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# Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis

J.Morris Clark

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# Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis

J. Morris Clark\*

## TABLE OF CONTENTS

I. INTRODUCTION	381
II. PUNITIVE LAWS AND REMEDIAL LAWS: AN EXERCISE IN CONTRADICTION	385
III. THE MEANING OF CRIMINAL PUNISHMENT	397
A. "PETTY OFFENSES" AND "INFAMOUS PUNISHMENTS"	397
1. <i>Fines and Forfeitures Labeled "Criminal"</i> <i>Constitutionally "Criminal" or "Petty"</i>	397
2. <i>"Infamous" Punishments That Are Always</i> <i>Constitutionally "Criminal"</i>	401
B. POLICIES UNDERLYING THE CIVIL-CRIMINAL DISTINCTION	403
1. <i>Why Should Not All "Severe" Punishments Be</i> <i>Considered "Criminal"?</i>	403
2. <i>Stigma: A Partial Explanation of Criminal</i> <i>Punishment</i>	406
C. APPLYING THE CIVIL-CRIMINAL DISTINCTION: THREE CASES	410
1. <i>Forfeitures Not Labeled "Criminal"</i>	410
2. <i>Incarcerations for Civil Contempt</i>	412
3. <i>Disqualification from Public Employment</i>	412
D. SUMMARY	413
IV THE CONSTITUTIONAL ASPECTS OF CIVIL PUNISHMENT	414
A. <i>Boyd v. United States: THE FIFTH AMENDMENT AND</i> <i>THE "QUASI-CRIMINAL" LAW</i>	414
B. SUMMARY ADJUDICATION: TAX OR PENALTY?	420
C. ENFORCEMENT OF FOREIGN PENAL LAWS	421
D. EX POST FACTO LAWS	424
E. OTHER CONSTITUTIONAL ASPECTS OF NONCRIMINAL PUNISHMENT	426
F. SUMMARY	427

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V. PUNITIVE LAWS IN CONSTITUTIONAL ADJUDICATION .....	429
A. THE MEANING OF "PUNISHMENT" .....	429
B. POLICIES UNDERLYING DISTINCTIONS BASED ON "PUNISHMENT" .....	432
1. <i>Procedural Safeguards</i> .....	432
2. <i>The Ex Post Facto Clause</i> .....	434
3. <i>Takings Without Just Compensation</i> .....	434
4. <i>The Tenth Amendment</i> .....	435
5. <i>The Cruel and Unusual Punishment Clause</i> .....	435
C. IDENTIFYING PUNITIVE PURPOSE .....	435
1. <i>Punishment as a State of Mind: The Court's Approach</i> .....	436
2. <i>Legislative "Motivation" and Legislative "Purpose"</i> ..	439
a. <i>Statutory interpretation</i> .....	440
b. <i>Constitutional validity</i> .....	441
3. <i>"Motivation": The Improper Use of Legislative History or Other Speculative Evidence of Intent to Invalidate a Statute</i> .....	441
4. <i>Inquiry into Legislative "Purpose" Under the Equal Protection Clause and the First Amendment</i> .....	444
5. <i>Application of the First Amendment and Equal Protection Tests to the Issue of "Punishment"</i> .....	454
6. <i>Applying the Test to Kennedy v. Mendoza-Martinez</i> ..	461
7. <i>Identifying Punitive Laws for Constitutional Purposes</i> ..	463
a. <i>Punishment and taxation</i> .....	463
b. <i>Punishment and compensation</i> .....	469
c. <i>Punishment and regulation</i> .....	475
(1) <i>Forfeitures</i> .....	475
(2) <i>Denials or deprivations of personal rights and privileges</i> .....	481
(3) <i>Expatriation and deportation</i> .....	487
(4) <i>Civil contempt</i> .....	488
d. <i>Punishment and treatment</i> .....	489
VI. POSTSCRIPT: THE PROCEDURAL ATTRIBUTES OF CIVIL PENALTY PROCEEDINGS .....	491
A. THE RIGHT TO JURY TRIAL UNDER THE SEVENTH AMENDMENT .....	491
B. REMISSION AND MITIGATION OF PENALTIES AND FORFEITURES .....	494
C. DUE PROCESS HEARING REQUIREMENTS IN PENALTY AND FORFEITURE PROCEEDINGS .....	496
VII. CONCLUSION .....	500

## I. INTRODUCTION

Laws that provide for punishment but are civil rather than criminal in form have sometimes been labeled "quasi-criminal" by the Supreme Court.<sup>1</sup> These laws, broadly speaking, provide for civil money penalties, forfeitures of property,<sup>2</sup> and the punitive imposition of various disabilities, such as the loss of professional license or public employment.

In determining the applicability of constitutional safeguards in proceedings involving these sanctions, the Supreme Court has treated particular laws as criminal in some contexts but civil in others. For example, the Court has stated that forfeiture proceedings are sufficiently "criminal" that the property owner can claim the protection of the fifth amendment's self-incrimination clause.<sup>3</sup> On the other hand, the Court has consistently held that neither the double jeopardy clause of the fifth amendment<sup>4</sup> nor the various criminal trial safeguards of the sixth amendment<sup>5</sup> apply in forfeiture cases.

The need for clarification in this area is becoming increasingly urgent. The use of civilly labeled monetary penalties and forfeitures has gained increasing attention recently as a means of substituting streamlined administrative proceedings for the more cumbersome judicial proceedings that typify the criminal process.<sup>6</sup> As the use of civil penalties increases, so must concern for defining the constitutional rights of those who will be sub-

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1. The term appears to have originated in *Boyd v. United States*, 116 U.S. 616, 634 (1886).

2. Forfeiture proceedings have frequently been regarded as in rem and therefore not as penalties against the person. *See, e.g., Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878). The sense in which these laws are properly regarded as punitive is discussed at text accompanying notes 286-309 *infra*.

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

4. *E.g., One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam).

5. *E.g., United States v. Zucker*, 161 U.S. 475 (1896).

6. The Administrative Conference of the United States has suggested that increased use of civil penalties may lead to greater administrative efficiency and in some cases to a better rendition of due process, since fewer cases will suffer from delay and forced settlement than in the criminal process. Administrative Conference of the United States, Recommendation 72-6: Civil Money Penalties as a Sanction, Dec. 14, 1972. The recommendation is based on H. Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies, Nov. 17, 1972, reprinted in 2 ADMINISTRATIVE CONFERENCE OF UNITED STATES, RECOMMENDATIONS AND REPORTS 896 (1972) [hereinafter cited as Goldschmid].



jected to punishment by these ostensibly noncriminal methods.<sup>7</sup>

The Court has never developed a principled explanation of why identical sanctions should trigger certain criminal constitutional safeguards but not others. Sometimes it has declared that certain constitutional safeguards, such as the self-incrimination clause, are broader than others.<sup>8</sup> At other times, apparently ignoring its distinction based on "breadth," the Court has asserted that all laws that serve primarily to punish are criminal in nature, presumably for all constitutional purposes.<sup>9</sup> But using this punitive-nonpunitive dichotomy, the Court has still managed to achieve a selective application of constitutional safeguards; in those cases where it has concluded that a particular constitutional safeguard should not be applied, it has strained to show that the civilly labeled sanctions in question are "remedial" rather than punitive. In a series of contradictory opinions, the Court has held the same sanction to be punitive for one constitutional purpose but remedial for others.

This Article sets forth guidelines that may help to explain and order the Court's holdings. To orient the reader, it may be useful to summarize its thesis at the outset. The Article will suggest that the Court's single distinction between punitive laws that are criminal and remedial laws that are civil requires revision. The decisions in fact indicate two critical distinctions, not one. First, the Court applies certain constitutional provisions only to punishments that are "criminal" in a specially defined sense, not to punishments that are "civil." Second, the Court applies other constitutional safeguards to any punishment, whether or not criminal, but not to "nonpunitive" laws.

The first portion of this Article deals with the distinction between criminal punishment and civil punishment. In general the Court has applied those constitutional provisions that refer explicitly to criminal prosecutions sparingly—only to cases that fit the Court's narrow concept of "criminal punishment. The cases that establish this proposition involve the double jeopardy clause of the fifth amendment<sup>10</sup> and the various crim-

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7. See Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORN. L. REV. 478 (1974) [hereinafter cited as Charney]; Note, *Forfeitures—Civil or Criminal?*, 43 TEMP. L.Q. 191 (1970); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

8. *Helvering v. Mitchell*, 303 U.S. 391, 400 n.3 (1938).

9. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

10. The double jeopardy clause has been restricted to "criminal"

inal trial safeguards of the sixth amendment. The only apparent exception to this restrictive application of "criminal" safeguards is the self-incrimination clause.<sup>11</sup>

These holdings, if not the Court's language, suggest that "criminal punishment" may be defined in terms of two categories. One consists of severe sanctions that the Court considers "infamous" and therefore criminal for constitutional purposes, whether or not so labeled by the legislature. Imprisonment for a substantial duration constitutes the usual example. A second category consists of less severe punishments, such as property forfeitures, which are regarded as criminal for constitutional purposes only if the legislature attaches a criminal label to the proceeding. Other penalties, such as small money fines, apparently fail to qualify as "criminal punishment" for purposes of certain sixth amendment provisions even if they do carry a legislatively imposed criminal label.

A second group of constitutional provisions and doctrines applies not only to this narrowly defined class of "criminal" punishments, but also to any other sanction that can be called punitive. Applicable to all punitive sanctions are the ex post facto clause, the exception to the full faith and credit clause that concerns enforcement of foreign penal laws, the due process rule that tax penalties may not be assessed by summary adjudication, a currently uncertain rule that the fourth and fifth amendments combined prevent compulsion of testimony in civil penalty cases, the doctrine that punitive takings do not fall within the scope of the fifth amendment's taking clause, and, finally, the cruel and unusual punishment clause itself.

The distinction the Article posits between criminal punishment and noncriminal punishment, and between constitutional provisions that apply only to the former and provisions that apply to both, serves purposes that are admittedly more descriptive than normative. Because the Constitution makes certain provisions applicable only to criminal prosecutions, the Court has evolved a meaning for criminal punishment. This meaning can more easily be described in formalistic and historical terms than defended in terms of policy. Apart from a general notion that procedural safeguards such as those embodied in the sixth amendment should be reserved for more severe or stigmatic pun-

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punishment despite the lack of an explicit textual reference to criminal prosecutions. See J. SIGLER, *DOUBLE JEOPARDY* 39 (1969).

11. Various explanations of this exception are explored below at text accompanying notes 110-24 *infra*.

ishments, no policy compels or underlies the Court's distinction between criminal punishments and other punishments.

The Court's formalistic lines are, at least, more certain and predictable than lines that might be produced by a policy-oriented approach testing whether the punishment at stake in a particular case is "severe." Moreover the lines drawn do have some general functional relevance, which this Article attempts to describe. For these reasons, plus the fact that the Court appears to be clearly committed to its existing concept of criminal punishment, the Article takes the basic outlines of the Court's holdings as given and undertakes first and foremost to analyze them in terms of their consistency and predictability as a tool of judicial decision.

The second major distinction dealt with by the Article is that between punishment and nonpunishment—a distinction that determines the applicability of all the constitutional provisions that have been mentioned, both those that apply to criminal and those that apply to civil punishments.

The core concept of punishment is relatively simple and well accepted. H.L.A. Hart and Herbert Packer have described it as having a dominant purpose of retribution, meaning the desire to hurt a law violator for no reason but revenge, or deterrence, meaning the desire to influence his future conduct or that of others who fear similar hurt.<sup>12</sup>

Notwithstanding general agreement about this core concept, the Court's application of it to particular cases has proved to be highly unpredictable and confusing. The source of this confusion lies in the two general means by which the Court has sought to uncover a "dominant" legislative purpose of retribution or deterrence. At times the Court has pointed to various objective "indicators" of legislative purpose, such as whether the sanction keys to conduct already labeled criminal, or whether the kind of sanction involved has traditionally been used to punish. None of these indicators, however, adequately explains or predicts the Court's actual holdings. At other times the Court has sought to determine dominant purpose by resorting to legislative history. This second approach, however, is an unreliable method of analysis which the Court has rejected in all other contexts requiring a determination of legislative purpose as a basis for holding a law constitutional or unconstitutional.

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12. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968) [hereinafter cited as H.L.A. HART]; H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 31 (1968) [hereinafter cited as PACKER]; text accompanying notes 161-62 *infra*.

Accepting the constitutional role assigned to the idea of punishment, this Article attempts to offer a more satisfactory approach to the key issue in defining it—the problem of identifying “dominant legislative purpose.” The Article suggests first, that a single method of analyzing punishment can serve to advance the diverse policies underlying the various constitutional provisions to which the concept is relevant. Second, it suggests that the problem of finding a dominant purpose to punish can be analogized directly to the problem of finding a dominant purpose to discriminate invidiously against a given class or to burden a “fundamental interest” under the equal protection clause or the first amendment. That is, if the law places special burdens specifically on a group of persons who have violated some legal prohibition, then there should exist a presumption that the law is punitive, absent convincing evidence of some other purpose. The analysis of alternative purpose should focus on the overbreadth or underbreadth of the legislation and on the presence or absence of a less burdensome alternative.

This mode of analysis is admittedly rigorous and puts a serious burden on those seeking to defend a law as “nonpunitive.” The Article suggests, however, that the burden is an appropriate one. To be sure, “punishment” itself is not an evil of the kind associated with invidious discrimination. As a general rule, there is nothing wrong with punishing a lawbreaker. Nonetheless, the form and procedural regularity of that punishment, as reflected by constitutional provisions such as the sixth amendment, the self-incrimination clause, and the ex post facto clause, are important constitutional values. A rigorous test of purpose, one that errs on the side of overprotecting those values, would not be unduly disruptive. For the most part, it would merely require that the government pursue its objectives with extra procedural safeguards. Even if a rigorous test of purpose does not strike exactly the right balance for all purposes, it may nevertheless be the best of available answers to an extremely complex issue. If, as this Article contends, the Court’s present efforts to deal with the issue of purpose have failed to produce consistent and predictable doctrinal tools in this area, an alternative approach that offers something more workable should at least be given serious consideration.

## II. PUNITIVE LAWS AND REMEDIAL LAWS: AN EXERCISE IN CONTRADICTION

The Supreme Court has indicated on numerous occasions that

all laws that serve primarily to punish are criminal in nature.<sup>13</sup> The leading example of this approach is the 1886 case of *Boyd v. United States*,<sup>14</sup> where the Government sought to subpoena the books and business records of a merchant who had allegedly imported 35 cases of plate glass in violation of the customs laws, thereby subjecting the goods to forfeiture. The owner asserted a constitutional privilege against the disclosure of the books and records, citing both the fourth and the fifth amendment. The Court sustained the claim, reasoning that search and seizure of books in order to bring a forfeiture serves essentially the same purpose as forcing a man to testify against himself in a criminal trial. The Court justified its holding as follows:

We are also clearly of the opinion that proceedings instituted for the purposes of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. . . . The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . . .<sup>15</sup>

In recent years the Court has reiterated this language in several forfeiture cases involving fourth and fifth amendment claims, stating that the forfeiture is "criminal" or "quasi-criminal" in nature and that the constitutional provisions in question

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13. The Supreme Court cases are analyzed in the following pages. Commentary that also makes this assumption includes Charney, *supra* note 7, which asserts that penal laws, in the sense of laws that primarily serve the purpose of retribution, are criminal. *Id.* at 509-14. See also Note, *Forfeitures—Civil or Criminal?*, 43 TEMP. L.Q. 191 (1970). Moreover, writers of jurisprudential articles on criminal law seem generally to assume that punishment is the exclusive hallmark of the criminal process. See, e.g., H.L.A. HART, *supra* note 12; H. PACKER, *supra* note 12. But see Note, *Statutory Penalties—A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938) (suggesting that certain penalties should be recognized as neither civil nor criminal, but construed on an ad hoc basis); Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez and Speiser Cases*, 34 IND. L.J. 231, 279-88 (1959) (arguing that many sanctions that the Court has strained to label as compensatory or regulatory should be recognized as punitive and, by implication, criminal) [hereinafter cited as *Indiana Note*].

14. 116 U.S. 616 (1886).

15. *Id.* at 633-35.

therefore apply.<sup>16</sup> The reason given for this conclusion has been that the forfeitures in question were punitive.

In other contexts, however, the Court has held forfeiture proceedings to be neither criminal nor punitive. In a 1972 case involving a claim of double jeopardy, where a forfeiture proceeding was commenced after the initiation of a criminal prosecution, the Court stated:

The . . . forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions.<sup>17</sup>

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16. In *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), the Court held that contraband seized in violation of the fourth amendment could not be used as evidence in a forfeiture proceeding involving the care used to transport the contraband. The Court again stated:

[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. . . . That the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts.

*Id.* at 700-01. Similarly, in *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), the Court dealt with a fifth amendment claim of privilege from filing incriminating tax documents in a suit to forfeit money used in a bookmaking operation. The contention, essentially, was that the requirement to register for the tax was a requirement of self-incrimination, so that the underlying tax statute was void. The question posed was whether this claim of privilege could be raised in a suit theoretically in rem against the property, not against the owner. The Court held that the forfeiture statute in fact applied only in cases where the owner was at fault, and hence amounted to a penal provision so that the fifth amendment claim could be raised. The Court quoted *Boyd* with approval and further stated:

From the relevant constitutional standpoint there is no difference between a man who "forfeits" [money] because he has used the money in illegal gambling activities and a man who pays a "criminal fine" . . . as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force.

*Id.* at 718.

17. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (per curiam). The forfeiture in this case was of goods brought into the country in violation of the tariff laws. Because such goods might be classified as contraband, the Court's characterization of the forfeiture as nonpunitive could arguably be explained by the need to keep them out of circulation. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965); text accompanying notes 298-302 *infra*. However, three arguments militate conclusively against such an explanation: (1) the gems were not "contraband per se" in the sense of being

In other opinions the Court has treated similar forfeitures as remedial and nonpunitive.<sup>18</sup> Yet in response to a recent claim that forfeiture of a rented yacht used to transport a small amount of marijuana constituted a taking without just compensation under the fifth amendment, the Court jumped back to the conclusion that the forfeiture served "punitive and deterrent purposes" and therefore did not fall within the taking clause.<sup>19</sup>

This ambivalence characterizes the Court's treatment of money sanctions as well as forfeitures. In the 1922 case of *Lipke v. Lederer*,<sup>20</sup> the Court dealt with a double "tax" payable by anyone who manufactured illegal beverages without paying the normal tax. The Court held that the Internal Revenue Service could not enforce such an assessment by distraint because the law constituted a punishment or penalty:

Evidence of crime . . . is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function "is to provide for the support of the government" and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.<sup>21</sup>

Yet in the leading case of *Helvering v. Mitchell*,<sup>22</sup> in 1938, the Court held that imposition of a similar tax assessment after a criminal prosecution did not constitute double jeopardy because it was not punitive. The tax provision in *Mitchell*, like that in *Lipke*, required one who had evaded taxes to pay not only the amount due but also an additional amount (in this case 50 percent of the alleged deficiency) collectible in a civil proceeding.<sup>23</sup>

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dangerous or forbidden to the general public; (2) they constituted exactly the same kind of property—goods imported in alleged violation of the customs laws—as that involved in *Boyd v. United States*, where the forfeiture was held criminal in nature; and (3) the Court did not purport to distinguish *Emerald* from other cases on the "contraband per se" notion.

18. Cases treating forfeitures as proceedings in rem maintainable without reference to the guilt or innocence of the owner were collected by the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-88 (1974). See, e.g., *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

19. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

20. 259 U.S. 557 (1922).

21. *Id.* at 562. The Court further observed that the penalty was "for crime." *Id.*

22. 303 U.S. 391 (1938).

23. The penalty in *Lipke* consisted of 100 percent of the alleged deficiency; that in *Mitchell*, 50 percent. The Court did not, however, rely on this difference in amount as a basis for distinguishing the two cases.

Nonetheless, the Court rejected the double jeopardy claim on the ground that the second suit was essentially remedial rather than punitive and thus civil rather than criminal.<sup>24</sup> The *Mitchell* Court acknowledged that the tax in *Lipke* had been a criminal sanction and reaffirmed (in dictum) that "Congress may not provide civil procedure for the enforcement of punitive sanctions."<sup>25</sup> It declared that "[w]here the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy."<sup>26</sup> The difference from *Lipke*, according to the *Mitchell* Court, lay in congressional intent as revealed by the choice of civil rather than criminal procedure. This choice, according to the Court, indicated that the *Mitchell* tax was "remedial" rather than "punitive." Yet this conclusion defies the *Lipke* holding that a civilly labeled "tax" can nonetheless constitute a punitive and therefore criminal sanction. The Court thus failed to explain its different treatment in *Lipke* and *Mitchell* of laws that appear to have been essentially identical in function and purpose.

Disparities also arise in cases involving monetary assessments other than taxes. Where a civil money penalty was assessed by the State of Wisconsin against an insurance company doing business in the state without a license, the Supreme Court held the imposition to constitute a penal law that the courts of another jurisdiction need not enforce.<sup>27</sup> Yet in *United States ex rel. Marcus v. Hess*,<sup>28</sup> where contractors who had submitted fraudulent bids for a government contract pleaded double jeopardy when a civil money penalty was assessed against them after a criminal prosecution, the Court characterized the proceedings as "civil, remedial actions brought primarily to protect the government from financial losses,"<sup>29</sup> and analogized the fixed-sum

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24. The Court stated:

*Mitchell* contends that this proceeding is barred under the doctrine of double jeopardy because the 50 per centum addition . . . is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts. Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.

303 U.S. at 398-99.

25. *Id.* at 402 & n.6.

26. *Id.* at 398 (citing *Murphy v. United States*, 272 U.S. 630, 632 (1926)).

27. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888).

28. 317 U.S. 537 (1943).

29. *Id.* at 548 (citing *Helvering v. Mitchell*, 303 U.S. 391 (1938)).



penalties to liquidated, compensatory damages.<sup>30</sup>

The Court has applied the same punitive-remedial distinction in a third category of cases. These cases involve denial or divestiture of personal rights and privileges: citizenship, professional licenses, government employment, and the like. Again, the results have been difficult to rationalize. In *Kennedy v. Mendoza-Martinez*<sup>31</sup> the Court held that the removal of United States citizenship from individuals who remained in foreign countries to escape the draft constituted punishment—and hence, apparently a fortiori, criminal punishment under the sixth amendment—because the legislative history indicated punitive intent. In two much earlier cases involving the removal of professional licenses from those who supported the Confederacy in the Civil War, the Court had found a punitive intent under the *ex post facto* clause without resorting to legislative history, because there existed no rational explanation of the law apart from intent to punish.<sup>32</sup>

On the other hand, the Court has declined to hold punitive, and hence criminal, the deportation of certain aliens for violating laws while in the United States,<sup>33</sup> and has similarly declined to hold punitive or criminal the cancellation of social security benefits otherwise due to an alien deported because of membership in the Communist Party.<sup>34</sup> Dismissals from union office for reasons of Communist Party affiliation or criminal offenses have been held both punitive<sup>35</sup> and nonpunitive<sup>36</sup> under the bill of attainder and *ex post facto* clauses. Although commentary has struggled to extract a rule from these cases to explicate the Court's punitive-remedial distinction, no coherent explanation

30. *Id.* at 551-52. See also *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) ("Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations.").

31. 372 U.S. 144 (1965).

32. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

33. *Lehman v. United States ex rel. Carlson*, 353 U.S. 685 (1957); *Marcello v. Bonds*, 349 U.S. 302 (1955); cf. *Galvan v. Press*, 347 U.S. 522 (1954) (deportation of member of Communist Party).

34. *Flemming v. Nestor*, 363 U.S. 603 (1960).

35. *United States v. Brown*, 381 U.S. 437 (1965) (disqualification from union office of present or past Communist Party members held punitive for purposes of the bill of attainder clause).

36. *De Veau v. Braisted*, 363 U.S. 144 (1960) (disqualification from union office of ex-felons not punitive for purposes of the bill of attainder and *ex post facto* clauses). See also *Hawker v. New York*, 170 U.S. 189 (1898) (delicensure of doctor convicted of crime is regulatory, not punitive in nature).

has thus far emerged.<sup>37</sup>

This brief juxtaposition of cases is illustrative of the Court's shifting and uncertain use of the distinctions between civil and criminal laws and between remedial and punitive laws. More than one academic critic has either given up hope of formulating an explanation,<sup>38</sup> or arrived at a definition that flies in the face of venerable and apparently unshakeable precedent,<sup>39</sup> or, still further from established precedent, sought to deny the need ever to hinge constitutional doctrine on a finding of punishment.<sup>40</sup>

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37. For an analysis of the Court's reliance on "punishment" in *Trop v. Dulles*, 356 U.S. 86 (1958), and *Flemming v. Nestor*, 363 U.S. 603 (1960), see Indiana Note, *supra* note 13; Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290 (1965).

38. The perceptive Indiana Note, *supra* note 13, concludes that "one cannot expect too much from a theory" and that "[e]ach of the many attempts to provide a test for punishment has utility and solves the problem in certain instances, but it seems unavailing to generalize from them to form a workable formula for future cases," and notes, "possibly the conclusion is that there are no workable standards at all." *Id.* at 287-88 & n.237. Likewise Note, *Statutory Penalties—A Legal Hybrid*, 51 HARV. L. REV. 1092 (1938), concludes that penalties should not be defined as either civil or criminal, but should be recognized as a hybrid, to be treated as either civil or criminal depending on which treatment seems more desirable in the circumstances. "Predictability and uniformity will be missing if this principle is followed, but at present the courts apparently are guided by it, for though in most cases the actions are treated as civil, whenever it seems desirable to give a defendant added protection, the criminal rules of procedure are adopted." *Id.* at 1101.

39. Professor Charney suggests that whenever a deterring sanction goes beyond what is strictly necessary to disable the actor from future undesirable conduct, the sanction should be regarded as criminal for all constitutional purposes. Charney, *supra* note 7, at 507-14. See Note, *Forfeitures—Civil or Criminal?*, 43 TEMP. L.Q. 191 (1970), takes a similarly Draconian view. Whatever the merits or demerits of this approach in terms of outcome, the analysis is clearly irreconcilable with numerous Supreme Court cases that reject the notion that forfeitures and civil monetary penalties should be treated as criminal proceedings for all purposes of constitutional procedure. It seems clear also that the Court is not inclined to reverse this imposing body of precedent. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (8-1 decision upholding forfeiture of yacht because of transportation of small amount of marijuana, as to owner-lessor without knowledge of or participation in the offense, on grounds that such forfeiture need not involve an affirmative showing of guilt on the part of the property owner).

40. Justice Frankfurter reached this conclusion with regard to the double jeopardy clause, arguing that the legislature can impose multiple punishments for the same crime and that only the cruel and unusual punishment clause should regulate the number of proceedings brought to enforce them. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 553-

In order to bring conceptual order to this area of the law, one must temporarily disregard the Court's language and look to the results of the cases. Although the Court in *Helvering v. Mitchell*<sup>41</sup> based its double jeopardy holding on the conclusion that the tax in question was remedial rather than punitive, the opinion was on much firmer ground when it observed in a footnote that "the cases have usually attempted to distinguish between the type of procedural [constitutional] rule involved rather than the kind of sanction being enforced."<sup>42</sup>

The Court's opinions suggest that it has separated the applicable constitutional provisions into two groups—one containing provisions that it has applied only to a narrowly defined group of "criminal" sanctions, and the other, provisions that it has applied to punitive sanctions whether or not "criminal." With regard to the first group, the Court has refused in recent years to apply either the double jeopardy clause<sup>43</sup> or the criminal trial guarantees of the sixth amendment<sup>44</sup> to forfeitures and

56 (1943) (Frankfurter, J., concurring). *But see* note 49 *infra*. Professor Ely similarly attempts to avoid the need for finding punishment where the ex post facto and bill of attainder clauses, procedural due process, and cruel and unusual punishment are concerned. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1311-13 n.324 (1970) [hereinafter cited as Ely]. The difficulties that inhere in this approach are dealt with in note 155 *infra*.

41. 303 U.S. 391 (1938).

42. *Id.* at 400 n.3. The complete footnote reads as follows:

The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced. Thus *Hepner v. United States*, 213 U.S. 103, 111-112, holding that a verdict may be directed for the Government, and *United States v. Regan*, 232 U.S. 37, 50, holding that the Government need not prove its case beyond a reasonable doubt, distinguished *Boyd v. United States*, 116 U.S. 616, and *Lees v. United States*, 150 U.S. 476, holding that the defendant could not be required to be a witness against himself on the ground that "the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination . . . is of broader scope than are the guarantees in Article III and the Sixth Amendment governing trials in criminal prosecutions." 232 U.S. at 50. Compare also *Pierce v. United States*, 255 U.S. 398, 401.

43. *See, e.g.*, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam) (forfeiture); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) (money penalty); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (money penalty); *Helvering v. Mitchell*, 303 U.S. 391 (1938) (money penalty).

44. *See, e.g.*, *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932) (civil money penalty may be assessed before administrative official rather than a court); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320

money penalties that are labeled "civil."<sup>45</sup>

(1909) (same); *Passavant v. United States*, 148 U.S. 214 (1893) (same); *Hepner v. United States*, 213 U.S. 103 (1909) (court may direct a verdict in favor of the Government in a money penalty case); *United States v. Zucker*, 161 U.S. 475 (1896) (no sixth amendment right of confrontation in forfeiture proceeding); cf. *United States v. J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974) (no sixth amendment right of jury trial in civil money cases).

45. The general statement that the Court has reserved the double jeopardy clause and criminal trial guarantees for purely criminal cases deserves some historical qualification. Several cases roughly contemporary with *Boyd v. United States* did apply double jeopardy protections in forfeiture and money penalty proceedings.

In *United States v. Chouteau*, 102 U.S. 603 (1881), a distiller paid a fine to the United States upon a criminal fraud charge and in return received a release from the "said indictments and prosecutions." The United States then proceeded against the distiller's surety in a civil action to collect a penal sum of \$2800. The Court held that the civil penalty was a "prosecution" within the terms of the settlement:

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . [The distiller] has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.

*Id.* at 611.

In *Coffey v. United States*, 116 U.S. 436 (1886), decided at approximately the same time as *Boyd*, the Court held that an acquittal on a criminal charge of tax evasion precluded a subsequent suit to forfeit distillery apparatus and liquors. The Court observed that

all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

*Id.* at 443. See also *United States v. La Franca*, 282 U.S. 568 (1931); *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1893). The language of these cases has subsequently been attacked as "uncritical," *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 555-56 (1943) (Frankfurter, J., concurring), and the holdings have been clearly rejected by the cases cited in note 43 *supra*.

In the criminal trial procedure context, the Court held as early as 1835 that the Government must prove its case in forfeiture proceedings beyond a reasonable doubt. *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682, 691 (1835) ("No individual should be punished for a violation of law which inflicts a forfeiture of property, unless the offence shall be established beyond reasonable doubt."). Subsequently, however, the Court has asserted that such proof was required not because of the criminal nature of the sanction, as the Court's language had clearly

Indeed, except for the self-incrimination clause,<sup>46</sup> the Court has declined to apply any constitutional provision that refers by its terms to criminal prosecutions<sup>47</sup> to any money penalty or forfeiture labeled "civil." Although the Court has never adequately explained its restrictive view of the sixth amendment<sup>48</sup> and the

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implied, but because the Government chose to prosecute the forfeiture by means of information rather than by means of a civil action.

In *Lilenthal's Tobacco v. United States*, 97 U.S. 237 (1877), the Court conclusively held that the Government's burden of proof in a forfeiture case is by preponderance of the evidence only. The Court stated:

Nor is there any thing in the case of *United States v. The Brig Burdett* . . . that is in conflict with these several propositions. Charges of the kind contained in an information ought to be satisfactorily proved; and it is correct to say that if the scale of evidence hangs in doubt, the verdict should be in favor of the claimant, which is all that was there decided. Jurors in such a case ought to be clearly satisfied that the allegations of the information are true; and when they are so satisfied of the truth of the charge, they may render a verdict for the government, even though the proof falls short of what is required in a criminal case . . .

