

OSHA and the Sixth Amendment: When Is a “Civil” Penalty Criminal in Effect?

By MICHAEL H. LEVIN*

Introduction

Great confusion has arisen over the “criminal” or “civil” nature of various sanctions prescribed by Congress to implement particular regulatory schemes. These designations may be crucial, since a penalty deemed to be “criminal” may be enforced only by proof of guilt beyond a reasonable doubt and procedures consistent with the mandate of the Sixth Amendment, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹

To the extent that these constitutional requirements are incompatible with civil and administrative process, any finding that a regulatory sanction meant to be imposed expeditiously is “criminal in effect” may well paralyze its meaningful enforcement.

Using the controversial “civil” money penalty scheme of the Occu-

* B.A., 1964, University of Pennsylvania; J.D., 1969, Harvard University; B. Litt., 1970, Oxford University. Member, Supreme Court and Circuit bars. Counsel for Appellate Litigation (OSH), Office of the Solicitor, U.S. Department of Labor, Washington, D.C.; Deputy Director, Interagency Task Force on Workplace Safety and Health, Rosslyn, Virginia. The opinions in this article are solely the author’s and should not be attributed to the Department, the Occupational Safety and Health Administration, or any other governmental entity.

For a related article on the scope and content of OSHA’s express criminal sanction under 29 U.S.C. § 666(e) (1970), see Levin, *Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act*, 14 AM. CRIM. L. REV. 717 (1977).

1. U.S. CONST. amend. VI. See also *Mullaney v. Wilbur*, 421 U.S. 684, 696-701 (1975); *Johnson v. Louisiana*, 406 U.S. 356, 359-63 (1972); *In re Winship*, 397 U.S. 358, 363-64 (1970).

pational Safety and Health Act of 1970 (OSHA)² as a vehicle for analysis, this article attempts to develop a consistent methodology for classifying regulatory sanctions as either civil or criminal in character. The author first summarizes OSHA's legislative history, showing how that history yields a typically mixed collection of individual motives and makes efforts to resolve the classification issue by rote reference to congressional purpose largely futile. Next, the author examines the antecedents and progeny of *Kennedy v. Mendoza-Martinez*,³ the Supreme Court's major attempt to distinguish civil sanctions from criminal ones. He demonstrates that those decisions are riddled with inconsistencies arising from the Court's continued failure to reconcile, or even acknowledge, the tensions between two competing approaches to the classification problem: a "subjective intent" theory that defers to "civil" motives expressed by legislators prior to a statute's enactment, and an "objective" theory that depends upon both textual evidence and the ability to attribute a nonpenal purpose to prescribed sanctions, regardless of particular legislators' subjective intent. The author then proceeds to demonstrate that this same failure of reconciliation characterizes and largely explains the formalistic nature of the two leading appellate decisions validating OSHA's "civil" penalty scheme, which adopt one or the other of these opposed approaches virtually without discussion of the reasons for their divergent choices. Finally, the author suggests general criteria for grappling with the difficult questions of the courts' role and the limits of congressional power that underlie the civil-criminal issue. Utilizing these criteria, he concludes that the decisions sustaining OSHA's explicitly "civil," administratively-imposed money penalties were correct, though partly for the wrong reasons.

I. The Occupational Safety and Health Act: Its Legislative History

The Occupational Safety and Health Act, passed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions,"⁴ empowers the Secretary of Labor to enforce mandatory workplace standards with a broad arsenal of administratively-imposed "civil" money penalties.⁵ However, the statute

2. 29 U.S.C. §§ 651-678 (1970).

3. 372 U.S. 144 (1963).

4. 29 U.S.C. § 651 (1970).

5. The Act authorizes the Secretary of Labor to issue mandatory safety and health standards applicable to all employers affecting interstate commerce. 29 U.S.C. §§ 652(5),

as initially proposed was much narrower in scope and was to be imple-

654(a)(2), 655 (1970). Although the Justice Department may prosecute employers in federal district court for violations deemed to warrant the filing of criminal charges, the Secretary is responsible for implementing civil sanctions. The enforcement procedure consists of three distinct steps: citation, administrative hearing, and appellate review by a court of law.

The citation stage begins when an authorized representative of the Secretary investigates workplace conditions (either on his own initiative or in response to a complaint) to determine whether an employer has violated either a specific health and safety standard, *id.* § 654(a)(2), or his general duty to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1). The phrase "recognized hazards" is a term of art that has been construed to encompass not only those dangers of which an employer has actual knowledge, but also those dangers of which he should be aware in light of the prevailing knowledge within his industry. *E.g.*, *Brennan v. OSHRC (Republic Creosoting Co.)*, 501 F.2d 1196, 1201 (7th Cir. 1974); *Brennan v. OSHRC (Vy Lactos Labs., Inc.)*, 494 F.2d 460, 464 (8th Cir. 1974). However, the term does not encompass situations where an employee engages in "idiosyncratic" self-exposure to a known danger against which his employer has taken reasonable preventive steps. *See Cape & Vineyard Div. of New Bedford Gas v. OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *Brennan v. OSHRC (Hanovia Lamp Div.)*, 502 F.2d 946, 951-52 (3d Cir. 1974); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973). *See also Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 570-71 (5th Cir. 1976). The relevant provision of the Act, 29 U.S.C. § 657(a) (1970), authorizes a federal investigator to conduct an inspection "without delay" in order to secure evidence of non-compliance. However, the Supreme Court has very recently held that a warrant requirement subject to flexible "administrative-cause" standards must be implied before a nonconsensual OSHA inspection may be conducted. *Marshall v. Barlow's, Inc.* 46 U.S.L.W. 4483 (U.S. May 23, 1978).

If a violation is discovered, the Secretary may, within six months after its occurrence, issue a citation specifying both the nature of the violation and the time period prescribed for its abatement. 29 U.S.C. § 658(a)-(c) (1970). He may also propose a variety of penalties, depending upon the nature of the offense in question. If the employer is guilty of willful or repeated violations of safety and health standards or of the general duty clause, he may be assessed a "civil penalty of not more than \$10,000 for each violation." *Id.* § 666(a). Courts have differed concerning the meanings of the terms "willful" or "repeated" in this context. The Third Circuit has effectively defined these words to connote bad intent, an obstinate refusal by an employer to comply with known workplace standards. *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 161 (3d Cir. 1976) (defining the term "repeatedly"); *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1975) (defining the term "willful"). Other courts have rejected this narrow interpretation, stating that the term "willful" refers only to cognition and encompasses violations committed in careless disregard of workplace standards. *See Todd Shipyards Corp. v. Secretary of Labor*, 566 F.2d 1327, 1330-31 (9th Cir. 1977); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 780 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976); *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975). If a violation is neither willful nor repeated, but rather is serious, *i.e.*, creates "a substantial probability that death or serious physical harm could result," 29 U.S.C. § 666(j) (1970), the cited employer must be assessed a "civil penalty" of up to \$1,000, provided he knew of the facts constituting the violation or could have discovered them with the exercise of reasonable diligence. *Id.* § 666(b), (j). If a violation is neither willful nor repeated nor serious, the Act nevertheless provides for discretionary imposition of a civil penalty of up to \$1,000. *Id.* § 666(c). While a serious violation is defined by the act to require a showing of scienter (or, at least, lack of diligence) and no such requirement is specified for non-serious offenses, the courts have differed over whether knowledge is an element of a non-serious violation.

mented through largely penal sanctions. The original bill,⁶ introduced by Congresswoman Lenore Sullivan in 1965 to protect workers directly exposed to hazardous materials, provided for enforcement almost entirely by criminal means.⁷ While not phrased in exclusively penal

Compare Dunlop v. Rockwell Int'l, 540 F.2d 1283, 1290-91 (6th Cir. 1976) and Brennan v. OSHRC (Hendrix), 511 F.2d 1139, 1143-45 (9th Cir. 1975) (indicating that knowledge is an element) with Arkansas-Best Freight Sys., Inc. v. OSHRC, 529 F.2d 649, 655 n.11 (8th Cir. 1976) and Brennan v. OSHRC (Interstate Glass Co.), 487 F.2d 438, 442-43 n.19 (8th Cir. 1973) (indicating that knowledge is not an element).

Section 666 of the Act also provides certain criminal sanctions. Thus, if an employer willfully violates a safety and health regulation and that infraction results in a fatality among his employees, he can be "punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both"; if it is his second such offense, the severity of the penalty is doubled. 29 U.S.C. § 666(e) (1970). Similarly, anyone giving unauthorized advance notice of an inspection is subject to a \$1,000 fine and/or six months in prison, *id.* § 666(f), and anyone making a false representation or filing a false statement is subject to a maximum fine of \$10,000, or six months' incarceration, or both. *Id.* § 666(g).

Civil citations and penalties that are not contested by employers within fifteen working days after their issuance become final and unreviewable by either courts or pertinent agencies. *Id.* § 659(a), (b). Those that are contested in a timely manner are prosecuted by the Secretary of Labor before administrative law judges of the Occupational Safety and Health Review Commission (OSHRC), an independent administrative court. *Id.* §§ 659(c), 661(i). All hearings before such judges are governed procedurally by the Federal Administrative Procedure Act, 5 U.S.C. § 554 (1976), and the Federal Rules of Evidence, 29 C.F.R. § 2200.72 (1977). The report of the judge becomes the final order of the Commission within thirty days, unless the parties convince the full Commission to grant discretionary review. 29 U.S.C. § 661(i) (1970); 29 C.F.R. §§ 2200.90-2200.91a (1977). Thus, the initial proceedings are entirely administrative; while the Act does contain a provision allowing the Secretary to sue alternatively in federal district court to recover assessments exacted by the Commission, that provision bars collateral relitigation on either the issue of liability or the amount of the assessment. 29 U.S.C. § 666(k) (1970).

A final order of the Commission is reviewable by an appropriate federal court of appeals under the substantial evidence rubric, which makes conclusive those findings of fact by an administrative body that are supported by substantial evidence based on the record as a whole. *Id.* § 660(a). For the leading decision on the nature and scope of the substantial evidence rubric, see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 487-90 (1951). See also Federal Administrative Procedure Act § 10(c), 5 U.S.C. § 706 (1976).

