. 69, 226 P. 259 (1924). On the other hand, where a statute prohibits a matter of public grievance or commands a matter of public convenience, although no penalty is prescribed for disobeying its prohibitions or commands, an indictment will be sustained and the offense punished by a fine. *State v. Deer*, 80 Wash. 92, 141 P. 321 (1914).

¹¹⁶ This approach is rejected by Cheadle, "The Delegation of Legislative Functions," 27 *YALE L.J.* 892 at 917-919 (1918). Cheadle takes the view that creation of a civil sanction is as much a legislative function as creating a penal sanction. See also, Brown, "Administrative Commissions and the Judicial Power," 19 *MINN. L. REV.* 261 at 293-295 (1935).

¹¹⁷ See Cheadle, "The Delegation of Legislative Functions," 27 *YALE L.J.* 892 at 917 (1918); Brown, "Administrative Commissions and the Judicial Power," 19 *MINN. L. REV.* 261 at 293-295 (1935); Hyneman, "Administrative Adjudication: An Analysis," 51 *POL. SCI. Q.* 383, 516 (1936).

the violation of such regulations. The penalty had to be paid to the shipper by the carrier responsible. In the Florida case of *State v. Atlantic Coast Line Ry.*,¹¹⁸ the shipper violated a demurrage rule and thereby incurred the monetary "penalty" fixed by the commission for the violation of the rule. When the shipper refused to pay it, the commission imposed another penalty and brought suit to enforce it. The action was dismissed, because the statute did not provide for such a second penalty. The court found that the first "penalty" was in fact not a penalty, but a monetary liability of a civil character, and that it therefore was strange on the part of the commission to enforce a monetary liability by a real penalty. That the sanction for the violation of the demurrage rule was a civil rather than a penal sanction was derived from the fact that the violation of the rule did not directly affect the public, that the liability incurred was not subject to the pardoning power and that the statute or rule gave only a private right to one person against another.

In the Georgia case of *Southern Railway v. Melton*,¹¹⁹ the defendant had violated a rule which was issued by the Railroad Commission of Georgia and had fixed a reasonable charge for the delay in furnishing cars. Upon suit for payment, the defendant contended that the statute conferred upon the Railroad Commission of Georgia the power to fix a penalty and that the statute was invalid. Again, the court found that the liability incurred by the violation of the rule was of civil rather than of penal nature, since the liability was not enforceable by the state, but by a private person. In the Mississippi case of *Keystone Lumber Yard v. Yazoo & M. V. R. R.*,¹²⁰ the court arrived at the same conclusion. The liability incurred by the violation of the Mississippi demurrage rule was characterized as a civil compensation rather than a penalty, and in *State ex rel. Chicago, M. & St. P. R. R. v. Public Service Commission*,¹²¹ the court referred to the *Melton*, *Atlantic Coast Line* and *Keystone Lumber Yard* cases, adding that the use of the word "penalty" in the statute is of no concern in determining its real nature.

The problem whether a liability is penal or civil is not a novelty. It has arisen in various fields of law.¹²² In administrative law, neither

¹¹⁸ 56 Fla. 617, 47 So. 969 (1908).

¹¹⁹ 133 Ga. 277, 65 S.E. 665 (1909).

¹²⁰ 97 Miss. 433, 53 So. 8 (1910).

¹²¹ 94 Wash. 274, 162 P. 523 (1917).