*Id.* at 272. This explanation of *The Brig Burdett* has been consistently followed (with the qualification that "clear and convincing evidence" is required) with regard to monetary penalties also. *E.g.*, *United States v. Regan*, 232 U.S. 37 (1914).

In *Chaffee & Co. v. United States*, 85 U.S. (18 Wall.) 516 (1874), a monetary penalty case, the Court reversed a judgment where the trial judge had instructed the jury that the defendant's silence could be used to prove facts against him beyond a reasonable doubt, and held that the Government must affirmatively prove its case beyond a reasonable doubt. However, although the form of the proceeding is not described, apparently all parties and the Court proceeded on the theory that the Government had opted to treat the case as criminal. The opinion cites with approval the early case of *Locke v. United States*, 11 U.S. (7 Cranch.) 339 (1813), where it was held, per Marshall, C.J., that in a forfeiture proceeding civilly commenced the burden of proof could be placed on the claimant after the Government had shown probable cause.

46. See *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

47. The double jeopardy clause does not refer to "criminal prosecutions," but forbids placing a person twice in jeopardy "of life or limb" for the same offense. This language clearly refers only to prosecutions that would be "criminal" by any measure, and arguably only to prosecution for capital offenses. However, the Court has not restricted the clause to capital crimes but has extended it to prosecutions for all crimes. See J. SIGLER, *DOUBLE JEOPARDY* 39 (1969).

48. The Court's explanation of its refusal to apply the sixth amendment to penalty and forfeiture cases is generally conclusory. The Court has simply stated that "[t]he Sixth Amendment relates to a prosecution of an accused person which is technically criminal in nature," *United States v. Zucker*, 161 U.S. 475, 481 (1896), without attempting to explain why these protections should not be extended, as the protections of the fourth and fifth amendments were extended by *Boyd*, to encompass forfeiture and penalty proceedings. For those meager explanations that do appear as to why the sixth amendment is narrower than the self-incrimination clause, see *Helvering v. Mitchell*, 303 U.S. 391, 400 n.3 (1938) (quoted in note 42 *supra*); *United States v. Regan*, 232 U.S. 37, 50

double jeopardy clause,<sup>40</sup> the explanation appears to lie in the

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(1914) ("the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination . . . is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions"). Cf. *United States v. Zucker*, 161 U.S. 475 (1896). The Court in *Zucker* explained the difference in scope for forfeiture purposes by citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892), which held the fifth amendment privilege to be available in grand jury proceedings because a future criminal prosecution might result—an explanation of *Boyd* suggested at text accompanying notes 111-17 *infra*.

49. The Court has at various times offered somewhat lengthy explanations why the double jeopardy clause does not apply to forfeitures or other civil penalty proceedings. In every case, however, the arguments reduce to the tautology that civil cases are not criminal.

One incomplete theory is that the related doctrines of *res judicata* and collateral estoppel are inapplicable because the government's failure to prove a prior criminal case beyond a reasonable doubt does not preclude a later finding for the government in a forfeiture action where the standard of proof is by a preponderance only. See *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938):

The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was "merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis v. Frick*, 233 U.S. 291, 302. It did not determine that Mitchell had not willfully attempted to evade the tax.

Collateral estoppel and *res judicata* are now considered an integral part of the double jeopardy clause. *Ashe v. Swenson*, 397 U.S. 436 (1970).

This argument depends, however, on the prior assumption that the forfeiture or penalty proceeding is not criminal in nature, so that proof beyond a reasonable doubt is unnecessary. Moreover, the collateral estoppel argument does not address the true problem of double jeopardy, for collateral estoppel would be irrelevant in a case where the government obtained a conviction in the first proceeding.

A second theory advanced by the Court is that the two proceedings do not involve the same offense for double jeopardy purposes, since the penalty proceeding does not necessarily involve a showing of *mens rea*. This argument is particularly plausible in forfeiture cases, where the government's case does not rest upon any showing of criminality or even of fault on the property owner's part. Consequently, the Court has asserted in forfeiture cases that the proceeding does not constitute a penalty, since it is directed to the object and is independent of the behavior of the owner. In related logic, the Court has also asserted that the two proceedings therefore do not involve the same offense. See, e.g., *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878). Similar reasoning can be found in money penalty cases. See *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956).

Ultimately, however, this argument reduces to the familiar contention that the forfeiture or monetary penalty is not penal but remedial. First, the argument fails to explain why double jeopardy should not apply where the government first obtains a criminal conviction, then brings an action for a forfeiture or money penalty. Second, it is generally conceded that criminal penalties may be and are inflicted in the absence of *mens rea*, as a kind of strict liability. Cf. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concur-

historical practice of extending given safeguards to certain kinds of proceedings but not others.

The Court's second group of provisions consists of those constitutional safeguards which, unlike the sixth amendment, do not refer explicitly to criminal prosecutions. The Court considers the

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ring). The question whether the government could bring successive criminal actions based on the same occurrence and evidence, and differentiated solely by the need or lack of need to prove wilfulness, intent, or the like, seems clearly answerable in the negative. We are consequently relegated once again to the question whether the second action is criminal or not according to some other test of purpose or effect. If the Court's test of wilfulness adds anything to this search, it is simply an additional element of confusion, for lower courts have occasionally stood the argument on its head and held that where the penalty or forfeiture is conditioned on wilful conduct, it must therefore be criminal in nature, see *United States v. One 1967 Cadillac El Dorado*, 453 F.2d 396 (9th Cir. 1971) (finding a bar to a forfeiture action since "the operative facts of both the criminal and the forfeiture proceedings are the same"), an outcome that is generally irreconcilable with the Court's decisions elsewhere. *E.g.*, *Helvering v. Mitchell*, 303 U.S. 391 (1938) (no double jeopardy where money penalty, assessed after criminal charge acquittal, was conditioned on wilful conduct).

A third explanation for the distinction, though not one that has been accepted by the Court, is one advanced by Justice Frankfurter in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 555-56 (1943) (concurring opinion). He argued that the double jeopardy clause does not prevent Congress from prescribing multiple punishments for a given offense, however penal and indeed criminal these punishments may be, and that the only limitation placed upon their separate enforcement lies in the cruel and unusual punishment clause. However, most commentators and apparently the Court concur in the view that the purpose of the double jeopardy clause is to alleviate precisely this kind of cruel and unusual punishment—a series of prosecutions based on the same offense—whether for purposes of harassment or otherwise. See J. SIGLER, *DOUBLE JEOPARDY* 156 (1969) ("The specific purposes of the protection are the avoidance of unnecessary harassment, the avoidance of social stigma, the economy of time and money, and the interest in psychological security."). See also *Breed v. Jones*, 421 U.S. 519, 530-31 (1975) (pointing to "anxiety and insecurity" and "heavy personal strain" of prosecution as relevant to double jeopardy protection).

Ineluctably, the Court's arguments return one to the tautology that the double jeopardy clause applies only in criminal proceedings, and that forfeiture cases and money penalty cases do not qualify as criminal. Thus, in *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-36 (1972) (per curiam) (footnote omitted), the Court stated:

If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering v. Mitchell* . . . at 399. See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). Forfeiture under § 1497 is a civil sanction.

ex post facto clause, for example, a "broader" constitutional provision, and therefore applies it without regard to the nature of the punishment involved in a particular case.

The need to define punishment is thus an analytical problem common to both groups of constitutional provisions. Isolating the particular kind of punishment that the Court deems "criminal" is a problem unique to the first group. By looking at the kinds of cases in which the Court has been willing to apply the double jeopardy clause and the sixth amendment's procedural guarantees, one can formulate a working meaning for the term "criminal punishment." The next section of this Article more closely examines this meaning.

### III. THE MEANING OF CRIMINAL PUNISHMENT

#### A. "PETTY OFFENSES" AND "INFAMOUS PUNISHMENTS"

What then is the constitutional meaning of criminal punishment, which appears to exclude money penalties and forfeitures labeled "civil" but to include certain other sanctions? A general answer can be sketched as follows. First, all punishments labeled "criminal" are generally criminal for constitutional purposes. However, the jury trial and right-to-counsel provisions of the sixth amendment, at least, do not apply to a class of sanctions that constitute "petty offenses." Second, there are certain "infamous" punishments that are always treated as criminal for constitutional purposes, even if they do not bear a criminal label. This categorization will best be regarded as an initial tool of classification, or sorting device, rather than as a precise template for all constitutional applications. Use of this tool does not foreclose principled differences in application from case to case, but does serve to describe and predict the general flow of the Court's decisions.

#### 1. *Fines and Forfeitures Labeled "Criminal": Constitutionally "Criminal" or "Petty"?*

As just mentioned, money penalties and forfeitures that are not labeled "criminal" appear never to trigger the safeguards of the sixth amendment or the double jeopardy clause. When a "criminal" label is attached to these sanctions, however, it appears that in general these protections do apply. The Supreme Court has said that a defendant threatened with a money fine labeled "criminal" must be afforded the sixth amendment right



to confront adverse witnesses and the right not to have a verdict directed against him.<sup>50</sup> The Court has also held that forfeiture cases initiated by information rather than civil procedure must be proved beyond a reasonable doubt.<sup>51</sup> In addition to these actual statements, the various cases in which the Court has declined to apply the double jeopardy clause to monetary sanctions and forfeitures because they were "remedial" rather than "penal" intimate that the Court would have applied the double jeopardy clause had the proceedings been labeled "criminal."<sup>52</sup>

On the other hand, there are two sixth amendment guarantees that do not apply in all criminally labeled cases. The Court has held that the right to jury trial does not obtain in cases involving potential imprisonment of less than six months,<sup>53</sup> nor in some cases involving a fine for criminal contempt.<sup>54</sup> The Court has, however, reserved the question whether a severe fine for contempt might suffice to require jury trial.<sup>55</sup> Second, the Court has strongly implied, but not held, that the right to counsel does not apply in cases involving only small money fines.<sup>56</sup> The other guarantees of the sixth amendment have apparently never been litigated before the Court in a case involving a fine or forfeiture labeled "criminal."

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50. *United States v. Stevenson*, 215 U.S. 190 (1909); *United States v. Hepner*, 213 U.S. 103 (1909); cf. *United States v. Regan*, 232 U.S. 45 (1914) (dictum) (right to confront adverse witnesses attaches in a forfeiture proceeding labeled "criminal," citing *Hepner*). The *Stevenson* Court stated in dictum that forfeiture and a money penalty of \$1000 per offense for assisting illegal immigration, if prosecuted criminally, would constitute a misdemeanor proceeding in which the defendant could claim a sixth amendment right to confrontation of adverse witnesses and could also avoid a directed verdict against him.

51. *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682, 691 (1835); cf. *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 272 (1877). *But see Clifton v. United States*, 45 U.S. (4 How.) 242 (1846), where the Court held that in a criminally commenced proceeding to forfeit goods for customs violations, the burden of proof could be placed on the claimant after a showing of probable cause. The apparent conflict between these cases may perhaps be harmonized on the ground that *Clifton* was a proceeding in rem. See text accompanying note 286 *infra*. At any rate, *Clifton* may well have been overruled by *Boyd v. United States*, 116 U.S. 616 (1886), which held forfeitures to be criminal for purposes of the self-incrimination clause even when not criminally labeled. Cf. *Snyder v. United States*, 112 U.S. 216 (1884).

52. See cases cited in note 43 *supra*.

53. *Baldwin v. New York*, 399 U.S. 66 (1970).

54. *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975).

55. *Id.* at 477.

56. *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972).

The reasons for the "petty offense" exception to these two sixth amendment rights are partly historical and partly functional. Historically, in both English and colonial practice predating adoption of the Constitution, fines and short prison sentences were meted out by judges sitting without juries.<sup>57</sup> The Court has adopted the view that the drafters of the Constitution did not intend to change this practice despite their use of language guaranteeing jury trial of "all crimes" in article III and of "all criminal prosecutions" in the sixth amendment.<sup>58</sup> Functionally, it is clear that the introduction of jury trials and the right to counsel into the most minor cases labeled "criminal" would drastically increase the expense and difficulty of such proceedings. Moreover, the Court has observed that the right of jury trial is less essential to the fundamental fairness of a trial than are certain other procedural safeguards.<sup>59</sup>

These considerations suggest the method by which the Court would determine as a matter of first impression whether fines and forfeitures labeled "criminal" trigger other guarantees of the sixth amendment, such as the right to speedy and public trial,

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57. See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922-33 (1926). Frankfurter and Corcoran further state that "[t]here was no unifying consideration as to the type of criminal offense subjected to summary trial" and that "[t]he controlling factor seems less the intrinsic gravity of the offense, judged by its danger to the community, than the desire for a swift and convenient remedy." *Id.* at 927. Colonial practice in the jury trial area demonstrates the same very loose distinction between serious and petty offenses. See *id.* at 934-65.

58. See *Baldwin v. New York*, 399 U.S. 66 (1970). In acknowledging the existence of petty offenses that are not constitutionally "criminal," the Court in *Baldwin* acceded to the Frankfurter-Corcoran view of jury trial. Frankfurter and Corcoran argued that the language of article III and the sixth amendment merely embodied, and did not change, the existing practice of using enhanced procedural safeguards only in cases not deemed "petty." So viewed, these constitutional provisions do not reach "acts . . . which [do] not offend too deeply the moral purposes of the community, which [are] not too close to society's danger, and [are] stigmatized by punishment relatively light." Frankfurter & Corcoran, *supra* note 57, at 980-81. Critics of this historical analysis of constitutional purpose argue that the language of article III and the sixth amendment was intended to eliminate the distinction between petty and serious offenses, at least in cases that involve imprisonment as opposed to property fines. Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959); see *Schick v. United States*, 195 U.S. 65, 72 (1904) (Harlan, J., dissenting) (constitutional references to crimes and prosecutions bring all criminally labeled money fines within the right to jury trial, regardless whether imprisonment might also result).

59. *Argersinger v. Hamlin*, 407 U.S. 25, 31-37 (1972).

subpoena power, and notice of charges. The Court has indicated that the considerations relevant to its decision include the historical practice of English and colonial courts with regard to a particular procedural right, the current consensus if any among the states, the current federal practice, the need for the protection in order to ensure fairness to the defendant, and, finally, the needs of the state in terms of cost and efficiency.<sup>60</sup> Although the Court has shown some willingness to judge whether an offense is "petty" for a given constitutional purpose, such as jury trial, by referring to the notoriety of the offense,<sup>61</sup> it has more recently regarded the severity of the penalty as controlling.<sup>62</sup>

The complexity of a decision based on all the above factors makes application of the "petty offense" classification difficult to predict in advance. However, because the Court has generally based its decisions on bright lines such as the length of a given imprisonment, such decisions are at least easy to follow once they are made. Moreover, the Court's reliance on history, current practice, and policy permits a reasoned explanation of the variations in standard from one constitutional provision to another and from one kind of sentence to another.

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60. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970). The Court, acknowledging the difficulties inherent in drawing lines on the basis of logic between serious offenses and penalties and nonserious ones, has weighed the governmental interest in efficient summary proceedings against the individual's interest in enhanced procedural safeguards. The Court has chosen to look to the federal legislative definition of "petty" offenses for the relevant constitutional purpose and to the prevailing legislative practice in the nation regarding the correlation between existence of the safeguard and seriousness of the penalty. In holding that the right of jury trial extends to potential prison sentences of six months or more, the Court observed: "This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.* In holding that the right to assistance of counsel and other sixth amendment rights extend not only to penalties of six months' imprisonment but to all cases involving the risk of any imprisonment, the Court pointed to the lack of any evidence that these rights had historically been denied in such cases. *Argersinger v. Hamlin*, 407 U.S. 25, 30 (1972). The Court also noted the greater need for these protections, as opposed to the need for jury trial, in order to ensure fundamental fairness. *Id.* at 31-37.

61. See *Callan v. Wilson*, 127 U.S. 540 (1888) (conspiracy is not a petty offense where punished by one month's imprisonment in default of \$25 fine).

62. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970).

## 2. "Infamous" Punishments That Are Always Constitutionally "Criminal"

The second generalization that can be drawn concerning criminal punishment is that the threat of significant imprisonment or other "infamous" punishment, even without the criminal label, is sufficient to trigger all constitutional safeguards applicable to criminal cases.<sup>63</sup> The cases that make this point are, admittedly, few. Those in which the Court has applied criminal trial safeguards to cases involving juveniles are instructive, but they explicitly recognize that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment."<sup>64</sup> Rather, they rely on the due process clause to establish the procedures constitutionally required.<sup>65</sup>

There are a limited number of other cases, however, in which the Court has applied the sixth amendment to proceedings that were not labeled criminal. In a number of early cases the Court held that, for purposes of the fifth amendment guarantee that infamous crimes must be prosecuted only upon grand jury indictment, an infamous crime is one that entails an infamous punishment.<sup>66</sup> In *Wong Wing v. United States*<sup>67</sup> the Court extended these holdings to rule that infliction of an infamous punishment also entitles the defendant to sixth amendment protections for criminal prosecutions.

The Court has not explicitly applied this infamous-punishment theory in any ostensibly civil case since *Wong Wing*, yet there seems no reason to doubt that the principle remains valid. Although the Court did not allude to it, the infamous-punishment theory perhaps explains the otherwise difficult case of *Kennedy*

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63. Imprisonments that are not considered punitive, such as civil commitment, do not, of course, fit this category. See text accompanying notes 331-32 *infra*.

64. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971).

65. *Breed v. Jones*, 421 U.S. 519 (1975) (double jeopardy clause applies to criminal trial following juvenile proceeding); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (jury trial not constitutionally required); *In re Winship*, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required); *In re Gault*, 387 U.S. 1 (1967) (self-incrimination clause applies).

66. See *Mackin v. United States*, 117 U.S. 348 (1886); *Ex parte Wilson*, 114 U.S. 417 (1885).

67. 163 U.S. 228 (1896) (imprisonment at hard labor for violation of immigration laws held "infamous" punishment despite lack of criminal label).

*v. Mendoza-Martinez*,<sup>68</sup> where four members of the Court stated that a statute which removed citizenship from draft evaders remaining outside the United States was punitive and hence criminal, so that sixth amendment safeguards applied. The fifth member of the majority, Justice Brennan, concurred on the ground that Congress lacks power to impose loss of citizenship as punishment.

The position of the plurality, that the expatriation at bar was criminal because punitive, is consistent with the simple punitive-equals-criminal formula used in a number of the Court's other decisions concerning sixth amendment safeguards.<sup>69</sup> In all of those other decisions, however, the Court strained to hold evidently punitive laws to be nonpunitive in order to avoid applying criminal safeguards. The strain indicates that the Court was not really prepared to apply the sixth amendment to sanctions merely because they were punitive in a commonsense sort of way, but was looking for something more. The *Mendoza-Martinez* plurality evidently found that something more in the fact that expatriation constituted infamous punishment while the sanctions of forfeiture or money penalty involved in the other cases, however punitive, were not infamous. Four members of the Court, three of whom sat in *Mendoza-Martinez*, had previously concurred in the view that expatriation of a native-born citizen for evasion of military service constitutes cruel and unusual punishment.<sup>70</sup> So viewed, the statute would be unconstitutional under the eighth amendment quite apart from the sixth. But with respect to the sixth amendment, surely a cruel and unusual punishment of this nature could also be classified as an infamous punishment within the meaning of *Wong Wing*, and hence criminal.

This view does not of course automatically turn *Mendoza-Martinez* into an easy case. It does not obviate the need to determine, as a prelude to concluding that the punishment was infamous, whether the expatriation constituted punishment, an issue which divided the Court in that and previous cases.<sup>71</sup> Nor does it save the Court from the involved questions of disproportion, historical disuse, and community standards that surround

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68. 372 U.S. 144 (1963).

69. See note 44 *supra*.

70. Justices Warren, Black, Douglas, and Whittaker in *Trop v. Dulles*, 356 U.S. 86 (1958). Justice Whittaker had retired when *Mendoza-Martinez* was decided.

71. See generally Indiana Note, *supra* note 13, at 288-96.

the resolution of eighth amendment issues.<sup>72</sup> What this view of the case does, however, is explain why the Court held this particular punishment to be criminal when other sanctions, held to be punitive in other contexts, have been held *not* to be punitive in the context of the sixth amendment. This explanation, in other words, frees us to distinguish not between laws that are punitive and those that are remedial for sixth amendment purposes, but rather between those penal laws that involve infamous punishments and those that do not.

The list of punishments that the Court has designated "infamous" is not a long one. The Court has observed in dictum that, in addition to imprisonment at hard labor, disqualification to hold public office may be infamous,<sup>73</sup> as may be whipping, standing in the pillory, and branding.<sup>74</sup> Moreover, imprisonment qualifies even if not at hard labor.<sup>75</sup> It is true on the one hand that most of these punishments are not imposed without prior criminal process;<sup>76</sup> on the other hand, the brevity of the list suggests the paucity of cases in which the Court will consider an ostensibly civil punishment to be truly criminal. Except for the forfeiture in *Boyd*, a subject discussed shortly,<sup>77</sup> the Court has uniformly declined to consider either forfeitures or money penalties to be criminal or infamous unless the proceeding in which they are assessed bears a criminal label imposed by the legislature.<sup>78</sup>

## B. POLICIES UNDERLYING THE CIVIL-CRIMINAL DISTINCTION

### 1. *Why Should Not All "Severe" Punishments Be Considered "Criminal"?*

The foregoing description obviously does not eliminate the ambiguity in the meaning of "criminal punishment." The Court

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

73. *Ex parte Wilson*, 114 U.S. 417, 426 (1885) (citing *United States v. Waddell*, 112 U.S. 76 (1884)).

74. *Id.* at 428.

75. *Mackin v. United States*, 117 U.S. 348 (1886).

76. Disqualification to hold public office is often imposed without criminal process, but the Court has frequently held the purpose of the disqualification not to be punitive. See text accompanying notes 310-24 *infra*. Where the disqualification has been held punitive, the Court has never had to face the question whether the disqualification is also criminal for purposes of the sixth amendment.

77. *Boyd v. United States*, 116 U.S. 616 (1886); see text accompanying notes 110-24 *infra*.

78. See notes 43-48 *supra*.

must still determine which penalties labeled "civil" constitute "infamous" punishment and which penalties labeled "criminal" constitute "petty" punishment for purposes of given safeguards. But recognition that the Court is treating only certain kinds of punishment as "criminal" for constitutional purposes allows one at least to describe what is actually being done. This, in turn, allows one to focus the inquiry on "why."

The description of criminal punishment given here does not yield a readily apparent rationale for the classification. Some writers have criticized the Court's failure to extend criminal safeguards not only to infamous punishments but to all punishment which is not de minimus—not only imprisonment but also substantial fines and forfeitures which are not criminally labeled.<sup>79</sup> Such penalties can produce greater burdens than usually result from criminal prosecutions arising out of the same offense. For example, the civil forfeiture of a yacht because a lessee used it without the owner's knowledge or consent to transport a small quantity of marijuana certainly far exceeds any possible criminal sentence the owner might have faced, even under a statute imposing strict criminal liability.<sup>80</sup> Likewise, the loss of a professional license may cause considerably more severe consequences than a short jail sentence. Good arguments can therefore be made that "if the purpose of the [sixth amendment] safeguards is to protect persons from mistaken imposition of grave sanctions, consistency ought to require that protection be afforded whenever a person is threatened with a grave sanction."<sup>81</sup>

There is force to this argument, and the fact that the Court has not sought to achieve such a consistency suggests that the Court does not consider the severity of a sanction determinant of whether the sanction is constitutionally "criminal." Its reasons for refusing to equate "severe" and "criminal" appear partly historical and partly functional. Historically, it seems clear that English and colonial practice assessed severe money penalties, as well as forfeitures labeled "civil," without the use of crim-

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79. See generally Charney, *supra* note 12; Comment, *The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez*, 32 U. CHI. L. REV. 290, 292 (1965).

80. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

81. Comment, *supra* note 79, at 292. The Comment goes on to observe, however, that "the purpose of the safeguards gives content to, but is also limited by, the [sixth amendment] phrase 'criminal prosecution.'" *Id.*

inal procedure.<sup>82</sup> Functionally, in order to change this practice under the Constitution, the Court would either have to require criminal procedure in even the most minor civil penalty and forfeiture cases, or else embark on the difficult task of determining whether a given penalty as applied to a given defendant is sufficiently severe to warrant a given constitutional safeguard.

Both of these alternatives are problematic. The first alternative would clearly involve expensive and cumbersome procedures in cases where fundamental fairness does not require them. Civil procedure is not, after all, a stranger to considerations of fairness. We have generally not found any problem of fairness in the fact that court proceedings, and still more informal procedure in administrative proceedings and arbitrations, determine the financial life or death of persons and institutions on a regular basis. Often the judgments include punitive damages.<sup>83</sup> Moreover, in cases involving civil punishment which is not highly severe the government has legitimate interests in saving judicial time and energy by using procedures less complicated than those compelled by the sixth amendment, and in imposing penalties through an administrative agency whose continual involvement with a given body of law permits a more coherent yet more flexible scheme of law enforcement than judicial proceedings can provide.<sup>84</sup> By the same token, of course, many sanctions labeled "criminal" could be fairly tried by more expeditious procedures. The fact that they are not tried by those procedures reflects more the compulsion of constitutional language requiring given procedures in "criminal" cases than it does the dictates of policy. In the absence of any convincing policy, there should be no need to extend criminal procedures beyond those cases where historical practice and constitutional language so require.

The second approach the Court might adopt in determining whether a sanction is sufficiently severe to be considered "criminal" would be to analyze the impact of the sanction on a case-by-case basis. However, it would be very difficult to determine the precise measure of severity embodied in a particular civil

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82. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974).

83. Yet these private suits for punitive damages do not entail special safeguards analogous to those in the sixth amendment. See note 283 *infra*.

84. See generally *Goldschmid*, *supra* note 6, at 30-34.



punishment on a particular occasion.<sup>85</sup> Whereas a six-month prison sentence would be a hardship for anyone, a penalty of \$1000 might or might not be severe depending on the financial status of the defendant.<sup>86</sup> Forfeitures likewise vary significantly in their severity depending on the value of the property in question. Moreover, the degree of severity required for a punishment labeled "civil" to be deemed criminal might depend, as with "petty offenses," on the particular sixth amendment right in question. This fact would add yet another layer of complexity to the determination. Distinguishing "severe" from "nonsevere" penalties on a case-by-case basis, therefore, would seem to involve the Court in a most difficult decision-making process, one which the Court might understandably want to avoid.

## 2. *Stigma: A Partial Explanation of Criminal Punishment*

The Court's criminal-civil distinction cannot be justified solely in terms of the severity of the sanction primarily because severity fails to explain the Court's reliance on the legislative criminal label as a trigger for constitutional protections. This reliance can instead be explained, at least partially, by the notion of stigma. Professor Henry Hart has observed that "[w]hat distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition."<sup>87</sup> The Court has, consistently with this theory,

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85. Although the Court may have to decide when a criminally labeled fine is or is not petty for purposes of jury trial or right to counsel, see *Muniz v. Hoffman*, 422 U.S. 454 (1975), such questions arise rarely because legislatures seldom impose severe "criminal" fines without affording constitutional safeguards. See text accompanying note 95 *infra*. By contrast, there are many "severe" money penalties labeled "civil" which do not involve criminal safeguards. If the Court were to consider whether the severity of such sanctions makes them criminal, it would confront a line-drawing problem much more frequently than it now does with regard to money fines labeled "criminal."

86. Cf. *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975) (\$10,000 fine against a union for criminal contempt held to constitute a petty sanction for purposes of sixth amendment right to jury trial).

87. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401, 404 (1958). Herbert Packer, *supra* note 12, at 25, 131, 274-75, 335 also hints at a distinction between punishment and criminal punishment, suggesting, as does Hart, that criminal punishment consists of the stigmatization that accompanies the criminal label. He also suggests that criminality may be indicated by the severity of the punishment. *Id.* at 131. This notion is attacked in Griffiths, Book Review, 79 *YALE L.J.* 1388, 1414-17 (1970). Even Griffiths, however, recognizes the condemnatory or "exiling" nature of criminal adjudication as a hallmark of existing criminal punishment, if not of the necessary, intrinsic nature of criminal

pointed to stigma as a primary reason for holding that due process requires juvenile proceedings to meet certain procedural requirements normally applicable to adult criminal proceedings.<sup>88</sup>

The criminal label undoubtedly does communicate a message of moral condemnation. Most people probably associate the criminal label with the intentional commission of wrongful acts, despite the modern proliferation of strict liability crimes. Moreover, most people probably attach moral significance to such acts and judge the character of the convicted person accordingly. For this reason the criminal label degrades to some extent the social status of the offender and sets him apart from the rest of society. Indeed, the status of criminality has been described as "exile" or "banishment" from society.<sup>89</sup>

Conversely, one can explain in terms of stigma the Court's refusal to treat civil penalties and forfeitures as criminal punishment. Such penalties create no "criminal record" and the public is less likely to be aware of their imposition. And even if members of the public were aware, they might well assume in the absence of any criminally labeled conviction that no intentional, serious wrong had been committed. One might conceptualize the difference between civilly and criminally labeled penalties by stating that most people see in civil penalties an element of deterrence, but not a very strong element of retribution or moral condemnation.

This explanation based on stigma serves to explain the critical nature of the criminal label in determining whether "criminal" punishment exists for constitutional purposes. On the other hand, one may question both whether the criminal label is an accurate guide to stigma in all cases, and whether stigma itself is so important a consideration that it should override all others in determining criminal punishment.

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law. Griffiths, *Ideology in Criminal Procedure*, 79 YALE L.J. 359, 385-86 (1970).

88. In *In re Gault*, 387 U.S. 1, 24 (1967), the Court observed that the term "delinquent" has "come to involve only slightly less stigma than the term 'criminal' applied to adults." Implicit in this observation is the related argument that a finding against the defendant generally connotes commission of an act that would be criminal but for the age of the defendant. The fact that this congruence between criminal offense and delinquency label is more frequent than the congruence between criminal offense and money penalty or forfeiture may suggest a difference in the stigma that attaches. See also *id.* at 36; *In re Winship*, 397 U.S. 358, 367 (1970).

89. Griffiths, *Ideology in Criminal Procedure*, 79 YALE L.J. 359, 378-79 (1970).

With regard to the first of these points, there may be cases of civil punishment that communicate a greater amount of stigma than certain cases of punishment labeled criminal. A large civil penalty imposed for intentional failure to comply with anti-pollution laws, for example, may stigmatize the defendant considerably more than would a small fine labeled "criminal" imposed for a traffic offense. And as the use of civil penalties proliferates, the public may come to associate them with the commission of serious, morally wrong acts in many cases.

Second, it may also seem anomalous to accord the good name of a defendant more constitutional protection than his property—especially in cases where the damage to his name is questionable and cases where the severity of his property loss is extreme. A property owner faced with a substantial civil fine or forfeiture may find considerable truth in the old adage about the harms caused by sticks and stones as opposed to names.

The Court's response to both of these arguments about the criminal label and stigma would have to be partly historical but largely pragmatic. Historically, the procedural safeguards embodied in the fifth and sixth amendments were generally reserved for the most serious offenses. These offenses generally demonstrated three important features: a serious moral wrong, a highly severe punishment, and a criminal label.<sup>90</sup> On the other hand, property fines and forfeitures were often imposed by civil procedure which did not embody these procedural safeguards.<sup>91</sup> However, over time, the category of serious crimes has become more diffuse. Sentences for some offenses have become less severe. It is at least arguable that the historical dichotomy between, on the one hand, criminally labeled cases which entail both highly immoral behavior and highly severe punishments, and, on the other hand, civilly labeled cases which entail neither, has now disappeared. And in any case, by referring to "all crimes" and "all criminal prosecutions," the Constitution arguably implies that at least some of its safeguards should apply to cases which historically would have been treated as misdemeanors and tried more summarily than serious crimes.

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90. Frankfurter and Corcoran, *supra* note 57, indicate that the right of jury trial at least was generally afforded except in instances "aptly characterized as 'petty' violations," but that some cases tried without a jury "bordered closely on serious felonies." *Id.* at 927. For illustration of the seriousness of the punishment ensuing upon conviction of a serious crime, see 4 W. BLACKSTONE, COMMENTARIES\* 376-89.