6. H.R. 1179, 89th Cong., 1st Sess., 111 CONG. REC. 88 (1965) [hereinafter cited as Sullivan Bill].

7. The Bill provided that "Whoever violates or fails to comply with . . . any regulation adopted to carry out the provisions of [this Act] . . . shall be guilty of an offense and, upon conviction thereof, shall be punished for each offense by a fine of not more than \$1,000 or imprisoned not more than one year or both." Sullivan Bill, *supra* note 6, at § 8. It was limited in scope as well as structure and purpose, reaching only employers "having employees engaged in commerce or the production of goods for commerce." *Id.* at § 4. See 92ND CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 at 1080-84 (1971) [hereinafter cited as LEG. HIST.] This volume conveniently collects all relevant bills, debates and committee reports.

The Sullivan Bill was reintroduced in succeeding Congresses, including the Ninety-First, which enacted OSHA. H.R. 1323, 90th Cong., 1st Sess., 113 CONG. REC. 122 (1967); H.R. 909, 91st Cong., 1st Sess., 115 CONG. REC. 75 (1969). See also S. 2864, 90th Cong.,

terms, the early proposals presented to the Congress that enacted OSHA were ambiguous in status. In the Senate, the proposal supported by organized labor provided administratively-assessed "civil" penalties for all substantive violations, but punished as a misdemeanor all willful or other failures to comply with administrative abatement orders accompanying such assessments.⁸ The first bill backed by the White House contained a provision imposing "civil" penalties (of up to \$10,000) solely for each willful violation of its substantive requirements, within a section otherwise prescribing expressly criminal penalties.⁹ The bill reported and passed by the Senate imposed both "civil" penalties of up to \$1,000 for any violation of substantive, record-keeping or inspection provisions, and express criminal sanctions for willful violations of those same provisions,¹⁰ and was explained by the Senate Labor Committee as "mak[ing] it a misdemeanor to willfully violate the requirements of the Act."¹¹

In the House, several proposals similarly provided both administratively-assessed "civil" penalties for initial violations or failures to abate and criminal misdemeanor penalties for "any person who willfully violates or fails or refuses to comply with any [administrative abatement] order."¹² Moreover, the version introduced by the chairman of the responsible committee contained "civil penalties" described as forfeitures subject to executive clemency.¹³ These proposals were

2nd Sess., 114 CONG. REC. 602-05, 7446, 16609, 18513-14 (1968) (Sen. Yarborough introducing the prime Johnson Administration precursor).

8. See S. 2193, 91st Cong., 1st Sess. § 9(a) & (b) (1969), reprinted in LEG. HIST., *supra* note 7, at 14-16. Section 9(a) provided civil penalties of up to \$1,000 for each violation; section 9(b) proposed that willful failure to comply with any order issued under the Act be deemed a misdemeanor, punishable upon conviction by not more than a \$5,000 fine and/or imprisonment for not more than six months.

9. See S. 2788, 91st Cong., 1st Sess. § 10(a)-(c) (1969), reprinted in LEG. HIST., *supra* note 7, at 54-55. Sections 10(a) and (b) imposed criminal penalties for knowingly making false statements, concealing material facts, and interfering with persons investigating possible violations, but not for substantive violations of the Act itself.

10. S. 2193, 91st Cong., 2nd Sess. § 14(a) & (c) (1970) (as amended), reprinted in LEG. HIST., *supra* note 4, at 265-66; S. 2193, 91st Cong., 2nd Sess. § 15(a) & (c) (1970), reprinted in LEG. HIST., *supra* note 7, at 565-66.

11. S. REP. NO. 91-1282, 91st Cong., 2nd Sess. 16 (1970), reprinted in LEG. HIST., *supra* note 7 at 156.

12. See H.R. 843, 91st Cong., 1st Sess. § 9(a) & (b) (1969), reprinted in LEG. HIST., *supra* note 7, at 612-13; H.R. 3809, 91st Cong., 1st Sess. § 9(a) & (b) (1969), reprinted in LEG. HIST., *supra* note 7, at 642-43; H.R. 4294, 91st Cong., 1st Sess. § 9(a)-(c) (1969) [hereinafter cited as Perkins Bill], reprinted in LEG. HIST., *supra* note 7, at 667-68.

13. Perkins Bill, *supra* note 12, at § 9(a), reprinted in LEG. HIST., *supra* note 7, at 667. In addition, the conspicuous omission of "willfully" before "fails" and "refuses" in all three bills could arguably have been read as creating a complete overlap between the "civil" and "criminal" nonabatement sanctions provided.

eventually rejected in favor of the reported Daniels Bill¹⁴ and the House-passed Steiger substitute,¹⁵ which provided only "civil" sanctions for all substantive violations. But that rejection did not resolve the matter, for the House Labor Committee characterized those civil sanctions in equivocal terms, suggesting that they were intended to effect the twin goals of retribution and deterrence normally associated with punishment:

A national occupational safety and health program raises the valid question of how great an emphasis shall be placed *on seeking out employers who do not follow safe practices* No matter what priority is given to voluntary compliance, companies which operate in a reckless manner *should be dealt with firmly* American industry cannot be made safe and healthful solely by enacting a Federal law *which emphasizes punishment. Nevertheless, this measure recognizes that effective enforcement and sanctions are necessary for serious cases.*¹⁶

Finally, Senator Dominick, whose own proposed substitute was identical to the Steiger Bill and failed passage by only two votes in the Senate,¹⁷ stated explicitly that the motive for this choice of "civil" sanctions was the difficulty of enforcing criminal penalties in these types of cases:

As noted above, under the provisions of the substitute, we have a civil not a criminal penalty for a willful or repeated violation. That has been treated with some care. We did it this way because . . . most of us know how difficult it is to get an enforceable criminal penalty in these types of cases. Over and over again, the burden of proof under a criminal-type allegation is so strong that you simply cannot get there, *so you might as well have a civil penalty instead of the criminal penalty and get the employer by the pocketbook if you cannot get him anywhere else.*¹⁸

This same motive was at least inferentially similar to that of the Joint Conference Committee, which retained verbatim the language of the House incorporating the Steiger-Dominick "civil" penalty structure, coupled with a version of the Senate's provision imposing criminal sanctions for willful violations of safety standards that cause fatalities

14. See H.R. 16785, 91st Cong., 2nd Sess. § 15(a)-(c) (1970) [hereinafter cited as Daniels Bill], reprinted in LEG. HIST., *supra* note 7, at 744-46.

15. H.R. 19200, 91st Cong., 2nd Sess. § 17(a)-(d) (1970) [hereinafter cited as Steiger Bill], reprinted in LEG. HIST., *supra* note 8 at 803-04. The Steiger Bill was adopted as an amendment in the nature of a substitute to the reported bill. *Id.* at 1091.

16. H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 26 (1970) (report accompanying Daniels Bill, *supra* note 14), reprinted in LEG. HIST., *supra* note 7 at 856 (emphasis added).

17. 116 CONG. REC. 37347 (1970). For Senator Dominick's proposal, see S. 4404, 91st Cong., 2d Sess. (1970), reprinted in LEG. HIST., *supra* note 7, at 73-140. His proposal's exclusively civil sanctions for substantive violations may be found in sections 17(a)-(d) of his substitute version. *Id.* at 113-14.

18. 116 CONG. REC. 37338 (1970) (remarks of Sen. Dominick) (emphasis added).

among employees.¹⁹

The government in subsequent cases cited Senator Dominick's language and the enacted bill's distinction between civil "penalties" and criminal "fines"²⁰ as conclusive evidence of the former category's civil status.²¹ But this evidence was hardly conclusive. Indeed, Senator Dominick's rather candid admission could easily be interpreted as expressing an intent to punish recalcitrant employers by a method that would circumvent the inconvenient strictures of criminal process—an intent supporting contentions that Congress was engaging in semantic games when it adopted the "civil penalty" label.²² Nor was the issue settled by the fact that the relevant provision of OSHA created distinct classes of pecuniary sanctions, "civil penalties" and "fines."²³ While the enactment of this provision evinced a legislative intent to demarcate the two types of sanctions that the Secretary of Labor may employ, it could not demonstrate per se that the former class of exactions was civil while only the latter was criminal, particularly where the terms used to designate those classes had been utilized ambiguously in the past.²⁴ Thus, a clash over the constitutional status of OSHA's money penalties under "the winding, twisting, all too vague boundary between the criminal and civil law"²⁵ implied in the Supreme Court's previous decisions

19. H.R. CONF. REP. NO. 91-1765, 91st Cong., 2d Sess. 18, 41 (1970) *reprinted in* LEG. HIST., *supra* note 7, at 1171, 1194. *See also id.* at 1203, 1210; 116 CONG. REC. 42201-42203 (1970) (remarks of Reps. Perkins & Daniels). At least one court has confirmed this possible inference of punitive motive. *See Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1205 n.12 (3d Cir. 1974) (citing Sen. Dominick's statement in a context apparently opposed to the opinion's conclusion that the congressional intent to create civil sanctions was clear).

20. *Compare* 29 U.S.C. § 666(a), (h), (i), and (k) (1970) *with id.* § 666(e)-(g).

21. *See, e.g.*, Brief for Respondents at 22-29, *Frank Irey, Jr., Inc. v. OSHRC*, No. 73-1765 (3d Cir. 1974). The same position was taken by the government in response to very early actions seeking to enjoin Commission proceedings as repugnant to article three, section two, clause three of the Constitution and to the Sixth Amendment. *See, e.g.*, Brief in Support of Respondents' Motion to Dismiss at 16-19, *Lance Roofing Co. v. Hodgson*, Civ. No. 16012 (N.D. Ga. Feb. 12, 1972), *complaint dismissed*, 343 F. Supp. 685 (N.D. Ga.), *aff'd*, 409 U.S. 1070 (1972).

22. *See* note 19 *supra*. Challengers to civil penalty provisions frequently claim that the designation "civil" is a subterfuge and that they should be afforded the procedural safeguards required in criminal proceedings. *See* Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties As a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 913 (1972) [hereinafter cited as Goldschmid].

23. *See* note 5 *supra*.

24. *See, e.g.*, *Filmon Process Corp. v. Spell-Right Corp.*, 404 F.2d 1351, 1355 & n.10 (D.C. Cir. 1968). *See generally* *United States v. Constantine*, 296 U.S. 287, 294 (1935); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922); *Helwig v. United States*, 188 U.S. 605, 610-13 (1903).

25. Goldschmid, *supra* note 22, at 913.

appeared inevitable.