¹²² Whether a sanction is penal is important in conjunction with: (a) The full faith and credit clause of the Constitution. See *Huntington v. Attrill*, 146 U.S. 657, 13 S. Ct. 224 (1892). (b) The ex post facto clause of the Constitution. See *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798). (c) Contempt of court. If a contempt is

the denial nor the revocation of a license has been considered a penalty.¹²³ It has also been said that the back pay under the National Labor Relations Act must not be regarded as punitive and that, therefore, a deduction should be allowed of that amount which the striker has or could have earned during the period of the strike.¹²⁴ It seems, however, that even though these deductions would not be allowed, the back pay would still not be a penalty, since it is a private right on the part of the employee against the employer though enforced by the National Labor Relations Board. In the Wisconsin case of *Klein v. Barry*,¹²⁵ a statute was involved which conferred power upon the state security commission to declare sales of securities voidable in the event they were issued in violation of the Blue Sky Law or in discord with the representations made to the commission or with its requirements. The court declared the statute invalid on the ground that "Under this act the corporation or person might be penalized or punished at the will of the Commission."¹²⁶ Publicity may be an administrative or a penal sanction.¹²⁷

C. Power to Choose a Penal Sanction out of Several Sanctions (Choice of Sanctions)

In numerous instances, statutes provide for several sanctions for the enforcement of the rules and regulations of administrative agen-

criminal, the President may exercise his pardoning power. *Ex parte Grossman*, 267 U.S. 87, 45 S. Ct. 332 (1925). (d) Equity jurisdiction. It has been held not to be permissible to enjoin a person from committing a crime, since prosecution of it constitutes an adequate remedy and the accused cannot be deprived of his right to a trial by jury. *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N.Y.) 371 (1817); *People v. Prouty*, 262 Ill. 218, 104 N.E. 387 (1914). See, however, *Featherstone v. Independent Service Station Assn. of Texas*, (Tex. Civ. App. 1928), 10 S.W. (2d) 124, commented upon in 42 HARV. L. REV. 693 (1928), 7 TEX. L. REV. 638 (1929) and noted in 27 MICH. L. REV. 833 (1929).

¹²³ *Mandel v. Board of Regents*, 250 N.Y. 173, 164 N.E. 895 (1928), affirming 224 App. Div. 772, 230 N.Y.S. 870 (1928).

¹²⁴ *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 59 S. Ct. 206 (1938); *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S. Ct. 490 (1939); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 at 198, 61 S. Ct. 845 (1941) ("Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he wilfully incurred"). See also *N.L.R.B. v. J. Grenebaum Tanning Co.*, (C.C.A. 7th, 1940) 110 F. (2d) 984; *N.L.R.B. v. Leviton Mfg. Co.*, (C.C.A. 2d, 1940) 111 F. (2d) 619; BUFFORD, THE WAGNER ACT, § 415 (1941).

¹²⁵ *Klein v. Barry*, 182 Wis. 255, 196 N.W. 457 (1923). See also 42 COL. L. REV. 472 (1942).

¹²⁶ 182 Wis. at 274.

¹²⁷ GINSBURG, PUBLICITY AS A SANCTION IN ADMINISTRATIVE LAW: A BIG STICK OF LITTLE FAME 330 (thesis submitted at Harvard Law School 1941).

cies.¹²⁸ The agency has the choice of employing them alternatively or cumulatively.¹²⁹ Where one of these sanctions is penal, can it be said that the administrative agency has the power to determine whether the violation of a rule or regulation shall be a crime? In *United States v. Bioff*,¹³⁰ and *Nick v. United States*,¹³¹ the federal courts had to decide whether the Antiracketeering Act was invalid in so far as it provides:

"Prosecutions under Sections 420a to 420e of this title shall be commenced only upon the express direction of the Attorney General of the United States."¹³²

It was contended that the statute attempted to delegate to the Attorney General the power to define and determine what acts shall constitute a crime and be punishable. In both cases, the courts held that the punishability was created by the act and not by the Attorney General. It was further said that the fact that the consent of the Attorney General to the prosecution was made a condition precedent purported merely to increase the safeguards for an unjustifiable trial. He has not discretion to determine whether an act shall be punishable, but whether a punishable act shall be prosecuted. Said the court in the *Bioff* case:¹³³

"The line of division between permitted and prohibited delegations of legislative powers has not yet been adequately surveyed by the few decisions which deal with the problem...."