91. See Frankfurter & Corcoran, *supra* note 57, at 937 n.91, 983-1019.

The Court's continued treatment of the criminal label, and the stigma it conveys, as controlling of constitutional applications may well reflect the prudential consideration that there exists no other manageable yardstick by which to measure the type of sanction deserving the safeguards of "criminal" procedure. The problems associated with determining that meaning by reference to the severity of the *punishment* were discussed earlier. Likewise, the Court might find it very difficult to determine which offenses are so serious that any punishment based on their intentional commission, even if labeled "civil", should trigger constitutional safeguards.<sup>92</sup> The proliferation of statutory offenses would render any historical reference to common law impossible in many cases.<sup>93</sup> The Court thus would be left with only its highly subjective judgment of whether a given offense is morally reprehensible. And any attempt to measure stigma by some combination of severity and nature of offense would be at least equally subjective if not more so.<sup>94</sup> By contrast, reliance on the legislative criminal label is a relatively simple and certain approach to applying constitutional safeguards. Indeed, the Court may well have chosen to rely on the criminal label largely by default: This standard is perhaps the only one which the Court can apply in a predictable and consistent manner.

To be sure, the Court must still determine when a given sanction labeled "criminal" is too innocuous or "petty" to trigger a given constitutional safeguard, or, on the other hand, when a given sanction labeled "civil" is so severe that it triggers constitutional safeguards nonetheless. As a practical matter, however, such questions arise relatively infrequently. With regard

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92. *But see* Callan v. Wilson, 127 U.S. 540 (1888) (conspiracy is not a "petty offense," even though punished by sentence of \$25 or 30 days imprisonment).

93. *Cf.* Schick v. United States, 195 U.S. 65 (1904) (conviction for violating a provision of the Oleomargarine Act, with penalty of \$50 per offense, was a "petty offense" for purposes of jury trial).

94. The Court might attempt to solve this line-drawing problem by applying standards developed in the context of the eighth amendment. In given circumstances, money penalties or forfeitures might be held to constitute infamous punishment even without a criminal label, on the ground that they are disproportionate to the offense for which they are imposed. *See* Furman v. Georgia, 408 U.S. 238 (1972). Yet it is hard to argue that they are either historically obsolete or violative of community standards. If money penalties or forfeitures are ever to be held impermissible on grounds of severity, it is much more likely to be because there exists no fault whatsoever on the part of the person to whom they are applied, so that they could be deemed arbitrary and violative of due process. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688-90 (1974).

to petty offenses, the Court needs to determine whether an offense is petty if there is a severe fine, labeled criminal, imposed without constitutional safeguards. As a practical matter, however, legislatures seldom impose heavy fines without also providing for potential imprisonment and, therefore, constitutional safeguards. The general exception to this rule, if one exists, involves sanctions applicable primarily to corporations or unions. The Court has been able to draw rather predictable, if arbitrary, lines regarding length of imprisonment<sup>95</sup> and might well hold similarly that all forfeitures labeled "criminal" trigger constitutional safeguards. The difficult question of when a money fine labeled "criminal" becomes sufficiently severe not to be petty has been raised but not resolved.<sup>96</sup>

At the other end of the spectrum, legislatures seldom create serious, "infamous" penalties without labeling them criminal. The Court has had to decide very few cases where such punishment is claimed to exist.<sup>97</sup> Admittedly there are no firm guidelines that would dictate whether, as a matter of first impression, a given punishment such as deprivation of citizenship should be considered "infamous." Yet because such cases of first impression arise infrequently, and because the decision once made is easily applied to future cases without regard to the circumstances of the defendant, the Court's treatment of infamous punishment creates no serious problems of uncertainty in the law.

### C. APPLYING THE CIVIL-CRIMINAL DISTINCTION: THREE CASES

#### 1. *Forfeitures Not Labeled "Criminal"*

Judicial analysis of legislative or executive intent might in rare cases lead to the conclusion that property forfeitures not criminally labeled are nonetheless infamous and hence should be treated as criminal for constitutional purposes. There is historical precedent for concluding in certain instances that the legislature intended such forfeitures to serve as criminal penalties.

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95. See *Baldwin v. New York*, 399 U.S. 66 (1970).

96. Cf. *Muniz v. Hoffman*, 422 U.S. 454 (1975) (\$10,000 fine on union a petty sanction for purposes of sixth amendment right to jury trial, absent contrary expression of congressional intent). With regard to forfeitures, on the other hand, the Court seems more willing to regard the criminal label of the proceeding as dispositive for constitutional purposes as well. Compare *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682 (1835), with *Lilienthal's Tobacco v. United States*, 97 U.S. 237 (1877). See note 45 *supra*.

97. See cases cited in notes 66 and 67 *supra*.

As the Court has occasionally observed, at common law a felon was subject to the forfeiture of all or most of his property. The Court stated in *The Palmyra*,<sup>98</sup> for example, that

[a]t the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested [sic] until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer.<sup>99</sup>

From this doctrine perhaps grows the dictum expressed in later cases that a money penalty or forfeiture may be criminal in nature for double jeopardy purposes if it occurs "by reason of" a criminal offense.<sup>100</sup> Yet unless the statute classifies the penalty or forfeiture as criminal, there is no way as a practical matter to distinguish penalties occurring "by reason of" a criminal offense from those civil penalties that, as *The Palmyra* recognized, the legislature may establish independently of whatever criminal penalty it chooses to provide. In the absence of a criminal label, therefore, the courts are highly unlikely to conclude that an ostensibly civil money penalty or forfeiture is anything other than it purports to be.<sup>101</sup> The only possible method of distinction probably lies in the fact that at common law a felon's entire estate was subject to forfeit. This fact may underlie the Court's occasional observation that the grossly excessive nature of a penalty may transform it from civil into criminal.<sup>102</sup> But short of a statute forfeiting a person's entire estate per se, probably no amercement would be so construed.

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98. 25 U.S. (12 Wheat.) 1 (1827).

99. *Id.* at 14.

100. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236 n.6 (1972) (per curiam); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886).

101. Indeed, the Court early in its history nearly precluded any such finding, stating in *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827), "But the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*."

102. *E.g.*, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (per curiam).

## 2. Incarcerations for Civil Contempt

In cases where civil contempt may result in incarceration the Court has denied a right to jury trial on the ground that the incarceration is "coercive" rather than punitive.<sup>103</sup> Even apart from this ground, incarceration for civil contempt need not be regarded as infamous. First, because the sanction can be avoided immediately by compliance with the court order, it is in a sense voluntary and therefore less severe from the defendant's point of view than other punitive incarcerations. Alternatively, if one looks to stigma as determinative, the incarceration does not imply the status of "badness" that other punitive incarcerations do. By making the imprisonment conditional, the court has declined to "banish" or exile<sup>104</sup> the respondent from society in the way that criminal incarcerations do. It is the act, not the individual, that is burdened, and the condemnation of the individual that inheres in the term "stigma" does not, therefore, attach.<sup>105</sup>

## 3. Disqualification from Public Employment

Finally, disqualification from public employment has been termed an infamous punishment,<sup>106</sup> but the Court has never confronted the question whether it is also criminal in nature. On several occasions the Court has held such disqualifications to constitute bills of attainder or ex post facto laws,<sup>107</sup> but, as will

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103. For reasons set forth below, incarceration as a sanction for civil contempt is not strictly punishment. See text accompanying notes 331-32 *infra*.

104. See Griffiths, *supra* note 89, at 378-79.

105. This distinction between condemnation of specific behavior and condemnation of the person has its analogy in psychological literature, and it seems reasonable to assume that the theory of stigmatization has similar roots. This concept, and the psychological views that underlie it, are explored by Griffiths. *Id.* at 371-76.

The case of incarceration pending a criminal trial (or pending a civil trial in those jurisdictions that have retained the antiquated forms of civil arrest) can be explained as a form of detention that does not constitute punishment.

106. *Ex parte Wilson*, 114 U.S. 417, 426 (1885) (dictum) (citing *Waddell v. United States*, 112 U.S. 76, 82 (1884)).

107. See *United States v. Brown*, 381 U.S. 437 (1965) (disqualification of Communist Party members from union officership a bill of attainder); *United States v. Lovett*, 328 U.S. 303 (1946) (disqualification of named individuals from government service a bill of attainder); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (disbarment of attorneys who supported Confederacy a bill of attainder and ex post facto law); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (disqualification of clergymen who had supported Confederacy a bill of attainder and ex post facto law).

be shown shortly, these determinations do not necessarily depend on the penalty being criminal. Moreover, in a variety of contexts the Court has found employment disqualifications not to be punitive, so that a fortiori they were not criminal in those cases.<sup>108</sup> If it could be demonstrated, however, that such disqualifications do constitute punishment (under the criteria developed later in this Article<sup>109</sup>) a municipal employee acquitted of a criminal charge of bribery might well allege double jeopardy in a subsequent proceeding under a statute disqualifying from public employment anyone administratively found to have taken a bribe. The Court's dictum that punishment involving such disqualification is infamous should lead to the conclusion that such punishments are criminal. As a practical matter, the loss of public employment might seem less severe and hence less deserving of enhanced constitutional protections than other penalties, such as substantial forfeitures of property, which do not trigger such safeguards. If there exists any defense for the Court's special concern for bars to public employment, it presumably has to do with the greater stigma resulting from the innuendo that a person so barred is morally unfit.

#### D. SUMMARY

It can be seen that the double jeopardy clause and sixth amendment safeguards have been applied solely to sanctions that fit within a rather narrow concept of "criminal punishment." One may further hypothesize that any other constitutional provision explicitly referring to "criminal prosecutions" would also be so limited. The reasons for this limitation are clearly historical, rooted in constitutional decisionmaking, and unlikely to change. The distinguishing feature of criminal punishment lies not merely in the severity of the sanction itself but in the stigma that accompanies the sanction. Accordingly, the Court has declined to classify sanctions labeled "civil" as "criminal" for constitutional purposes unless they amount to infamous punishments, but has allowed the legislature more broadly to define punishments through use of the criminal label.

As noted earlier, there is a second group of constitutional provisions that the Court has applied to a seemingly much broader class of sanctions—a class which, while it includes criminal

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108. See *De Veau v. Braisted*, 363 U.S. 144 (1960); *Hawker v. New York*, 170 U.S. 189 (1898); *Ex parte Wall*, 107 U.S. 265 (1883).

109. See text accompanying notes 310-25 *infra*.



punishments, also includes other sanctions that clearly would *not* be classified as "criminal punishment" under the definition just stated. We now turn to an examination of this second area, and to the concept of "punishment" that appears to underlie it.

#### IV. THE CONSTITUTIONAL ASPECTS OF CIVIL PUNISHMENT

##### A. *Boyd v. United States*: THE FIFTH AMENDMENT AND THE "QUASI-CRIMINAL" LAW

When Justice Bradley announced in *Boyd* that forfeiture proceedings, "though they may be civil in form, are in their nature criminal,"<sup>110</sup> he introduced an unnecessary and dangerous dictum into the law. For the forfeiture involved in *Boyd*, though a penalty for reasons set forth below, definitely was not a criminal penalty in the sense we have just been discussing. The term "quasi-criminal," which the Court coined to describe the proceeding, has muddied legal waters ever since.

To recapitulate, *Boyd* raised the question whether books and records relating to property the Government sought to forfeit could be subpoenaed in the forfeiture proceeding. The Court held the documents privileged from discovery on fourth and fifth amendment grounds, even though discovery of evidence in civil litigation does not normally constitute an unreasonable search and seizure and the fifth amendment's self-incrimination clause prevents the compulsion of testimony in criminal cases only. It was to overcome these barriers that the Court held the forfeiture proceeding to be essentially criminal in nature.

*Boyd* can be explained in at least three ways that permit rejection of the rationale that forfeitures are criminal prosecutions. First, the threat of forfeiture can be viewed as a means of coercing *Boyd* to give testimony that could be used against him in a subsequent criminal trial.<sup>111</sup> At the time of the forfeiture proceeding *Boyd* had apparently neither undergone criminal prosecution nor been granted immunity. In recent years the Court has established that potentially incriminating testimony may not be coerced by the threatened revocation of a professional

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110. 116 U.S. 616, 633-34 (1886).

111. Cf. *United States v. Zucker*, 161 U.S. 475 (1896) (explaining *Boyd* by citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (holding the fifth amendment privilege to be available in grand jury proceedings because a future criminal prosecution might result)).

license,<sup>112</sup> loss of public employment,<sup>113</sup> or loss of government contracts,<sup>114</sup> and that immunity must be granted with regard to such testimony before it may be required in civil proceedings conducted for the purpose of revoking a license or terminating employment.<sup>115</sup> The Court has not indicated that there is anything criminal about these delicensure or termination proceedings; the relevant fact is that they serve in some sense to discourage invocation of the constitutional privilege from compelled self-incrimination.<sup>116</sup> Under these more recent deci-

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112. *Spevack v. Klein*, 385 U.S. 511 (1967).

113. *Uniformed Sanitation Men Ass'n v. Commissioner*, 392 U.S. 280 (1968). See also *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

114. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

115. *Id.* See also cases cited in note 113 *supra*.

116. The rationale for *Spevack v. Klein*, 385 U.S. 511 (1967), and its progeny is somewhat difficult to set forth, and no extended attempt to do so will be made here. In general, the Court has held that the government is entitled to obtain information otherwise protected by the fifth amendment so long as it has some valid, noncoercive purpose for doing so. Thus in *California v. Byers*, 402 U.S. 424 (1971), the Court upheld auto accident reporting statutes not aimed narrowly at compelling incriminating testimony, but rather applicable to the general public and serving a valid regulatory purpose, namely, the satisfaction of civil liabilities arising from automobile accidents. The Court held determinative the purpose of the statute, as illustrated by its target group, rather than the possibility of self-incrimination resulting from a particular report filed under the statute. The Court distinguished other cases where the statute was directed at a "highly selective" group or one "inherently suspect of criminal activities" such as *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965), *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968). 402 U.S. at 429-31. Similarly, the Court has held that the federal government may require taxpayers to keep and produce records under a general regulatory scheme such as the Price Control Act, even though in specific instances the records might prove incriminating. *Shapiro v. United States*, 335 U.S. 1 (1948). And it has upheld the requirement that all taxpayers must at least file tax returns. *United States v. Sullivan*, 274 U.S. 259 (1927). But see *Garner v. United States*, 44 U.S.L.W. 4323, 4328 (U.S. Mar. 23, 1976) (gambler is privileged from listing "occupation" on tax return, though question is not narrowly aimed at illegal activity).

In *Spevack* and such subsequent cases as *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Lefkowitz v. Turley*, 414 U.S. 70 (1973), the Court has held invalid the compulsion of testimony in proceedings to disbar attorneys, fire public employees, or terminate government contracts. The rationale of these holdings is presumably twofold. First, the testimony compelled in such proceedings is essentially coextensive with testimony that would establish a crime. Hence the inquiry is arguably directed at a "highly selective" group or individual "inherently suspect of criminal activities" within the meaning of the *Marchetti* line of cases. Second, the very failure to grant immunity before requiring testimony

sions, it seems probable that the type of forfeiture proceeding involved in *Boyd* would also be regarded as coercive for purposes of self-incrimination and, for that reason alone, justify invocation of the privilege. One recent case in which the Court has repeated the unfortunate "quasi-criminal" language of *Boyd*, *United States v. United States Coin & Currency*,<sup>117</sup> can be explained on the same ground.

Second, the subpoena in *Boyd* might have been held invalid under the fourth amendment, quite apart from the fifth, on grounds that no probable cause existed for its issuance. It is now clear—though it perhaps was not in 1886—that the guarantee against unreasonable searches and seizures applies in civil as well as criminal proceedings.<sup>118</sup> Although it has been established that subpoenas do not constitute searches or seizures under the fourth amendment,<sup>119</sup> this rule did not prevail when

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might indicate a purpose to compel self-incriminating testimony, regardless whether the inquiry was "narrowly focused" on illegal activity.

There are problems with this first analysis. One does not sense that disbarment proceedings, unlike the various taxes on illegal activities involved in *Marchetti* and its companion cases, have as their primary purpose the discovery and prosecution of criminals. Indeed, disbarment may occur for many reasons which do not involve the commission of crimes. In this sense disbarment proceedings or termination of government employment or contracts more strongly resemble *California v. Byers*, where the reporting statute was not narrowly aimed at criminal activities, than they do the *Marchetti* line of cases. Yet if the second theory is adopted, that immunity must always be granted when the response to a question would incriminate, *Byers* may be nearly overruled by *Gardner*.

However, to the extent that *Spevack* and its progeny remain good law despite the analytical difficulties just mentioned, it seems that forfeitures and civil money penalties serve unconstitutionally to compel self-incrimination. Frequently such penalties attack conduct that is also criminal, and their primary purpose is to deter or revenge such conduct.

117. 401 U.S. 715 (1971). As in *Boyd*, the Court held that a forfeiture proceeding was essentially criminal in nature. The question was whether the Government could penalize the failure to pay gambling taxes and to register as a gambler, where compliance with these laws would necessarily have involved self-incrimination. The only relevance of the criminal nature of the forfeiture proceeding was to establish the money owner's standing to assert the personal self-incrimination defense in what was technically an in rem suit against the property rather than an in personam proceeding against the owner. Standing could just as well have been established by recognizing the coercive nature of the suit with regard to testimony that could be used in a possible criminal prosecution in a future case, without commenting on whether the forfeiture was also criminal in nature.

118. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

119. See *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946).

*Boyd* was decided. To the extent that the statute in *Boyd* permitted a subpoena to issue without a showing of probable cause or to require the production of any and all business records regardless of relevance, the fourth amendment view then held by the Court might have condemned the procedure regardless of the type of proceeding.

This second explanation of *Boyd* serves to distinguish a recent Supreme Court case that reiterates the notion that forfeitures are criminal for fourth and fifth amendment purposes. In *One 1958 Plymouth Sedan v. Pennsylvania*,<sup>120</sup> the Court ruled merely that the improper search and seizure of liquor from an automobile justified exclusion of the evidence in a forfeiture case—a ruling that makes perfect sense even if the forfeiture proceeding is conceded to be noncriminal.

However, neither of these first two alternative explanations of *Boyd* very well reflects the spirit of the opinion, which is that it is unfair, and in some way unconstitutional, to compel testimony in a forfeiture proceeding. *Boyd* does not advert either to future criminal prosecution or to lack of probable cause to seek the testimony.

A third explanation of *Boyd* may come closer to preserving its spirit. Compulsion of testimony in a punitive (though non-criminal) proceeding could be said to offend the constitutional policy of fundamental fairness that underlies the self-incrimination clause, quite apart from the possibility of future prosecution. Though the consequences of noncriminal punitive proceedings are not infamous, nonetheless the state is seeking retribution for legal transgressions. Consequently such proceedings raise some of the same concerns that underlie the self-incrimination clause, albeit in somewhat more attenuated form: the concern, for example, that oppressive tactics will be used to secure testimony and that such testimony will often prove unreliable.<sup>121</sup>

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120. 380 U.S. 693 (1965). In *Plymouth Sedan* a vehicle owner accused of violating liquor laws claimed that the police had stopped and searched his car without probable cause. Under *Camara* the lack of criminality in the proceeding should not influence the availability of the fourth amendment right or of the exclusionary rule. Cf. *United States v. Alcatex, Inc.*, 328 F. Supp. 129, 132 n.6 (S.D.N.Y. 1971) (Frankel, J.); “*Boyd v. United States . . . is designed to expand [the Fourth] Amendment’s protection of privacy and security. . . . What the Government has unlawfully seized, it may well have no business keeping simply because a proceeding is captioned ‘civil.’*”

121. These policies are described by the Court in *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964), and may be summarized as four in number: (1) The problem that self-condemnatory statements may be

If the Court deems these policies persuasive, it could find a constitutional source for them in cases like *Boyd* without classifying the proceedings "criminal." Indeed, it seems clearly preferable to avoid this result and with it the confusion of *Boyd*'s "quasi-criminal" classification. Instead, a home for the doctrine could readily be found in the due process clauses of the fifth and fourteenth amendments, subject to an explanation of the reasons why fundamental fairness compels such a policy.

Alternatively, the Court could rely on the language in *Boyd* indicating that the fourth amendment prevents the compulsion of testimony in punitive though noncriminal cases. Such an application of the fourth amendment, however, would differ significantly from its usual function, which is not to create any absolute privilege from discovery, but only to limit the circumstances and methods of searches and seizures by requiring warrants and showings of probable cause. Because the *Boyd* doctrine creates nearly as great a bulge in the fourth amendment as it does in the fifth, the preferable policy might be to rely on the due process approach instead.

If the Court so desired, it could extend other fifth and sixth amendment safeguards to encompass noncriminal punitive proceedings by relying on the due process clause. Such an approach would at least enable the Court to explain its reasons for extending some guarantees but not others without summarily concluding that certain punitive proceedings are "criminal" in some contexts but not others.

In fact, however, the Court has avoided deciding whether it will either accept this third construction of *Boyd* or adhere to the notion that some civil penalties are "criminal" under the fifth

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unreliable, either because of a kind of death-wish psychology in the person interrogated or because that person fears wrongful charges of perjury or contempt; (2) the need to adopt a prophylactic rule to avoid abusive police practices during interrogation; (3) the notion that the individual has a right to be let alone absent good cause for intrusion into his privacy, and that the availability of alternative methods for gathering evidence of guilt negates any showing of good cause; and (4) the need to preserve the adversarial, as opposed to inquisitorial, nature of the criminal trial.

It seems true that the first two justifications decrease in importance as the severity of the sanction (and presumably of the underlying offense) decreases. Nonetheless, it is difficult to assert that they disappear where noninfamous punishments are concerned. The third and fourth justifications seem weak in any case, inasmuch as civil procedure normally provides discovery, and hence invades privacy, in the context of an adversarial (albeit less adversarial) proceeding. Ultimately the degree of adversariness desired and the extent to which privacy may be sacrificed seem to depend on the first two concerns.

amendment. Because the Court's more recent applications of *Boyd* can be explained in terms of the first two, narrower explanations set forth above, it is unclear whether the Court would actually permit reliance on *Boyd* in a punitive but noncriminal proceeding where no chance of future prosecution exists and where there is probable cause for the inquiry. Justice Douglas, however, has argued that a self-incrimination claim should be available to a defendant in such circumstances. He suggests that compelled testimony may not be used by the government to deprive an individual of a job, labor union position, or passport even though immunity from criminal prosecution was granted before the testimony was compelled.<sup>122</sup> While Justice Douglas bases his argument on the view that such proceedings are criminal and hence within the protection of the fifth amendment, his argument could equally be made on the view that such proceedings are punitive and hence within the due process clauses for the purpose just discussed. Whether or not the proceedings cited by Justice Douglas are in fact punitive, as opposed to regulatory, is a separate and difficult question addressed at a later point in this Article.<sup>123</sup>

If the broad meaning of the *Boyd* case is to be preserved, it should be done by that method which avoids *Boyd's* simplistic language that forfeitures are criminal for purposes of the fifth amendment though not elsewhere. A better way is to take up the invitation of a footnote in *Helvering v. Mitchell* stating that "the guaranty in the Fifth Amendment . . . is of broader scope than are the guaranties in Article III and the Sixth Amendment."<sup>124</sup> Functionally this is an assertion that the policies underlying the self-incrimination clause, unlike those of other guarantees, should be extended to noncriminal cases. The trouble with *Boyd* is that the Court, armed with its facile "quasi-criminal" label, did not feel the need to explain what those policies are and why they differ. Perhaps the chief gain from removing the "quasi-criminal" rationale would be to force the

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122. In *Ullmann v. United States*, 350 U.S. 422 (1956), the Court held that a grand jury witness could be compelled to testify upon the grant of immunity from future criminal prosecution. The Court did not pass on the question whether a *Boyd* defense would be valid if such testimony were used in subsequent proceedings to deprive the witness of a job, labor union position, or passport. Justice Douglas, dissenting, urged that such burdens constituted penalties within the meaning of *Boyd*, from which Congress had not granted immunity, and that the witness should thus be permitted not to testify at all. *Id.* at 440-43.

123. See text accompanying notes 310-25 *infra*.

124. 303 U.S. 391, 400 n.3 (1938) (quoting *United States v. Regan*, 232 U.S. 37, 50 (1914)). See also note 42 *supra*.

Court to elaborate the rationale that is, in fact, its ground for decision.

The critical conclusion in the interpretation of *Boyd* just offered is therefore that the privilege there recognized should rest on the ground that the proceeding in question was *punitiva* in purpose, not on whether it was civil or criminal. A number of other constitutional privileges or guarantees whose applications are also often articulated on the basis of puzzling "criminal" or "quasi-criminal" classifications in fact rest on the same concerns. We now turn to these other constitutional doctrines.

#### B. SUMMARY ADJUDICATION: TAX OR PENALTY?

The Supreme Court has on several occasions distinguished between taxes, which may be collected by distraint and assessed without a prior administrative hearing, and penalties, which may be assessed and collected only after a prior hearing. In *Lipke v. Lederer*,<sup>125</sup> the Court examined a double "tax" payable by anyone who manufactured regulated beverages without paying the basic tax. Sensibly enough, the Court held that the purported tax was actually a penalty and that summary procedures were impermissible. The language of the Court went further, however, stating that the act constituted a penalty "for an alleged criminal act,"<sup>126</sup> and that "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."<sup>127</sup>

This insinuation that the penalty itself was criminal in nature was later made explicit in *Helvering v. Mitchell*,<sup>128</sup> where a taxpayer had been acquitted of tax evasion but was then sued civilly for a penalty of 50 percent of the alleged deficiency. The Court properly rejected the taxpayer's claim that the second proceeding placed him in double jeopardy. It did so, however, on the ground that the sanction was essentially remedial and not

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125. 259 U.S. 557 (1922).

126. *Id.* at 562. Also holding that a penalty cannot be imposed by summary procedures is *Regal Drug Co. v. Wardell*, 260 U.S. 386 (1922). The Court cited with approval the quoted language from *Lipke* and also noted with approval the language of the complaint, which averred that an alleged tax was in fact a penalty "for criminal violations of the law." *Id.* at 392. See also *Speiser v. Randall*, 357 U.S. 513, 524-25 (1958).

127. 259 U.S. at 562.

128. 303 U.S. 391 (1938).

punitive. The opinion characterized *Lipke* as involving a criminal sanction, as to which collection by distraint was unconstitutional, and stated in further dictum that "Congress may not provide civil procedure for the enforcement of punitive sanctions"<sup>129</sup> such as those involved in *Lipke*.

The suggestion that any sanction which serves a punitive rather than a remedial purpose is "criminal" for all constitutional purposes forced the *Mitchell* Court into an awkward corner. The Court found itself unable to deny Mitchell's double jeopardy claim without a very strained finding that his 50 percent penalty was "nonpunitive," even though it was for all practical purposes similar in function and apparent intent to the "punitive" 100 percent penalty involved in *Lipke*. This convoluted piece of statutory construction was quite unnecessary. The holding in *Lipke* did not have to be justified under the constitutional guarantees for criminal proceedings; the statutory procedures in that case would have been deficient for lack of any preseizure hearing even if the assessment had been a pure tax with no punitive aspects.<sup>130</sup> But even ignoring this fact, it is reasonable to state that the assessment of any penalty, whether or not criminal in nature, should require an opportunity for a plenary hearing.<sup>131</sup>

Had the *Mitchell* Court construed *Lipke* in this fashion, the Court would have been free to decide what it clearly wanted to decide, namely, that the 50 percent surcharge, even though clearly punitive, was not a "criminal punishment" in the narrow sense in which those words are understood in the double jeopardy clause and the sixth amendment. It was not "criminal" because it was neither an infamous punishment nor endowed with the "criminal" label.

### C. ENFORCEMENT OF FOREIGN PENAL LAWS

The Supreme Court has had several occasions to construe the comity rule that courts of one state need not enforce the penal laws of another. The Court has often restated this rule as one that is limited to laws "criminal or quasi-criminal" in nature<sup>132</sup> and then, to make sense of the rule, gone on to state

129. *Id.* at 402 n.6.

130. *See, e.g.,* *Covey v. Town of Somers*, 351 U.S. 141 (1956); *Turner v. Wade*, 254 U.S. 64 (1920); *Central of Ga. Ry. v. Wright*, 207 U.S. 127 (1907). The Court in *Lipke* cited the *Central of Ga. Ry.* case for this proposition; why the Court did not rest there remains a mystery.

131. *See generally* Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975). *See also* text accompanying notes 248-49 *infra*.

132. *Huntington v. Attrill*, 146 U.S. 657, 676 (1892).



that a law will fit this classification whenever "its purpose is to punish an offence against the public justice of the state."<sup>133</sup> Moreover, the Court has included within this definition both *qui tam* actions by a private informer to recover a money penalty, and personal disabilities such as a convict's loss of the right to testify or the prohibition against remarriage by the guilty party in a divorce.<sup>134</sup> Once again, some of these decisions fail to harmonize with decisions in other areas. *Qui tam* actions for money penalties (under the double jeopardy clause),<sup>135</sup> for example, have been held not criminal, and indeed not punitive.

This disharmony can be eliminated by recognizing that the rule regarding enforcement of foreign penal laws applies to all punitive laws, while the double jeopardy clause applies only to punitive laws that are also "criminal." In the principal case quoted above, *Huntington v. Attrill*,<sup>136</sup> the Court held that the rule regarding nonenforcement of foreign penal laws did not apply to a New York law making corporation directors personally liable to creditors for corporate debts in case of fraud. The Court could have avoided stating that the rule encompasses only criminal laws, for the fact that the statute permitted compensation to a private plaintiff distinguished it from laws, such as those exacting forfeitures and money penalties, that are enforced by the state and can be defined as punitive, as they are in this Article.<sup>137</sup>

The second leading case in this area, *Wisconsin v. Pelican Insurance Co.*,<sup>138</sup> did apply the foreign penal law rule to a sanction that clearly was not criminal. There, in an original jurisdiction action, the Court declined to enforce a *qui tam* judgment of \$8500 against a Louisiana corporation obtained by the Insurance Commissioner in Wisconsin courts on behalf of the State of Wisconsin, on the ground that the corporation had done business in Wisconsin without registering. In holding the exaction a penalty for purposes of the comity rule, the Court observed:

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences

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133. *Id.* at 673-74.

134. *Id.* at 673.

135. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

136. 146 U.S. 657 (1892).

137. *See* note 283 *infra*.

138. 127 U.S. 265 (1888).

for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.<sup>139</sup>

The case thus indicates that punitive laws generally, and not merely criminal laws, fall within the meaning of the rule. The *Pelican Insurance Co.* case thus properly permits the Court to avoid both the conclusion that such laws are criminal in nature and the need to hold them punitive for one purpose but remedial for another.

It must be recognized, however, that policy considerations might well point to restricting the foreign penal laws rule to criminal punishments instead of extending it to punishments generally. The forum state has good reason to avoid the expense of imprisoning convicted criminals who have offended the law elsewhere.<sup>140</sup> Likewise, there is good reason to avoid entrusting the discretionary function of sentencing to a state whose own citizens have not been offended by the defendant's conduct. Neither would it be generally feasible to try the defendant in one state and then send him to another state for sentencing and imprisonment. Moreover, the criminal prosecution function could not generally be performed either by a foreign lawyer or by a private lawyer hired by the foreign plaintiff state, and it would burden the forum state's prosecutor to have to handle cases on behalf of other states.<sup>141</sup> And, of course, extradition provides an alternative to the enforcement of foreign criminal laws.

These arguments diminish in force when noncriminal punishments such as money penalties and forfeitures are concerned. Except perhaps for the problem of supervising forfeited property—the cost of which could be taxed to the plaintiff foreign state—enforcement of such sanctions involves no more expense or discretion than does ordinary civil litigation in which another state is the plaintiff. For these reasons, the Court might do well to reexamine the logic of its holdings and restrict the meaning of “foreign penal laws” to criminal laws or even to criminal laws involving the possibility of imprisonment.

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139. *Id.* at 290.

140. See Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 199 (1932).

141. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 793 (1965).