II. When are "Civil" Sanctions Criminal in Effect?

This section analyzes *Kennedy v. Mendoza-Martinez*,²⁶ the Supreme Court's major recent attempt to develop coherent guidelines for distinguishing civil from criminal sanctions for constitutional purposes. After concluding that this attempt failed, the section then traces the precedents *Mendoza-Martinez* sought to reconcile and demonstrates that those prior cases are themselves riddled with inconsistencies, which *Mendoza-Martinez* and its progeny have almost inevitably come to reflect.²⁷

A. General Principles: The *Mendoza-Martinez* Case

In *Kennedy v. Mendoza-Martinez*,²⁸ the Court was faced with the question of whether a statutory provision automatically expatriating any citizen who left or remained outside the United States to evade military service during time of war or national emergency²⁹ was invalid because such a sanction was beyond Congress' power to impose.³⁰ The Court avoided this question by focusing instead upon the civil-criminal issue of whether the challenged enactment imposed a penal forfeiture without according the appellees their procedural rights under the Fifth and Sixth Amendments.³¹ It then held, five to four, that expatriation as imposed by the statute in question was "evidently punitive."³² In so

26. 372 U.S. 144 (1963).

27. See notes 67-159 and accompanying text *infra*.

28. 372 U.S. 144 (1963).

29. Nationality Act of 1940, Pub. L. No. 76-853, § 401(j), 54 Stat. 1137 (added by Act of Sept. 27, 1944, Pub. L. No. 78-431, 58 Stat. 746), amended by Immigration & Nationality Act of 1952, Pub. L. No. 82-414, § 349(a)(10), 66 Stat. 163, 267-68 (repealed by Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1258).

30. 372 U.S. at 146, 164-66. The argument that expatriation could not be invoked by Congress rested both on the uniquely high status of citizenship under the first section of the Fourteenth Amendment and on a contention that, at least as applied to one appellee who did not possess dual nationality and would therefore be left stateless, denationalization constituted a cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 160.

31. *Id.* at 164. While the Court also adverted to a general due process right to a hearing, it seemed to base its holding mainly on the denial of the specific guarantees of the Fifth and Sixth Amendments requiring a prior criminal trial with all its attendant procedural safeguards. This course was undoubtedly taken because administrative and judicial machinery was expressly made available to challenge expatriation determinations before any actual deprivation was finally imposed. *Id.* at 167. See, e.g., *Perez v. Brownell*, 356 U.S. 44, 47 (1958); *Trop v. Dulles*, 356 U.S. 86, 122-23 (1958) (Frankfurter, J., dissenting).

32. 372 U.S. at 168.

ruling, the majority summarized “the tests traditionally applied to determine whether an Act of Congress is penal or regulatory” as follows:

Whether the sanction [employed] 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 for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry *Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.*³³

The startling aspect of these tests was their open-ended nature, both in content and in the way the majority in *Mendoza-Martinez* proceeded to disregard them. The Court admitted that the seven factors listed “may often point in differing directions”³⁴ and that the classification issue “in other cases . . . has been extremely difficult and elusive of solution,”³⁵ but the difficulty was not merely one of elusiveness. The precise dichotomy between statutes which are “penal” and those which are “regulatory in character” was itself unclear, for use of criminal sanctions to implement regulatory programs whose aims were essentially prospective and beneficent was well-established.³⁶ Nor did the factors listed by the majority really narrow the issue. *Scienter* was notoriously subject to definition by virtue of the particular regulatory scheme at hand³⁷ and had long lost *mens rea* connotations even for express criminal sanctions.³⁸ Moreover, the goals of retribution and de-

33. *Id.* at 168-69 (footnotes omitted) (emphasis added).

34. *Id.* at 169.

35. *Id.* at 168.

36. *See, e.g.*, Sherman Act §§ 1-3, 15 U.S.C. §§ 1-3 (1970); Federal Food, Drug, and Cosmetic Act § 303, 21 U.S.C. § 333 (1970).

37. Thus, as one commentator has pointed out, “knowledge” as a *mens rea* requirement may have five possible meanings: (1) guilty knowledge arising from an awareness that is derived from personal observation; (2) a correct guilty belief; (3) guilty avoidance of knowledge, *i.e.*, either a guilty statement of knowledge by one who is aware of his ignorance, or a guilty “shutting of the eyes” in order to avoid discovering relevant facts; (4) a bona fide but erroneous belief resulting from criminal negligence; or (5) a bona fide but erroneous belief based upon reasonable grounds or resulting from slight negligence. *See* R. PERKINS, CRIMINAL LAW 775-79 (2d ed. 1969). Which of these definitions of *scienter* will be applied to a particular offense will turn on both the nature of that offense and its relative place in the particular hierarchy of criminal offenses at hand.

38. *See, e.g.*, *United States v. Freed*, 401 U.S. 601, 607-10 (1971); *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943). *Freed* involved a challenge to an amended provision of the National Firearms Act making it unlawful for one “to receive or possess a firearm

terrence are "not solely a value of the criminal law, but [have] long played a role in civil law too (*e.g.*, treble damages in antitrust and punitive damages in tort law)." ³⁹ The same ambiguity existed with respect to the Court's affirmative-disability, historical, prior-crime, and excessive-sanction factors. History and the nature of past criminal prescriptions are not helpful in classifying either newly-defined transgressions, which trigger novel sanctions, ⁴⁰ or offenses invoking sanctions like money penalties, which have been used indiscriminately for both "penal" and "regulatory" purposes. ⁴¹ And absent a penalty like impris-

which is not registered to him." 26 U.S.C. § 5861(d) (1970). The respondents in that case, who were indicted as unregistered possessors of hand grenades, argued that the indictment returned against them was invalid because it contained no allegation of scienter. The Court noted that ordinary people would not be astonished to learn that possession of grenades is unlawful, but it went on to say that even if the respondents had acted innocently, the statute exemplified that class of legislation in which occasional hardships visited upon unsuspecting individuals were justified by the countervailing benefits conferred upon the public at large. *Dotterweich* involved a provision of the Federal Food, Drug, and Cosmetic Act of 1938 that punished as a misdemeanor the distribution in interstate commerce of adulterated or misbranded drugs. 21 U.S.C. § 331 (1938). *Dotterweich*, president of Buffalo Pharmacal Company, challenged his conviction under this provision on the ground that he had never known that persons in his firm were committing the proscribed acts. The Court found this defense irrelevant and upheld the conviction as a matter of law, citing the congressional purpose to protect the innocent public despite the "[h]ardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting." 320 U.S. at 284.

One of the two cases cited by the majority in *Mendoza-Martinez* in support of its reference to the element of scienter, 372 U.S. at 168 n.24, only emphasizes that element's ambiguities. *Helwig v. United States*, 188 U.S. 605 (1903), involved a challenge to an additional customs duty assessed against anyone who undervalued imported goods. The Court found the duty to be penal, even though it could be imposed, absent a showing of scienter, "because of the carelessness, ignorance or mistake, without fraudulent intent, upon the part of the importer." *Id.* at 612. That finding would appear to contravert the very proposition for which the case was cited in *Mendoza-Martinez* itself.

39. *Goldschmid*, *supra* note 22, at 914-15. *See also id.* at 912.

40. It may well be doubted whether, for example, the violation of an anti-pollution ordinance that results in the temporary governmental nationalization of the offending company until abatement controls are in place, is criminal. Certainly the issue is not resolved by invoking historical experience as a decision-making guideline. Justice Brennan alluded to this potential difficulty when, concurring in *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring), he noted that: "The novelty of expatriation as punishment [in American law] does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment."

41. *See, e.g.*, *United States v. Constantine*, 296 U.S. 287, 294 (1935); *United States v. La Franca*, 282 U.S. 568, 572 (1931); *Helwig v. United States*, 188 U.S. 605, 611 (1903). The mere fact that Congress has not already made the proscribed conduct a crime cannot control whether a challenged sanction is penal. The contrary conclusion would free a legislature from compliance with procedural restrictions mandated by the Constitution whenever it creates a new offense. But by the same token, it is difficult to see how the *presence* of parallel criminal sanctions can resolve the issue of classification, which logically turns on the "nature" and "character" of the remedy at hand, *Helwig v. United States*, 188 U.S. at 613, not

onment or disqualification from gainful employment,⁴² the disabling or disproportionate nature of a particular sanction seems equally unhelpful. *All* sanctions by definition impose some "affirmative disability or restraint," and disproportionate severity is peculiarly in the eye of the beholder.⁴³

More importantly, the rational attribution test,⁴⁴ on which the case might actually have turned, appeared to be an empty vessel that the majority's opinion did not fill. Having stated that the seven factors specified must be considered in relation to the statute on its face, the Court immediately decided that it did not need to apply those factors in

the existence of a complementary sanction that has not been invoked. The Court has elsewhere acknowledged as much. In *Helwig*, it indicated that the presence of parallel criminal sanctions will not confer "civil" status on a challenged remedy. *Id.* at 611-13. In *Helvering v. Mitchell*, 303 U.S. 391 (1938), it further ruled that Congress could impose both penal and nonpenal sanctions for the same act or omission. *Id.* at 399. Indeed, in *Mitchell* the Court went on to suggest that Congress may prescribe express criminal procedures for imposing a sanction, without necessarily making that sanction punitive in effect. *Id.* at 402 n.6.

42. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 316 (1946) (disqualification from governmental employment); *Wong Wing v. United States*, 163 U.S. 228, 236-37 (1896); *Mackin v. United States*, 117 U.S. 348, 350-52 (1886); *Ex parte Wilson*, 114 U.S. 417, 426-29 (1885) (all three cases involving the sanction of imprisonment at hard labor); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867) (disqualification from practicing law in federal courts); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320-21 (1867) (disqualification from practicing one's duties as a priest).

43. This point was made forcefully by objections in *Trop* to the plurality's conclusion that desertion punishable by execution could not be sanctioned by expatriation: "Congress may justifiably be of the view that stern measures—what to some may seem overly stern—are needed in order that control may be had over evasions of military duty . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" *Trop v. Dulles*, 356 U.S. 86, 121, 125 (1958) (Frankfurter, J., dissenting).