"It is to be noted that in the case at bar the crime is fully and adequately defined in the statute. The punishable action is clearly identified. What is left open to the Attorney General's discretion is whether a prosecution shall commence. In that respect it differs from the cited instances where either law making or regulation making power is conferred upon an administrative agency, operative in futuro. No such authority is conferred by the statute under consideration."

"The Attorney General is given the limited choice of proceeding or forbearing in any particular instance after the event."

The *Bioff* and *Nick* cases seem to be applicable to the problem of choice of sanctions, one of which is of penal nature. In having the

¹²⁸ On "choice of sanctions," see Monographs on Civil Aeronautics Authority, p. 43, and Security and Exchange Commission, p. 8 (criteria for choice of sanctions), ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. 10, 77th Cong., 1st sess. (1941), pts. 6, 13.

¹²⁹ *Id.*, Securities and Exchange Commission Monograph, p. 8.

¹³⁰ (D.C. N.Y. 1941) 40 F. Supp. 497.

¹³¹ (C.C.A. 8th, 1941) 122 F. (2d) 660.

¹³² 48 Stat. L. 979 (1934), 18 U.S.C. (1940), § 420c.

¹³³ 40 F. Supp. at 498.

choice of sanctions, the administrative agency does not determine whether an act shall be a criminal offense. It merely has discretion to decide whether a prosecution shall be commenced.

II

POWER OF ADMINISTRATIVE AGENCIES TO IMPOSE PENALTIES

A. *Inflexible Penalties*

Whether an administrative agency may impose the penal sanction upon a delinquent is one of the most serious problems in administrative law. If the penalty which the statute provides is inflexible, the imposition of this penalty results in nothing but a finding of facts. A finding of facts has always been considered as an administrative function.¹³⁴ Consequently, it seems that the administrative agency may impose an inflexible penalty. Of course, the constitutional requirements of trial by jury and due process have to be complied with.¹³⁵ In many instances, trial by jury can be dispensed with by federal agencies, since the constitutional provision of trial by jury does not apply to "petty" offenses.¹³⁶

The Supreme Court of the United States has approved of the imposition of inflexible penalties by administrative agencies. In the

¹³⁴ *Bartlet v. Kane*, 16 How. (57 U.S.) 263 (1853); *Arrow Stevedore Co. v. Pillsbury*, (C.C.A. 9th, 1937) 88 F. (2d) 446; *Index Mines Corp. v. Industrial Commission*, 82 Colo. 272, 259 P. 1036 (1927). Cf. *Milwaukee Corrugating Co. v. Industrial Commission*, 187 Wis. 414, 222 N.W. 251 (1928).

¹³⁵ *Passavant v. United States*, 148 U.S. 214 at 222, 13 S. Ct. 572 (1892) stated "They [defendants] had full notice of the proceedings before the board of general appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods." See, however, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 329 at 340-343, 29 S. Ct. 671 (1909), holding that the party fined had no right under the statute or due process to a hearing.

In *Lloyd Sabauda Societa v. Elting*, 287 U.S. 329, 53 S. Ct. 167 (1932), the Supreme Court modified *Oceanic Navigation Co. v. Stranahan*, supra, to the extent of saying that the statute, as interpreted by administrative practice, contemplated an administrative hearing and a fair determination of the evidence, and that the conclusion of the administrative agency as to the evidence was final. See "Report of the Special Committee on Administrative Law," 61 A.B.A. REP. 721 at 747 (1936), reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 423 at 448-449 (1938); 80 UNIV. PA. L. REV. 96 (1931).