## D. EX POST FACTO LAWS

The Court has pursued an ambivalent course on the question whether the ex post facto clause is limited to criminal punishments or has some broader application. In *Calder v. Bull*,<sup>142</sup> its earliest encounter with the question, the Court stated per Justice Chase that the clause applies only to criminal punishments.<sup>143</sup> This observation, however, has dubious precedential value. In the first place, the statement is dictum, for the question at bar was whether the reversal of a probate court judgment by the Connecticut legislature (acting according to long-standing tradition as a court of appeal) and the consequent order of a new trial constituted an ex post facto law. The Court was at pains to demonstrate that the clause did not invalidate all legislative interferences with vested property rights, but only those that constituted punishments.<sup>144</sup> Secondly, the Court appears to have used the terms "punishment" and "criminal punishment" interchangeably, assuming that the two were coextensive. The Court did not address the possibility that punitive but non-criminal laws might violate the ex post facto clause. The assumption that punishment and criminal punishment are coextensive also characterizes Chief Justice Marshall's slightly later

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142. 3 U.S. (3 Dall.) 386 (1798).

143. Throughout, the opinion tends to use punishment and criminal punishment as interchangeable terms, on the apparent assumption (as in *Boyd v. United States*) that all punishments are criminal in nature. Thus, Justice Chase states as his exhaustive definition of ex post facto laws:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

*Id.* at 390. Justice Iredell, concurring, likewise observed that "the true construction of the prohibition extends to criminal, not to civil, cases." *Id.* at 399.

144. For a general history of the debate concerning these rival interpretations, see Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947). Professor Crosskey points out that one of the Court's major concerns in deciding *Calder v. Bull* was to indicate that a federal bankruptcy law, then pending before Congress, would not be unconstitutional if enacted. *Id.* at 560-64. This fact may explain why the Court adopted an interpretation of the clause that has not been borne out by the Court's later application of the clause to penal laws generally.

opinion in *Fletcher v. Peck*.<sup>145</sup>

Subsequently, the *ex post facto* clause has been applied to a variety of laws which, though punitive, need not be called criminal. In a series of cases the Court has held that some disqualifications from government or professional employment can be punishment and therefore, when retroactively applied, *ex post facto* laws.<sup>146</sup> It can be argued that when such disqualification is punishment, it is infamous punishment because of the stigma it imparts and therefore constitutes a criminal sanction.<sup>147</sup> Yet the logic of the *ex post facto* clause reaches beyond infamous punishments to punishments generally. As has been argued elsewhere, the principle vice of *ex post facto* legislation is the unfairness of seeking revenge for voluntary actions that were not forbidden at the time they were undertaken.<sup>148</sup> Such

145. 10 U.S. (6 Cranch) 87 (1810). Justice Marshall stated that an *ex post facto* law is one

which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds the estate? The Court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

*Id.* at 138-39.

146. *United States v. Lovett*, 328 U.S. 303 (1946) (government employees); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (attorneys); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (clergymen).

147. See text accompanying note 63-78 *supra*.

148. This argument appears in Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 222 (1960). Unnecessarily, however, Slawson limits his argument to criminal laws, with their consequent social condemnation. Logically, the argument should extend to any sanction that serves no purpose other than to burden a conscious past choice to do an act not then prohibited. Cf. L. FULLER, *THE MORALITY OF LAW* 51-65 (1964).

Additional policies underlying the *ex post facto* clause are suggested in Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1501 (1975):

[I]n deciding whether a law is proscribed by the *ex post facto* prohibition, a court should consider three factors: first, does the law penalize activities in the absence of fair warning and frustrate reasonable reliance on existing laws; second, can the law serve its ostensible purpose—for instance, does the law attempt to regulate behavior through threats of unpleasant consequences

unfairness, it is argued, outweighs the value of any deterrence that also results from punishing such actions. And revenge, the argument continues, is unfair when imposed without warning, whether or not it bears the particular form and consequences we label "criminal punishment." Any form of punishment, civil or criminal, is equally unfair in these circumstances.

Despite these arguments, the Court has continued to reiterate the old language providing that the *ex post facto* clause applies only to criminal punishments.<sup>149</sup> This uncareful language serves only to obscure the true function of the clause, as well as the essential difference between criminal and civil punishments for other purposes to which that difference is relevant.

#### E. OTHER CONSTITUTIONAL ASPECTS OF NONCRIMINAL PUNISHMENT

The existence of punishment, but not necessarily of criminal punishment, is relevant to several other constitutional provisions and to numerous statutory references.<sup>150</sup> Arguments that for-

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where deterrence is no longer possible; and, finally, could the law have been a consequence of legislative vindictiveness.

149. In *Galvan v. Press*, 347 U.S. 522 (1954), the Court rejected a plea that a law deporting aliens for acts committed before its enactment violated the *ex post facto* prohibition. In dictum, the opinion states that "the *ex post facto* Clause applies only to prosecutions for crime." *Id.* at 531 n.4. And in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 174-76 (1963), the plurality reasoned conversely that because expatriation had been held by state courts to constitute *ex post facto* legislation for certain purposes, expatriation must therefore constitute criminal punishment for purposes of the sixth amendment.

150. In *United States v. Constantine*, 296 U.S. 287 (1935), the Court held that a federal "tax" of \$1000 on retail liquor dealers who violated state or local law was in fact not a tax but a "penalty" which, as an attempt to enforce the eighteenth amendment, fell with that amendment's repeal.

In *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958), the Court held that the taxpaying corporation could not deduct state fines and penalties imposed for operation of overweight trucks as an ordinary business expense because such a deduction would frustrate state policy by reducing the sting of a penalty. As in *Lipke* and *Constantine*, the Court observed that the object of the legislation in question was to forbid the acts upon which the sanction hinged, so that the sanction constituted a penalty and not a tax.

In *Helwig v. United States*, 188 U.S. 605 (1903), the Court determined that a levy of two percent for each one percent by which the true value of imported goods exceeded their declared value was a penalty within the meaning of a statute that gave the district court exclusive jurisdiction over suits to recover penalties and forfeitures. The Court observed that if an exaction is "enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the [wrongful] action of the importer,

feitures of property amount to taking without just compensation under the fifth amendment have encountered the response that forfeitures are punitive and hence outside the scope of the taking clause.<sup>151</sup> Various cases early in the twentieth century held purported tax laws, not criminal in nature, to be punitive and hence regulatory in violation of states' rights under the tenth amendment.<sup>152</sup> The cruel and unusual punishment clause has been applied to punishments that did not purport to be criminal, and the Court has not had to determine, in order to apply the clause, whether an infamous punishment is criminal.<sup>153</sup> And finally, the due process clause has been held to prevent imposition under a "vague" statute of a sanction which was punitive, though arguably not criminal.<sup>154</sup>

#### F. SUMMARY

In each of the contexts discussed above, the Court, beginning with *Boyd*, has applied the Constitution to laws that are punitive but not criminal. These civil punishments contrast with criminal punishments, which alone secure sixth amendment and double jeopardy protections. In some instances the extension of

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such facts clearly show it is a penalty in its intrinsic nature." *Id.* at 613.

In *United States v. Nash*, 111 F. 535 (W.D. Ky. 1901), a lower court held that for purposes of district court jurisdiction the term "public offense" included penalties as well as criminal proceedings, so that a suit to collect the penalty was not within exclusive agency jurisdiction under the statute in question.

151. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-90 (1974); cf. *United States v. One 1962 Ford Thunderbird*, 232 F. Supp. 1019 (N.D. Ill. 1964). *But see Flemming v. Nestor*, 363 U.S. 603 (1960) (retroactive deprivation of social security benefits held not to be punitive, but also not violative of the taking clause because no vested property rights existed in such benefits).

152. *E.g.*, *United States v. Constantine*, 296 U.S. 287 (1935); *Bailey v. Drexel Furn. Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922).

153. The Supreme Court has resorted to the due process clause in order to forbid incarceration without treatment of allegedly mentally ill but nondangerous persons. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). However, lower courts have relied in addition on the cruel and unusual punishment clause. *See cases cited in note 334 infra. See also Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1259-60 (1974) (suggesting that under *Robinson v. California*, 370 U.S. 660 (1962), even a civil sanction, if intended as punishment, might fall under the eighth amendment).

154. In *Giacco v. Pennsylvania*, 382 U.S. 399 (1966), the Court applied the void-for-vagueness rule to a procedure that allowed a jury to assess costs against an acquitted criminal defendant and further permitted the defendant to be jailed until the sum was paid or security given.

constitutional protections to noncriminal punishment is questionable in view of both the language of the Constitution (particularly in regard to self-incrimination) and social policy (with regard to enforcement of foreign penal laws). But by describing what the Court has done, even without defending its decisions, one can open the door to a workable definition of punishment that harmonizes the law to which that term is relevant. Moreover, one can identify a general constitutional policy that can guide and inform the meaning of the term "punishment" in most of the areas in which it has been applied.

Before we turn to those matters, a postscript may be appropriate. It should be obvious that the existence of punishment not only is essential to the various constitutional provisions just described, but also underlies the meaning of the term "criminal" itself. The point would hardly require mention but for the fact that one leading constitutional law scholar has suggested in passing that determining whether laws are punitive can be avoided. This argument, and the reasons why I find it untenable, appear in the margin.<sup>155</sup>

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155. Ely, *supra* note 40, at 1311-13 n.324, argues that the need to find punishment is not critical to constitutional decisionmaking. The reason for his argument is the desire to avoid resting decisions on questions of legislative motivation. As argued below, I think that the problems inherent in determining legislative psychology need not affect the determination of punishment, which can be made on more objective grounds. And in any event, it is difficult to see how punishment can be dispensed with as a constitutionally critical term.

In the first place, Ely limits his consideration to the bill of attainder, *ex post facto*, cruel and unusual punishment, and procedural due process requirements of the Constitution. He thus omits other areas where punishment is critical to constitutional decision: the *Boyd* fourth and fifth amendment privilege, the rule against enforcement of foreign penal laws, the taking clause of the fifth amendment, the meaning of "infamous punishment," and the meaning of "criminal punishment" generally, to make a partial list.

Second, I disagree that punishment can be dispensed with as a key to the application of the provisions with which Ely does deal. Ely suggests that the *ex post facto* clause, in combination with the bill of attainder clause, is designed only to ensure that the legislature does not usurp the judicial function of applying the law to particular parties by passing what purports to be legislation but in fact adjudicates existing rights. This Ely refers to as "method retroactivity," borrowing the term from Slawson, *supra* note 148, at 217-18. Yet Slawson explicitly notes that "[a]ll *ex-post-facto* laws are method-retroactive" and defines the constitutional role of method-retroactivity thus:

[W]hen the *only* justification for imposing liability is that a person has *chosen* to conduct himself in a manner called wrong by the law, imposition of the liability after choice is no longer possible removes the only justification for the liability and therefore deprives the person of property without due process of law.

## V. PUNITIVE LAWS IN CONSTITUTIONAL ADJUDICATION

### A. THE MEANING OF "PUNISHMENT"

The Court's discordant treatment of similar laws as punitive in one constitutional context but not in another was illustrated

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*Id.* at 224 (emphasis in original).

So viewed, method retroactivity and retroactive punishment are synonymous. As argued below, when a law has no purpose other than to burden conscious past choices for purposes of deterrence or revenge, it is punitive. When there exists some other valid purpose that looks to the future—regulation, taxation, compensation, treatment—then the law is not punitive, and, in Slawson's terms, its retroactive application is not "method-retroactive," however much it may interfere with vested rights and expectations.

Consequently the meaning that Ely suggests for ex post facto punishment—"the conditioning by the government of any serious deprivation upon activity completed prior to the announcement of the condition," Ely, *supra* note 40, at 1312 n.324; see *Marcello v. Bonds*, 349 U.S. 302, 319 (1955) (Douglas, J., dissenting)—is simply too general. As Slawson recognizes, many laws that are not punitive and do not violate the ex post facto clause turn upon past acts, constitute serious deprivations, and thwart reasonable expectations. Changes in tax laws are one example. It is only when the law's purpose relates *solely* to the past activity or condition that the law violates the ex post facto clause. And this, in turn, is because the law is punitive and because of the nature of the legislature's purpose—or, if you will, motivation. (See text accompanying notes 170-237 *infra*).

I do not quarrel with Ely in his statement that the requirement of procedural due process in the civil sense does not disappear if a law is not punitive. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). But to the extent that Ely means to include in the term "procedural due process" the rights guaranteed to criminal defendants by the sixth amendment, I do not concur. If I am right in suggesting that cases such as *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), convey criminal safeguards only because the sanction involved constitutes an infamous punishment, then surely punishment must be defined. Ely would perhaps avoid this difficulty by suggesting, as he does with regard to cruel and unusual punishments, that the clause is meant to apply only to sanctions that are "unreasonably (or 'unusually') out of proportion to the conduct which triggered" them. Ely, *supra* note 40, at 1313 n.324. Yet consider the case of *Specht v. Patterson*, 386 U.S. 605 (1967), where the Court held that an individual could not be incarcerated under a sex offenders act without criminal trial procedures. Had the purpose of the act been regarded by the Court as treatment and prevention, it is difficult to see why the sanction would have been unreasonably or unusually disproportionate to the conduct causing it, any more than long-term civil commitments of the mentally ill are unreasonable or unusual. It was only because the Court regarded the sanction as punitive that the procedural rights of the sixth amendment attached.

I can agree with Ely in discussing the cruel and unusual punishment clause that the disproportion of the offense to the conduct may very well indicate that the law is arbitrary with regard to any purpose other than punishment. What this suggests to me, however, is not that punishment is an irrelevant term, but that its existence can be ascertained by means more objective than legislative psychology.



at the beginning of this Article. In large part this conflict has arisen because the Court has failed to distinguish those constitutional provisions that apply only to criminal laws from those that apply to punitive laws in general.

But the conflict also results from the Court's failure to formulate any clear notion of the meaning of punishment. Because the application of numerous constitutional provisions turns on the determination of punishment, it is critical to formulate some workable meaning for that term. It may be that no one definition of punishment can serve the diverse policy considerations that underlie each of the constitutional provisions in question.<sup>156</sup> There are, however, certain common concerns and policies in each of these constitutional areas that make a general concept of punishment basically workable. This "general concept" works no more magic than does speaking of a general concept of "arbitrariness" or "invidious discrimination" applicable to both the due process and the equal protection clauses. The concept of punishment, like those of arbitrariness or discrimination, is not so much a definition as a mode of analysis.

The Supreme Court has used the terms "punishment" and "penalty" to mean at least two different things. For purposes of semantic clarity it is useful to distinguish these before proceeding further. The primary use here of the term punishment is that defined by H.L.A. Hart and Herbert Packer:<sup>157</sup> the imposition of burdens, for purposes of retribution or deterrence, upon people who have violated legal norms.

The Court, however, also uses the term from time to time in a "secondary" sense to describe burdens placed upon given groups of people because of their exercise of constitutionally protected rights such as speech<sup>158</sup> or interstate travel.<sup>159</sup> These

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156. Cf. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-63 (1958) (arguing that no word ever has a "standard meaning" for purposes of statutory interpretation, and that meaning can only be ascribed by reference to statutory purpose in a given context).

157. See text accompanying notes 161-62 *infra*.

158. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"); *In re Stolar*, 401 U.S. 23, 28 (1971) ("the First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization"); *Speiser v. Randall*, 357 U.S. 513, 527 (1958) (purpose of loyalty oath requirements, as opposed to the instant denial of tax exemption to members of subversive organizations, "was

burdens are not true punishments in the "primary" sense for two reasons. First, they do not involve violations of legal prohibitions. Second, they are not always imposed because of past acts, but sometimes burden only continuing acts and are removed when such acts cease. A ban on union officeholding by current members of given political parties is one example. Such a "penalty" on political association is coercive only as a civil contempt sanction is coercive, and differs from punishments imposed because of past misdeeds and without regard to forcing some immediate change in behavior. Despite these differences, however, there are clear similarities between the Court's analysis of the two kinds of burdens: In both situations the Court must seek to find a retributive or deterrent purpose in order to find that a penalty exists.

The following discussion deals with the "primary" meaning of punishment, which applies to violators of legal norms. Most of the jurisprudential discussion of the meaning of punishment has occurred in the context of criminal law and its purposes. The definitions there formulated, however, apply equally to noncriminal punishment and provide a good starting point for discussion.

H.L.A. Hart, drawing largely on the work of Antony Flew,<sup>160</sup> has defined punishment as follows:

- i. It must involve pain or other consequences normally considered unpleasant.
- ii. It must be for an offence against legal rules.
- iii. It must be of an actual or supposed offender for his offence.
- iv. It must be intentionally administered by human beings other than the offender.
- v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.<sup>161</sup>

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not to penalize political beliefs"); cf. *United States v. Brown*, 381 U.S. 437 (1915) (ban of Communist Party members from union offices held a penalty upon such membership for purposes of the bill of attainder clause). See also *Barsky v. Board of Regents*, 347 U.S. 442, 472-74 (1954) (Douglas, J., dissenting); *Wieman v. Updegraff*, 344 U.S. 183, 192-94 (1952) (Black, J., concurring).

159. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974) (emphasis in original):

[T]hus *Shapiro* [v. *Thompson*, 394 U.S. 618 (1969)] and *Dunn* [v. *Blumstein*, 405 U.S. 330 (1972)] stand for the proposition that a classification which "operates to penalize those persons . . . who have exercised their constitutional right of interstate migration" must be justified by a compelling state interest. *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) . . .

160. Flew, *The Justification of Punishment*, *PHILOSOPHY* 291 (1954).

161. H.L.A. HART, *supra* note 12, at 4-5.

Improvements upon this definition have been offered and attacked by other scholars. In order to distinguish punishment from treatment, compensation, and regulation, Professor Herbert Packer has suggested an additional criterion:

vi. It must be imposed for the dominant purpose of preventing offenses against legal rules or of exacting retribution from offenders or both.<sup>162</sup>

It has been argued that Packer's addition is unnecessary because the requirements of deterrence and retribution are implicit in Hart's requirement that the consequences be "for" the offense, a requirement that would exclude alternative purposes such as treatment, compensation, and regulation.<sup>163</sup> Without joining in this essentially semantic debate, we may assert, first, that both Packer and Hart see in punishment a purposive element. Punishment is imposed solely because an offense occurred, and, at least in Packer's view, for the "dominant" purpose of deterrence or retribution or both.

Second, it should be observed that Packer's view of deterrence, or the prevention of offenses against legal rules, does not include the kind of incapacitation that takes place while a person is disbarred or in jail,<sup>164</sup> but refers only to the dissuasion resulting from fear of sanctions that occurs while one is free to violate norms.

## B. POLICIES UNDERLYING DISTINCTIONS BASED ON "PUNISHMENT"

### 1. *Procedural Safeguards*

What relevance, then, does this composite view of the meaning of punishment have to constitutional law? Perhaps this question can best be approached by considering first the procedural safeguards of the Constitution that key to punishment, criminal or civil: the fifth amendment double jeopardy and self-incrimination clauses, the sixth amendment guarantees, and the summary adjudication rule in tax penalty cases. The purposes of these safeguards can be generally stated as to ensure so far as possible that conviction will not be based on error,<sup>165</sup> to prevent abuses and excesses against defendants (particularly with regard

162. H. PACKER, *supra* note 12, at 31.

163. Griffiths, Book Review, 79 YALE L.J. 1388, 1406-13 (1970).

164. This sort of incapacitation has also been called "special deterrence." See J. ANDENAES, PUNISHMENT AND DETERRENCE 175-81 (1974).

165. See *In re Winship*, 397 U.S. 358, 362 (1970).

to compelled testimony) that might result in emotionally charged cases, and, related to the last, to avoid the use of repetitious prosecution to harass, intimidate, or wrongfully convict defendants.

Why do these criminal safeguards apply for example in cases of punitive and (because infamous) criminal incarcerations but not in cases of incarceration for treatment of mental illness or for quarantine? Why, in other words, is the punitive nature of the proceeding critical to the constitutional outcome in these instances? The answer, I think, is that in cases of punishment the defendant's interest is greater and that of the state less compelling than in other cases. Moreover, these differences relate directly to the purposes of retribution or deterrence that underlie the concept of punishment.

For several reasons the defendant's interest in avoiding punitive incarceration is greater than his interest in avoiding incarcerations for treatment or quarantine. First, at least in the case of mental health treatment, the defendant may stand to benefit in a way that retribution and deterrence cannot offer. Second, because punitive incarceration includes elements of moral condemnation, the defendant is stigmatized in a way that does not characterize the other incarcerations. And third, because of this same element of moral condemnation, there may exist a greater danger in punitive cases that unfair procedures will be used against a defendant who is despised by the public and its officials.

The state's interest in winning a given case, on the other hand, may be less strong in cases of punishment. The purpose of punishment, as defined here, is not primarily to "prevent" crime by keeping dangerous persons off the streets (as might be the primary purpose of mental health commitment of dangerous persons), but rather the revenge of crime and deterrence of future crime by reason of apprehension of the sanction. The interest in retribution has to do with public perceptions of fairness in the administration of justice, and although this interest is essentially immeasurable, it could reasonably be perceived to be secondary in importance to the need for additional caution in obtaining convictions. Likewise, the interest in deterrence, while again obviously important, is perhaps less immediately affected by the outcome in the case of an individual defendant than are the state interests involved in the quarantine and mental health laws. If a class of persons who actually committed crimes were nonetheless acquitted because the case was proved only by a preponderance but not beyond a reasonable doubt, the impact

upon future law observance by them and others in the community might nonetheless be imperceptible or speculative. Apprehension of punishment may well vary more with the perceived probability of arrest than with the perceived probability of conviction after arrest. By contrast, the improper dismissal of a petition for involuntary commitment or quarantine may more predictably result in immediate harm to the individual or the surrounding community.

The fifth and sixth amendments can therefore be viewed as expressing the judgment that the choice between society's and the defendant's interest should be weighted in the latter's favor where criminal punishment is involved. Moreover, this policy of favoring the defendant can be viewed as a function of the concept of punishment, which, in turn, embodies the goals of retribution and deterrence. The same general concerns may underlie the procedural safeguards that apply to civil punishment also.

## 2. *The Ex Post Facto Clause*

Justifications for the critical use of "punishment" can also be found in the ex post facto clause. Retribution is generally viewed as fair, rather than arbitrary, when applied to voluntary, knowingly wrongful conduct.<sup>166</sup> When an act was not illegal at the time of its commission it could not have been known to be wrong, and so our legal system judges retribution inapposite.<sup>167</sup> Moreover, although sanctions might serve a deterrent purpose even absent an opportunity to know the act was wrong, the value of such deterrence may be viewed as outweighed by the concern for fairness to the individual. By contrast, if purposes of prevention, rehabilitation, or compensation motivate the sanction, retroactive application scarcely seems arbitrary or unjust, for fulfillment of those purposes does not necessarily depend (as does retribution) on whether a wrong was knowingly committed.

## 3. *Takings Without Just Compensation*

With regard to the rule that punitive takings do not infringe the fifth amendment stricture against taking property without just compensation, the policy seems to be that where the govern-

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166. See generally Slawson, *supra* note 148.

167. See H.L.A. HART, *supra* note 12, at 28-53 (dealing with excusing conditions as opposed to general justifying aims of criminal punishment). See also L. FULLER, *supra* note 148, at 51-55.

mental purpose is to secure the use of private property for the state's use and benefit, the state should have to pay for that property. Where the taking is intended to punish, payment would render it painless and thus ineffectual. Consequently, the isolation of retribution or deterrence as a dominant purpose, and the conclusion that compensation is not one, appropriately serve the policies of the fifth amendment.

#### 4. *The Tenth Amendment*

The cases, now mostly outmoded, which held that federal taxes designed primarily to punish rather than tax certain conduct violated states' rights under the tenth amendment<sup>168</sup> rely on a finding of penalty in either its primary or its secondary sense. The basic question was whether the federal government sought primarily to raise revenue, which was proper, or to exercise the police power, which was not. The police power can be exercised not only by the imposition of penalties on those who violate state or federal prohibition, but also by the imposition of coercive burdens not keyed to violations of law. Hence these cases (discussed below)<sup>169</sup> turn on findings that the Congress had sought to deter or coerce certain social conduct, whether or not actually forbidden, by means of its tax law.

#### 5. *The Cruel and Unusual Punishment Clause*

Finally, with regard to the cruel and unusual punishment clause, the difference between torture by police or prison personnel and painful treatment by electric shock in a government mental hospital apparently lies in the supposed benefits to the mental patient, the relative immediacy of the state's goal in his case, and his freedom from stigma.

These, then, are some of the justifications for the use in diverse contexts of "punishment" as a key concept in constitutional adjudication. The remainder of this Article is concerned with determining how a particular dominant purpose of retribution or deterrence can be identified, as against other possible purposes, such as regulation, taxation, rehabilitation, or compensation.

### C. IDENTIFYING PUNITIVE PURPOSE

It is rather easy to agree with Hart and Packer that if a given law served only the purposes of retribution and/or deter-

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168. See note 246 *infra* and accompanying text.

169. See note 246 *infra*.

rence, that law would be punitive. As a practical matter, however, few laws can be found which serve only the purposes of retribution or deterrence.<sup>170</sup> Perhaps physical torture or pillorying are examples. But even the death penalty serves to incapacitate dangerous criminals by removing them from society and thus, under Packer's scheme, "preventing" crime as opposed to "detering" it. And incarceration serves not only to incapacitate, but additionally, in theory at least, to rehabilitate.

Consequently, it becomes essential as a practical matter to find some method by which courts can isolate a "dominant" purpose from among various purposes that a given law, or sanction, might be said to serve. I would suggest that there are essentially two ways of going about this. The first is a method that the Court seems to have adopted, namely, to employ legislative history to determine the purpose that was uppermost or dominant in the group psyche of the legislature at the time the statute was enacted. The second method consists of presuming from the effects of a law, subject to rebuttal by reference to other effects, that it is punitive if it demonstrates certain of the indicia of punishment. This method may perhaps be described as a search for purpose pure and simple, eschewing the idea of "dominant" purpose, with its overtones of inquiry into legislative history to determine what individual legislators or officials actually had in mind.

### 1. *Punishment as a State of Mind: The Court's Approach*

The Court's most explicit treatment of the meaning of punishment appears in *Kennedy v. Mendoza-Martinez*,<sup>171</sup> which dealt with the question whether expatriation for draft evasion constituted punishment, and if so whether such punishment was constitutionally permissible. The Court listed seven tests, based on the surface characteristics of statutes, which might serve as indications of punitive purpose.<sup>172</sup> After listing these factors, however, the Court declined to apply them. Instead, it found "conclusive evidence of congressional intent as to the penal na-

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170. Cf. *United States v. Brown*, 381 U.S. 437, 458 (1965):

It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

171. 372 U.S. 144, 168-69 (1963).

172. See text accompanying note 223 *infra*.

ture of a statute" in an "objective manifestation of congressional purpose" contained in the legislative history of the enactment.<sup>173</sup> This same resort to legislative history also characterizes other cases dealing with punishment.<sup>174</sup> Although in most other contexts the Court has criticized the use of legislative history as a means of determining the constitutional validity of statutes,<sup>175</sup> the Court has stated that an "inquiry into whether the challenged statute contains the necessary element of punishment" may be a situation "where the very nature of the constitutional question requires an inquiry into legislative purpose" by resort to legislative history.<sup>176</sup>

This use of legislative history suggests that the Court views legislative psychology or motive, in a sense described below, as the basic ingredient of punishment itself, as alone determining the "dominant purpose" which Packer describes.<sup>177</sup> This motivational view of punishment doubtless coincides closely with our own commonsense perceptions. Just as any dog, so it is said, knows the difference between being kicked and stumbled over,<sup>178</sup> we sense a sharp difference between being shoved in anger and being shoved out of the way of an oncoming truck. Quite apart

173. 372 U.S. at 169.

174. See *United States v. Lovett*, 328 U.S. 303 (1946); cf. *Helvering v. Mitchell*, 303 U.S. 391 (1938) (where Court inferred legislative intent not to punish from the fact that the legislature provided for civil procedure).

175. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (quoting *McCray v. United States*, 195 U.S. 27, 56 (1904)) ("The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."); *United States v. Lovett*, 328 U.S. 303, 326 (1946) (Frankfurter, J., concurring) ("presumed motive cannot supplant expressed legislative judgment"). See also *Palmer v. Thompson*, 403 U.S. 217 (1971).

176. *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968).

177. Legislative motive has been referred to as "the state of mind of the legislators when they enacted the measure." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1092 (1969). It has also been asserted, however, that motivation means the same thing as purpose. Ely, *supra* note 40, at 1217-21. I view the term as suggesting not so much a special kind of purpose, but a particular method in constitutional adjudication of determining the purpose of a law—by reference to legislative history or pure speculation—just as presumptions and other means of statutory construction constitute more traditional methods of doing so. See text accompanying notes 180-93 *infra*.

178. O.W. HOLMES, JR., *THE COMMON LAW* 7 (M. Howe ed. 1963).



from whether the shove was really necessary to our safety, we react to the sincerity or mental state of the person who inflicts the burden. It is his or her animus to which we react. Where we sense an animus behind the infliction of pain, even where an alternate purpose may exist, we may become ambivalent in our attitude, attempting to determine what the other person "really meant." Whether or not punishment exists thus frequently depends on the attitude, or the motivation or dominant purpose, if you will, of the party who imposes the burden in question.

This perception of the psychological nature of punishment seems reasonable enough. However, the Court and commentators frequently criticize inquiries into legislative motivation on grounds that such inquiries are both unseemly and inconclusive in their results.<sup>179</sup> Indeed, the Court's inquiries into the punitive or remedial motivation of the various sanctions discussed at the beginning of this Article are far from consistent. Sometimes these inquiries produce seemingly contradictory conclusions about the motivation of similar-appearing sanctions. At times the Court also appears uncertain as to the test by which motivation should be determined. These difficulties partly arise from the Court's confusion between punitive and criminal laws—the confusion, described earlier in this Article, which has forced the Court to strain to hold laws punitive for purposes of certain constitutional provisions but remedial for purposes of others. But the difficulties also result from the Court's apparent uncertainty about when and how to inquire into legislative motive.

This Article takes the position that inquiries into punitive motivation are appropriate, but that the search of legislative history employed in *Mendoza-Martinez* is the wrong way to go about it. A better approach can be found by examining the Court's decisions in other areas of the law.

The following sections elaborate this hypothesis. First, we shall examine the distinction between "motivation," which courts often decline to examine, and "purpose," which courts regularly do examine. Next, the Article turns to areas of constitutional adjudication in which courts do inquire into legislative purpose using a method of analysis which avoids some of the pitfalls associated with analysis of the legislative psyche by reference to legislative history. The Article will then attempt to show that the

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179. See notes 175 *supra*, 184 *infra*.

method of analysis used in these last-mentioned areas can also be applied to the issue of punitive purpose.

## 2. Legislative "Motivation" and Legislative "Purpose"

This discussion begins by suggesting that inquiries into "motivation," which the Court has condemned, and inquiries into "purpose," which it has sustained, both aim at determining the legislative "intent" or general goals of a statute. There is no difference in kind between goals referred to as "motivation" and those referred to as "purpose."<sup>180</sup> Rather, the words can be viewed as labels which signify whether or not the Court deems

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180. A distinction has sometimes been drawn between legislative "purpose," indicating the immediate meaning or application which the legislature would wish a court to assign to an ambiguous statute, and legislative "motivation," meaning the general objectives which justify or explain why a particular interpretation is preferred. See, e.g., Hayman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 115-16 (1961). For example, if a city council condemns land on which a low-income housing development would have been built, and instead creates a park, the "purpose" of the council's action is to create a park. Cf. *Deerfield Park Dist. v. Progress Dev. Corp.*, 22 Ill. 2d 132, 174 N.E.2d 850 (1961) (first appeal), 26 Ill. 2d 296, 186 N.E.2d 360 (1962), cert. denied, 372 U.S. 968 (1963). The "motivation" here, according to the distinction just cited, might well have been to keep low-income people out of the community, or perhaps some other objective.