The subjective nature of "disproportionate severity" is further emphasized by juxtaposing two other decisions of the Supreme Court. In *Helwig v. United States*, 188 U.S. 605 (1903), the Court had held disproportionate and penal an additional customs duty of two percent for each percent the appraised (actual) value of imported articles exceeded their declared value. The penalty assessed pursuant to this provision amounted to \$9,068—fifty-four percent of the underpaid items' actual value. *Id.* at 610-11. Yet in *Helvering v. Mitchell*, 303 U.S. 391 (1938), the Court held civil, remedial, and a fortiori not disproportionate, a flat fifty percent addition to an individual's income tax for "fraud with intent to evade taxes," which had resulted in the assessment of a penalty of \$364,000 against that taxpayer. *Id.* at 397-406.

44. "[W]hether an alternative purpose to which . . . [the sanction] may rationally be connected is assignable for it . . ." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnote omitted). This formulation seems closely related to the principle that legislative actions will, in general, be sustained against claims of unconstitutional arbitrariness, where any rational connection between a legislative power, the evil sought to be remedied and the remedy invoked can be attributed to the legislature, even if it never considered that connection when the challenged statute was passed. *See Trop v. Dulles*, 356 U.S. 86, 105-07 (1958) (Brennan, J., concurring).

Mendoza-Martinez itself because “the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.”⁴⁵ The Court then proceeded to find the challenged sanction “plainly” or “primarily” penal⁴⁶ on the basis of a detailed examination of that sanction’s legislative antecedents, but barely referred to rational attribution, objective evidence of congressional purpose or the text of the statutory provision at hand.

More specifically, the Court began its analysis with a detailed scrutiny of the legislative debates underlying enactment of an 1865 law⁴⁷ that was the challenged statute’s predecessor, concluding that both the sponsors and the opponents of this prior legislation deemed its provisions punitive.⁴⁸ In addition, the Court cited several decisions construing this predecessor statute as penal in character.⁴⁹ This 1865 law was amended in 1912,⁵⁰ and again the Court focused on congressional statements that the proposed amendment would ameliorate some of the more punitive aspects of the law.⁵¹ However, in assuming that focus, the Court failed to acknowledge that proposed sanctions may be described as “punitive” for the purposes of legislative debate without any belief by the debaters that those sanctions are criminal per se.⁵² In this consideration of predecessor legislation, the Court analyzed both statements of legislative purpose and the language and structure of the law itself, at least as interpreted judicially. However, when the majority in *Mendoza-Martinez* considered the actual legislation being questioned—section 401(j) of the amended Immigration Act of 1940 and its successor, section 349(a)(10) of the Immigration and Nationality Act of 1952⁵³, which represented a comprehensive *replacement* of prior provi-

45. 372 U.S. at 169.

46. *Id.* at 167, 169, 183.

47. Act of March 3, 1865, 13 Stat. 487.

48. 372 U.S. at 171-74 (citing CONG. GLOBE, 38th Cong., 2d Sess. 642 (1865) (remarks of Sens. Morrill and Johnson); *id.* at 643 (remarks of Sen. Hendricks); *id.* at 1155-56 (remarks of Reps. Allen and Schenck)).

49. 372 U.S. at 174-76 (quoting *Kurtz v. Moffitt*, 115 U.S. 487, 501-02 (1885); *Huber v. Reily*, 53 Pa. 112, 114-15 (1866)).

50. Act of August 22, 1912, 37 Stat. 356.

51. 372 U.S. at 177-78 (quoting H.R. REP. NO. 335, 62d Cong., 2d Sess. 2 (1912); 48 CONG. REC. 2903 (1912) (remarks of Rep. Roberts); *id.* at 9542 (remarks of Sen. Bristow)).

52. *See, e.g.*, *Frank Irey, Jr. Inc. v. OSHRC*, 519 F.2d 1200, 1204 (3d Cir. 1974), *aff’d without considering the point*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *cert. denied on the point*, 424 U.S. 964 (1976). This is especially true where the “penal” label is applied by those attempting to mitigate the severity of such provisions. *See, e.g.*, S. REP. NO. 91-1282, 91st Cong., 2d Sess. 61-64 (1970), *reprinted in* LEG. HIST. *supra* note 7, at 200-03; H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 47-60 (1970), *reprinted in* LEG. HIST., *supra* note 7, at 877-90.

53. Nationality Act of 1940, Pub. L. No. 76-853, § 401(j), 54 Stat. 1137 (added by Act of

sions, not a mere amendment—it took into account only two varieties of evidence: legislative debates and a letter from the Attorney General purportedly explaining the purpose of the provision that became section 401(j).⁵⁴ It also noted that unlike its predecessors, section 401(j) afforded no hearing prior to the imposition of sanctions, ignoring the possible inference that for this very reason Congress did not consider those sanctions to be criminal.⁵⁵ The Court concluded that because this evidence “brought to light no alternative purpose to differentiate the new statute from its predecessor,” the challenged provisions must be struck down.⁵⁶

Thus, the Court’s conclusion regarding the issue of punishment was premised on the observation that Congress *had not in fact* mentioned an alternate non-punitive purpose, rather than whether one could rationally be assigned to the sanction in question.⁵⁷ Despite emphatic prior pronouncements that congressional intent could not be dispositive and that “even a clear legislative classification . . . as ‘non-penal’ would not alter the fundamental nature of a plainly penal statute,”⁵⁸ the majority’s analysis suggested, as did that of the dissent,⁵⁹ that the controlling test for distinguishing “punishment” from “regulation” was the underlying, subjective purpose of the legislature enacting the challenged law. This analysis indicated neither what result would follow nor what presumptions might be relied upon where relevant leg-

Sept. 27, 1944, Pub. L. No. 78-431, 58 Stat. 746), *amended by* Immigration & Nationality Act of 1952, Pub. L. No. 82-414, § 349(a)(10), 66 Stat. 163, 267-68 (repealed by Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1258).

54. 372 U.S. at 180-83 (citing H.R. REP. NO. 1229, 78th Cong., 2d Sess. 2-3 (1944) (text of Attorney General’s letter); 90 CONG. REC. 3261 (1944) (remarks of Rep. Dickstein); *id.* at 7629 (remarks of Sen. Russell)).

55. 372 U.S. at 179. *See also* *Helvering v. Mitchell*, 303 U.S. 391, 399, 402 (1938), in which the Court actually appeared to draw such an inference.

56. 372 U.S. at 183-84.

57. *Id.* at 169-184, 186 n.43. Justice Brennan’s concurring opinion appeared to make a deliberate attempt to remedy this perceived gap in the majority’s analysis. Noting that because “Congress was not consciously pursuing any foreign affairs [or war power] objective may not necessarily preclude reliance on that power as a ground of constitutionality,” *id.* at 193 (Brennan, J., concurring), he marshalled a series of powerful arguments meant to demonstrate that no purpose other than a desire to impose “naked vengeance” on wartime deserters could possibly be attributed to this statute. *Id.* at 187-97. As the dissent indicated, however, these arguments tended to prove too much, for they suggested that denationalization was inherently penal. *Id.* at 201-04, 208-10, 212-14 (Stewart, J., dissenting). They certainly did not answer the question of what result would follow where rational alternative attributions were less conclusively foreclosed and the challenged sanction was not “the drastic, the truly terrifying remedy of expatriation.” *Id.* at 187 (Brennan, J., concurring).

58. *Trop v. Dulles*, 356 U.S. 86, 95 (1958) (footnote omitted).

59. 372 U.S. at 203-204, 208-209.

islative history was non-existent or intractably ambiguous.⁶⁰ Finally, the Court in *Mendoza-Martinez* made no effort to explain the relationships among legislative intent, textual statutory evidence, and the Court's own powers in this delicate area. Where the indicia of punitive intent are "overwhelming"⁶¹ and the sanction is not part of a finely-balanced regulatory scheme, it is not particularly disruptive to take the legislature at its word and require that the sanction be imposed through criminal process. But what if Congress assumes that swift, easily-imposed civil sanctions are necessary and bases an entire statutory scheme of regulation upon that assumption?

These difficulties might be dismissed as anomalies resulting from the Court's casual response to an easy case, both because draft evasion was already subject to separate, severe criminal penalties and because Congress evinced an apparent intent to use denationalization as an alternate means of punishing those who were beyond American jurisdiction and could not be prosecuted.⁶² But the Court did not treat the case casually. Nor did its discussion of the merits appear to rely on the fact that draft evasion was already a crime, although the Court had been compelled to deal with this fact as a threshold matter.⁶³

In sum, *Mendoza-Martinez* not only raises more questions than it resolves, but also presents a classic example of the difficulties inherent in attempts at civil-criminal classification. The Court first articulated

60. The dissent would have presumed the questioned statutory sanctions to be civil, absent clear proof "in the history of *this* legislation . . . that these statutes, though not in terms penal, nonetheless embody a purpose of the Congresses which enacted them to impose criminal punishment without the safeguards of a criminal trial." 372 U.S. at 204 (Stewart, J., dissenting) (emphasis in original).

61. 372 U.S. at 170 n.30.

62. See *id.* at 147, 150-51, 155-58, 180-84 (majority opinion); *id.* at 190-91 & n.5 (Brennan, J., concurring).

63. See *id.* at 155-58, 164, 166-67 (majority opinion); *id.* at 190-91 & n.5 (Brennan, J., concurring). The majority did bracket its analysis of the merits with observations that the challenged sanction's "primary function is to serve as an additional penalty for a special category of draft evader," *id.* at 169-70 (majority opinion) (footnote omitted), and that "Congress in these sections decreed an additional punishment for the crime of draft avoidance in the special category of cases wherein the evader leaves the country." *Id.* at 184. But the sanction at issue was an *alternative, substitute* measure chiefly meant to reach draft evaders who could not be prosecuted, rather than an additional punishment for those who could. *Id.* at 183. If its vice was the overbreadth inherent in the possibility that it might be used to denationalize some citizens who had already been prosecuted for the separate crime of draft evasion, then that vice could presumably be cured by limiting its application solely to those not subject to such prosecution. But this curative interpretation was foreclosed by the facts of the case itself. *Mendoza-Martinez*, one of the appellees, had been previously convicted of draft evasion; yet the Court rejected his initial defense that the government was stopped by his prior conviction from invoking the sanction of denationalization. *Id.* at 155-58.