¹³⁶ *Schick v. United States*, 195 U.S. 65, 24 S. Ct. 826 (1904). See also *Frankfurter and Corcoran*, "Petty Federal Offense and the Constitutional Guaranty of Trial by Jury," 39 HARV. L. REV. 917 (1926). Whether trial by jury is required in the states depends on state law. Due process of law under state constitutions does not prevent a state from abolishing jury trial in trial of serious offenses. *Williams v. Hert*, (C.C.Ind. 1901) 110 F. 166. *Ex parte Brown*, (D.C. N.C. 1905) 140 F. 461. Due process under the federal Constitution does not require the states to provide for trial by jury in case of petty offenses. *Natal v. Louisiana*, 139 U.S. 621, 11 S. Ct. 636 (1891).

first cases in which the Supreme Court dealt with the problem, a penalty was imposed by custom officials for the undervaluation of goods imported into the United States. The penalty consisted of an additional duty of a certain percentage on the actual value of the goods. As early as 1853, the Supreme Court, in *Bartlet v. Kane*,¹³⁷ held the imposition of the penalty by a custom official valid. In *Passavant v. United States*,¹³⁸ the Court regarded the additional penalty as "a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute." *Origet v. Hedden*¹³⁹ was decided by reference to *Passavant v. United States*. In *Oceanic Steam Navigation Co. v. Stranahan*,¹⁴⁰ and *Lloyd Sabauo Societa v. Elting*,¹⁴¹ the Supreme Court pronounced the same ruling for the field of immigration. In the *Oceanic Navigation* case, the defendant was punished by the Secretary of Commerce and Labor for the violation of the Alien Immigration Act of March 3, 1903,¹⁴² with the penalty provided in the act. The act declares that a person or transportation company who brings to the United States an alien afflicted with a loathsome or with a dangerous contagious disease shall pay to the Collector of Customs the sum of \$100 for each and every violation of the provisions. The delinquent attacked the statute for the reason, among others, that it did not provide for a judicial procedure. The Court distinguished the case from the *Wong Wing* case on the ground that a flexible penalty was involved and held the statute valid upon the precedents of *Bartlet v. Kane*, *Passavant v. United States*, and *Origet v. Hedden*. The case of *Lloyd Sabauo Societa v. Elting* also involved the imposition of an inflexible penalty by the Collector of Customs for bringing aliens to the United States who were afflicted with certain diseases. Again, the contention was made that the imposition of the penalty without a judicial procedure was invalid. This contention was rejected by reference to the *Oceanic Steam Navigation Co.* case, where the Court had considered the same argument unfounded. The imposition of an inflexible penalty by an administrative agency is permissible not only in the fields of tariff, internal revenue and taxation, but also in other subjects.¹⁴³

¹³⁷ 16 How. (57 U.S.) 263 (1853).

¹³⁸ 148 U.S. 214 at 222, 13 S. Ct. 572 (1892).

¹³⁹ 155 U.S. 228, 15 S. Ct. 92 (1894).

¹⁴⁰ 214 U.S. 320, 29 S. Ct. 671 (1909).

¹⁴¹ 287 U.S. 329, 53 S. Ct. 167 (1932).

¹⁴² Alien Immigration Act, 32 Stat. L. 1213, c. 1012 (1903).

¹⁴³ In *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320 at 339, 29 S. Ct. 671 (1909), the Supreme Court said: "In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was

B. *Flexible Penalties*

The imposition of a flexible penalty by an administrative agency requires not only a finding of facts but also a finding of the proper and adequate remedy. It is true that the finding of a penalty by an administrative officer is not something that is foreign to the field of administrative law. It is established that an administrative officer may exercise the power to pardon or to remit a penalty.¹⁴⁴ However, the exercise of this power can result only in an advantage and not in a disadvantage for the individual, whereas the finding of a penalty leaves discretion to the administrative agency in either direction. A recognized power which comes closest to the imposition of a flexible penalty by an administrative agency is that of an officer to determine the concrete penalty which an indeterminate sentence has imposed upon the accused.¹⁴⁵ Once it is admitted that an administrative agency may establish the guilt of an accused as a matter of finding of facts, there is not much difference between an officer who determines the final penalty of an indeterminate sentence and an administrative agency which imposes a flexible penalty, except that the scope of discretion might be narrower in the first case than in the latter.