Other writers have persuasively attacked this distinction, however. In the first place, "purpose" is frequently used to refer to objectives more generalized than the specific result illustrated above. See Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 972 (1940) ("The phrase, 'legislative intention,' may be taken to signify the teleological concept of legislative purpose, as well as the more immediate concept of legislative meaning.") (emphasis in original). To use a different example, in determining whether an airplane constitutes a "motor vehicle" within the meaning of a statute, cf. *McBoyle v. United States*, 283 U.S. 25 (1931), it might be relevant to seek the legislative purpose not merely in terms of whether key legislators believed airplanes to be included, but also—since no one may ever have thought of airplanes at all—in terms of the general objectives or "purpose" of the statute as well. So viewed, the distinction between purpose and motivation rests at most on degrees of generality, with "motivation" referring to somewhat more general goals than "purpose."

Professor Ely, *supra* note 40, argues persuasively that this difference in terms of generality is in fact insignificant. An individual legislator's reasons for supporting given legislation are inevitably expressed in terms of the ends that he wishes to see accomplished. *Id.* at 1217-21. Therefore, when one speaks of the intent of the legislature as a corporate body, one tends to express the reasons for the passage of given legislation (motivation) in terms of the goals or results that the legislature seeks to accomplish (purpose). Thus the distinction tends to disappear for practical purposes. Cf. Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1887-88 n.1 (1970).

it appropriate to inquire into the legislature's intent or goals. This decision turns on the uses for which legislative intent is sought and the way in which it is to be determined.<sup>181</sup>

a. Statutory interpretation

Courts frequently use legislative intent to construe an ambiguous statute. If, for example, a statute specifies that all motor vehicles shall be licensed, the question may arise whether an airplane constitutes a "motor vehicle" for purposes of the statute.<sup>182</sup> The Court may then inquire whether the general goal or intent of the legislature was to raise revenue, which arguably would involve licensing airplanes, or to ensure traffic safety by regular inspection and licensing of vehicles, which arguably would preclude licensing airplanes.

Frequently the evidence of the legislature's intent is speculative or even nonexistent. There may be no legislative history, or the legislative history which does exist may be inconclusive. Nonetheless, the courts have to reach some decision, and even speculative evidence about legislative intent may help to tip the court's decision in one direction or the other. The courts in effect work in partnership with the legislature to achieve results which are rational and desirable and which harmonize with the goals that most legislators probably wished or would have wished to be served. Consequently, there are no institutional conflicts between courts and legislatures when courts base their decisions in part upon speculative legislative history or guesses about what the legislature desired to accomplish. Indeed, the partnership exists even when courts fill obvious gaps in a statute by offering, in the guise of finding legislative intent, their own judgments about what results are desirable.

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181. See generally MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966). It has been suggested elsewhere that legislative motivation refers to the reasons why individual legislators voted for a given statute, whereas purpose refers to the ends, determined by objective methods, that the legislature seeks to achieve by given legislation. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 209-10 (1962); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091-92 (1969). This Article takes a generally similar view, except to suggest that both "motivation" and "purpose" refer to the end or goals which the legislature seeks to achieve, and that analysis of "purpose" does this by inference from the effects of legislation, whereas analysis of "motivation" does so by reference to legislative history or other, generally speculative, indications of what legislators or officials actually thought as an historical matter.

182. Cf. *McBoyle v. United States*, 283 U.S. 25 (1931) (dealing not with licenses but with interstate transportation of stolen vehicles).

b. Constitutional validity

Although courts are willing to rely on even a speculative assessment of legislative purpose based on legislative history in order to interpret a statute, such inquiries are generally condemned as a means to invalidate a statute. Courts are generally bound by the presumption that statutes or regulations are constitutional unless the opposite is demonstrated in some compelling way. Although one legislative purpose may be more likely than another, and therefore helpful for purposes of interpretation, courts are naturally reluctant to conclude, absent highly persuasive evidence, that only one generalized purpose can reasonably be said to underlie a given statute, so as to impeach its constitutionality. When courts are asked to hold a statute unconstitutional on the basis of inconclusive evidence of purpose, they frequently refer to such speculative purpose as "motivation."

3. "Motivation": *The Improper Use of Legislative History or Other Speculative Evidence of Intent to Invalidate a Statute*

The reasons why legislative history constitutes only an imperfect indicator of general purpose, and the reasons why it therefore does not normally serve as an adequate basis to invalidate statutes or regulations have been well stated by the Supreme Court<sup>183</sup> and its critics,<sup>184</sup> and I reiterate them here only by way of summary.

First, there may exist no single purpose at all, much less a discoverable one, with regard to a given statute. The very idea of intent or purpose is based on a model of the individual psyche which is only approximated, more closely in some cases than others, in group decisionmaking. The legislature has no psyche except in the sense of a consensus of individuals, and this consensus may or may not exist with regard to given legislation, even among those who supported it.<sup>185</sup> Different legislators may support a law for different reasons. Indeed, any given legislator may simultaneously entertain two or more motives in voting for a bill.<sup>186</sup> And as Justice Frankfurter has indicated, the

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183. See note 175 *supra*.

184. See Ely, *supra* note 40, at 1212-17; MacCallum, *supra* note 181. But see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95, 119-30.

185. See A. KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 207 (1930); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

186. See Ely, *supra* note 40, at 1213-14.

executive's motive for signing a bill into law may be entirely different from that of the legislature in passing it—yet should be no less relevant to the act's purpose.<sup>187</sup> All this is not to say, of course, that a recognizable consensus about the purpose of legislation does not exist in many cases.<sup>188</sup> Courts do and must assume that laws are purposive and that certain effects were intended by the legislature.<sup>189</sup> As a practical matter,

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187. *United States v. Lovett*, 328 U.S. 303, 324-27 (1946) (concurring opinion).

188. In certain cases the majority of the legislature may very well have had a given purpose or explanation for a statute in mind when they voted for a law. Cf. Jones, *supra* note 180, at 968-70; MacCallum, *supra* note 181, at 784-85. I would suggest, however, that because legislative intent is generally not judicially measurable, even if it is conceptually definable in the first place, the explanation which a court calls the legislative intent or purpose is an explanation arrived at by independent judicial means and then attributed to the legislature.

189. Although this assertion invites a jurisprudential demonstration which the scope of this Article does not afford, the outline of an argument can be sketched. I would start with the proposition that when the application of legal rules to a specific fact situation is unclear, judges normally repair to some general explanation of the goals of the statute and then demonstrate why a given outcome in the case at bar would or would not advance those goals. Cf. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). Under this view, an explanation of the goals of a given law is essential to its application to unclear cases.

Dworkin further suggests that in order for the explanation of goals, and therefore the legal application, to be persuasive and politically acceptable, the choice of explanation by the judge needs to be defensible in terms other than the judge's individual feelings or persuasions. Where several possible explanations (or principles, as Dworkin terms them in common-law adjudication) present themselves, the judge justifies his choice among them by reference to the community's standards of political morality. Cf. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243-49 (1973). When the issue involves an interpretation of statutory law, the judge justifies his choice of policies by stating the one that seems to him most logical or persuasive and attributing that choice to the legislature. One can see these judicial attributions of legal explanations to community standards or to the legislature as genuflections to the "rules of adjudication and recognition" that convey to judges their authority in the first place. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961).

Hence, when a judge suggests an explanation of the goals of a given law—the purpose of that law, if you will—he or she usually does not only argue that his or her explanation is the most desirable one possible, but also that the legislature, has at least by implication, chosen or intended that explanation. Absent such an imputation of choice or intent to the legislature, the court arguably violates the "rule of recognition," which authorizes it to declare "rights," and instead offers an undemocratic, and essentially unauthorized, choice of goals. The argument that this imputation is sometimes fictitious and arguably unnecessary does not refute the fact that it regularly occurs. See Wellington, *supra*, at 262-64.

however, any law that can serve more than one purpose may have also been intended by various people (or any one of them) to serve more than one purpose.

Second, even if a consensus did to some extent exist about a given law's purpose, that consensus may as an historical matter be difficult to ascertain. Determination of legislative intent by reference to committee reports and floor debates necessarily depends on the words of a few members of the legislature. In state legislatures even this indication of legislative intent may be lacking.

Third, if the Court does strike down a law on the basis of legislative history which shows that it was passed for the wrong reason, presumably there is nothing to prevent the legislature from reenacting the same law with a "laundered" legislative history, thus rendering futile the court's action.<sup>190</sup>

Fourth, the Court has declined to invalidate laws serving useful purposes simply because they were passed for the wrong reasons. To do so would be to invalidate useful laws in order merely to chasten legislative immorality.<sup>191</sup>

And finally, it has been suggested that it would be constitutionally inappropriate for the Supreme Court to invalidate the actions of the coordinate branches of government by cross-examining their motives and thereby demeaning their dignity.<sup>192</sup>

For these reasons courts are properly reluctant to rely on legislative history as an indication of invalid purpose where the statute also demonstrably furthers one or more valid goals. The Supreme Court has likewise declined to invalidate legislation where its effects, quite apart from legislative history, inconclusively suggest both good and bad purposes. Again, the Court

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In summary, statutory purpose can be equated with an explanation of the general goals that the statute should be understood to serve. And because the choice of explanations must itself be justified by reference to rules authorizing the choice, the court attributes that choice, however determined, to the legislature itself.

190. See *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or other relevant governing body repassed it for different reasons."); *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

191. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 360 (1949).

192. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 215 (1962).

has condemned such speculation about intent based on effects as inquiry into "motivation."<sup>193</sup>

#### 4. *Inquiry into Legislative "Purpose" Under the Equal Protection Clause and the First Amendment*

Despite all of these problems with determining the legislature's general goals or intent by reference to legislative history or other speculative sources, the Court routinely assesses these goals under the rubric of "purpose" in determining claims of equal protection violation.<sup>194</sup> The Court's decisions in the first amendment area can likewise be viewed as turning on determinations of purpose, and indeed, as shown below, the Court's opinions frequently use that language.

Just as the meaning of punishment has to do with the subject's perception of a kind of animus on the part of the punisher, so the meaning of invidious discrimination in the law of equal protection involves a perception of animus and a corresponding moral affront. As stated by Tussman and tenBroek,

It is difficult to see that anything else is involved in the discriminatory legislative cases than questions of motivation. Hostility, antagonism, prejudice—these surely can be predicated not of laws but of men; they are attitudes, states of mind, feelings, and they are qualities of law-makers, not of laws.<sup>195</sup>

Moreover, in dealing with equal protection claims, the term "penalty" has been used to characterize an unconstitutional discrimination against a given class.<sup>196</sup> The Court also uses "penalty"

193. *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); cf. *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (citing *Arizona v. California*, 283 U.S. 423, 455 (1931); *McCray v. United States*, 195 U.S. 27, 56 (1904)).

194. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091-92 (1969).

195. Tussman & tenBroek, *supra* note 191, at 358 (footnote omitted). See also Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting The Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49 (1969):

The peculiar evil of a relative deprivation (read "discrimination" or "nonevenhandedness") is psychic or moral; it consists of an affront; it is immediately injurious insofar as resented or taken personally, and consequently injurious insofar as demoralizing.

196. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (Marshall, J.); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1174-75 (1969) (footnote omitted):

Unlike "intelligence" and "physical deformities," however, "race," "lineage," and "poverty" are not in common experience connected with lack of merit or performance. . . . [W]here it seems highly implausible that a correlation exists, stricter review is required to dispel the natural suspicion—buttressed by reason and experience—that whenever *that* trait is used to single out a group for unfavorable treatment, the state is applying pen-

to characterize improper burdens placed on fundamental rights such as those set forth in the first amendment.<sup>197</sup>

Yet the Court has structured its search for "purpose" in these areas in a way which avoids ultimate reliance on legislative history and systematizes the search for legislative purpose.

With respect first of all to equal protection claims, it has been stated that "the 'purpose' of a measure is generally only a legal abstraction attributed to the statute by the courts; it denotes the permissible objective which the legislature might have had in enacting the statute. Finding a statute's 'purpose' does not usually involve inquiry into the legislators' 'motives.'"<sup>198</sup> The courts determine "purpose" by deciding first whether a law can be suspected more or less strongly of serving constitutionally improper goals, and then by requiring the government to rebut that evidence of impropriety with an adequate demonstration that the law is necessary to the achievement of some proper governmental purpose. Some indicia of improper purpose, such as a racial classification contained in a statute, are so suspect that the courts generally require a demonstration of "compelling" state interest to rebut the inference of impropriety.<sup>199</sup> Other

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alties simply for the sake of penalties, with the accompanying suggestion of imputed inferiority.

197. See note 158 *supra*.

198. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091 (1969). It might be more accurate to say that purpose analysis does draw conclusions about the legislature's corporate goals or "motives," but does so without exploring the historical record to determine the mind-set of particular legislators.

199. Classifications are suspect precisely because they are likely to have resulted from animus or arbitrary bias. Classifications based on race, alienage, or illegitimacy generally affect a group that has traditionally been subjected to irrational hostility and disadvantage and has lacked the political ability to counter that bias. See note 196 *supra*. See also *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Tussman & tenBroek*, *supra* note 191. By deeming such classifications suspect, the law effectively incorporates the presumption that such laws are invidiously discriminatory and requires the state to rebut that presumption by adducing a compelling justification for the discrimination. No justification which is not "compelling" will be accepted. If the interest is "compelling," the state must show that the burden is necessary to serve that interest, and does so in a direct fashion. If, for example, the state seeks to bar minority group members from public facilities and justifies that ban on grounds that minority group members are violent and unruly, the state would have to explain why it did not word its law to include all those persons who are violent and unruly, regardless of minority status, and only those persons who are violent and unruly, again regardless of minority status. See *id.* at 346-48; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084-87 (1969).

This same process of presumption and rebuttal occurs not only



suggestions of an impermissible legislative or administrative purpose, such as evidence of a disproportionately low number of blacks on a jury panel, do not involve explicit statutory classifications. Such evidence of bad purpose may perhaps be rebutted by the state with only a demonstration that some rational explanation for the discrepancy exists, so that no racial classification exists and the question of "compelling" interest is not reached.<sup>200</sup>

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where suspect classifications appear but also where "fundamental interests" are involved. If it is shown that a law serves to impair the fundamental right to travel by denying nonemergency medical services to newly arrived state residents, for example, then the state must demonstrate that it has implemented its valid underlying purpose (providing such medical services only to those who can pay for them, for example) not only as to new arrivals but also as to long-time residents. Absent such a demonstration, the law is discriminatory because it singles out for a burden that vulnerable group of persons who have recently exercised their fundamental right to enter the state. Cf. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 40-47 (1969).

200. See Ely, *supra* note 40, at 1263-66. Professor Ely has suggested a slightly different role for the term "motivation" than that in this Article. He points out that there are certain areas, such as selection of individuals for jury service, where the government must exercise random selection, and other areas, such as choice of school curricula, where the government necessarily makes discretionary value judgments with respect to which very few restraints are imposed. *Id.* at 1230-37. Where a "motivation" to accomplish particular results can be "demonstrated" in these areas, the government can be viewed as having voluntarily injected a rational choice into a normally irrational or discretionary area, and the government must then defend its action in rational terms. *Id.* at 1237-54.

However, at the beginning of his article, Ely states that legislative motivation and legislative purpose are conceptually indistinguishable in terms of the goals they describe. *Id.* at 1217-21. Some confusion may result from this identification when Ely subsequently argues that a "demonstration" of illicit motivation should then trigger judicial scrutiny of the law to discover whether it serves some valid state interest. This language seems to suggest that "motivation" can sometimes be determined when "purpose" cannot. Yet Ely subsequently recognizes that "alternative explanations [of legislative or administrative goals] will often render impossible a responsible inference of illicit motivation." *Id.* at 1267-69. If this is true, then motivation can be isolated no more easily than purpose; it is simply another name for legislative goals. These goals can be established as "purpose," or else they remain inchoate. And it is hardly novel to state that when the goals of a statute or rule can be isolated with some certainty as "purpose," the constitutionality of the statute or rule must be judged in terms of that purpose.

It seems to me that Professor Ely's valid contribution might be stated somewhat more intelligibly and simply in terms of traditional purpose analysis. Ely appears to argue that some laws which do not explicitly create a suspect classification, and do not explicitly burden a fundamental interest, may nonetheless be suspected of serving an invalid

In either case, the question whether the law serves a compelling or otherwise valid state purpose may be tested by asking whether the law is narrowly drafted and administered to serve the proper purpose asserted, or whether, to the contrary, it is over- or under-inclusive with regard to that purpose.<sup>201</sup>

Similar analysis takes place in the first amendment area. Laws which clearly set out to penalize certain kinds of speech (such as advocacy of overthrow of government, or libel) may be justified only by a showing that the regulation is necessary because the language in question generates a clear and immediate danger that some substantial harm will result.<sup>202</sup> But a question also often arises whether the purpose of a given law actually is to regulate or penalize expression, or whether the law serves some other valid purpose, in which case the law need not be justified in the manner just cited. Various disabilities such as denial of public employment<sup>203</sup> or union office<sup>204</sup> to communists, for example, have been upheld or stricken depending upon the

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purpose because of the way the law actually works. A jury selection law, neutral on its face, which results in a disproportionately low number of blacks on jury panels might constitute an example. Because the "suspicion" of improper legislative goals here is weaker than the "presumption" of such which attends an explicit classification by race, the rebuttal of the inference can also be by means less persuasive than the demonstration of a "compelling state interest." In the above example, the suspicion of improper purpose might be rebutted simply by showing that the techniques of jury selection were reasonably fair and impartial, and that more blacks than whites claimed exemption or were ineligible for neutral reasons. Cf. *Swain v. Alabama*, 380 U.S. 202 (1965). Failure to make such a "reasonable," if not compelling, explanation would invalidate the law. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Likewise, in the first amendment area, a law that prohibits the mutilation or destruction of draft cards arouses some suspicion that this apparently innocuous regulation may actually have been passed solely to penalize a popular and rebellious form of speech. *United States v. O'Brien*, 391 U.S. 367 (1968). Such suspicion, though relatively weak, should at least, according to Ely, require the government to rebut it by demonstrating that the law serves some valid purpose, albeit not a compelling one.

This analysis seems to constitute an intelligent and useful improvement upon the "two-tier" view of equal protection, see note 209 *infra*. However, it might be semantically clearer to indicate that "motivation" here is used to refer not to purpose, or even to a method of discovering purpose by reference to legislative history, but rather to a suspicion of "bad" purpose which requires some governmental demonstration of reasonableness.

201. Cf. note 209 *infra*.

202. See *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964) (libel); *Dennis v. United States*, 341 U.S. 494 (1951) (advocacy of overthrow).

203. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

204. See *United States v. Brown*, 381 U.S. 437 (1965).

adequacy of the state's demonstration that the law serves some valid purpose other than burdening expression. Where no adequate interest exists, or where there exists some less burdensome alternative, the regulation has been stricken as "overbroad."<sup>205</sup> Significantly, such overbroad regulations have also been referred to from time to time as "penalties" on the exercise of free speech.<sup>206</sup> And in one case, *United States v. Brown*,<sup>207</sup> an overbroad ban upon union membership was explicitly held to constitute punishment of Communist Party members for purposes of the bill of attainder clause. Yet whether these cases speak of the existence of some less burdensome alternative, or of the deterrent, and therefore penal, *purpose* of the burden, or of the deterrent *effect* of the burden (chill on first amendment

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205. The term "overbreadth" has two uses, which I do not wish to confuse. The use to which I do *not* refer is the doctrine that certain laws that reach beyond their proper regulatory scope and therefore abridge first amendment rights will be stricken by the Court even where the conduct or speech of the party raising the claim is not necessarily privileged from regulation under a properly drawn law. See *generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). This doctrine deals largely with questions of standing to raise *jus tertii*.

Rather, my reference to overbreadth concerns the separate question whether the law affects speech or association in a manner not justified by a proper state purpose. As stated in Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 469 (1969): "Any sensible construction of the first amendment would forbid a legislature to go out of its way to inhibit expression, either by design or accident, and the choice of the harsher of equally effective means suggests that suppression of speech was the legislature's real purpose from the start." This same logic obtains even where adoption of the less drastic alternative does involve some costs. For example, a law prohibiting the employment of Communists in defense plants may be viewed as overbroad, and hence as penalizing free speech, because the legitimate interest in preventing sabotage or espionage could be achieved by the narrower and less burdensome means of barring only active Communists from certain sensitive positions or installations. See *United States v. Robel*, 389 U.S. 258 (1967). Likewise, the valid interest in preventing advocacy in the public schools of overthrow of the government may be protected more narrowly than by disqualifying any person with Communist affiliations from teaching. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). On the other hand, where no less burdensome alternative exists, the statute will be upheld. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act adequately defines political activities forbidden to federal employees because of danger of politicization of civil service); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (bar examiners may legitimately ask whether applicants have belonged to subversive organizations as a prelude to questioning active membership and presence or lack of good moral character).

206. See note 158 *supra*.

207. 381 U.S. 437 (1965).

rights), the method of analysis remains constant: is some valid, regulatory purpose served by the burden placed on a fundamental right, so that the burden is justified? If some less burdensome alternative exists, then the regulation is overbroad, and because the overbreadth serves no valid purpose, it can be described as punitive of the exercise of free speech.<sup>208</sup>

In summary, in the law of equal protection and first amendment law alike, the less-burdensome-alternative test and the rule against over- or under-inclusive laws both indicate a search for animus or improper purpose with regard to specific groups or interests. The possibility of animus or arbitrariness is indicated by the very existence of a classification or a burden that focuses on an ethnic group or on persons who have exercised a "fundamental" and hence vulnerable right. This perception of possibly improper purpose then frames the question hypothetically addressed by the court to the legislature: if your intent is *not* to discriminate against that group for invalid reasons, then why did you not serve your alternate purpose as directly as possible, rather than in a way which unnecessarily burdens such particular groups? Indeed, the very failure of the legislature to serve valid purposes as directly as possible—that is, the over- or under-inclusiveness of the law—may be the very factor which creates a disproportionate burden on a protected group and causes a court to initiate its investigation of purpose in the first place.<sup>209</sup>

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208. The question whether a fundamental right is affected and the question whether a compelling state interest exists thus merge. As set forth in Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975), a law that prohibits flag desecration may not be viewed in the first place as a law burdening freedom of speech unless its purpose is shown to be the regulation of speech. And this demonstration, in turn, may rely on a showing that the legislature declined to implement its alternative justification (preventing the confusion of well-known symbols) on a basis that would reach not only the flag, but also other symbols. If such a law is viewed as under-inclusive with regard to its valid justifying purpose, it may be seen as an attempt to penalize a particular exercise of the right of free speech. Thus the question whether this is a statute aimed at regulating speech depends on the analysis of a narrowly served alternative purpose.

209. See note 208 *supra*. Although the Court has sometimes failed to recognize the fact, the threshold question whether a suspect classification exists itself depends on scrutiny of the law for alternative, valid purposes. It is partly this lack of recognition (along with a restrictive choice of suspect classes) which exposes the traditional "two-tier" equal protection standard to the accusation that the threshold question of strict or minimal scrutiny necessarily determines the outcome of the case. According to critics of the traditional formula, strict scrutiny inevitably results in condemnation of the challenged law, and minimal scrutiny always upholds it. See, e.g., Gunther, *The Supreme Court, 1971 Term, Foreward*:

This method of determining the intention of the legislature by reference to rules and presumptions based on statutory effects avoids the fallacy that a true legislative consensus can be reliably known as an historical fact, whether by reference to legislative history or other speculative evidence. Rather, the use of speculative "motivational" evidence serves at most to create a suspicion of improper purpose and therefore to require the govern-

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*In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact." (footnote omitted)).

However, it can be argued that the Court's determination whether to apply strict scrutiny itself depends on its analysis of the under- or over-inclusiveness of the law with respect to a proper state purpose. Thus in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court may have overturned the statute less because the "privacy" interest outweighed any noncompelling interest of the state than because the only possible reasons for denying contraceptives to married people, apart from the suspicion of an invidious religious reason, were so tenuous that they seem not to have been seriously argued.

Similarly, the determination of whether a law creates a suspect classification or abridges a recognized protected interest—the precondition for the exercise of "strict scrutiny"—may depend on an initial examination of the law's under- or over-inclusiveness with respect to a proper, alternative state purpose. In the equal protection area, a law that purports to regulate laundries for purposes of fire protection (usually a kind of regulation not subject to strict scrutiny) may nonetheless be strictly scrutinized if the law is enforced in a racially oriented manner that cannot be explained in functional, nonracial terms. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Similarly, facially neutral voter-registration tests may be strictly scrutinized if an initial scrutiny indicates that they are applied only to blacks and are therefore under-inclusive by reference to their alleged purpose. *Lane v. Wilson*, 307 U.S. 268 (1939). And in the first amendment area, a facially neutral law that purports to regulate public school students' dress but in fact regulates only clothing with symbolic significance, such as armbands, clearly constitutes a regulation of speech rather than conduct, by reason of its under-inclusiveness, so that strict scrutiny attaches. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

This merging of the strict scrutiny of a statute with the suspect nature of the classification which purportedly triggers that scrutiny appears to underlie Professor Ely's thesis regarding motivation, *supra* note 200. Briefly stated, some indications of possibly invidious legislative purpose (such as a disproportionately low number of blacks on a jury panel) raise some suspicion of invidious legislative purpose, but less suspicion than the literal presumption of bad purpose that a facially discriminatory law creates. Consequently the suspicion raised can be rebutted or put to rest by a rational rather than a compelling state interest. See note 200 *supra*.

ment to adduce countervailing evidence that the legislation serves proper goals.<sup>210</sup> This approach avoids in general the other major problems of invalidating statutes on the sole basis of legislative history. The Court avoids striking down a statute which serves good purposes simply because the Court believes that the legislators had the wrong goals in mind. Nor could a law once stricken simply be reenacted with a "laundered" legislative history.

As should be clear, this rules-and-presumptions test does not rest on what could be called a "finding" of actual, historical legislative purpose. It remains to ask therefore whether the characterization of this test in terms of "purpose" adds anything to a simple determination whether the effects of the statute are good or bad, quite apart from any "purpose" or goals the legislature might have had in mind in enacting the statute. Arguably, reference to "purpose" is merely a rhetorical flourish appended to a balancing test.

For example, it might be argued that in a typical first amendment case all the purpose test does is to balance the burden on the protected interest against an allegedly necessary objective. Assume a law that requires all applicants for membership in the bar to state whether they have ever been members of the Communist Party. In applying its purpose test to such a law, the Court may simply be weighing the burden on first amendment interests against the danger to the state which would result from the "less burdensome alternative" of determining "moral character" without the help of such a required revelation.<sup>211</sup> To call the existing law "penal" or "invidious" if the balance tips in favor of first amendment rights is arguably of merely rhetorical value. Could not the result be stated solely in terms of effect—that a burden on first amendment rights will be tolerated only if that burden is necessary to some valid and compelling state interest?

This explanation oversimplifies what the Court actually does in cases of first amendment balancing. First of all, the

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210. For development of this theory by Professor Ely see note 200 *supra*. Brest, *supra* note 184, also argues that circumstantial evidence, as well as legislative history or overt statements of administrators, may signify an improper motivation which in turn should compel the state to justify the statute by demonstrating that it serves some "compelling" state interest. *Id.* at 118.

211. See *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).

extent to which the Court will conclude that a given law is "necessary" to some compelling state interest, or that a less-burdensome-alternative should be adopted instead, seems to vary with the extent to which the Court thinks the enactment suspicious in its purpose. In the first amendment area, such suspicion may explain in part why the Court is more critical of attempts to regulate political than commercial speech,<sup>212</sup> or of libel laws applied to speech directed at public figures as opposed to private figures.<sup>213</sup> The distinction, I submit, lies not so much in the fact that one kind of speech is necessarily more or less valuable than another, but in the fact that regulation of speech is more likely to be purposefully and deliberately hostile in one area as opposed to the other.

Similarly in the equal protection area, a law which forbids the lease of advertising space on trucks, but not the posting of advertising on a company's own trucks, is effectively presumed to draw a permissible distinction between the two.<sup>214</sup> Where a distinction is based on race or alienage or illegitimacy, however, the Court critically examines the law for over- or under-inclusiveness and searches for less burdensome alternatives. If the equal protection clause is interpreted simply to ban laws which have no justification, it seems difficult to explain this difference in treatment. The legislature is theoretically capable of passing arbitrary laws that achieve no worthwhile effects, in almost any area of regulation and with regard to almost any group of people. The simplest and most straightforward explanation of the reason for strict scrutiny, surely, is that arbitrary burdens have historically been imposed with some frequency upon certain groups, not as a result of accident or oversight, but as a result of purpose and animus. Indeed, the Court has recognized as much.<sup>215</sup> Much the same explanation—that legislatures and officials have frequently sought purposely to suppress unpopular expression—helps to explain why strict scrutiny applies in first amendment cases as well.

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212. See *Valentine v. Chrestenson*, 316 U.S. 52 (1942). The problems with arguing that the distinction exists because commercial speech is "valueless" appear in Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

213. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

214. See *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

215. See the discussion of factors influencing the Court's determination that a classification is "suspect" in *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973).

In addition, therefore, to helping explain why strict scrutiny applies in some cases but not others, reference to purpose can be helpful in explaining why a law which is necessary to some "compelling" state interest can overcome first amendment rights without a further balancing of that compelling interest against the first amendment interest. The balancing test itself fails to explain this phenomenon. Why, for example, should the interest of a bar association,<sup>216</sup> legislature,<sup>217</sup> or grand jury<sup>218</sup> in gathering information necessarily serve to overcome first amendment interests in free association, assuming that a given law is essential to the gathering of that information? Why should the interest in compensating libel victims ever override the right to free speech?<sup>219</sup> These are the questions that Justices Douglas and Black, the first amendment "absolutists," have asked with no better answer than that the Court's balancing has determined that the compelling interests in question were in fact more compelling than first amendment interests.<sup>220</sup> This unexplained and inexplicable balancing has also been attacked by various commentators who would not necessarily reach Justices Black's and Douglas's results.<sup>221</sup>

Reference to purpose can help to explain this phenomenon. If the Court in fact believes that laws should be stricken *only* if they have a "bad" purpose, then laws should be upheld where convincing demonstration of a neutral purpose makes it impossible to conclude that the purpose is "bad." This view could be defended in terms of the Court's institutional role. Congress and the state legislatures are the initial judges of the constitutionality of legislation. So long as these bodies do not purposely attempt to penalize protected interests or groups, the Court might well desire to avoid the intuitive and imponderable judgment that a state interest that is valid nonetheless fails to

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216. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).

217. *Barenblatt v. United States*, 360 U.S. 109 (1959).

218. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

219. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967), the majority, per Chief Justice Warren, declared it inappropriate for the Court ever to balance first amendment interests against other proper legislative interests, and stated that the Court would uphold laws narrowly drafted to serve such proper interests despite their impact on speech.

220. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355 (1974) (Douglas, J., dissenting); *Barenblatt v. United States* 360 U.S. 109, 134 (1959) (Black, J., dissenting).

221. See Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).



prevail over freedom of speech and assembly. Absent purposeful interference with first amendment freedoms, the Court may wish to trust the wisdom and good faith of the people's representatives.

Viewing constitutional adjudication in terms of the Court's policing of legislative purpose obviously does not preclude recognition of a balancing approach, or of the fact that balancing is involved in the very determination of legislative purpose. To be sure, if the Court is to decide whether state investigation of communists constitutes a less burdensome alternative means to achieving a given purpose than requiring persons to divulge their own past communist affiliations, the Court must weigh the cost to the state involved in adopting the alternative. A law is "necessary" to some compelling state interest depending on the outcome of this balancing. But because this balancing involves more specific factors and narrower value choices, the Court avoids the cosmic and uncertain judgements entailed in balancing such imponderables as free speech and national security.

##### 5. *Application of the First Amendment and Equal Protection Tests to the Issue of "Punishment"*

It is possible to apply the test of purpose developed in the first amendment and equal protection areas in determining whether punishment is the "dominant purpose" of legislation.<sup>222</sup> Instead of searching out a purpose to burden protected interests or groups, as it does with regard to the first two areas, the Court would instead search out a dominant purpose of retribution or deterrence. Setting aside for the moment the question whether this approach would be proper and desirable, let us first examine how such a test might work.

The first amendment and equal protection test of purpose begins with identification of a certain type of classification or burden regarding a given class or interest, which triggers the presumption of improper motive. An inquiry into punitive purpose requires some threshold test which would identify what might be termed a *prima facie* purpose to punish.