seven discrete tests for determining whether a sanction is “civil” or “criminal” in effect, several of which possessed doubtful analytical relevance. It admitted that these tests would often point in differing directions, but made no effort either to explain how they might interact with each other or to indicate the relative weights accorded to each of them in the event of conflict. Instead, the Court announced that this set of “objective” criteria need not be applied at all because the legislative history underlying the challenged provisions conclusively disclosed a subjective congressional intent to punish. However, even the legislative record in *Mendoza-Martinez* was not conclusively clear. This contention was tacitly supported by the majority opinion itself, which progressed swiftly from the opening statement that “the provisions in question can *only* be interpreted as punitive”⁶⁴ to more cautious assertions that those provisions were primarily or predominantly penal in character.⁶⁵ That progression implied—as did the single-minded tenor of the majority’s scrutiny of subjective legislative intent—that a different result might have been reached had the Court attempted to impute a rational nonpenal purpose to the statute before it. The majority’s approach also implied that an entirely different method of analysis might have been required if one legislator had chanced to express a clear belief that the challenged sanctions were “civil” in nature. Such implications in turn raised the troubling possibility that the Court’s analysis was fundamentally unprincipled—that penal sanctions were, like Justice Stewart’s definition of hard-core pornography, something recognized only when seen.⁶⁶

B. Some Antecedents and Descendants of *Mendoza-Martinez*

1. *Early Developments: From Helwig to Constantine*

In fact, many of the cases cited by the Court in *Mendoza-Martinez* in support of its seven factors disclose deeper divisions that have not yet been resolved. In *Helwig v. United States*,⁶⁷ the Court was confronted with a statute⁶⁸ that levied both a ten percent ad valorem duty on the declared value of imported articles and a “further sum” of two percent of the appraised value of such articles for each one percent that such an appraisal exceeded the declared amount; where appraised value exceeded declared value by forty percent or more, a flat forfei-

64. *Id.* at 169 (emphasis added) (footnote omitted).

65. *See id.* at 169-70, 183.

66. *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

67. 188 U.S. 605 (1903).

68. Act of June 10, 1890, ch. 407, § 7, 26 Stat. 131, 134.

ture of the articles in question was imposed.⁶⁹ Helwig declared the value of a quantity of imported wood pulp at \$13,252 and paid as a duty ten percent of this amount. A customs appraiser subsequently valued the pulp at \$16,792.20. Helwig thereupon paid the government \$354 ad valorem based on the increased appraisal. However, the government also claimed and sought to recover the “further sum” of \$9,068—over half the imported pulp’s appraised value⁷⁰—resulting from this act of undervaluation. Helwig claimed that this extra assessment was not a tax, but a penalty and that the relevant court lacked statutory jurisdiction to impose it.⁷¹

The Supreme Court unanimously agreed with these claims, in an opinion that utilized both “subjective” and “objective” approaches to classification without indicating which approach would control. The Court first stated that the additional duty in question was a penalty because it was triggered by the importer’s act rather than the value of his goods and because it was “enormously in excess of the [ten percent] regular duty . . . imposed upon an article of the same nature.”⁷² These statements ignored the point that *all* regulatory sanctions necessarily turn on the act sought to be regulated. Nor did the Court clarify the relevance of disproportionate severity or enormous excessiveness. Since Helwig had already paid in full the ten percent duty on the appraised value of his wood pulp, *any* additional assessment would appear equally disproportionate, if the governing test was whether that assessment “is . . . imposed for . . . purpose[s] of revenue, [or] is in addition to the duties [normally] imposed.”⁷³ Instead, the Court’s conclusions appeared to be premised on a belief that the challenged exaction was intrinsically penal—that the “use of [civil] words does not change the nature and character of the enactment,” the sanction for which “will be regarded as a penalty when by its very nature it is a penalty.”⁷⁴ Yet at the same time, the Court indicated that the intrinsic nature of the sanction might not be controlling, for “[i]f it clearly appear . . . the will of Congress that the provision shall not be regarded as in the nature of a penalty, the Court must be governed by that

69. 188 U.S. at 609 n.1. The “further sum” was imposed only where the appraised value exceeded the declared value by over ten percent. However, once this provision was triggered, the amount assessed was calculated on the basis of the entire percentage of excess appraised value, not merely the portion exceeding ten percent. *Id.* at 607, 611.

70. For a recital of the facts of the case, *see id.* at 606-08.

71. *See id.* at 610.

72. *Id.* at 613.

73. *Id.* at 611.

74. *Id.* at 613.

will."⁷⁵

These conflicting statements might have been reconciled by making the intrinsic character of the challenged sanction dispositive, absent express legislative declarations of a contrary intent. But apart from the Court's failure to present meaningful criteria by which the intrinsic nature of a sanction could be determined, it advanced no logical reason demonstrating why legislative intent *should* control. If the inherent character of the questioned sanction possessed independent weight, exactly the opposite would seem to be the case. Thus, the holding of the Court seemed not only to confirm that Congress could evade the strictures of the Sixth Amendment by fiat, but also to invite decisions based on the fortuitous degree of explicitness with which a legislature expressed, or failed to express, its specific desires. This impression was strengthened by the Court's disregard of clear indications of nonpenal congressional intent in favor of advisory opinions of the Attorney General and judicial dicta construing the challenged provision and its predecessors as penal for very different purposes.⁷⁶ Even more disturbingly, the Court in *Helwig* ignored the fact that Congress had not only used expressly civil terms to describe the "additional duty" being exacted, but had also used the same terms to describe the flat forfeiture imposed on undervaluations of forty percent, and had provided the same civil collection process for both.⁷⁷ Congress had also legislated a presumption of fraud in order to justify these forfeitures—a presumption that seemed incompatible with any inference of penal intent.⁷⁸ All these elements undermined the Court's reasoning, which relied on the assumption that such forfeitures were penal for its conclu-

75. *Id.*

76. *Id.* at 616-19 (citing *Passavant v. United States*, 148 U.S. 214, 221 (1892); *Stairs v. Peaslee*, 59 U.S. (18 How.) 521, 527 (1855); *Ring v. Maxwell*, 58 U.S. (17 How.) 147, 150 (1854); *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 274 (1853); *Greely v. Thompson*, 51 U.S. (10 How.) 225, 238 (1850); 20 OP. ATT'Y GEN. 660 (1893)). The authorities cited had construed analogous provisions in previous tariff acts. See Act of July 24, 1897, ch. 11, § 32, 30 Stat. 151, 212; Act of July 30, 1846, ch. 74, § 7, 9 Stat. 42, 43; Act of Aug. 30, 1842, ch. 270, § 17, 5 Stat. 548, 564. The most persuasive indication cited by the Court was the 1897 Act, which "plainly directed that the additional duty . . . shall not be construed as a penalty." 188 U.S. at 616. Despite the fact that Congress had deliberately changed this provision's predecessor from a "penalty" to a "duty" some seventy years before, Act of May 19, 1828, ch. 55, § 9, 4 Stat. 270, 274, and had since re-enacted that change, the Court dismissed this "mere description" as "evidently not regarded as of vital importance." 188 U.S. at 614-15.

77. 188 U.S. at 609-10 & n.1.

78. See also *Mullaney v. Wilbur*, 421 U.S. 684, 696-701 (1975); *Johnson v. Louisiana*, 406 U.S. 356, 359-63 (1972); *In re Winship*, 397 U.S. 358, 363-64 (1970); *Nishikawa v. Dulles*, 356 U.S. 129, 133-37 (1958); *Coffin v. United States*, 156 U.S. 432, 452-61 (1895).

sion that the lesser two percent duty possessed the same character.⁷⁹ Such elements suggested that despite its logical apparatus and apparent willingness to defer to congressional intent, the Court's opinion actually turned on unstated criteria of fairness, on the inchoate equities underscored by the petitioner's act of innocent undervaluation.

This suggestion was reinforced by subsequent cases holding other taxes inherently punitive without any regard for the expressed intent of the legislature. In *Lipke v. Lederer*⁸⁰ the Court, despite an apparent lack of equity jurisdiction,⁸¹ invalidated section thirty-five of the National Prohibition Act, which assessed against the illegal manufacturers or sellers of liquor (a) a "tax" equal to double the amount imposed against the receipts of those distributing liquor lawfully and (b) an "additional penalty" of \$500 on retail dealers and \$1,000 on manufacturers.⁸² Both the receipt tax and the additional penalty were expressly distinguished from the Act's criminal sanctions, and civil tax process was prescribed for their collection.⁸³ But in *Lipke*, imposition of the challenged sanctions had resulted in an impending property seizure against a retailer whose state liquor license had not yet expired. The Court simply cited *Helwig*, stating:

The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid When by its very nature the imposition is a penalty, it must be so regarded. *Helwig v. United States*. . . . 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.⁸⁴

In *United States v. La Franca*⁸⁵ the Court was asked to determine

79. 188 U.S. at 612.

80. 259 U.S. 557 (1922).

81. See *id.* at 563-65 (Brandeis, J., dissenting, joined by Pitney, J.). Justice Brandeis argued that the petitioner had numerous adequate remedies at law, including an action to recover the amount paid to the tax collector, a suit for trespass incident to wrongful distraint, or a possible action of replevin. Consequently, he concluded, "[w]hether the government's demand be deemed one for a fine or for a tax which is unconstitutional, legal remedies are available; and there is, therefore, lack of jurisdiction in equity." *Id.* at 564-65.

82. 41 Stat. 305, 317-318, 27 U.S.C. § 52 (1928) (repealed 1933). The terms of this section specified both that "[t]his Act shall not relieve anyone from paying any taxes or other such charges imposed upon the manufacture or traffic in . . . liquor" and that "this Act [shall not] relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

83. See 259 U.S. at 560-61.

84. *Id.* at 561-62 (quoting *O'Sullivan v. Felix*, 233 U.S. 318, 324 (1914)).

85. 282 U.S. 568 (1931).

the status of another federal liquor tax, which appeared in the Revenue Code, rather than a regulatory statute. Section five of the Federal Willis-Campbell Act⁸⁶ preserved parallel state legislation from implicit repeal by the National Prohibition Act, but provided that conviction under one set of laws would bar subsequent "prosecution" for the same offense under the other. Pursuant to section 701 of the Revenue Act of 1924,⁸⁷ anyone retailing liquor in violation of state law was assessed \$1,000 in addition to all other taxes. The respondent challenged assessments made under both this section and the section involved in *Lipke*, claiming that the government's civil suit for collection of these sums was precluded because he had previously been convicted and fined under the criminal provisions of the National Prohibition Act.⁸⁸ Neither the fact that section 701 appeared in a revenue statute originally enacted prior to Prohibition,⁸⁹ nor the fact that the section was enforced through civil process, nor the fact that it was admittedly awkward to apply the term "prosecution" as used in the Willis-Campbell Act to this civil suit for collection,⁹⁰ deterred the Court from stating mechanically:

A "tax" is an enforced contribution to provide for the support of government; a "penalty" . . . is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke*
91

The Court then proceeded, spurred by apparently unfounded fears of double jeopardy complications, to find the challenged suit for collection barred because that suit was "in its nature" a criminal

86. 42 Stat. 222, 223, 27 U.S.C. § 3 (1928) (repealed 1935).