There is little doubt, however, that the Supreme Court of the

within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." See also Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 (1935).

¹⁴⁴ In most states the pardoning power is in the governor, who is to exercise it with the advice of his counsel or other officers designated for the purpose or alone, but a statute giving a board authority to pardon or parole does not grant judicial power, nor delegate legislative authority. *Woods v. State*, 130 Tenn. 100, 169 S.W. 558 (1914). See also 1 BISHOP, CRIMINAL LAW, 9th ed., § 899, p. 644 (1923); 1 WHARTON, CRIMINAL LAW, 12th ed., § 44, p. 62 (1932); JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922); 8 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO EXECUTIVE ADMINISTRATION AND POWERS 22-25, 63-79 (1938). Also, see 3 U.S. ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, c. 9 (1939); Weihofen, "The Effect of a Pardon," 88 UNIV. PA. L. REV. 177 (1939); Weihofen, "Legislative Pardons," 27 CAL. L. REV. 371 (1939); Radin, "Legislative Pardons: Another View," *id.* 387 (1939); 5 FORD. L. REV. 166 (1936).

¹⁴⁵ *Cohn v. Ketchum*, 123 W. Va. 534, 17 S.E. (2d) 43 (1941). See also *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1929); *State v. Duff*, 144 Iowa 142, 122 N.W. 829 (1909); *State v. Stephenson*, 69 Kan. 405, 76 P. 905 (1904); *Mutart v. Pratt*, 51 Utah 246, 170 P. 67 (1917); *State v. Dugan*, 84 N.J.L. 603, 89 A. 691 (1913); *Miller v. State*, 149 Ind. 607, 49 N.E. 894 (1898); *In re Marlow*, 75 N.J.L. 400, 68 A. 171 (1907); *State v. Mulcare*, 189 Wash. 625, 66 P. (2d) 360 (1937). For an elaborate discussion of the purpose of the "indeterminate sentence" law, see *Ware v. Sanders*, 146 Iowa 233, 124 N.W. 1081 (1910).

United States, in the *Wong Wing* case,¹⁴⁶ declared the imposition of a flexible penalty by an administrative agency unconstitutional. In this case, the Commissioner of Immigration found that Wong Wing and others were unlawfully within the United States and not entitled to remain. He adjudged that they be imprisoned at hard labor and afterwards removed from the United States. Upon a petition for a writ of habeas corpus, the Supreme Court condemned the imposition of the penalty without a judicial trial and said:

“...It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the facts of guilt and adjudge the punishment by one of its own agents.”¹⁴⁷

The *Wong Wing* case raises the question to what extent an administrative agency is prohibited from imposing a flexible penalty without judicial trial. The language of the opinion, as quoted above, suggests that the prohibition is limited to the imposition of a flexible penalty for an “infamous crime.”¹⁴⁸ This suggestion seems to be corroborated by a dictum in the *Oceanic Steam Navigation* case, where the Court conceded that it is

“... within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.”¹⁴⁹

¹⁴⁶ *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977 (1895). See Brown, “Administrative Commissions and Judicial Power,” 19 MINN. L. REV. 261 (1935).

¹⁴⁷ 163 U.S. at 237.