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222. Professor Charney, *supra* note 7, has suggested a similar method of testing punitive purpose, although he uses it to conclude, contrary to the view expressed in this Article, that a finding of punitive purpose automatically renders the sanction "criminal" for all constitutional purposes.

Although it did not use it, the plurality in *Mendoza-Martinez* offered a set of considerations which may supply such a test. This set of considerations is as follows:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry and may often point in differing directions.<sup>223</sup>

It is worthwhile to examine briefly just why these various tests “often point in differing directions” and then to question whether they may be reassembled into a workable test.

The first factor, whether the sanction involves an affirmative disability or restraint, is virtually meaningless except to determine whether a burden exists. Any burden can be viewed as an affirmative disability or restraint<sup>224</sup>—the obligation to pay taxes on the one hand or criminal fines on the other; confinement in a hospital for treatment or in a prison for punishment; deprivation of a driver’s license for reasons of recrimination or blindness. The question whether the sanction involves an affirmative disability or restraint is better simplified to whether there is a sanction at all—or in H.L.A. Hart’s terms, whether there is “pain or other consequences normally considered unpleasant.” However important such a question may be to a complete definition of punishment, in the context of adjudication it always exists. For assuming that punishment can exist without a sanction (and I can think of no case falling outside Hart’s definition), such punishment would certainly not be of any practical or legal concern.

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223. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1965) (footnotes omitted).

224. Like many other terms involved in this Article, “affirmative disability or restraint” lacks any formal definition by the Court and invites further discussion that is beyond the scope of this Article. Briefly, however, I would assert that the term “affirmative” means nothing except perhaps the notion that the government has acted to create a burden or restraint that would not otherwise exist; that is, that the government has imposed a sanction.

The terms “disability” and “restraint” both suggest a limitation on private rights. Absent a distinction between negative restraints and positive compulsions (such as that to pay a fine), which would serve no apparent purpose in this context, such a limitation on private rights seems to add nothing to the concept of “purposive burden” or “sanction.”

Whether a sanction has historically been regarded as punishment likewise advances our inquiry very little, except perhaps with regard to such outmoded sanctions as whipping or pillorying, which serve no evident purpose other than punishment in the sense of retribution and deterrence. But for most purposes, the sanction in question can serve and historically has served both penal and nonpenal purposes. Incarceration, deportation, and exactions of money may all be punishments in certain contexts but not in others. Again, all this test really does is ask whether the sanction *can* be used as punishment. The answer in nearly every case is that it can, and that its punitive status depends on the purpose of its author or enforcer. But the test is not itself purposive.

The same problem inheres in the Court's fourth test, whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence. Again, any sanction which is truly burdensome or severe will produce aversion in the person to whom it is applied and therefore may act as a deterrent and satisfy the need for revenge. The only exception, I presume, is a nonaversive sanction, like the briar patch for B'r'er Rabbit. I recognize that the words retribution and deterrence here imply that the sanction is meant to reach purposive conduct and to affect moral culpability,<sup>225</sup> but these implications are more directly reached by other tests that the Court suggests.

These three tests, then, are not helpful simply because they do not address the purposive nature of punishment. They ask whether a given sanction *could* be used for punitive purposes, and the answer is almost universally "yes," for almost any sanction can be punitive and there are a very few which probably serve no other purpose at all.

The rest of the Court's tests are closer to the mark. If we combine the third and fifth tests—whether the sanction comes into play only on a showing of scienter and whether the behavior to which the sanction is applied is already a crime—we find the seeds of an important concept, namely, that a primary function of punishment is to burden purposive conduct which the state

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225. Deterrence I understand generally as a purposive ordering of conscious choices by means of the threat of sanctions. See H. PACKER, *supra* note 12, at 39-48. Retribution has been seen as a moral imperative that wrongful actions should be burdened or redressed. The underlying notion of moral culpability reflects the assumption that an individual can choose whether to participate in unlawful conduct. See *id.* at 71-79; H.L.A. HART, *supra* note 12, at 113-35; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 408-11 (1958).

desires not to occur. The deterrent aspect of punishment depends on the idea that people can be discouraged from committing a proscribed act by the prospect of a resulting sanction. Likewise, the retributive aspect of punishment depends at least on a notion of offense, and normally also on the notion of purposive offense or culpability.<sup>226</sup>

What the Court has done here is to suggest that where the sanction attaches by reason of a purposive, forbidden act, there may very well be a punitive purpose underlying the sanction.<sup>227</sup> I think that this observation is useful. Before pursuing it, however, it is worthwhile to observe its limitations. In the first place there are punitive sanctions which involve purposive acts but not scienter. Strict liability crimes are one example.<sup>228</sup> So are forfeitures of goods used to commit illegal acts, where the owner is innocent not only of intent to commit the offense, but even of knowledge that the offense did or would occur.<sup>229</sup> The significance of punishment in both cases, however, is that it burdens not the offense of committing the proscribed act, but the offense of not taking adequate pains to guard against it. Perhaps it can be argued here that the law presumes scienter in strict liability situations, in that the punished party knew that he could have taken steps which he did not take in order to pre-

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226. See note 225 *supra*.

227. Hart, of course, suggests that the general limitation of punishment to purposive acts is required not by the nature of the goals of punishment (Hart's "General Justifying Aims"), be they retribution and deterrence or others, but by concepts of fairness to individuals. H.L.A. HART, *supra* note 12, at 11-24. Packer attempts to demonstrate that the same notions of individual fairness are also reflected in the goals or Justifying Aims of retribution and deterrence. H. PACKER, *supra* note 12, at 65-66. In either case, the limitation serves to characterize the way in which punishment normally applies.

228. "Strict liability" is a term capable of two meanings which I hope not to confuse. As set forth below, the Court tends to view forfeitures of property used to commit illegal acts as a kind of strict liability, so that the forfeiture is valid even if the property owner did not know of the illegal use by someone else and was not in any way directly responsible. See text accompanying note 296 *infra*. Nonetheless, the Court has suggested that a modicum of responsibility or fault must exist: if the owner has done everything reasonably possible to guard against the illegal use, the forfeiture may be avoidable. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974).

A second kind of strict liability is that which is imposed when the person punished not only lacked *mens rea* but also could not reasonably have avoided the event that prompts the punishment. See H.L.A. HART, *supra* note 12, at 136. I use the term here in its first sense.

229. See *United States v. Stowell*, 133 U.S. 1 (1890); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878).

vent the occurrence of the proscribed event.<sup>230</sup> So modified, the Court's definition is acceptable.

The Court also unnecessarily limits the notion of proscribed acts, or offenses, when it refers only to whether the behavior triggering the sanction is already criminal. The limitation results no doubt from the Court's erroneous assumption in *Mendoza-Martinez* that the existence of punishment denotes the existence of criminal punishment.<sup>231</sup> But the essence of punishment lies in its purpose to deter or avenge the commission of proscribed acts, and there is nothing to prevent the legislature from seeking to accomplish this without affixing a criminal label. Various civil penalties attach to conduct which is not also criminal.<sup>232</sup> The more difficult question, which arises occasionally though infrequently, is whether the sanction is in fact "prohibited behavior," that is, whether the legislature desires to prohibit it, or merely to tax or regulate it. This judgment is itself a subsidiary one of legislative purpose, which the Court has resolved in the past by standard methods of statutory construction.<sup>233</sup>

These two tests, scienter and criminal conduct, combined, then, point toward the somewhat more refined question whether a given sanction is limited to conduct which is purposive and proscribed. If such a limitation is found, it may well signify a purpose of retribution or deterrence or both.

The Court's other two tests in *Mendoza-Martinez*—whether there may be some alternative purpose for the sanction and whether the burden fits that purpose or is excessive—both relate to the simple question whether the burden could serve any purpose other than retribution and/or deterrence. This is essentially the same question the Court poses in applying its strict scrutiny test in the areas of equal protection and first amendment overbreadth analysis: does the burden further some compelling state

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230. See, e.g., H.L.A. HART, *supra* note 12, at 152-57; Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 426 (1971) ("[T]here are good reasons to regard negligence as culpable, to regard it therefore as a form of *mens rea*, and to subject negligent conduct to criminal sanctions."); Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960). But see J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 133 (2d ed. 1960); O.W. HOLMES, JR., *THE COMMON LAW* 50-59, 61, 81-82, 107-109 (M. Howe ed. 1963); Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 4-5 (1927).

231. See text accompanying notes 68-72 *supra*.

232. E.g., 19 U.S.C. § 1460 (1970) (entering the United States without stopping at a border checkpoint).

233. See, e.g., *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958).

interest, and could that interest instead be served by some less burdensome alternative? Alternatively, is the law either over- or under-inclusive in reference to the claimed purpose?

There appears therefore to be no reason why the same test which determines whether constitutionally recognized groups and interests have been discriminated against, or "penalized" in the secondary sense of that word set forth above, cannot be applied to determine whether any other group or interest has been penalized in the primary sense of that term. The functional nature of punishment as we have discussed it is the deterrence and avenging of forbidden conduct. Just as constitutionally forbidden penalties or discrimination are presumed when burdens are placed upon constitutionally specified groups or interests, so punishment can be presumed when a burden is placed upon persons who commit forbidden acts. The question that follows is also the same: if the government contends that the purpose of this burden is something other than punishment, can the government demonstrate that that purpose was not capable of fulfillment in a way that would not have placed special burdens on persons who commit forbidden acts? And lastly, these two steps may merge: the question whether special burdens have in fact been placed on persons committing forbidden acts may depend on whether the alternative purpose was capable of broader or narrower application; that is, on whether the law is over- or under-inclusive with respect to the alternative purpose.

We have shown that the strict scrutiny test of the first amendment and equal protection clause can be applied to the question of punishment. Whether it should be applied is of course a separate question. Arguably there is no reason why strict scrutiny should apply to punishment at all. The reason why the Court so carefully scrutinizes legislation in the other areas is that the presence of an improper purpose constitutes a direct violation of important, constitutionally protected rights. Consequently, because purpose or legislative intent can never be discovered precisely, the Court requires an affirmative demonstration of a valid intent as a check against improper attempts or purposes by the legislative majority. In effect, it establishes a "safety zone" of sorts around the protected group or interest to guard against the possibility of invidious purpose. Arguably, punitive laws, unlike laws in these other two areas, are not suspect and do not invade highly protected rights. There is obviously nothing wrong with placing special burdens on lawbreak-

ers, whereas there clearly is with placing special burdens on minority ethnic groups or persons making unpopular speeches.

In response to this argument, it can be asserted that constitutionally protected individual rights are in fact involved in the determination of punishment, as the first part of this Article has attempted to demonstrate. To be sure, these rights are mostly procedural, and they affect the way in which punishment is imposed rather than the right of the state to impose it at all: the right not to have punishment imposed retroactively, or by compelled testimony against self-interest, or (in the case of criminal punishment) by more than one proceeding for the same charge, or without enhanced procedural trial safeguards. But the fact that these safeguards are procedural does not make them any less important. And when the legislature passes a law that appears to be punitive according to the standards more fully described below, and the government then asserts that certain procedural safeguards are to be denied, it seems appropriate to scrutinize the nonpunitive effects of the legislation carefully before concluding that constitutional procedural safeguards are unnecessary.

One further caveat is probably warranted at this point. By suggesting that the same kinds of analysis developed in the equal protection and first amendment areas can be applied to determine the existence of penalties, I do not mean that analysis in those areas necessarily provides consistent answers or totally satisfying results. Difficult questions arise in the first amendment area concerning whether a statute is directed at the regulation of expression or of neutral conduct,<sup>234</sup> and if the former, what kinds of less burdensome alternatives should have been adopted. There is obviously an element of balancing and value choice involved in these judgments.<sup>235</sup> Likewise, in the equal protection area, dissatisfaction with the traditional "two-tier" formula of minimal and strict scrutiny has given rise to advocacy on the

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234. See *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (declining any very serious search for a less burdensome alternative, apparently on the ground that the apparent purpose of the law was to regulate conduct and not communication). See generally Ely, *Flag Desecration: A Case Study in the Rules of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

235. But cf. Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A.L. REV. 428, 442-44 (1967) (pointing out that the kind of balancing involved in purpose analysis is a great deal more limited in scope than a general balancing test sometimes allegedly employed by the Court elsewhere).

Court of "sliding scales" and "irrebuttable presumption" tests, which themselves have been criticized<sup>236</sup> and partially disavowed.<sup>237</sup> This Article cannot hope to treat, much less resolve, these controversies. But what it can do is to suggest that the law of punishment is not *sui generis*, as it has traditionally been treated, but raises problems which scholarship has dealt with elsewhere.

#### 6. *Applying the Test to Kennedy v. Mendoza-Martinez*

*Kennedy v. Mendoza-Martinez*<sup>238</sup> itself serves to illustrate the way in which legislative history can be avoided in determining legislative purpose. In that case, federal law provided for expatriation, or divestiture of citizenship, of persons found to have remained outside the United States in order to evade the draft. The triggering mechanism clearly comes into play: a sanction or burden is made applicable solely to those persons who commit a forbidden act. Moreover, examination of the alternative, nonpunitive explanation advanced by the Government in *Mendoza-Martinez* supports the conclusion that the law did not narrowly seek to accomplish nonpunitive purposes.

The nonpunitive rationale advanced was that failure to expatriate draft evaders remaining abroad would seriously injure troop morale. Justice Stewart, dissenting, pointed out that

Congress could reasonably have concluded that the existence of such a group, who voluntarily and demonstrably put aside their United States citizenship "for the duration", could have an extremely adverse effect upon the morale and thus the war effort not only of the armed forces, but of the millions enlisted in the defense of their nation on the civilian front.<sup>239</sup>

It does not appear that Justice Stewart implied by this statement that loss of citizenship was nonpunitive because voluntarily brought about; that would no more be accurate than to say that a criminal sentence is nonpunitive because the crime was voluntarily committed. Nor do I understand Justice Stewart to have argued that the draft evaders in question had shown themselves

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236. With regard to the Court's various standards, see generally Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 269 (1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

237. See *Weinberger v. Salfi*, 422 U.S. 749 (1975) (irrebuttable presumption doctrine).

238. 372 U.S. 144 (1965).

239. *Id.*, at 210 (Stewart, J., dissenting).



to be unfit for citizenship so that they could no longer be trusted with its responsibilities. That argument would have justified expatriation on the ground of prevention, just as removal of drivers' or professional licenses is justified as preventing future harm by incapacitating the dangerous driver or professional.<sup>240</sup>

Instead, Justice Stewart argued that expatriation was necessary because of its impact on morale and the war effort. Construed in its least favorable light, this argument was simply that expatriation was necessary to deter others from draft evasion. So viewed, the rationale for the sanction would remain purely punitive. Somewhat more favorably viewed, the argument may have been that, quite apart from its impact on draft evasion, the sanction was necessary to abate feelings of unfairness in the loyal public. It is by no means clear, however, that this argument would constitute an alternative, nonpunitive explanation of the sanction, for it more readily fits the theory that the effects of punishment were necessary and desirable than that the law was nonpunitive. Troop morale would be harmed because certain persons were "getting away with something" by going unpunished. Retribution would restore a sense of fairness. The imposition of the sanction would deter others from leaving the country to avoid the draft. And since normal kinds of punitive sanctions are unavailable against persons who reside outside the country and cannot be reached by extradition procedures, the punitive sanction of expatriation was the next best solution.

To be effective, an alternative explanation of a sanction must be couched in terms that retribution and deterrence alone do not fulfill, and the alternative explanation advanced in *Mendoza-Martinez* does not qualify. One could try to improve the argument by suggesting that the governmental purpose was to equalize burdens so that persons not serving in the armed forces would not be privileged by comparison with soldiers and others required to make inordinate sacrifices for the nation. This principle of alternative burdens is not itself punitive in nature, for it looks not to the question whether lawbreakers are adequately punished, but to the broader question whether all citizens are equally treated.<sup>241</sup>

Under close examination, however, such an argument would be impossible to maintain. First, the interest in making certain

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240. *But cf.* text accompanying notes 310-25.

241. Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 349 (1969).

that all members of the community bear equal burdens would presumably have required the imposition of burdens not merely on lawbreakers but on all persons who did not have to make war-related sacrifices. No evidence that such a policy was undertaken appears. Second, there appears to have been no attempt by the Government to equate the degree of the burden with that experienced by draftees. Finally, the sanction was under-inclusive: there appears to have been no reason to limit it to those draft evaders who left the country, except for the lack of any alternative means by which to punish them.

*Mendoza-Martinez* thus constitutes a case where the Court might well have held the law arbitrary and capricious for any purpose other than punishment, almost without resort to the concept of less burdensome alternatives. (Indeed, Justice Brennan, concurring, found the law arbitrary even as a punitive exercise.) It is ironic that the leading authority for resorting to legislative history in order to determine legislative motivation to punish had so little need to do so.

#### 7. Identifying Punitive Laws for Constitutional Purposes

Most statutes are not so easily classed as punitive as was that in *Mendoza-Martinez*. For purposes of discussion, the distinction between punitive and nonpunitive laws can be analyzed according to the various justifying purposes that have been advanced to rebut the contention that laws are punitive. These purposes can be generally treated as taxation, compensation, prevention (or regulation), and treatment.

##### a. Punishment and taxation

The question whether a law constitutes a penalty or a tax measure has arisen in the context of the fifth amendment right against self-incrimination,<sup>242</sup> the due process right to a hearing,<sup>243</sup> the now-atrophied rule that the federal taxing power may not be used to regulate in areas subject to the states' police power,<sup>244</sup> and the right of innocent owners of illegally used

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242. *Marchetti v. United States*, 390 U.S. 39 (1968) (overruling *United States v. Kahriger*, 345 U.S. 22 (1953)). It should be noted that the notion of penalty here involves the word's secondary sense: a dominant purpose of deterrence or retribution not toward those violating legal norms, but toward those exercising a legal right, namely, that not to incriminate oneself.

243. *Lipke v. Lederer*, 259 U.S. 557 (1922).

244. *Sonzinsky v. United States*, 300 U.S. 506 (1937); *United States*

property to avoid forfeiture of the property under a "penal" as opposed to a taxing act.<sup>245</sup> For various reasons, the lively debate over the tax/penalty distinction has largely disappeared for constitutional purposes. The Court has generally been content to let Congress determine the limits of its powers under the commerce and taxing provisions of the Constitution, so that the tenth amendment issue is seldom litigated.<sup>246</sup> For purposes of the

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v. Constantine, 296 U.S. 287 (1935); *McCray v. United States*, 195 U.S. 27 (1904).

245. *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926). The Court resolved the argument there by holding that the act constituted a tax rather than a penalty. More recently, however, the Court has recognized the right of the Government to forfeit the property of innocent owners even when the enactment is described by the Court as "punitive" or "deterrent," at least absent a showing that the owner took all steps reasonably possible to prevent the illegal use. See text accompanying note 294 *infra*.

246. In a variety of cases decided during the first part of this century the Court held that if a tax constituted a "penalty" in the secondary meaning of that term, it served to regulate and therefore lay outside the taxing power. See, e.g., *United States v. Constantine*, 296 U.S. 287 (1935); *Hill v. Wallace*, 259 U.S. 44 (1922); *Bailey v. Drexel Furn. Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922). The problem with this reasoning lies in the fact that whenever a special tax burden, like any other burden, is placed only upon a limited activity, a "penalty," in the sense of a burden serving to deter that activity, may be said to result to that group. Whether the burden is actually referred to as a penalty normally depends on the existence of any valid explanation or justification for the burden. (The fact that revenue is raised does not necessarily serve as a justification for the disproportionate nature of a tax placed upon one group.)

Normally, of course, differences in relative tax burdens are not called penalties because the differences are viewed as permissible, either because they serve some justifiable policy of economic regulation or because some degree of arbitrariness is inevitable in a complicated tax scheme. Only where the relative tax burden falls on a protected class is a penalty normally said to result. Thus a tax upon persons exercising certain rights of free speech might be called a penalty on first amendment rights. Cf. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) ("We hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.").

The Court's tax opinions recognized this pattern, at first implicitly, then explicitly. In several early cases the Court upheld as nonpenal taxes on colored oleomargarine, *McCray v. United States*, 195 U.S. 27 (1904), on state-issued bank notes, *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1870), on dispensation of narcotic drugs, *United States v. Doremus*, 249 U.S. 86 (1919), and on sawed-off shotguns, *Sonzinsky v. United States*, 300 U.S. 506 (1937). Although the Court failed to articulate any consistent rationale for distinguishing these taxes from others that it has stricken as "penal," the holdings were justifiable. The *Veazie Bank* decision is explicable in terms of the congressional power to coin money in article I, section 8, clause 5. The others served to keep in-

fifth amendment, strict scrutiny has traditionally been available to test whether purported taxes actually serve primarily to coerce, or, in the word's secondary sense, to "penalize" the exercise of the right against self-incrimination.<sup>247</sup> And due process is generally recognized to compel a hearing before property is taken, regardless of whether the taking constitutes a penalty.<sup>248</sup>

Nonetheless, the distinction between tax and penalty has continued to be relevant for rules such as that which permits taxes, but not penalties, to be assessed before a hearing and thus imposes on the taxpayer the burden of disproving the Commissioner's assessment at an administrative hearing.<sup>249</sup> The distinction is also relevant where the taxpayer claims that *Boyd* affords him a right against self-incrimination in any penalty proceeding, apart from the possibility of future criminal prosecution. Such a claim would arguably affect both the burden of proof in such proceedings and the government's ability to subpoena taxpayer records or compel testimony. The distinction between tax and penalty is also relevant to federal income tax rules such as that permitting state taxes but not state penalties to be deducted from income for federal tax purposes.<sup>250</sup>

The case of *Helvering v. Mitchell*,<sup>251</sup> discussed earlier, pro-

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trinsically dangerous or deceptive commodities out of the marketplace, a purpose recognized in commerce clause cases such as *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903), and *McDermott v. Wisconsin*, 228 U.S. 115 (1913), as a legitimate one for the federal government.

This implicit recognition of certain proper regulatory purposes whose presence precluded the finding of a penalty broadened after 1937 into an explicit recognition that Congress and not the Court must generally determine the propriety of purposes underlying tax discriminations as well as regulations of interstate commerce, at least where states' rights and not individual rights are concerned. In *United States v. Kahriger*, 345 U.S. 22, 31 (1953) (footnote omitted), the Court stated that "[u]nless there are [penalty] provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." In recent years, it is only where tax laws or the reporting provisions connected therewith serve no significant purpose other than to burden individual rights, such as the privilege against self-incrimination, that the Court has seen fit to find a tax penal, again in the secondary sense of that term. See *Marchetti v. United States*, 390 U.S. 39 (1968).

247. See note 116 *supra*.

248. See generally Note, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89. Hearing rights are triggered by the deprivation of liberty or property, whether or not for penal purposes.

249. For cases establishing the distinction in burden of proof, see H. BALTER, *TAX FRAUD AND EVASION* §§ 10.4-5 to 10.4-7 (3d ed. 1963).

250. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958).

251. 303 U.S. 391 (1938).

vides a context for illustration. The assessment that the Court there held to be nonpunitive was 50 percent of any tax deficiency resulting from tax fraud, in addition, of course, to the deficiency itself. In order to hold that the assessment was not criminal for double jeopardy purposes, the Court unnecessarily held that the sanction was not "intended as punishment" but was remedial in nature, "as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."<sup>252</sup>

With deference, I doubt that the Court would have taken the view it did had it been asked whether such an assessment could have been retroactively enacted, rather than whether double jeopardy prohibited the assessment. Nor, perhaps, should it have, for although the Court addressed only what should have been an irrelevant issue, its decision that the assessment was not punitive seems dubious.

The triggering mechanism for a finding of punitive purpose was clearly present: the sanction, the 50 percent additional assessment, applied only to those persons guilty of the forbidden act of tax evasion. The next question, therefore, was not merely whether some alternative purpose might exist (the question that the Court asked) but whether the alternative purpose could have been served more narrowly and in a way that did not burden only those persons committing forbidden acts.

To the extent that the law was designed to reimburse the Government for the loss resulting from fraud, its purpose could have been more narrowly accomplished by simply collecting the amount of the tax deficiency itself, whether actual or estimated.<sup>253</sup> Therefore this purpose does not explain the 50 percent addition.

Another explanation, which also appears in other cases,<sup>254</sup> is that the additional assessment served to reimburse the Government for the expenses of collecting delinquent taxes.<sup>255</sup> Still another is that it served to recover lost taxes on illegal profits

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252. *Id.* at 398-99, 401.

253. The government is permitted to estimate income in cases where the taxpayer's records are inadequate. Cf. INT. REV. CODE OF 1954, §§ 446 (b), 6001.

254. See text accompanying notes 266-72 *infra*.

255. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 n.26 (1974); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (*per curiam*).

(on the theory that such profits normally are not reported and, because risky, are larger than those in legal businesses).<sup>256</sup>

The two latter justifications are plausible, and under an approach based on the psychological model of legislative motivation, the Court might have difficulty rejecting either if it fulfilled its duty to presume constitutionality. Under a less-burdensome-alternative approach, however, the Government would be hard put to explain why, with regard to the final justification above, the statute could not have been more narrowly drafted to authorize the Internal Revenue Service to estimate the amount of concealed income by a formula based on the net worth of the taxpayer, as is done elsewhere in the Internal Revenue Code.<sup>257</sup>

With regard to the first of these latter two justifications, the imposition of the costs of law enforcement would fall uniquely on lawbreakers and not on a larger segment of the general public. Moreover, compensation to the state could justify assessment of staggering sums of money against individual lawbreakers if the annual law enforcement budget of the state were prorated among the criminals convicted there each year. On its face, such an imposition is hard to distinguish from fines and money penalties that are labeled punitive, for both assessments are large and are placed solely on law violators. Indeed, the Court has rejected a claim that imposition of court costs upon an acquitted criminal defendant was permissible because the statute was not punitive, where the imposition hinged on some finding of misconduct by the defendant.<sup>258</sup>

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256. See *United States v. Constantine*, 296 U.S. 287, 297 (1935) (Cardozo, J., dissenting):

Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. . . . Congress may also have believed that the furtive nature of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the treasury than men engaged in a calling that is beneficent and lawful.

257. See note 253 *supra*.

258. *Giacco v. Pennsylvania*, 382 U.S. 399 (1966).

For these reasons, a compensatory purpose should perhaps be recognized only if that purpose affirmatively appears on the face of the law and some formula is provided to estimate the sum of compensation due by reference to actual state costs. Requirements that persons placed in the county jail pay room and board there might constitute an example of a compensatory law serving to recoup the costs of law enforcement. However, the tax in *Helvering v. Mitchell* involved no such affirmative indication of legislative purpose.

The tax in *Helvering v. Mitchell* appears, therefore, to have been punitive. This fact, of course, does not mean that the Court should always reach that conclusion with regard to taxes on forbidden activities. In the first place, before the strict scrutiny test comes into play, there must be a special tax imposing a "disproportionate burden" on the forbidden activity.<sup>259</sup> Moreover, a special tax on illegal activities may well be justified if the Government can adequately document the existence of large, secret profits. Even then, however, the Government would need to show why it could not employ its usual method of estimating income not subject to strict verification and thus avoid singling out the illegal activity for special procedural treatment probably more burdensome to the taxpayer.<sup>260</sup>

Furthermore, there are many instances when the Court should accept statutory indicia that Congress intended a tax rather than a penalty, simply because of the constitutional context in which the question arises. The argument that federal actions under the police power, as opposed to the taxing power, violate states' rights under the tenth amendment has passed largely, though perhaps not entirely, into disuse.<sup>261</sup> In areas where that amendment is indeed moribund, the Court should realistically indulge the presumption that Congress acted within its powers and decline to scrutinize the constitutionality of the assessment.

To determine that the incremental tax described in *Helvering v. Mitchell* was a penalty is not, therefore, drastically to

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259. See *Grosso v. United States*, 390 U.S. 62 (1968) (single tax on illegal activities is legitimate, but reporting requirement serves to penalize right not to incriminate oneself); *Marchetti v. United States*, 390 U.S. 39 (1968) (same); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926) (distinguishing "double taxes" from "single taxes").

260. See note 253 *supra*.

261. See *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The tenth amendment states but a truism that all is retained which has not been surrendered."); cf. *Wickard v. Fillburn*, 317 U.S. 111 (1942).

revise existing constitutional law. The fact that such penalties are punitive does not, as the *Mitchell* Court wrongly assumed, render them criminal. Consequently, such penalties can be levied by administrative processes<sup>262</sup> without the complications that attend criminal prosecutions. But by recognizing the *Mitchell* "tax" as a penalty, the Court could bring some consistency to its description of punishment.

b. Punishment and compensation

The distinction between punishment and compensation has special relevance to the fifth amendment's taking clause, but it is also relevant to claims under the self-incrimination clause, the *ex post facto* clause, and perhaps to the right to jury trial.<sup>263</sup>

An occasional case has held that where a government suit for a monetary recovery is not restricted, as it would be in a private party's suit for compensatory damages, to a proven amount of simple damages, it is punitive rather than compensatory.<sup>264</sup> Commentary has also taken this position.<sup>265</sup> On the other hand, the great weight of authority holds that the recovery of a flat sum for each offense without proof of damages to the government, or the recovery of damages in a multiple amount of demonstrated damages, does not indicate a lack of compensatory intent. The leading case for this proposition is *Rex Trailer Co. v. United States*,<sup>266</sup> where a statute assessed monetary sanctions of two times the actual damages plus \$2000 per offense against persons who fraudulently claimed veterans' preferences to purchase army surplus equipment. It is ironic that this case contains the leading discussion of the punishment/compensation distinction, for it involved a claim of double jeopardy, and money sanctions labeled "civil," however punitive, are highly unlikely to be treated as "criminal" in nature, as is required for double jeopardy to attach. The Court offered the following rationale for holding the recoveries there to be nonpunitive:

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262. See text accompanying notes 351-52 *infra*.

263. The definition of punishment in the context of the jury trial guarantee is discussed in text accompanying notes 341-57 *infra*.

264. See *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1893) (fact that United States could have sued for single damages under normal civil procedures indicates that suit for double damages and forfeiture is punitive).

265. See Charney, *supra* note 7, at 509. Charney, however, draws the unwarranted conclusion that damage actions not so limited should be called criminal.

266. 350 U.S. 148 (1956).



Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations. . . . Liquidated-damage provisions, when reasonable, are not to be regarded as penalties . . . and are therefore civil in nature.<sup>267</sup>

The difficulty with this explanation is that it is almost universally available, for governmental damages are generally so indefinite, and when definite so vast, that the liquidated-damages theory serves to define nearly any monetary exaction as merely compensatory.<sup>268</sup> *Rex Trailer* itself provides a good example of this fact. The defendant company fraudulently used veterans' preferences to buy Army surplus trucks. The Government, after obtaining a criminal conviction and a \$25,000 fine, sued separately for statutory recoveries of \$2000 for each of five offenses. The Court rejected the company's double jeopardy claim, not on the ground that the penalty was not criminal, but on the ground that no penalty was involved because the statutory purpose was compensatory, not punitive. The Court observed:

It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances.<sup>269</sup>

This language indiscriminately lumps together the Government's role as protector of individual veterans, its role as guardian of the economy, and its arguably proprietary role as seller and user of trucks. Doubtless, where the government sues in a purely proprietary role—for example, as party to a breached contract or as owner of damaged property—the damages recovered are compensatory in the traditional legal sense. Moreover, in various contexts the government has sued on behalf of individual citizens to recoup for them collectively damages suffered by reason of the defendant's actions.<sup>270</sup> On the other hand, as a

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267. *Id.* at 151.

268. This same problem affects the rationale that assessment of law enforcement costs against lawbreakers constitutes a compensatory rather than penal measure. See text accompanying notes 253-56 *supra*. *Giaco v. Pennsylvania*, 382 U.S. 399 (1966), provides some support for the proposition that the Court would decline to view as compensatory the imposition of even definite governmental costs or damages on offenders, but would treat the imposition as punitive.

269. 350 U.S. at 153-54.