87. Int. Rev. Code of 1924, ch. 234, § 701, 43 Stat. 253, 327.

88. See 282 U.S. at 570.

89. See *id.* at 571-72: "[Section 701] was passed in lieu of a similar provision in the Revenue Act of 1918, repeated in the Revenue Act of 1921. The government, accordingly, treats the item sought to be recovered under § 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree."

90. See *id.* at 575:

But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word "prosecution" is not inapt to describe such an action. . . . In any event, we should feel bound to resolve a greater doubt than we now entertain in favor of that interpretation of the word so as to avoid the grave constitutional question which otherwise would arise.

91. *Id.* at 572.

prosecution.⁹²

A similar approach focusing on the inherent nature of the sanction was taken in *United States v. Constantine*.⁹³ That case involved a challenge to section 701 of the Revenue Act of 1926,⁹⁴ which levied a "special excise tax" of \$1,000 on manufacturers or sellers of liquor in violation of state law. The same section also imposed an expressly-differentiated "penalty" of \$1,000, or one year in prison or both, upon anyone failing to pay "special taxes" exacted by section 205 of Title twenty-six of the United States Code.⁹⁵ The Court noted that under the Eighteenth Amendment, Congress could have sanctioned violations of national prohibition laws by either taxes or penalties.⁹⁶ But with the repeal of the Amendment, it became necessary to consider whether the \$1,000 "excise tax" of section 701 was in fact penal. The majority in *Constantine* stated summarily that while the smaller "special" taxes of section 205 were "true taxes" rather than penalties, the tax imposed under section 701 was levied on the commission of a crime under state law.⁹⁷ But it focused primarily on the purported exorbitancy of the sum assessed, concluding that because \$1,000 was forty times the "special tax" of twenty-five dollars paid by a retail dealer like the respondent,⁹⁸ "this additional sum is grossly disproportionate to the amount of the normal tax . . . [and therefore its] purpose is to impose a penalty as a deterrent and punishment of unlawful conduct."⁹⁹ This conclusion was reached despite the fact that, as the government pointed out, the substance of section 701 was passed long before the enactment of the Eighteenth Amendment and abrogated well after that Amendment's repeal, a consideration that appeared to refute any inference that the section was intended to enforce national prohibition.¹⁰⁰ It was

92. *See id.* at 573-75. Even where both offenses are committed against the same sovereign, no claim of double jeopardy arises unless both are criminal as well. *Cf., e.g., Helvering v. Mitchell*, 303 U.S. 391 (1938); *see* notes 105-122 and accompanying text *infra*. To avoid this issue of classification on the grounds that "grave constitutional problems" may arise, is to avoid determining the essential prerequisite for those problems' presence.

93. 296 U.S. 287 (1935).

94. Int. Rev. Code of 1926, ch. 27, § 701, 44 Stat. 9, 95.

95. 26 U.S.C. § 205 (1926) (repealed 1935). This section imposed special annual taxes as follows, without regard to the local lawfulness of the occupations taxed: \$100 for brewers, \$50 for manufacturers of stills, \$20 for each still, \$25 for retail dealers in liquors, \$100 for wholesale dealers in liquors, \$20 for retail dealers in malt liquors and \$50 for wholesale dealers in malt liquors.

96. 296 U.S. at 292-93.

97. *Id.* at 291 & n.5, 295.

98. *See* note 95 *supra*.

99. 296 U.S. at 294-95.

100. As the government observed, the substance of section 701 was enacted on Feb. 28,

also reached despite the fact that, as the dissent observed, the assessment exacted by section 701 possessed neither a necessary connection with state penal aims nor any disproportion when considered in light of other rational taxing purposes attributable to Congress.¹⁰¹

Thus, *Lipke*, *La Franca* and *Constantine* eschewed any reliance on either objective or subjective evidence of congressional intent, rejecting as irrelevant not only contentions that the civil-criminal classification issue was one of statutory construction,¹⁰² but also contentions that the legislative history of the challenged taxes disclosed a nonpunitive purpose.¹⁰³ Instead, all three rulings rested on the inherently penal nature of the assessment being questioned, without articulating satisfactory criteria for determining such inherent nature. Each decision seemed ultimately to turn on an essentially semantic distinction between laws designed to deter certain behavior and those designed merely to raise revenue. If the aim or effect of a purported tax was any regulation of conduct, it would apparently be deemed punitive and beyond the

1919, Revenue Act of 1918, ch. 18, §§ 1001(12), 1005, 40 Stat. 1057, 1128, 1129 (1919), while the Eighteenth Amendment was proclaimed on January 9, 1919, effective January 9, 1920. Section one of the Twenty-First Amendment, which repealed the Eighteenth Amendment, was ratified on December 5, 1933, while the substance of section 701 was not repealed until 1935. Act of Aug. 30, 1935, ch. 829, 49 Stat. 1014. See 296 U.S. at 291.

101. The majority's precise conclusion was that "in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State." 296 U.S. at 296 (footnote omitted). Justice Cardozo's dissent rested prophetically on a theory of "objective" rational attribution in arguing that multiple non-penal purposes could be inferred from the face of the statute:

Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally . . . is likely to yield larger profits . . . Not repression, but payment commensurate with the gains is thus the animating motive. . . . Congress may have also believed that the furtive character of the business would increase the difficulty and expense 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 . . . [by requiring] men engaged in such a calling . . . to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

Id. at 297 (Cardozo, J., dissenting). Thus, Justice Cardozo argued that the face of the statute indicated that it was adopted

as an appropriate instrument of the fiscal policy of the nation Classification by Congress according to the nature of the calling affected by a tax . . . does not cease to be permissible because the line . . . between callings to be favored and those to be reprovved corresponds with a division between innocence and criminality under the statutes of a state. . . . By classifying in such a mode Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business . . . with notice to the taxpayer that if he embarks upon that business he will be subjected to a special burden. What he pays, if he chooses to go on, is a tax and not a penalty.

Id. at 297-98.

102. See, e.g., *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922).

103. See, e.g., *United States v. Constantine*, 296 U.S. 287, 293-94 (1935).

pale.¹⁰⁴

2. *The Mitchell and Marcus Cases*

This trend was reversed abruptly in *Helvering v. Mitchell*,¹⁰⁵ which sustained a similar tax by implicit reliance on an axiom that sanctions are civil when Congress says they are. Under section 146(b) of the Revenue Act of 1928, a fine or imprisonment plus recovery of the costs of prosecution could be imposed for willful "attempts . . . to evade or defeat" payments of income tax¹⁰⁶; under section 293(b) of the same statute, an "addition to the tax" of fifty percent of the amount owed the government could be assessed civilly against a deficient taxpayer "[i]f any part of any deficiency is due to fraud with intent to evade tax."¹⁰⁷ Mitchell had been indicted under section 146(b) for underreporting his income taxes by over \$700,000; he was tried and acquitted. Pursuant to section 293(b), the government then sought to assess against him both this sum and an additional fifty percent amounting to \$364,354. Mitchell claimed the latter assessment was barred by the doctrine of double jeopardy because it was "not a tax, but a criminal penalty intended as punishment for . . . fraudulent acts."¹⁰⁸ Indeed, in light of prior holdings, the additional assessment seemed clearly penal, for it was plainly meant to deter specified conduct, involved proportionately large amounts¹⁰⁹ and was levied for tax fraud effectively identical to the willful tax evasion that was criminally proscribed by section 146(b).

The Court nevertheless managed to rely on these ostensibly penal aspects to justify its holding that section 293(b) exacted a civil sanction. It began by disposing of any notion that a tax was intrinsically criminal because it was imposed to compel desired behavior, stating that the question was "one of statutory construction" because Congress was free to inflict either criminal or civil sanctions "[t]o ensure full and honest

104. *See also* *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20 (1922), in which the Court invalidated as "penal" a federal excise tax of ten percent of the net profits imposed upon any business operated by anyone who knowingly employed child labor. The unsatisfactory nature of relying on the behavioral effects of a tax in order to support a conclusion of penalty was amply demonstrated by the Court's difficulty in distinguishing other cases sustaining similar taxes having equal or greater effects on human behavior. *See id.* at 40-43.

105. 303 U.S. 391 (1938).

106. Int. Rev. Code of 1928, ch. 852, § 146(b), 45 Stat. 835.

107. *Id.* § 293(b), 45 Stat. 858.

108. 303 U.S. at 398.

109. This was especially apparent because fifty percent of the entire deficiency could be assessed under section 293(b), even if only one dollar of that deficiency was attributable to fraud on the part of the taxpayer.

disclosure [and] discourage fraudulent attempts to evade the tax.”¹¹⁰ It then advanced several reasons for its finding that the flat fifty percent “addition to the tax” was civil in nature. First, said the Court, a sanction may be remedial and “characteristically free of the punitive criminal element” despite its comparative severity.¹¹¹ Such remedial sanctions included “[f]orfeiture of goods . . . and the payment of fixed or variable sums of money . . . which have [long] been recognized as enforceable by civil proceedings.”¹¹² Second, the sanctions imposed by section 293(b) could be inferred to fall within this remedial category, since they “are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer’s fraud.”¹¹³ Third, Congress had provided a distinctly civil procedure for collecting both the tax due and the fifty percent addition, a procedure which would be unconstitutional if punishment were contemplated and which was said to indicate clearly the legislature’s intent to create a civil rather than a criminal sanction.¹¹⁴ Finally, Congress had enacted two separate and distinct provisions imposing sanctions, one labelled “penalties” and prescribing criminal fines or imprisonment,¹¹⁵ the other composed of “additions to the tax” that were “[o]bviously all . . . intended . . . as civil incidents of the assessment and collection of the income tax.”¹¹⁶

The problem with these justifications was that, taken separately or together, they afforded no firmer support for the Court’s conclusion that the challenged sanction was nonpenal than those stated in prior decisions that had supported a contrary result. To assert that a sanction is inherently remedial rather than inherently criminal scarcely advances analysis where no criteria defining the former classification are announced. Indeed, that approach makes reference to specific congressional intent irrelevant, as the Court itself tacitly admitted when it remarked that the “fact that a criminal procedure is prescribed for the enforcement of a sanction may be an indication that it is intended to be punitive, *but cannot be deemed conclusive* if alternative enforcement by a civil proceeding is sustained.”¹¹⁷ If specific congressional intent

110. 303 U.S. at 399.