¹⁴⁸ There is a split of opinion on the question what the test is for the determination of an infamous crime. The old test was the character of the crime rather than the nature of the punishment. The modern view, however, is that the question is determined by the nature of the punishment, and not by the character of the crime, and that any crime is infamous that is punishable by death or by imprisonment, with or without hard labor, in a state prison, or by the loss of civil or political privileges. See *United States v. Smith*, (C.C. Va. 1889) 40 F. 755; *United States v. Johannesen*, (C.C. Ga. 1888) 35 F. 411; *People v. Toynbee*, 20 Barb. 168, 11 How. Pr. 289, 2 Park Cr. 329 (N.Y. 1855), *affd.* *Wynehamer v. People*, 13 N.Y. 378, 12 How. Pr. 238, 2 Park. Cr. 421, 490 (1856); *Baum v. State*, 157 Ind. 282, 61 N.E. 672 (1901). The determination turns not on the punishment actually inflicted but upon the punishment which the court is authorized to impose. See *United States v. Carrollo*, (D.C. Mo. 1939) 30 F. Supp. 3; *State ex rel. Anderson v. Fousek*, 91 Mont. 448, 8 P. (2d) 791 (1932); *In re Dunham's Estate*, 181 Okla. 407, 74 P. (2d) 117 (1937).

¹⁴⁹ *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 at 339, 29 S. Ct. 671 (1909).

However, the case of *Lipke v. Lederer*¹⁵⁰ has given rise to doubt whether an administrative agency may impose a flexible penalty even within the limitations of the *Wong Wing* and *Oceanic Steam Navigation* cases. In the *Lipke* case, the Collector of Internal Revenue imposed upon Lipke a penalty tax for the nonpayment of the regular tax and threatened collection of the tax and penalty by seizure and sale of property. Lipke petitioned for a restraining order. Under section 3224 of the Revised Statutes, the Court did not have jurisdiction, if the assessment or collection of a tax and not that of a penalty was involved. However, it was found that the assessment was in fact an imposition of a penalty so that jurisdiction existed. Assuming jurisdiction, the Court had to determine the question whether the imposition of the penalty was consistent with due process of law. This question was answered in the negative, the Court saying:

“...And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded.”¹⁵¹

Since this statement was necessary for the final determination of the petition, it was not merely dictum, but holding.¹⁵² Did this holding overrule the *Wong Wing* and *Oceanic Steam Navigation* cases, as far as these cases permitted the imposition of a flexible penalty by an administrative agency? This seems to depend upon whether the Court condemned the “secret finding and summary action” rather than the fact that it was done by “executive officers.”

The case of *Regal Drug Corp. v. Wardell*¹⁵³ does not throw any light on the problem. Here the Collector of Internal Revenue levied a penal tax for the withdrawal of distilled liquor from bonded warehouses after the revocation of the liquor license. He further imposed various other penalties without notice and hearing in order to satisfy the assessment of the taxes and penalties. The order to refrain from enforcing the collection of the taxes and penalties was granted by reference to the *Lipke* and *Lederer* cases without any further elaboration.

¹⁵⁰ 259 U.S. 557, 42 S. Ct. 549 (1921).

¹⁵¹ 259 U.S. at 562.

¹⁵² Cf. GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 440, 441 (1940), suggesting that it was dictum.

¹⁵³ 260 U.S. 386, 43 S. Ct. 152 (1922).

The majority of the lower federal courts,¹⁵⁴ as well as the Utah Supreme Court,¹⁵⁵ took a stand against the imposition of any flexible penalty by administrative agencies.

The problem is of eminent importance. Due to the fact that administrative boards and tribunals have been held to lack the power to punish for contempt, even if conferred by legislative act,¹⁵⁶ statutes have been passed which declare contempt of boards a criminal offense¹⁵⁷ and confer power upon the agency itself to impose the penalty.¹⁵⁸ But even more important is the fact that, in general, courts are today swamped with great floods of cases which they were never designed to handle and the machinery breaks under the strain. In Massachusetts, for instance, almost a third of the total number of lower courts and

¹⁵⁴ *Dukich v. Blair*, (D.C. Wash. 1925) 3 F. (2d) 302; *Jasper v. Hellmich*, (D.C. Mo. 1925) 4 F. (2d) 852. *Contra*: *Seligman v. Bowers*, (D.C. N.Y. 1925) 4 F. (2d) 1011.