270. *Oklahoma v. Cook*, 304 U.S. 387 (1938); *North Dakota v. Minnesota*, 263 U.S. 361 (1923); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883).

lower court stated in a suit for treble damages where it rejected a government claim that the action was not punitive because the price violations in question caused harm to individual citizens,

it may be said that in the prosecution of any public offense the Government sues on behalf of the public at large. Almost any crime or offense which involves money or property affects the national economy, and both the public and the Government in its sovereign capacity benefit directly or indirectly from the punishment of the offender. So far as recoupment by the Government of its own damages caused by inflation is concerned, unless it purchases goods in excess of ceiling prices from the offender himself, I think the violation of the act by an individual has too remote an effect on the price of commodities purchased by the Government to be considered a basis for civil damages.<sup>271</sup>

This language points out that recoveries under the police power are not equivalent to recoveries of compensatory damages. If compensation is to have meaning, the government must not be permitted to argue that whenever persons or private property are harmed, the government's recovery is either on behalf of the harmed individuals or on behalf of its own interests as protector of the economy. Under a less-burdensome-alternative concept, the government should have to demonstrate that it has not singled out a narrow class of lawbreakers from whom to seek compensation, for such singling-out appears punitive. If indeed the motive is compensation, the government should proceed under rules which, analogously to those governing damage suits by private parties, demonstrate a close relationship between loss suffered and compensation sought.<sup>272</sup>

As a corollary to the principle that the government must show actual loss, the government might be required to demonstrate a property right, as opposed to a police power interest, which it seeks to defend by suit. Governmental property interests have already been defined to some extent in litigation arising in the original jurisdiction of the Supreme Court for purposes of determining when a state sues for compensatory damages, as opposed to when it sues for punitive (police power) purposes.<sup>273</sup>

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271. *Bowles v. Trowbridge*, 60 F. Supp. 48, 50 (N.D. Cal. 1945).

272. Cf. Charney, *supra* note 7, at 509.

273. The Court will entertain only the compensatory action. If a state seeks to recover its "own" damages from another state, the controversy is one "between two or more States" within the Court's article III, § 2 jurisdiction. If, however, the state seeks to recover damages suffered by its individual citizens, the suit is one "commenced or prosecuted against one of the United States by Citizens of another State" and therefore falls outside the judicial power of the United States by virtue of the eleventh amendment.

Applying this body of authority, we may say that where the government sues (1) on behalf of specific individuals, to collect as guardian specific damages suffered by them,<sup>274</sup> or (2) as *parens patriae*, to collect damages to certain property interests that the government alone can own or protect on behalf of its citizens,<sup>275</sup> or (3) in a proprietary capacity, for harm done to specific property that the government owns as a private party owns property,<sup>276</sup> the suit can be regarded as compensatory.

These distinctions are not airtight, but they do have certain established meanings. To hold that the government's suit is on behalf of specific individuals, the Supreme Court has in the past demanded proof that the recovery will be passed on to those persons.<sup>277</sup> There seems to be no reason why this should not be the controlling requirement for present purposes where the government seeks to establish a compensatory purpose on a guardianship theory. Lower courts have further held that where the government does intend to pass a recovery on to private citizens, it acts in the same capacity as does a private, representative plaintiff in a class action, and that class action procedural requirements should therefore apply.<sup>278</sup> Again, this requirement seems sensible and should be adopted.

Where the government sues not on behalf of individual plaintiffs, but as *parens patriae* on behalf of the economy or environmental assets such as earth, air, and water, rules have again been developed in other areas to define the limits of governmental standing. Although the government has standing to sue for damages to the general economy for such wrongs as anti-trust violations, the Court has held that a recovery would duplicate private recoveries for the same harm, with the clear implication that the duplicate recovery would be punitive.<sup>279</sup> It may be

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274. See cases cited in note 270 *supra*.

275. See *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208 (1901); cf. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972).

276. Cf. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 n.14 (1972). Thus, suits by the government for harm to its property or for breach of contract rely on common-law concepts of tort and contract applicable to private plaintiffs. See *Illinois v. Milwaukee*, 406 U.S. 91, 98-108 (1972) (federal common law based on general tort concepts applies where state sues to protect its natural environment).

277. See cases cited in note 270 *supra*.

278. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).

279. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-62 (1972).

that such macro-economic harms as inflation are separable from any individual financial losses suffered by private persons and that the government does have exclusive standing to sue for these.<sup>280</sup> Moreover, the government has consistently been held to have exclusive standing to collect damages for harm done to the environment through pollution.<sup>281</sup>

Finally, when the government sues in a proprietary capacity, its recovery should be governed by the same rules that govern recovery by private individuals. Recoveries that exceed demonstrated actual damages are labeled punitive in private law, and there seems to be no reason not to label them punitive for public law purposes when the government sues to collect them. Of course, properly computed liquidated damages are excepted from the general rule that compensatory damages must be demonstrated with specificity, but, again, private law standards should apply for measuring the validity of liquidated damages.

Let us apply these ideas to the *Rex Trailer* case, where the Court held that monetary penalties were compensatory and not punitive. The holding was unnecessary under the view that double jeopardy would not attach even if the recovery did constitute a penalty, since it was not criminal in nature. But the Court did reach the question of punitive versus compensatory purpose, and its answer seems open to attack. Under a strict scrutiny test, the government must demonstrate that the law could not have been more narrowly drafted to achieve its compensatory aim. Contrary to the Court's assertion, private tort law does not include a concept of liquidated damages; such damages appear in the law of contract and even then are usually limited to a reasonable approximation of actual damages that cannot be proved with exactitude.<sup>282</sup> And although statutes may "liquidate" private recoveries for loss of wages, the label does not necessarily indicate that no punitive damages are included.<sup>283</sup>

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280. Cf. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

281. See *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355-56 (1908); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

282. See generally 5 A. CORBIN, *CONTRACTS* § 1057 (1964).

283. Thus the federal Fair Labor Standards Act provides for "liquidated" damages equal to and in addition to the unpaid minimum or overtime wages due to a covered employee. 29 U.S.C. § 216(b) (1970). The fact that those damages may be forgiven by the court upon a showing that the employer's violation was in good faith, *id.* § 260, together with the lack of any specification in the Act of the kinds of actual damages being liquidated, strongly suggests that these "liquidated" damages in

In *Rex Trailer*, there was no indication that the Government's actual damages were not susceptible of measurement, nor any suggestion of the exact nature or magnitude of harm to the Government's proprietary interests. Nor was there a demonstration that the Government was suing as guardian of wronged veterans, intending to pass the recovery on to them. And finally, there was no allusion to a *parens patriae* interest in the suit.

Perhaps proof of one or more of these various indicia of a compensatory suit could have been adduced. But where the statute sets a fixed sum of \$2000 per offense as the recovery, allowing no demonstration of actual damages, Congress has fairly effectively blocked the opportunity to prove the kinds of damages that normally render a private recovery compensatory rather

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fact serve a punitive function. Because these damages are recoverable by a private party, however, there is no "penalty" of the sort described in this Article.

*Compensation and Private Punitive Damages.* The constitutional nature of penalties collectible by private parties rather than the government bears some discussion. They have been held not to fall within the meaning of "foreign penal laws." *Huntington v. Attrill*, 146 U.S. 657, 676 (1892). Yet fairly clearly treble-damage actions are authorized by Congress on a "private attorney general" theory—that permitting private suits permits police power enforcement of the law without the need for governmental prosecution. To a greater or lesser extent, therefore, the private plaintiff in such cases sues "on behalf of" the government and for punitive, police power reasons.

The Court's interpretation of the rule against enforcement of foreign penal laws not to include private penalties is difficult to defend, if only because the rule against enforcement of foreign civil penalties by the foreign sovereign itself is difficult to defend. See text accompanying notes 140-41 *supra*. The distinction could far more logically be drawn between civil and criminal actions. And there seems no very good policy reason to distinguish governmental collection of punitive damages from private collection of punitive damages.

Similarly, the retroactive enactment of a private treble-damage remedy might violate the *ex post facto* clause, on the theory that punitive damages serve only to discourage prohibited conduct and could affect conduct previous to the law's enactment. See text accompanying notes 142-49 *supra*.

On the other hand, there is no indication that the broadly interpreted *Boyd* privilege from discovery of harmful testimony or business records in civil penalty cases is likely to be extended to private punitive damage actions. This can best be explained by the fact that the *Boyd* notion that the government cannot force testimony that will result in civil punishment, as opposed to future criminal prosecution, itself finds only uncertain constitutional support.

Finally, it seems logical that private punitive damages, like governmental civil penalties, should be applicable only in cases involving at least some degree of fault. For a treatment of the question, largely dealing, however, with those constitutional provisions that apply only to truly criminal proceedings, see text accompanying note 309 *supra*; Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

than punitive. In sum, the Government appears to have sued in *Rex Trailer* under the police power, in order to enforce the law by means of penalties.

### c. Punishment and regulation

Perhaps it is most difficult to distinguish between a punitive and a nonpunitive civil law when the law in question purports to regulate. Alternative terms for "regulate," used by the Court and commentators, include "prevent"<sup>284</sup> and "incapacitate."<sup>285</sup> These terms primarily refer to laws that serve a preventive function by disabling the defendant from doing harm to the public. Laws that take drivers' licenses away from persons involved in serious accidents serve as an illustration. One purpose served by the deprivation is to prevent a presumably unsafe driver from further endangering the public. Forfeitures of property used to commit illegal acts supply another example: by removing the property from the owner's control, the government prevents its use in future forbidden activity.

As with the distinction between punishment and taxation or compensation, the distinction between punishment and regulation may involve the entire range of constitutional provisions discussed earlier. In cases involving such infamous sanctions as incarceration or disqualification from all public employment, these provisions include criminal safeguards. Most of the sanctions discussed, however, such as forfeitures and money sanctions, do not qualify as infamous punishments. As to these sanctions, the various results of concluding that they are punitive would be to permit invocation of the *Boyd* privilege from self-incrimination, to bar their retroactive application under the ex post facto clause, to refuse their enforcement at the behest of a foreign sovereign, to uphold them against a claim of taking without just compensation, and perhaps, as suggested below, to deny a seventh amendment claim to trial by jury.

#### (1) Forfeitures

The Court has been ambivalent about whether forfeitures are punitive, and they serve as a good example for discussing the distinction between punitive and regulatory laws. Two disparate lines of reasoning appear in the case law and indeed some-

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284. *United States v. Brown*, 381 U.S. 437, 458 (1965).

285. H. PACKER, *supra* note 12, at 48-53.

times within the same case. One line emphasizes that forfeitures are in rem and therefore directed at the property and not the person of its owner, so that they are necessarily remedial and not punitive.<sup>286</sup> The second line emphasizes that forfeitures do serve a punitive and deterrent function, despite their in rem procedural nature.<sup>287</sup>

The venerable history of civil, in rem forfeiture proceedings against property used to commit illegal acts originates in the Biblical and medieval tradition of deodand, a sacrificial offering to God of an object that has caused death or physical harm.<sup>288</sup> The Court has frequently observed that such actions are not personal or criminal in nature because they are directed at the property itself, for its own "offense." In *Various Items of Personal Property v. United States*<sup>289</sup> the Court rejected a plea of double jeopardy in a forfeiture action succeeding a criminal conviction and arising from the same facts. The Court stated simply:

A forfeiture proceeding . . . is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense.<sup>290</sup>

Similar logic has been used to explain the fact that the government may forfeit the interest of an innocent mortgagee, lessor, or secured creditor in property used unlawfully: because the action was in rem, the only question at bar was the illegal use of the property itself.<sup>291</sup> The property owner was techni-

286. See, e.g., *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *United States v. Stowell*, 133 U.S. 1 (1890); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

287. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Lees v. United States*, 150 U.S. 476 (1893); *Boyd v. United States*, 116 U.S. 616 (1886).

288. See O.W. HOLMES, JR., *THE COMMON LAW* 23-24 (M. Howe ed. 1963); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and The Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 180-96 (1973).

289. 282 U.S. 577 (1931).

290. *Id.* at 581.

291. See, e.g., *United States v. One 1936 Model Ford Coach*, 307 U.S. 219 (1939); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *United States v. Stowell*, 133 U.S. 1 (1890); *Dobbins's Distillery v. United States*, 96 U.S.

cally not even a party to the suit, and consequently his guilt or innocence was irrelevant to the outcome: "It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental."<sup>292</sup>

Although the Court has recently reaffirmed the vitality of these decisions, it recognized in the same opinion the contradictory principle that forfeitures, at least of property that is not itself contraband, are punitive. In *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>293</sup> the Court observed in dictum that where property was taken from an owner without his consent and illegally used, or was illegally used although the owner had done everything reasonably possible to prevent such use, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." This statement implies due process limitations on the use of forfeitures. Elsewhere in the opinion the Court referred explicitly to the "punitive and deterrent" purposes<sup>294</sup> forfeiture serves in persuading owners of property to use "greater care" in permitting its use by others.<sup>295</sup> At other times, dating from its earliest history, the Court has held forfeitures justified on the ground that when the owner entrusts his property to other persons he assumes the risk of its misuse and of its consequent forfeiture.<sup>296</sup> In these cases, then, the Court has viewed forfeiture as reflecting at the very least a kind of strict liability, to which the owner should not be subject when he has made all possible efforts to avoid misuse of the property. That this strict liability is considered personal rather than purely in rem, and at least in some circumstances, punitive, is reflected in the *Boyd* decision and subsequent cases holding

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395 (1878); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).

292. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 513 (1921).

293. 416 U.S. 663, 689-90 (1974).

294. *Id.* at 686.

295. *Id.* at 688.

296. See, e.g., *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878) (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844)):

Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those entrusted with its possession, care, and custody, even when the owner is otherwise without fault . . . .

[I]t has always been held in such cases that the acts of the master and crew [of a ship] bind the interest of the owner of the ship, whether he be innocent or guilty, and that in sending the ship to sea under their charge he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by means of their unlawful or wanton misconduct.



that an owner of property subject to forfeiture may claim the protections of the fourth amendment and the fifth amendment's self-incrimination clause.<sup>297</sup>

These two lines of reasoning, on the one hand that forfeitures affect only the property itself, and on the other hand that they punish and deter owners, may be partially reconciled by looking to the kinds of property being forfeited. The Court has recognized a category of property "malum in se," consisting of contraband whose possession by any private citizen is unlawful.<sup>298</sup> Examples are narcotic drugs,<sup>299</sup> counterfeit money,<sup>300</sup> and unregistered sawed-off shotguns.<sup>301</sup> It may be argued, rather conceptually, that forfeiture of such items does not punish or deter because they are never legally owned and, consequently, no deprivation of a legal property interest is involved in their forfeiture.<sup>302</sup>

But however logically satisfying such a formal distinction might be, there are many cases where the property forfeited was not contraband, yet where forfeitures have been held not to affect personal interests and not to punish the owner.<sup>303</sup>

The element of strict liability may provide the best reconciliation of the two general approaches to forfeitures.<sup>304</sup> Because liability is strict in forfeiture cases, the guilt or innocence of the owner is irrelevant except to the limited extent that he may avoid forfeiture by raising the defense that he did everything reasonably possible to guard against misuse of his property. At the same time, and because of this possible defense, forfeiture

297. See text accompanying notes 110-24 *supra*.

298. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965); Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAWYER 727 (1963).

299. *United States v. Jeffers*, 342 U.S. 48, 54 (1951).

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

301. See *United States v. One 1971 Ford Truck*, 346 F. Supp. 613 (C.D. Cal. 1972).

302. Cf. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

303. *United States v. One 1936 Model Ford Coach*, 307 U.S. 219 (1939) (automobile); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878) (real property); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) (ship).

304. For a discussion of strict liability with respect to a money penalty, see *Elting v. North German Lloyd*, 287 U.S. 324, 326-28 (1932); *Chicago, B. & Q. Ry. v. United States*, 220 U.S. 559 (1911). Cf. *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320 (1909).

by strict liability clearly does serve to deter and, in some sense of the word, to punish.

How, then, should forfeitures be classified for purposes of the punitive-regulatory distinction? It seems clear that forfeiture of contraband items can be justified as regulatory rather than punitive even apart from the formal "property interest" idea. Forfeiture of such items does not depend on their use to commit an illegal act, so that the sanction of forfeiture does not apply uniquely to lawbreakers.<sup>305</sup> The state's interest in keeping dangerous items out of the hands of the public is properly fulfilled by forbidding their use by all persons, whether or not those persons have committed offenses, and whether or not the forbidden items have been used to commit offenses.

This rationale is not available for forfeitures of noncontraband property used to commit forbidden acts, for the property deprivation is imposed solely by reason of an offense against legal norms. The question then becomes whether the taking can nonetheless be justified as merely regulatory. Where the property has been used as an integral and important part of a professional criminal enterprise and would be difficult or impossible for the criminals to replace, its taking may have the reasonable regulatory effect of keeping its prior owners out of business. The forfeiture of trucks used by a smuggling operation would presumably fulfill this purpose, at least on the assumption that the owners would sooner or later go free and be able to use the trucks again. Even then, however, the preventive effect could be served more narrowly by forbidding convicted felons from owning particular vehicles or firearms and thus forcing the sale of those items, rather than requiring forfeiture of them. There is also considerable difference between a smuggler's truck and an aging family car in which a youngster has been apprehended with a small amount of marijuana.<sup>306</sup> First, the vehicle has not been used in a criminal "enterprise" in a way that would lead one to believe that future criminal acts will be furthered by its retention. Second, forfeiture of the vehicle does not really prevent the owner from acquiring another vehicle to carry on his business, for cars are not extraordinarily expensive or difficult to acquire. The deterrent effect of the forfeiture is essentially the

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305. Only those burdens that attach uniquely to the commission of forbidden acts serve to trigger strict scrutiny. See text accompanying notes 160-61 *supra*. Here, possession is prohibited regardless of whether forbidden acts have been committed in the past.

306. See, e.g., *In re One 1965 Ford Mustang*, 105 Ariz. 293, 463 P.2d 827 (1970).

same as that of a money fine enforced by sale of the car or other assets: the individual has fewer assets to commit to the criminal enterprise in the future.

Consequently, determinations that forfeitures of goods used to commit illegal acts are regulatory rather than punitive should normally be based on proof that the goods are so peculiarly suited for criminal activities that, like burglar's tools, stills, or nets used in illegal fishing,<sup>307</sup> they are dangerous for any member of the public to possess. Absent such a showing, the preventive purpose of the deprivation could be accomplished by a narrower and more effective method, namely, by depriving the offending party of the right to use similar property, such as a vehicle, within the jurisdiction enacting the deprivation. To suggest that forfeiture of a yacht<sup>308</sup> really serves the purpose of preventing (as opposed to deterring) either its users or owners from using marijuana, simply because some marijuana was once found on the boat, is absurd. If the desire to prevent the transportation of marijuana is uppermost in the legislative mind, the offending party might better be banned from owning or leasing any vehicle. The inefficacy of this or any other method of preventing the transportation of drugs suggests that only deterrence (and therefore punishment) is effective against such transportation. Deterrence is the only purpose that appears to be served by the forfeiture law in question.

In concluding the discussion of forfeitures, it may be appropriate to dwell for a moment on the due process requirement that an owner not be punished if he demonstrates that he did everything possible to prevent the misuse of his property. The Court has not spelled out with any exactitude the degree of fault that the government must demonstrate in order to avoid the due process objection. Just what is involved in taking "reasonable steps" to avoid misuse of the property is unclear. Where a statute has provided for a reasonable care defense, reasonable care has apparently consisted of inquiring into the criminal record and reputation of lessees, mortgagors, buyers of goods subject to security interests, and other persons likely to use the property.<sup>309</sup> The value of this process must be questioned. In the first place, prior criminal records do not necessarily serve as accurate predictors of behavior. Second, serious reliance on them would

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307. Cf. *C.J. Hendry Co. v. Moore*, 318 U.S. 133 (1943).

308. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

309. See *United States v. One 1936 Model Ford Coach*, 307 U.S. 219 (1939).

cause a restriction of credit for all ex-convicts, and it is at least dubious that such a result would serve to prevent rather than enhance criminal activity. Third, "reputation" is a nebulous standard and perhaps an even poorer predictor of future activity than is past criminal record. And fourth, even if it could be assumed that a perfunctory series of questions on a lease or loan form would be truthfully answered by persons likely to misuse property, the use of a straw man to serve as the nominal lessee or borrower would easily circumvent the inquiry.

For all these reasons, the property owner can hardly be said in any very realistic way to be at "fault" in leasing or holding a security interest in property without going through the motions of a character examination. In reality, such a requirement does not measure fault, but instead renders the property owner a guarantor or surety for the property user. And where the forfeiture performs no real function of prevention or incapacitation, it is difficult to see this requirement of a guarantee of the behavior of the user as anything but arbitrary and hence violative of due process.

A much more realistic standard of fault for forfeitures would involve some showing that the property owner either knew or had reason to know that the property would probably be used to commit a crime, or at least that the owner failed to prevent the crime by taking steps more realistically effective than a character inquiry. The failure to act in such a case could be deemed negligent, and punitive liability for negligence is a far more acceptable concept in our law than is strict liability of the kind discussed previously. It is doubtful that the Court is ready to change the standard of fault required in forfeiture cases, but until it does the standard has very weak support indeed.

## (2) Denials or deprivations of personal rights and privileges

Distinguishing regulatory laws from penalties is also difficult in the area of delicensing proceedings initiated because of past crimes or other misdeeds. As with forfeitures and money sanctions, the conclusion that suspensions and disqualifications are punitive does not normally lead to the conclusion that they are unconstitutional, for a civil punishment in addition to a criminal punishment is normally permissible for the same offense.<sup>310</sup> The constitutional implications of a finding of punishment would nor-

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310. Because double jeopardy applies only to multiple criminal, not civil, punishments. See note 43 *supra*.

mally be limited to the ex post facto clause, since the taking clause and the seventh amendment right to jury trial apply to money cases only. The *Boyd* privilege from self-incrimination would also turn on the distinction. Finally, in cases of public employment disqualification, punitive intent might signal an infamous crime and the right to sixth amendment and double jeopardy protections.

An example of the problem of distinguishing punitive from nonpunitive disqualifications is the suspension of a driver's license by reason of an accident caused by careless and negligent driving. If the state or a party desired to argue that such a suspension was not punitive, it would do so on the ground that licenses are denied to various kinds of persons who are unfit to drive, and that persons convicted of careless and negligent driving constitute one subclass of the unfit.<sup>311</sup> So viewed, the sanction is not limited to persons convicted of forbidden acts, but applies to unfit persons generally, and strict scrutiny does not apply.

Whether this view is correct and acceptable depends on whether a legislature could rationally find that causation of a serious accident indicates a higher degree of proclivity for accidents,<sup>312</sup> and whether a less burdensome alternative exists in the form of individual determinations of proclivity, as opposed to blanket suspensions applicable to all persons involved in accidents.<sup>313</sup> The root question here, as in many recent equal pro-

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311. Cf. *Bell v. Burson*, 402 U.S. 535 (1971); *Perez v. Campbell*, 402 U.S. 637 (1971), where state statutory requirements of a bond and prospective liability insurance depended upon the fault of consequent potential liability of the uninsured motorist involved in the accident.

312. Query whether such documentation can be produced. See generally D. KLEIN & J. WALLER, CAUSATION, CULPABILITY & DETERRENCE IN HIGHWAY CRASHES 95-97 (1970).

313. The question whether determinations should be individualized underlies the Court's relatively recent and controversial use of the "irrebuttable presumption" standard to hold unconstitutional laws that do not provide for hearings regarding the individual abilities or characteristics of someone who falls within a burdened class. See generally Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269 (1975). Significantly, the Court indicated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), that the doctrine may be confined to the examination of regulations that impinge upon some "constitutionally protected status"—the very situation where both first amendment and equal protection doctrines have traditionally involved active scrutiny for less burdensome alternatives, including individualized review rather than presumptive classifications applicable regardless of individual differences. If the irrebuttable presumption doctrine is thus viewed as one means of determining whether a purpose to penalize constitutionally protected interests or

tection cases, is the extent to which the Court will permit the legislature to disadvantage an individual on the basis of statistics or evidence that applies to a group but not necessarily to the individual member. On several occasions in recent years the Court has styled such legislative findings irrebuttable presumptions and has stricken them.<sup>314</sup> I do not intend to address the desirability of these holdings, but only to point out that the problem of defining punishment in the present context is directly analogous to these equal protection problems.

Perhaps statistics can verify a higher degree of accident-probability for persons once at fault in serious accidents, and, likewise, the evidence might show that individual determinations of dangerousness are impossible. But, absent statistical evidence that suspension can in fact reduce the driver's dangerousness when he returns to the road, it remains questionable whether a temporary suspension does not belie the desire to prevent harm.<sup>315</sup> Persons with inadequate eyesight are not, after all, given temporary suspensions; they are disqualified from driving unless their eyesight improves. And it seems doubtful that a person's poor driving habits necessarily improve during a period of suspension, unless as a result of enhanced fear of future suspension. Such an improvement, of course, results from deterrence and hence punishment.

The significant difference in this context between the determination of punitive purpose, on the one hand, and equal protection analysis, on the other, is that under most circumstances the government is not constitutionally prohibited from taking a driver's license for punitive reasons. So long as the underlying conduct—careless and negligent driving—was itself properly subject to punishment, few objections could be raised. A retroactive taking, of course, would give rise to a constitutional objection based on the action's punitive nature. The government's ability to compel testimony in the delicensure proceeding might also be affected.

Similar analytical considerations apply in determining

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groups is present, *Salvi* may be seen to stand for the logical proposition that this inquiry need not be made unless the law involved uniquely burdens some such interest or group.

314. See Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

315. Cf. H. PACKER, *supra* note 12, at 55 (implying that the willingness to release a criminal without proof of rehabilitation belies rehabilitation as the justifying aim of confinement and indicates retribution or deterrence instead).

whether delicensures of professionals and disqualifications from public employment based on convictions for crimes of moral turpitude constitute punishment or regulation. The Supreme Court's position on the issue is presently unclear. As in other areas involving constitutional provisions which apply only to constitutionally "criminal" prosecutions, the Court has emphasized that disbarment is not a punitive sanction in order to avoid holding that the fifth and sixth amendment rights to indictment and jury trial apply in disbarment proceedings.<sup>316</sup> On the other hand, the Court has described disbarment proceedings as "punitive" in other constitutional contexts where such a finding was probably unnecessary. Thus the Court has stated in the course of holding that due process compels notice of charges in disbarment proceedings that "[d]isbarment . . . is a punishment or penalty imposed on the lawyer" and that "[t]hese are adversary proceedings of a quasi-criminal nature."<sup>317</sup> These statements are dictum, for presumably due process would require notice of charges whenever important personal or property rights are at stake, whether or not the proceeding is punitive.<sup>318</sup> Yet in another context as well the Court has suggested that disbarments are punitive in nature. The Court has on one occasion reversed an order of disbarment on grounds that the disbarment was "unnecessarily severe" in light of the fact that the attorney had also served a six-month sentence for contempt of court.<sup>319</sup> The implication of the Court's language, underscored by the arguments of Justice Reed, dissenting, is that the disbarment was viewed by the Court as punitive rather than remedial. Moreover, the delicensure of lawyers and clergymen who supported the Confederacy without having violated any oath of office was held punitive and violative of the ex post facto clause.<sup>320</sup> These disqualifications were deemed to be based on behavior that was irrelevant to future employability and therefore, presumably, violative of due process requirements as well as the ex post facto clause.

All of the Court's language in these cases which suggests that disbarments are punitive proceedings either involves constitutional provisions which do not hinge on punishment, or else

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316. *Ex parte* Wall, 107 U.S. 265, 288 (1883) (disciplinary proceedings are "not for the purpose of punishment" but are designed to protect the public).

317. *In re* Ruffalo, 390 U.S. 544, 550, 551 (1968).

318. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

319. *Sacher v. Association of the Bar*, 347 U.S. 388, 389 (1954) (per curiam).

320. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

involves arbitrary disbarments which would void for lack of due process. None of these cases indicate whether the Court would consider disbarment punitive in a case where, for example, a defendant claimed the *Boyd* privilege not to testify in a disbarment proceeding even after an award of immunity from criminal prosecution, on the ground that the disbarment proceeding was itself punitive. Lower courts have rejected this argument, and the Supreme Court's opinions at least suggest that public employees can be fired for refusing to testify against their own interest after a grant of immunity, whether because the discharge is not punitive or because the *Boyd* privilege does not so broadly obtain even in punitive proceedings.<sup>321</sup>

Analytically, the question whether disbarments are punitive again depends on the presence or absence of valid regulatory purposes for the sanction. The view that such sanctions are merely preventive rests on the assumptions that those to whom they are applied are more likely than others to be untrustworthy in the future and that even if such a statistical correlation is unavailable, the public assumes it and would, absent the sanctions, lose trust in licensed professionals and public servants. Again, the claim is advanced that the government has not singled out lawbreakers for special burdens; that conviction for crimes of moral turpitude is but one of a number of indicia of incompetence or unfitness that may result in delicensure or dismissal. And again the critical question should then be whether such convictions can properly be viewed as indicia of unfitness. With certain crimes, such as murder committed in passion rather than with premeditation, it might be very difficult to demonstrate statistically that criminals have a greater likelihood of disserving the public professionally than has any other group. And if precise draftsmanship is required, limitation of the sanction to those convicted of certain crimes giving rise to more demonstrable probabilities of future misbehavior, such as fraud or embezzlement, might be in order.

On the other hand, it can be argued that regardless of whether a greater likelihood of future criminal action can be statistically predicted as a result of past actions, people as a matter of course judge each other's "moral character" on the basis of past

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321. See *Gardner v. Broderick*, 392 U.S. 273, 276 (1968); cf. *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968). State court cases holding the self-incrimination privilege unavailable in disbarment proceedings after grants of immunity are collected in Annot., 62 A.L.R.3d 1145 (1975).



acts. Judges might well accede to this commonsense approach even without—or in spite of—statistical evidence. Even if a judge did not himself think that a conviction foreshadowed future untrustworthiness, he might view the delicensure as a nonpunitive means of preserving public confidence in the profession. Even if it could be demonstrated that professional bad faith is more likely to characterize the convicted murderer, for instance, than anyone else, popular belief in his untrustworthiness—the appearance of evil as opposed to its actuality—might itself justify the disqualification. People who lack faith in public servants or licensed professionals are likely, to their own detriment, not to seek or rely on their assistance. Moreover, the employment of a notorious lawbreaker in a position of public trust and service to the law may reduce public respect for the law itself. Unlike the problem of troop morale in *Kennedy v. Mendoza-Martinez*,<sup>322</sup> the problem of public respect for law and its servants arises not only from the public's desire not to see lawbreakers "getting away with something," but also from their fear that they themselves will be disserved by such persons.

Which way the Supreme Court would decide this question is not clear from its past opinions. The fourteenth amendment itself imposed a disability to hold public office upon persons who, having sworn to uphold the Constitution, had given aid or comfort to the Confederacy.<sup>323</sup> If this language is to be read consistently with the Supreme Court cases explicating application of the ex post facto clause,<sup>324</sup> such disabilities must be regarded as having been remedial and not punitive. If so, a strong argument is created that all public disabilities based upon breach of public trust should be considered remedial rather than punitive. Certain aspects of the procedures used to impeach presidents and other federal officials make those removals from office also appear remedial rather than punitive.<sup>325</sup>

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322. 372 U.S. 144 (1965).

323. Section 3 of the fourteenth amendment states:

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

324. See text accompanying notes 142-49 *supra*.

325. Art. I, § 3, cl. 7, states that a party who is impeached is still

The degree of statistical support that the Court will require for legislative judgments of unfitness for public trust, or the way in which the Court will assess such judgments in the absence of statistical evidence, remains unclear. It is also unclear to what extent determinations of unfitness may be made not on an individual basis but on the basis of "irrebuttable presumptions" that all persons who have violated certain norms are unfit.

### (3) Expatriation and deportation

A third line of cases raising questions of regulation and punishment is that involving deportation and expatriation. Among these cases is *Mendoza-Martinez*, which was discussed earlier.