111. *Id.* at 399-400 & n.3.

112. *Id.* at 400.

113. *Id.* at 401 (footnote omitted).

114. *Id.* at 402.

115. *Id.*

116. *Id.* at 404-05 (footnote omitted).

117. *Id.* at 402 n.6 (emphasis added). This language implied that certain sanctions

were relevant, as the Court's reliance on statutory construction might suggest, it was difficult to understand how the civil enforceability of forfeitures and payments enacted in other contexts would be useful in resolving the issue. Moreover, it was simply inaccurate to imply that the inherently civil character of tax forfeitures and additions was settled, as *Lipke* and *Helwig* demonstrated.

These difficulties might have been cured by the Court's imputation of revenue-protecting and compensatory motives to Congress in order to support its remedial classification. But the Court did not explain why the fifty percent addition for fraud exacted by section 293(b) was any more "compensatory" than the very similar sanction imposed on *innocent* conduct in *Helwig*, a decision that had been cited repeatedly by Mitchell¹¹⁸ and that should have governed his case. The same revenue-protecting function could well have been served by criminal sanctions of far less severity; and since Mitchell had already been found liable for the entire tax deficiency¹¹⁹ and remained fully liable for interest thereon, the compensatory aspect of the \$364,000 addition was not apparent. In fact it was unclear why even compensation "for the heavy expense of investigation"¹²⁰ was involved, since the cost of investigating a \$2,000 fraud that would trigger a \$1,000 addition might easily have equalled the cost of investigating the \$700,000 fraud at bar.¹²¹ Finally, a similar logical flaw undermined the Court's reliance on the fact that Congress had expressly distinguished this tax from parallel criminal sanctions and prescribed civil process to collect it. *Lipke*, *La Franca* and *Constantine* had invalidated smaller assessments that had also been similarly differentiated, indicating that one important test for determining the character of a sanction is "whether the behavior to which it applies is already a crime."¹²² While it was true that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission,"¹²³ the mere fact that two sanctions were enacted could not establish that only one of those exactions was penal.

might always be deemed civil, despite clear evidence of punitive congressional intent and the enactment of criminal enforcement procedures confirming that intent.

118. *Id.* at 392-94 (summary of brief for respondent).

119. *Mitchell v. Commissioner*, 89 F.2d 873, 877-78 (2d Cir. 1937).

120. 303 U.S. at 401.

121. Indeed, Congress had expressly authorized the government to recover the costs of a successful criminal prosecution for willful tax evasion under section 146(b). *See* note 106 *supra*. The lack of similar language in section 293(b) suggests as a matter of statutory construction that the legislators had entertained no compensatory motive with respect to that provision.

122. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 & n.26 (1963).

123. 303 U.S. at 399.

Thus, *Mitchell* begged both the question of when sanctions *that Congress labels as civil* are criminal in effect, and the larger question of whether there exist any principled constitutional limits on the legislative power to sanction. If Congress could punish criminal conduct simply by creating two sanctions and denominating one of them as civil, the protections of the Sixth Amendment would be minimal indeed.

This bleak prospect seemed confirmed by *United States ex rel. Marcus v. Hess*,¹²⁴ which reduced *Mitchell's* reliance on remedial compensation and congressional labels to a talismanic formula. *Marcus* involved a challenge to sections 231 through 234 of Title thirty-one and sections 80 through 83 of Title eighteen of the United States Code.¹²⁵ Under those provisions: (a) anyone attempting to defraud the government could be punished by a fine and a prison term and (b) anyone committing such fraudulent acts would "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages . . . sustained . . . together with costs of suit."¹²⁶ This forfeiture could be enforced either by the government suing on its own behalf or by a *qui tam* action brought by a private person suing on behalf of the government and dividing equally any recovery.¹²⁷ Like *Mitchell*, the respondents in *Marcus*, electrical contractors accused of engaging in collusive bidding on federal public works projects, had been criminally indicted.¹²⁸ Unlike *Mitchell*, they pleaded *nolo contendere* and were fined \$54,000.¹²⁹ Subsequently, a *qui tam* action was brought against them to recover for the same fraudulent acts. When that action produced an additional judgment of \$315,000, including \$112,000 in forfeitures—more than twice the criminal fine—they also argued that the double jeopardy doctrine barred its enforcement. The Court disagreed, making no effort to analyze either the motives of Congress as expressed on the face of the statute for imposing this heavy additional sanction, or the actual motives that might have produced it. Instead, the Court stated that the "forfeit and pay"

124. 317 U.S. 537 (1943).

125. Rev. Stat. §§ 3490-3493, 5438 (formerly codified at 31 U.S.C. §§ 231-234 (1940); 18 U.S.C. §§ 80-83 (1940)).

126. Rev. Stat. § 3490 (formerly codified at 31 U.S.C. § 231 (1940)).

127. A *qui tam* action is one brought by a common informer whose only interest in the controversy is statutory. See 317 U.S. at 540-41 & n.4.

128. *Id.* at 539-40.

129. See *id.* at 545. The criminal prosecution had been brought under the general federal conspiracy statute, 18 U.S.C. § 88 (1940) (*now codified at* 18 U.S.C. § 371 (1976)), rather than the challenged enactment's express criminal provisions. The Court correctly deemed this fact unimportant. 317 U.S. at 548.

provision simply afforded the government full restitution.¹³⁰ The fact that the provision seemed guaranteed to yield more than the amount of actual damages suffered, especially where it was invoked by the government rather than a private party, was abruptly dismissed:

As to the double damage provision, it cannot be said that there is any recovery in excess of actual loss for the government, since in the nature of the qui tam action the government's half of the double damages is the amount of actual damages proved. But in any case, Congress might have provided as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. Congress could remain fully in the common law tradition and still provide punitive damages.¹³¹

With respect to the penal or remedial intent of Congress, the Court simply asserted:

It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy. . . . We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. *Helvering v. Mitchell*

. . . .¹³²

130. 317 U.S. at 551-52.

131. *Id.* at 550 (footnote omitted).

132. *Id.* at 549. This result was sufficiently problematic with respect to the provision for double damages, but did not begin to deal with the problems raised by the forfeitures levied. As to those, the Court merely remarked that even higher levels of damages could have been imposed by Congress, quoting from *Brady v. Daly*, 175 U.S. 148, 157 (1899), to the effect that punishment may arise from the application of a statute so far as the wrongdoer is concerned, "but this is not enough to label it as a criminal statute." 317 U.S. at 551. This remark resembled contentions that because Congress may impose capital punishment, it may permissibly employ the lesser sanctions of branding and thumbscrews. It suffered from the same analytical defect of depriving constitutional limitations of content. *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 189-90 (1963) (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (plurality opinion).

Justice Frankfurter in *Marcus* was sufficiently distressed by these "dialectical subtleties" to propose a test which would have completely removed civil-criminal considerations from the double jeopardy sphere:

Punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends. . . .

The protection against twice being punished for the same offense should hardly be made to depend upon the necessarily speculative judgment of a court whether a "forfeiture" and "double the amount of damages which the United States may have sustained" constitutes an extra penalty, or merely an indemnity for loss suffered. *If that is the issue on which the protection against double jeopardy turns, those who invoke the Constitution . . . ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss.* That in civil actions punitive damages are, as a matter of

This conclusion ignored the fact that the *criminal* fines imposed on respondents, unlike those prescribed in *Mitchell*, also seemed at least partly calculated to afford indemnification.¹³³ That conclusion suggested nothing less than an axiom that Congress' classification would be totally dispositive, notwithstanding the actual legislative intent underlying a sanction or the irrationality of compensatory motives judicially inferred to sustain it.¹³⁴

due process, sometimes allowed . . . or that there may be distinct penal and remedial provisions for the same wrong . . . does not help solve our present problem. . . .

317 U.S. at 554-55 (Frankfurter, J., concurring) (emphasis added). However, the solution actually proposed by Justice Frankfurter was to treat the "forfeit and pay" language of section 231 as an integral part of a single governmental remedy that included the express criminal sanction. *Id.* at 555-56. This conveniently reduced double jeopardy to single jeopardy, but appeared to admit that the "civil" half of that remedy was criminal in fact.

133. See *Helvering v. Mitchell*, 303 U.S. 391, 395-96 (1938). The Court in *Marcus* did assert that respondents' criminal punishment "was not intended to compensate the government, in any manner, for damages it suffered as a result of successful execution of the conspiracy." 317 U.S. at 548. But the criminal provision in *Mitchell* had been construed to impose a single fine or prison term for all fraudulent acts contributing to the same total deficiency. The criminal provision in *Marcus*, however, had apparently been construed to apply separately to each of respondents' interrelated projects, since the maximum fine for a single violation was \$5,000, far below the \$54,000 assessment actually imposed. See 317 U.S. at 549. The Court applied the same interpretation to sustain the imposition of an aggregate \$112,000 forfeiture for fifty-six violations of the civil "forfeit and pay" provision of section 231, stating that

[u]nder respondents' view the lump sum to be paid would be about \$30.00 a project; and we cannot suppose that Congress meant thus *to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects each of which individually increased their profit.*

317 U.S. at 552 (emphasis added). This approach implied that restitution to the government played a substantial part, as a matter of the Court's threshold statutory construction, in the imposition of both the fine and the forfeiture.

134. See Goldschmid, *supra* note 22, at 913-14, concluding that *Mitchell*, *Marcus* and "[s]ubsequent cases provide little basis for further analysis. The typical opinion dealing with classification concludes that a penalty is 'remedial' and therefore civil, or a 'punishment' and therefore criminal, and contains only the scantiest reasoning to justify the result." See also *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). The Court there upheld section 26(b)(1) of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. § 1635(b)(1) (1946) (repealed 1949), which permitted the government to recover a sum of \$2,000, plus double the amount of any damages incurred, plus costs of suit, from anyone fraudulently obtaining or seeking to obtain benefits in connection with the disposition of property under the act. The Court cited not only *Marcus* and relevant legislative reports purporting to indicate Congress' nonpenal intent, 350 U.S. at 151-52, but also statutory language indicating that the civil remedies provided were "in addition to all other criminal penalties." *Id.* at 152. Such evidence scarcely demonstrated either that Congress' actual intent was to create a civil sanction, or that the effect of these provisions placed them unequivocally beyond pertinent constitutional protections. But the Court used it to support the proposition that "[t]he Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Id.* at 153.