¹⁵⁵ *Tite v. State Tax Commission*, 89 Utah 404, 57 P. (2d) 734 (1936). See GELLHORN, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 446, 447 (1940).

¹⁵⁶ *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S. Ct. 1125 (1892); *Harriman v. Interstate Commerce Commission*, 211 U.S. 407, 29 S. Ct. 115 (1908); *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 44 S. Ct. 336 (1924); *People v. Swena*, 88 Colo. 337, 296 P. 271 (1931); *Langenberg v. Decker*, 131 Ind. 471, 31 N.E. 190 (1892); *Roberts v. Hackney*, 109 Ky. 265, 58 S.W. 810, 59 S.W. 328 (1900). See also 35 COL. L. REV. 578 (1935); 37 HARV. L. REV. 747 (1924); Lilienthal, "The Power of Governmental Agencies to Compel Testimony," 39 HARV. L. REV. 694 (1926); Langelutig, "Constitutional Limitations on Administrative Power of Investigation," 28 ILL. L. REV. 508 (1933); Waite, "Inquisitorial Powers of Administrative Tribunals," 12 UNIV. CINN. L. REV. 164 (1938); 3 MO. L. REV. 457 (1938).

¹⁵⁷ See Hyneman, "Administrative Adjudication: An Analysis," 51 POL. SCI. Q. 383, 516 (1936). Even where the constitutionality of contempt proceedings before administrative agencies has been denied, the power of making contempt of board a crime has generally not been questioned. See *Kuhlman v. Superior Court*, 122 Cal. 636, 55 P. 589 (1898); *Whitcomb's Case*, 120 Mass. 118 (1876); *State ex rel. Haughey v. Ryan*, 182 Mo. 349, 81 S.W. 435 (1905). See also Lilienthal, "The Power of Governmental Agencies to Compel Testimony," 39 HARV. L. REV. 694 at 700 (1926). However, it has been said that the limitation of the contempt authority to the imposition of a fine enforceable only in court is insufficient to avoid constitutional objections otherwise present. See *People v. Swena*, 88 Colo. 337, 296 P. 271 (1931). For the constitutionality of a Congressional act punishing contempt of legislative bodies, see *In re Chapman*, 166 U.S. 661, 17 S. Ct. 992 (1896); Landis, "Constitutional Limitations on the Congressional Power of Investigation," 40 HARV. L. REV. 153 at 158 (1926); Shull, "Legislative Contempt—An Auxiliary Power of Congress," 8 TEMPLE L.Q. 198 (1934).

¹⁵⁸ If no provision is made for the punishment by the administrative agency itself, the courts would be competent for the punishment. This procedure would be cumbersome. See Lilienthal, "The Power of Governmental Agencies to Compel Testimony," 39 HARV. L. REV. 694 at 700 (1926). Consequently, the "Brimson device" would be a better way of compulsion than punishment by the courts.

trial justices each year are concerned with violations of motor vehicle or traffic laws, for which the established doctrines of criminal liability are not suitable. The number of such cases is increasing rapidly. What is badly needed is some form of administrative control which will prove quick, objective and comprehensive.¹⁵⁹

IV

THE FUNCTION OF ADMINISTRATIVE SANCTIONS

In general, courts have shown a liberal attitude toward the problem whether administrative agencies may participate in the creation of a criminal offense by rules and regulations and may impose the penalty for the violation of administrative duties. Is there any justification for the fact that administrative agencies have been permitted to create certain elements of a criminal offense and, eventually, the penalty? As so often in the field of administrative law, "necessity" might be one justification. In addition, it seems that the device of punishment for the violation of administrative duties is distinguishable from the type of ordinary crime. In the first place, this "administrative crime"¹⁶⁰ is not the outbirth of a particular unmoral conduct, but is characterized by disobedience to administrative duties.¹⁶¹ In the second place, the function of this "administrative crime" is deterrence rather than retribution.¹⁶² The mere existence of the penal sanction should make the individual comply with his administrative duties.