Deportation of persons convicted of crimes of moral turpitude, unlike expatriation, has been held nonpunitive.<sup>326</sup> Unlike removal of citizenship from natural-born citizens, deportation of aliens (or initial denial of entry to them) occurs for various reasons related to their economic status, work skills, and personal desirability or lack thereof. The Court has frequently resorted to a kind of right-privilege distinction (now generally abandoned in constitutional adjudication) in holding that aliens have no "right" to remain in the country.<sup>327</sup> Underlying this language, however, is a recognition that Congress has wide discretion to remove aliens or deny them entry, and that it often uses that discretion to remove them for reasons other than the commission of undesirable acts. So viewed, the burden of deportation is not placed uniquely on offenders, but on persons who show themselves to be undesirable for a variety of reasons which include lawbreaking. This limited recognition of the right-privilege distinction does not, of course, imply that deportation or the loss of other "privileges" can be based on acts which are constitutionally protected or bear no relevance to a proper purpose. Indeed, where the

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"subject to Indictment, Trial, Judgment and Punishment, according to Law." From this it can be reasoned that the removal itself is at least not criminal in nature, for otherwise the two trials would violate the modern notion of double jeopardy. If one assumes that disqualification from public office would be infamous if it were punishment, one can further assert that impeachment is a remedial, not a punitive sanction. See STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REPORT ON CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 22-27 (Comm. Print 1974).

326. See, e.g., *Lehman v. United States ex rel. Carlson*, 353 U.S. 685 (1957); *Marcello v. Bonds*, 349 U.S. 302 (1955); *Galvan v. Press*, 347 U.S. 522 (1954).

327. See *Trop v. Dulles*, 356 U.S. 86, 98 (1958).

deprivation can be shown to penalize (in the secondary sense of that term) the exercise of constitutionally protected rights, it has traditionally been held unconstitutional.<sup>328</sup>

The case of *Flemming v. Nestor*<sup>329</sup> illustrates another aspect of the Court's approach to determining regulation versus punishment of aliens. There a deported alien challenged the Government's denial to him of social security benefits as a violation of due process, the ex post facto prohibition, the right to jury trial in article III, and the sixth amendment. The benefits were denied only to aliens deported because of membership in the Communist Party; not to those deported for other reasons. The Court held that social security benefits do not constitute an accrued property right, but limited the relevance of this holding to the due process issue and to the conclusion that the punishment, if any, was not infamous for purposes of the constitutional safeguards for criminal prosecutions. The Court concluded that the statute was nonpunitive because it was aimed at preventing benefits from being spent abroad rather than in this country. This conclusion is highly dubious in light of congressional refusal to limit social security benefits to persons deported for reasons other than Communist Party affiliation, but the Court chose to ignore the implications of this under-inclusion—implications that have led to opposite results in other cases.<sup>330</sup>

#### (4) Civil contempt

The final group of laws raising the regulatory-punitive issue consists of those designed to "coerce" present or future conduct, such as those providing sanctions for civil contempt. In the context of a decision that there is no right to a jury trial in civil contempt proceedings,<sup>331</sup> the Court has held that such sanctions are not punitive.

There certainly is a distinction between coercive sanctions and punitive sanctions in general in that coercive sanctions can be avoided, even after imposition, by compliance with some stated condition, such as one contained in a court order. Thus, in the case of civil contempt, the individual is said to hold the keys to his own jail cell. This fact explains why the Court does not consider imprisonment for civil contempt to be an infamous punishment for purposes of the sixth amendment. The sentence

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328. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

329. 363 U.S. 603 (1960).

330. See *United States v. Brown*, 381 U.S. 437 (1965). See also text accompanying notes 202-08 *supra*.

331. *Shillitani v. United States*, 384 U.S. 364 (1966).

can be avoided at any time, and short-term imprisonments have traditionally not given rise to all constitutional protections.

This is not to say, however, that coercive sanctions may not be considered punitive for other constitutional purposes. The use of torture as a coercive sanction would doubtless qualify as cruel and unusual punishment. Coercive sanctions might also be considered functionally punitive under the rule regarding enforcement of foreign penal laws. A court is not constrained by considerations of "full faith and credit" to enforce by means of its contempt power injunctions issued by foreign courts.<sup>332</sup> Whether any other constitutional provisions might apply to coercive sanctions is difficult to predict.

#### d. Punishment and treatment

The debate over the distinction between treatment and punishment has occurred primarily in the area of civil commitment of the mentally ill.<sup>333</sup> Yet in a sense the debate is misplaced. Those cases that have treated confinement ostensibly for treatment as cruel and unusual punishment<sup>334</sup> have confused arbitrary incarceration with punishment. The decisions rely generally on *Robinson v. California*,<sup>335</sup> which held imprisonment of a narcotics addict to constitute a burden on a status rather than an act, and hence to be cruel and unusual punishment. The preferable way of stating the conclusion of *Robinson* is that the imprisonment does not constitute punishment, in the sense of a burden calculated to deter or revenge a violation of legal norms, for the very reason that it does burden a status rather than a voluntary act; but rather that the imprisonment is purposeless and hence violative of due process. Alternatively, it might be argued that the affixation of the criminal label in *Robinson* was itself punitive, and hence cruel and unusual because arbitrary.

Civil commitment statutes do not generically include any reference to specifically prohibited conduct or acts; the focus instead is on the status or mental health of the individual.<sup>336</sup> Because of this fact, retribution and deterrence are not effectively

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332. See generally *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1042-44 (1965).

333. See, e.g., *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1259-64, 1330-33 (1974).

334. See *Martarella v. Kelly*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972); *United States v. Walker*, 335 F. Supp. 705, 708-09 (N.D. Cal. 1971); *United States v. Jackson*, 306 F. Supp. 4 (N.D. Cal. 1969); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974).

335. 370 U.S. 660 (1962).

336. See generally *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-07 (1974).

served. If arbitrary confinement is to be attacked, it should be as a denial of due process of law, not as cruel and unusual punishment.

There are instances, of course, where confinement is ostensibly prescribed for treatment purposes, but solely for those persons who have violated particular norms. For example, the sex-offender statute involved in the case of *Specht v. Patterson*<sup>337</sup> provided that after conviction of a sex offense, a person could be given an indeterminate sentence under the Sex Offender Act if found to be dangerous and mentally ill. Arguably, this statute was designed to serve the purpose of prevention, by removing the offender from society, and, perhaps, that of treatment as well. Nonetheless, the Court seems to have been correct in holding the statute in the case at bar to be punitive and therefore, because the case involved the infamous punishment of imprisonment, also criminal. Where an ostensible treatment applies only to persons who have committed criminal or other forbidden acts, a demonstration of some preventive purpose proves nothing, for all criminal sentences serve to prevent crime (at least crime committed outside the prison) during the period of incarceration, and also aim to fulfill the purposes of treatment and rehabilitation. Had the legislature desired to avoid the implication of punishment in the Sex Offender Act, an alternative was available, namely, a requirement of review for possible initiation of civil commitment proceedings at the time the criminal sentence expired.<sup>338</sup> To the extent that prevention and treatment were the goals rather than punishment, common procedures might have been adopted for offenders and nonoffenders alike. Thus the Act is distinguishable from a commitment statute listing as a ground of commitment the commission of certain sex offenses. If it could be demonstrated that commission of such offenses necessarily indicates future dangerousness to the public, at least as a matter of statistical probability, commission of an offense would simply become a signal of the need for preventive measures, much as in the case of the revoked driver's license or that of disbarment for fraud.<sup>339</sup> Here, however, the indeterminate sentence procedure constituted a different and more burdensome procedure than that involved in civil commitment. It required judicial approval for release and employed the label "sentence" rather than "commitment." Indeed, the label alone would arguably be enough conclusively to indicate a legislative intent to punish.

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337. 386 U.S. 605 (1967).

338. Cf. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

339. See text accompanying notes 310-24 *supra*.

## VI. POSTSCRIPT: THE PROCEDURAL ATTRIBUTES OF CIVIL PENALTY PROCEEDINGS

This Article has been primarily concerned with the distinction between civil and criminal punishment and with the distinction between punishment and nonpunishment. In the process of this investigation, the Article has attempted to sort out the constitutional protections that apply only to criminal punishments from those that apply to punishments generally.

Some of the constitutional and statutory attributes of non-criminal punishment are less certain than the constitutional applications discussed previously. The applicability of procedural requirements such as the seventh amendment right to jury trial, the enforceability of the provision for remission and mitigation of penalties that is contained in some statutes, and the placement of the burden of proof in penalty proceedings, for example, still remain somewhat uncertain. This last section of the Article attempts to outline the scope of these uncertainties, but does not necessarily undertake to resolve them. Hopefully, the parameters of the arguments in each of these areas will at least be pointed out.

### A. THE RIGHT TO JURY TRIAL UNDER THE SEVENTH AMENDMENT

The sixth amendment right to trial by jury seems clearly inapplicable in civil penalty and forfeiture proceedings,<sup>340</sup> and the corresponding right under the seventh amendment remains something of a bone of contention.<sup>341</sup> The proponents of expanded use of civil penalties argue against application of the seventh amendment, pointing to streamlined agency procedures as a primary advantage over the use of criminal sanctions.<sup>342</sup>

History provides some guidance in this area, at least with regard to the jury trial right in strictly judicial proceedings not involving agency assessment of penalties. The Court has indicated that it views maritime forfeiture proceedings as maintainable, at the government's option, either in the common-law courts, where a jury was traditionally available,<sup>343</sup> or in admir-

340. See *United States v. J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974).

341. For a recent analysis, see Note, *Right to Jury Trial under Section 5(l) of the Federal Trade Commission Act—Building "Iron Power" in the Seventh Amendment*, 59 MINN. L. REV. 715, 729-49 (1975).

342. See Goldschmid, *supra* note 6, at 30-34.

343. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 140, 152, 153 (1943):

"[S]eizures, in England, for violation of the laws of revenue, trade or navigation, were tried by a jury in the Court of Exchequer, according to the course of the common law . . ."

[quoting 1 J. KENT, COMMENTARIES 374 (12th ed. 1873)].

alty, where it was not.<sup>344</sup> Seizures on land were uniformly adjudicated with a jury.<sup>345</sup> As for suits for monetary penalties, the Court has asserted without elaboration that the defendant is "of course" entitled to a trial by jury.<sup>346</sup>

However, the right to jury trial seems to disappear when the legislature (or at least Congress) commits the matter to agency determination.<sup>347</sup> The Court has on various occasions recognized that administrative agencies rather than courts may constitutionally be entrusted with determining whether a penalty or forfeiture has been incurred,<sup>348</sup> and has implied that no judicial review will lie other than equitable enforcement of the agency order or appellate review for abuse of discretion.<sup>349</sup> The clearest demonstration of this position has been in cases involving immigration, an area where congressional power has been described as plenary and constitutional restraints are minimal.<sup>350</sup>

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The Court has never held or said that the admiralty jurisdiction in a forfeiture case is exclusive, and it has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations *in rem* with trial by jury.

344. "[Earlier Supreme Court decisions] held that when the seizure occurred on navigable waters the cause was maritime and hence triable without a jury in the federal courts." *Id.* at 152 (citing section 9 of the Judiciary Act of 1789, 1 Stat. 77).

345. See note 343 *supra*. See also *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943), and cases there cited.

346. *Hepner v. United States*, 213 U.S. 103, 115 (1909). See also *United States v. Regan*, 232 U.S. 37, 43-44 (1914) (quoting *Hepner*).

347. See *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974). The notes in the remainder of this section on the right to jury trial draw heavily on the scholarship of Professor Goldschmid, *supra* note 6, at 38-44.

348. See *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320 (1909); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-35 (1932):

By the words of the statute the Secretary's is the only voice authorized to express the will of the United States with respect to the imposition of the fines; the judgment of a court may not be substituted for the discretion which, under the statute, he alone may exercise. In conferring that authority upon an administrative officer, Congress did not transcend constitutional limitations.

[D]ue process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them.

349. See cases cited in note 348 *supra*.

350. See note 348 *supra*. See also *Elting v. North German Lloyd*, 287 U.S. 324, 328 (1932). With regard to the plenary powers of Congress over immigration, see notes 326-27 *supra*. It has been observed, however, that in other areas where constitutional restraints normally apply, such

Nonetheless, the Court has also upheld agency imposition of penalties in such areas as taxation<sup>351</sup> and wage stabilization,<sup>352</sup> where constitutional restraints operate with full force. There has been no suggestion that the administrative imposition of penalties need be subject to judicial retrial before a jury because of the seventh amendment.<sup>353</sup>

The argument that such delegation to agencies violates the right to jury trial has depended on the view that money penalty and forfeiture proceedings are common-law actions for debt.<sup>354</sup> The better view seems to be that Congress can vary the nature of the proceeding as it sees fit by providing either judicial adjudication of the penalty, which resembles a common-law action for debt, or an agency proceeding followed by judicial enforcement, which more nearly resembles a proceeding in equity than an action at law.<sup>355</sup>

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as interstate commerce, congressional power has also been described as "plenary." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.13, at 136 (1958); Goldschmid, *supra* note 6, at 39 n.220.

351. In *Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320, 339 (1909), a case imposing penalties on a steamship company for carrying illegal immigrants, the Court indicated the broad scope of congressional power to authorize administrative imposition of such penalties:

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 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.

As Professor Goldschmid points out, the opinion in *Helvering v. Mitchell*, 303 U.S. 391 (1938), upheld the authority of the Internal Revenue Service to impose a civil penalty for tax evasion (although the Court itself called the imposition "remedial," not punitive). See Goldschmid, *supra* note 6, at 39-40. See also *Olshausen v. Commissioner*, 273 F.2d 23 (9th Cir.), *cert. denied*, 363 U.S. 820 (1960); *Walker v. United States*, 240 F.2d 601 (5th Cir.) (per curiam), *cert. denied*, 354 U.S. 939 (1957).

352. *N.A. Woodworth Co. v. Kavanaugh*, 102 F. Supp. 9 (E.D. Mich. 1952), *aff'd*, 202 F.2d 154 (6th Cir. 1953) (per curiam).

353. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 91 (abr. ed. 1965). A recent en banc decision of the Third Circuit upheld the power of the Occupational Safety and Health Review Commission to impose monetary penalties without de novo judicial review and seventh amendment right of jury trial. *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n*, 519 F.2d 1200, 1215 (3d Cir. 1975) (en banc) (citing *Curtis v. Loether*, 415 U.S. 189 (1974)).

354. See Note, *supra* note 341, at 733.

355. See *Curtis v. Loether*, 415 U.S. 189 (1974); cf. *Pernell v. Southall Realty Co.*, 416 U.S. 363, 383 (1974) (dictum) ("the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of ad-



If this view prevails, then the determination of the right to jury trial depends on a search for congressional purpose. If Congress intended plenary judicial trial of an agency complaint requesting that a penalty be imposed, then jury trial would be constitutionally available by analogy to the Exchequer proceedings cited above.<sup>356</sup> If, on the other hand, Congress intended to submit imposition of the penalty to agency determination, the proceeding to enforce the agency's order would involve no right of jury trial.<sup>357</sup>

#### B. REMISSION AND MITIGATION OF PENALTIES AND FORFEITURES

For many years the courts have treated agency or executive remissions and mitigations of penalties and forfeitures as acts of grace, much like a pardon, and hence entirely discretionary and beyond judicial review.<sup>358</sup> The Court has suggested, however, that agencies may not penalize an innocent owner of prop-

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ministrative discretion"); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.12, at 131 (1958). And in *Passavant v. United States*, 148 U.S. 214, 219 (1893), the Court stated:

It was certainly competent for Congress to create this board of general appraisers . . . and not only invest them with authority to examine and decide upon the valuation of imported goods, . . . but to declare that their decision "shall be final and conclusive as to the *dutiable value* of such merchandise against all parties interested therein."

The Court held that the collector of the port could then automatically levy an additional sum, albeit called a penalty, on the basis of the board's appraisal.

356. See note 343 *supra*.

357. *United States v. J.B. Williams Co.*, 498 F.2d 414, 439 (2d Cir. 1974) (Oakes, J., dissenting); cf. *Olshausen v. Commissioner*, 273 F.2d 23 (9th Cir.), *cert. denied*, 363 U.S. 820 (1960). There is, however, an additional due process problem in penalty cases where no stay is provided pending appeal from the agency to the courts. The resulting cumulation of damages may effectively discourage appeal. See Note, *Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures*, 84 YALE L.J. 1380, 1382-88 (1975).

358. See, e.g., *United States v. One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States v. One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964); *Jary Leasing Corp. v. United States*, 254 F. Supp. 157 (E.D.N.Y. 1966). In *One 1961 Cadillac* the court stated:

The purpose of the remission statutes was to grant executive power to relieve against the harshness of forfeitures. The exercise of the power, however, was committed to the discretion of the executive so that he could temper justice with mercy or leniency. Remitting the forfeiture, however, constituted an act of grace. The courts have not been granted jurisdiction to control the action of the executive, even where it is alleged, as here, in general conclusory language, that discretion has been abused.

337 F.2d at 733. See generally Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U.L.Q. 265, 279-83. But see *Elting v. North German Lloyd*, 287 U.S. 324, 328 (1932) (duty to remit a penalty if the person subject to it could not have avoided the violation).

erty used to commit illegal acts, where the owner took all reasonably possible steps to guard against the illegal use.<sup>359</sup> In addition to imposing this due process limitation on forfeitures and penalties, the Court has implied that where a statutory provision for mitigation and remission exists, the agency charged with its exercise may be required to apply it to persons who were totally without wrongful intent.<sup>360</sup>

The standard of review consequently appears to be moving toward the "abuse of agency discretion" model that obtains elsewhere in administrative law, with the agency forbidden not to remit or mitigate sanctions in situations where the statute constructively intends remission or mitigation. Although this result has been avoided by courts that have held that remission and

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359. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974); *Elting v. North German Lloyd*, 287 U.S. 324, 328 (1932); *see United States v. One 1971 Ford Truck*, 346 F. Supp. 613 (C.D. Cal. 1972); *United States v. One Bally Sun Valley Pinball Machine*, 340 F. Supp. 307 (W.D. La. 1972); *In re One 1965 Ford Mustang*, 105 Ariz. 293, 463 P.2d 827 (1970).

360. In *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971), the Court stated:

An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law. . . ." 19 U.S.C. § 1618. Upon this showing, the Secretary is authorized to return the seized property "upon such terms and conditions as he deems reasonable and just." It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner's protests have gone unheeded. *United States v. Edwards*, 368 F.2d 722 (CA4 1966); *Cotonificio Bustese, S.A. v. Morgenthau*, 74 App. D.C. 13, 121 F.2d 884 (1941) (Rutledge, J.). When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

The Court reached this conclusion en route to concluding that, as in *Boyd*, the statute was designed to burden criminal conduct and hence was "quasi-criminal" for purposes of the fourth and fifth amendments. It seems more reasonable to say that forfeiture laws are penal in a strict-liability sense, regardless of the criminal intent of the property owner, and that the *Boyd* rule applies to penal actions generally, whether or not they involve criminal laws. *See* text accompanying notes 110-24 *supra*. The difficulty with the Court's approach in *Coin & Currency* is that, by straining to limit the statute to criminal conduct, the Court impliedly removed the strict liability that the statute was fairly clearly designed to create. The resulting confusion is demonstrated in lower court cases that have denied liability absent a showing of criminal intent under statutes providing for remission and mitigation. *See, e.g.*, *United States v. One 1971 Ford Truck*, 346 F. Supp. 613 (C.D. Cal. 1972); *Suhomlin v. United States*, 345 F. Supp. 650 (D. Md. 1972); *cf. McKeehan v. United States*, 438 F.2d 739 (6th Cir. 1971). A corrective footnote appears in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 n.27 (1974).

mitigation are matters entirely "committed to agency discretion" under the Administrative Procedure Act or other statutes,<sup>361</sup> these decisions perhaps fail to consider both the constitutional limitations and statutory policy that prevent the forfeiture of property belonging to totally innocent owners.

### C. DUE PROCESS HEARING REQUIREMENTS IN PENALTY AND FORFEITURE PROCEEDINGS

In the early case of *Oceanic Steam Navigation Co. v. Stranahan*,<sup>362</sup> the Court stated that the Secretary of Commerce and Labor need not grant a hearing on the question whether a steamship company brought an alien with a communicable disease to this country. This language was disavowed as dictum by the Court in a later case dealing with the same statute.<sup>363</sup> There now seems little doubt that, like all other governmental deprivations of property, agency penalty and forfeiture proceedings must provide an opportunity to be heard.<sup>364</sup> The more difficult problems are defining the issues on which hearings are required, allocating the burden of proof on those issues, and determining whether bonds can be required to secure such hearings.

Various federal statutes provide that in order to subject property to forfeiture the Government need only show probable cause to believe that the property should be forfeited, and that the claimant must then prove the negative.<sup>365</sup> Such a procedure is commonplace and constitutionally acceptable in proceedings where taxpayers challenge the assessment of tax deficiencies,<sup>366</sup> and early in the Court's history Chief Justice Marshall upheld such a procedure as applied to the forfeiture of illegally imported goods.<sup>367</sup> In the 1874 case of *Chaffee v. United States*,<sup>368</sup> however, the Court held unconstitutional a lower court's jury instruction that the failure of a defendant in a money penalty case to adduce proof within his exclusive possession could be consid-

361. See, e.g., *United States v. One 1957 Oldsmobile Automobile*, 256 F.2d 931 (5th Cir. 1958); *United States v. Gramling*, 180 F.2d 498 (5th Cir. 1950); *United States v. One 1957 Buick Roadmaster*, 167 F. Supp. 597 (E.D. Mich. 1958).

362. 214 U.S. 320, 340-43 (1909).

363. *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 336-37 (1932).

364. See generally Note, *Forfeiture Proceedings—In Need of Due Process*, 3 *FORDHAM URB. L.J.* 347 (1975).

365. See, e.g., 19 U.S.C. § 1615 (1970) (customs).

366. See, e.g., *Crocker First Nat'l Bank v. United States*, 183 F.2d 149, 151 (9th Cir. 1950); *United States v. Peabody Co.*, 104 F.2d 267, 269 (6th Cir. 1929); *Schwarz v. United States*, 138 F. Supp. 840 (E.D. Wis. 1956).

367. *Locke v. United States*, 11 U.S. (7 Cranch) 339 (1813).

368. 85 U.S. (18 Wall.) 516 (1874).

ered as evidence against him, as in other civil cases. The Court based its decision on the now-discredited assumption that the government must generally prove forfeiture cases beyond a reasonable doubt<sup>369</sup>—a precursor no doubt of the language of *Boyd*—and it distinguished cases where the statute explicitly cast the burden of proof on the claimant after a showing of probable cause.<sup>370</sup>

Whether the *Chaffee* court should so easily have put these cases aside, however, seems doubtful. Even a narrow reading of *Boyd*<sup>371</sup> would indicate that an individual cannot be compelled by means of a threat of forfeiture of his property to give testimony that might result in his prosecution in a future criminal case.<sup>372</sup> A number of lower courts have used such reasoning to conclude that placement of the burden of proof on the property owner is unconstitutional.<sup>373</sup> And if *Boyd* is read more

369. See note 45 *supra*.

370. 85 U.S. at 545-46.

371. See text accompanying notes 111-16 *supra*.

372. In *Boyd*, a forfeiture proceeding, the Court held unconstitutional a subpoena of business records backed with the threat of contempt. Since *Boyd* the Court has made it clear that the threat of forfeiture itself, apart from enforcement of subpoenas by contempt, unconstitutionally burdens the exercise of the fifth amendment right. See *United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). See also *Suhomlin v. United States*, 345 F. Supp. 650 (D. Md. 1972).

373. See *McClendon v. Rosetti*, 460 F.2d 111, 115 (2d Cir. 1972):

The burden of proof in any civil action is expressly put on the claimant . . . [to prove lawful title and possession]. . . . [T]he burden exists even if there is insufficient evidence for an indictment. . . . It seems plain enough that absent evidence of unlawful conduct, criminal sanctions may not be imposed . . . , nor property forfeited . . . , even though in the case of property forfeiture the burden of proof on the government seeking it is only by a preponderance of the evidence.

See also *Iannelli v. Long*, 333 F. Supp. 407, 410 (W.D. Pa. 1971), *rev'd*, 487 F.2d 317 (3d Cir.), *cert. denied*, 414 U.S. 1040 (1973) (equating enforcement of tax lien with a forfeiture):

In order to prevail in a suit for refund, the burden of establishing the correct tax due is upon the taxpayer. The *Iannellis*, therefore, would be required to prove facts about their operations and income which might directly incriminate them both in the pending federal court suit and perhaps also in a state court action.

To the plaintiffs, therefore, the choice seems to be simple. They either waive their right to be silent under the Fifth Amendment of the Constitution in connection with the criminal case or they must forfeit all of their property down to and including the furniture in their home.

Moreover, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court held that a state could not place on an individual the burden of proving that he had not engaged in prohibited speech, because of the chilling effect and "margin of error" that such placement of the burden entailed. Although the burden of proof in *Speiser* affected a preferred first amend-

liberally, to indicate that testimony cannot be compelled in a forfeiture proceeding regardless of whether it may be used in a separate criminal action,<sup>374</sup> then placement of the burden of proof on the property owner is still more suspect.

Several lower court cases have avoided this problem by construing "probable cause" to mean something more nearly approaching "prima facie proof."<sup>375</sup> Such a reading of the statutory standard would probably pass constitutional muster under the "preponderance-of-the-evidence" standard, which normally applies in penalty and forfeiture cases where the government bears the burden under the terms of the relevant statute.<sup>376</sup>

The form and availability of hearings also raise problems in penalty and forfeiture cases. Federal forfeiture statutes frequently permit the government agency to seize property without a warrant and hold it without demonstration of probable cause until the agency determines whether to remit or mitigate the forfeiture and any incidental money penalties.<sup>377</sup> A hearing

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ment right (unlike penalty and forfeiture cases), the Court relied on *Lipke v. Lederer*, 259 U.S. 557 (1922), the tax penalty case that invalidated the use of summary collection procedures, 357 U.S. at 525, thus indicating that ordinary tax procedures are not always constitutionally permissible. It remains unclear whether the Court would be willing to reverse the analogy and hold that penalty cases are like first amendment cases for purposes of the *Speiser* rule that the burden of proof must be borne by the government.

374. See text accompanying note 124 *supra*.

375. See, e.g., *Olshausen v. Commissioner*, 273 F.2d 23, 28 (9th Cir.), *cert. denied*, 363 U.S. 820 (1960):

Where one fact (willful neglect) is a logical conclusion from another (failure to file), there is no constitutional infirmity in presuming the second fact from the first, thus putting the burden of proof on the protestant. . . . An almost impossible burden would be placed on the government if it had to prove willful neglect by evidence in addition to a taxpayer's failure to file, whereas the taxpayer can easily explain his failure if good cause therefor existed. The allocation of the burden of proof . . . is, therefore, founded in good common sense and fair play.

*But see* *United States v. One 1949 Pontiac Sedan*, 194 F.2d 756 (7th Cir.), *cert. denied*, 343 U.S. 966 (1952); *Jackman v. United States*, 56 F.2d 358 (1st Cir. 1932); *United States v. Davidson*, 50 F.2d 517 (1st Cir.), *cert. denied*, 284 U.S. 660 (1931); *United States v. 1,197 Sacks of Intox. Liquor*, 38 F.2d 822 (D. Conn. 1930).

376. See *Lilienthal's Tobacco v. United States*, 97 U.S. 237 (1877); *Utley Wholesale Co. v. United States*, 308 F.2d 157 (5th Cir. 1962); *D'Agostino v. United States*, 261 F.2d 154 (9th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959).

377. See, e.g., 19 U.S.C. §§ 1595a, 1608 (1970). No administrative hearing is provided for in the statute, and in practice none is generally granted.

Although the claimant may force the government to institute a judicial forfeiture proceeding if he files a bond with the agency, considerable time can elapse before the government files suit and a judicial hearing is obtained.

may then be obtained, but in certain cases a bond must be posted to cover court costs. These procedures may create insuperable barriers for indigents unable to afford a bond.

The Court has properly justified the denial of preseizure hearings in forfeiture cases on the grounds that seizure is necessary to establish in rem jurisdiction, that seizure is necessary to prevent the property's removal, and that the decision to seize is made by state officials rather than private parties.<sup>378</sup> The Court has not described the attributes of the postseizure hearing, however. In view of the serious inconvenience that may result from the seizure of an automobile or ship and all its contents, it seems imperative that some form of hearing before an impartial officer should be afforded as soon as practical after the seizure occurs. Federal statutes that do not afford such an opportunity seem vulnerable to constitutional attack.

The bond requirement also raises constitutional difficulties. In cases where the bond is addressed to the court, federal law, at least, provides relief for indigents under the *forma pauperis* statute.<sup>379</sup> However, where the statute requires a bond addressed to the relevant agency in order to require the agency (rather than the claimant) to initiate a forfeiture proceeding, the *forma pauperis* statute appears to afford no relief. In such circumstances at least one lower court interpreting state law has held that the procedure denies indigents due process of law.<sup>380</sup> This conclusion seems clearly warranted under both criminal and civil cases affording court access to indigents who cannot pay

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378. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676-80 (1974).

379. 28 U.S.C. § 1915 (1970). In *Colacicco v. United States*, 143 F.2d 410 (2d Cir.), *cert. denied*, 323 U.S. 763 (1944), the Court raised but did not decide the question whether the *forma pauperis* statute would eliminate the requirement of a cost bond for one who could not afford the bond.

380. *Fell v. Armour*, 355 F. Supp. 1319, 1333 (M.D. Tenn. 1972):

The \$250 cost bond of the Act allows one sufficiently affluent to obtain a hearing whereby he may seek recovery of his vehicle and avoid the harsh penalty of forfeiture. Those owners of seized vehicles who cannot afford the cost bond have their rights to seek recovery of the vehicle and thereby avoid the harsh penalty of forfeiture extinguished by their personal poverty. As to these indigent owners, the effect of the \$250 cost bond requirement is to grant to the seizing police officer the effective right to extinguish all property interests. As to those too poor to afford a hearing, this exercise of raw power can only lead to arbitrary state action in that no neutral hearing officer or judicial official will have the opportunity to review the evidence and determine the propriety of the forfeiture or the claim for recovery. Thus, the indigent owner may be deprived of property without due process of law in that the deprivation may occur without any process whatsoever.

normal costs.<sup>381</sup>

## VII. CONCLUSION

The goal of this Article has been to sort out descriptively what the Court does in applying the Constitution to penalties that are not labeled "criminal," and to provide some sort of analytic framework that might make decisions in this area more predictable, consistent, and articulate. The Article does not purport to provide definitive answers about the constitutional outcomes that should obtain in particular cases, but instead offers an overview and a framework of analysis. Nor is it meant to suggest that the overview provided here is necessarily the only one which the Court could responsibly use. One might perhaps retain the description of penalties and forfeitures as "quasi-criminal" and still explain in functional terms why certain provisions of the Constitution, such as the self-incrimination clause, are "broader" than other provisions, such as the sixth amendment. One might also, for example, formulate a view of "punishment" that avoids reference to purpose altogether and instead employs a balancing test.

If space permitted, certain issues raised by this Article would clearly warrant more extended consideration. The question whether reference to "purpose" in the first amendment cases contributes more to analysis there than does the balancing language currently employed is an intriguing issue whose full exploration is beyond the scope of this Article. At a less general level, the questions raised in the last section of this Article about the procedural attributes of civil penalty proceedings are only adumbrated. They in particular deserve more extended analysis.

Nonetheless, it is hoped that this effort will at least serve to stimulate more detailed examination of these and other issues upon which the Article touches. If the use of civil penalties proliferates, as it seems likely to, the need to explain and justify their constitutional treatment will become increasingly critical. This Article may at least serve to facilitate that task.

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381. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (emphasizing the fundamental nature of the interest at stake (marriage) and the judicial monopoly over the grant of divorce). *But see* *United States v. Kras*, 409 U.S. 434 (1973) (no waiver of fees in federal voluntary bankruptcy cases). Also reaching the conclusion that the bond requirement in forfeiture cases is unconstitutional is Note, *Forfeiture Proceedings—In Need of Due Process*, 3 *FORDHAM URB. L.J.* 347, 355-57 (1975), which further points out that certain federal statutes may be defective in failing to provide for notice of seizure to owners of property worth less than \$2500. *Id.* at 353-55.