¹⁵⁹ Sayre, "Public Welfare Offenses," 33 COL. L. REV. 55 at 69 (1933).

¹⁶⁰ The concept of an "administrative crime" has been developed by JAMES GOLDSCHMIDT, *DAS VERWALTUNGSSTRAFRECHT* 548, 566 (1902); Goldschmidt, "Das Verwaltungsstrafrecht ins Verhältnis zur Modernen Staats- und Rechtslehre," *FESTGABE DER JURISTISCHEN GESELLSCHAFT ZU BERLIN FÜR RICHARD KOCH* 415 (1903). Goldschmidt bases his theory on the contention that a crime committed in violation of administrative duties differs from the ordinary crime. The administrative crime consists of the omission to support the policy of the state, which is directed towards the well-being of the state. See also FRITZ TROPS, *BEGRIFF UND WERT EINES VERWALTUNGS-STRAFRECHTES* (1926); v. Dona, "Beziehungen und Begrenzungen von Strafrecht und Verwaltungsrecht," 30 *VERWALTUNGSARCHIV* 233 (1925). Opposed to the idea of a special concept of "administrative crime" is FRITZ FLEINER, *INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHT*, 6th ed., 316 (1939); WALTER JELLINEK, *VERWALTUNGSRECHT* 322 (1928) (25 *Enzyklopädie der Rechts und Staats Wissenschaft*).

¹⁶¹ Sayre, "Public Welfare Offenses," 33 COL. L. REV. 55 at 79-80 (1933); also MICHAEL and WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES* 6-11, 786, 787 (1940).

¹⁶² See *MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE*, S. Doc. 10, 77th Cong., 1st sess. (1941), pt. 12, Federal Power Commission, p. 39, where it is said: "The forfeiture provisions of the act have never been formally invoked by the Commission but, no doubt, they have some value as deterrents."

To what extent should the legislators use the device of the administrative crime? Since the chief interest of government in the field of administrative law is directed toward compliance with administrative duties, specific performance of administrative duties rather than punishment for their violation must be the primary objective, as the distinguished Swiss professor of administrative law, Fritz Fleiner has urged.¹⁶³ Consequently, direct compulsion should be exercised for the purpose of enforcing administrative duties, wherever it is possible.¹⁶⁴ For instance, where a person carries on an enterprise without a license, the enterprise should be closed (direct compulsion). Where a person is bound to perform an administrative duty which can be carried out by a third person, it should be done by the third person at the expense of the individual who is subject to the administrative duty (substituted performance).¹⁶⁵ Only in those cases in which neither direct compulsion nor substituted action is possible, should the concept of the "administrative crime" be used, not as a means of punishment, but as a means of indirect compulsion.¹⁶⁶ This punishment is not to vindicate past conduct, but to enforce future conduct. Consequently, it has nothing to do with the ordinary concept of crime. Therefore, a penalty can be imposed as often as necessary to make the individual comply with the administrative order, and the prohibition of double jeopardy does not apply.¹⁶⁷ On the other hand, once the order is complied with, the penalty can no longer be imposed or exacted. Of course, under this concept, the penal sanction becomes an administrative sanction and the problems which result from the use of the penal sanction in administrative law no longer exist. Even though punishment as an administrative sanction should be employed, there always would remain a proper field for the use of the administrative crime as a penal sanction.

¹⁶³ FRITZ FLEINER, *INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHT*, 6th ed., 216 (1939). He says (translated): "Compulsion and punishment go their own ways, and it is wrong from a legislative point of view to make the violation of secondary administrative interests a criminal offense and to resort to punishment, where plain compulsion would be sufficient."

¹⁶⁴ *Id.* at 222.

¹⁶⁵ *Id.* at 220.

¹⁶⁶ *Id.* at 218, 219.

¹⁶⁷ *Id.* at 219.