3. *The Perez, Trop and Nestor Decisions*

Yet, in two denationalization decisions handed down on the same day in 1958, the Court reached variant and bitterly-divided results that looked beyond congressional classifications and turned entirely on the justices' proclivity to infer rational nonpenal purposes from the challenged statute on its face. In *Perez v. Brownell*,¹³⁵ the Court held, five to four, that a statute which expatriated citizens without a prior hearing simply for voting in foreign elections was constitutionally permissible.¹³⁶ The Court inferred that Congress had enacted the law in question in order to avoid embarrassment in its conduct of foreign relations. It also inferred the existence of a rational connection between the evil sought to be remedied—involuntary American “embroilment” with other countries through an individual’s acts—and the remedy imposed.¹³⁷

In *Trop v. Dulles*,¹³⁸ however, a plurality of the Court refused to

135. 356 U.S. 44 (1958), *overruled by* *Afroyim v. Rusk*, 387 U.S. 253 (1967).

136. 356 U.S. at 62.

137. *Id.* at 47-62. There was no legislative evidence that such embroilment had ever occurred through the simple act of voting, and the challenged provision seemed effectively to reach far beyond Congress' declared intent to “relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose.” *Id.* at 55 (quoting 86 CONG. REC. 11944 (1940) (remarks of Rep. Dickstein)). Indeed, on its face, the enactment applied both to American residents and to citizens who never intended any shift in allegiance. *Id.* at 55-56. The majority (consisting of Justice Frankfurter, joined by Justices Brennan, Burton, Clark and Harlan) stated that the essential question was whether “the means, withdrawal of citizenship, [is] reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections.” It held that it was, since “[t]he termination of citizenship terminates the problem.” *Id.* at 60. This rationale might equally well have justified imposition of capital punishment for fraud.

Chief Justice Warren's dissent went straight to the weakness of attributing a permissible rational purpose to such an apparently overbroad remedy. After noting both actual indications of a narrower congressional intent underlying the enactment and the traditional legislative solicitude for the sacrosanct right of citizenship, he concluded that: “a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a *conceivably rational basis* for wanting to do so.” *Id.* at 65, 73-75 (Warren, C.J., dissenting, joined by Black and Douglas, JJ.) (emphasis partly added). The Chief Justice went on to say that “[t]he fatal defect in the statute before us is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship ‘The connection between the fact proved and that presumed is not sufficient.’” *Id.* at 76 (quoting *Manley v. Georgia*, 279 U.S. 1, 7 (1929)). *See also id.* at 82 (Warren, C.J., dissenting, joined by Douglas & Black, JJ.) (“What the Court does is to make it possible for any one of the many legislative powers to be used to wipe out or modify specific rights granted by the Constitution, provided the action taken is moderate and does not do violence to the sensibilities of a majority of this Court”).

138. 356 U.S. 86 (1958). The plurality opinion in this case was authored by Chief Jus-

make the same attributions in order to sustain a provision imposing expatriation after a conviction for desertion in wartime.¹³⁹ Instead, it held that the statute on its face prescribed cruel and unusual punishment in violation of the Eighth Amendment, regardless of Congress' underlying intent:

The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems Here the purpose is punishment, and therefore the statute is a penal law.

It is urged that this statute is not a penal law but a regulatory provision authorized by the war power. It cannot be denied that Congress has power to prescribe rules governing the proper performance of military obligations *But a statute that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law* If this statute taking away citizenship is a congressional exercise of the war power, then it cannot rationally be treated other than as a penal law, because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power.¹⁴⁰

Though this conclusion might have been founded on Congress' apparent desire to provide an additional punishment for desertion, the plurality opinion did not appear to rely on that ground.¹⁴¹ Instead, it based its holding on the presumption that the *only* conceivable purpose of the challenged law was punitive. It completely ignored the fact that

tice Warren, joined by Justices Black, Douglas and Whittaker. Justice Brennan concurred separately while Justice Frankfurter wrote a dissent in which Justices Burton, Clark and Harlan joined.

139. *Id.* at 94-101.

140. *Id.* at 97-98 (emphasis added). The plurality did advert to actual congressional intent, concluding it was "equivocal, and cannot possibly provide the answer to our inquiry." *Id.* at 95. But it also stated that "even a clear legislative classification of a statute as 'nonpenal' would not alter the fundamental nature of a plainly penal statute." *Id.* at 95 (citing *United States v. Constantine*, 296 U.S. 287, 294 (1935); *United States v. La Franca*, 282 U.S. 568, 572 (1931)). And it went on to treat as "controlling" the "evident purpose of the legislature" said to be apparent on the face of the statute itself. *Id.* at 96.

141. The plurality did note in passing that: "Plainly legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute." *Id.* at 97. This observation was beside the point, since the statute did not substitute expatriation for imprisonment, which had also been imposed on the petitioner in this case. *Id.* at 87-88. Indeed, the fact that expatriation was imposed only after a due process conviction for wartime desertion might equally well have supported the inference that its purpose was the nonpenal one of "designat[ing] a reasonable ground of eligibility for [continued citizenship]," as the plurality's approving reference to loss of voting rights following a conviction for felony indicated. *Id.* at 96-97.

if its language were applied literally, both the provision involved in *Perez* and any other regulatory provision prescribing "the consequence that will befall one who fails to abide" by it would be penal. More confusingly still, the decisive concurrence of Justice Brennan, who had voted with the majority in *Perez*, admitted that expatriation of deserters might be sufficiently related to the exercise of the war power to justify both loss of citizenship and other sanctions on either a penal or nonpunitive basis, if the challenged provision were more narrowly drawn.¹⁴² A powerful dissent would have followed *Perez* and sustained the statute as nonpenal on rational-attribution grounds.¹⁴³

Two years later, in *Flemming v. Nestor*,¹⁴⁴ the Court announced a new and equally confusing test for determining the civil or criminal status of a sanction. In sustaining as "civil" a law requiring an automatic, and apparently punitive, termination of social security benefits for persons deported due to past membership in the Communist Party, the Court stated:

142. *See id.* at 106-07, 112-14 (Brennan, J., concurring). Justice Brennan found the severity of denationalization to be "an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted [war] power." *Id.* at 110. On this basis, he concluded that expatriation was beyond Congress' power to invoke as *either* punishment or remedy, since the questioned provision's relation to the effective conduct of war was remote at best. *Id.* at 111-14. This approach not only failed to consider Congress' power to invoke other sanctions, but implied that use of such alternatives would per se be permissible: "It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections." *Id.* at 114.

The plurality also made the severity of the sanction a factor in its decision-making calculus. *Id.* at 96 n.18.

143. "It is not for us to deny that Congress *might reasonably have believed* the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of need were to remain in the communion of our citizens." 356 U.S. at 122 (Frankfurter, J., dissenting, joined by Burton, Clark & Harlan, JJ.) (emphasis added). *See also id.* at 124-25:

Simply because denationalization was attached by Congress as a consequence of conduct that it had elsewhere made unlawful, it does not follow that denationalization is a "punishment," any more than it can be said that loss of civil rights as a result of conviction for a felony . . . is a "punishment" for any legally significant purposes. . . . *Since there are legislative ends within the scope of Congress' war power that are wholly consistent with a "nonpenal" purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed . . . a "punishment."* (emphasis added).

In subsequent denationalization cases, the Court avoided the punishment issue entirely, resting its results instead on Congress' lack of power to employ such a sanction regardless of its status. *See Afroyim v. Rusk*, 387 U.S. 253 (1967). *See also Rogers v. Bellei*, 401 U.S. 815 (1971); *Schneider v. Rusk*, 377 U.S. 163 (1964); *United States v. Matheson*, 532 F.2d 809 (2d Cir.), *cert. denied*, 423 U.S. 823 (1976).

144. 363 U.S. 603 (1960). The majority opinion was authored by Justice Harlan, who was joined by Justices Clark, Frankfurter, Stewart and Whittaker.

Where the source of legislative concern *can be thought to be* the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.

. . . .

. . . *Where no persuasive showing of a purpose "to reach the person, not the calling," . . . has been made,* the Court has not hampered legislative regulation of activities within . . . [Congress'] sphere of concern, despite the often-severe effects such regulation has had on the persons subject to it.¹⁴⁵

This language appeared to reduce the category of sanctions that might be found "penal" to those constituting explicit bills of attainder.¹⁴⁶ Indeed, both the facts and the majority's reasoning supported that interpretation. Nestor had lived in this country for forty-three years, during which he had regularly made social security contributions. Nevertheless, he was administratively deported a year after his retirement due to a relatively brief Party membership that had occurred at a time when such activity was lawful.¹⁴⁷ That deportation automatically terminated his retirement benefits under a social security amendment linking such terminations to fourteen specified grounds of deportation, all of which were either crimes or acts deemed to indicate severe moral turpitude.¹⁴⁸

The majority's threshold ruling was that automatic termination of Nestor's noncontractual retirement benefits did not constitute a deprivation of property without due process of law.¹⁴⁹ But the Court was also compelled to deal with the claim that this termination imposed punishment *ex post facto*, by bill of attainder and without criminal safeguards. These claims were rejected by sleight of hand. Justice Harlan, speaking for the majority, acknowledged the holding of *Trop v. Dulles*,¹⁵⁰ which had recently invalidated a similarly broad-gauged sanction and which seemed to militate in favor of the conclusion that the Social Security Act amendment involved in *Nestor* was also punitive. But he discarded *Trop* and similar precedents by remarking that

145. *Id.* at 614, 616 (emphasis added) (footnote omitted).

146. *Id.* at 616. See, e.g., *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

147. 363 U.S. at 605-06.

148. See, e.g., *id.* at 604-06 & n.1, 618 & n.10. The deportation grounds included prostitution and narcotics addiction, as well as various criminal convictions and two types of subversive activity. *Id.* at 618 n.10.

149. *Id.* at 608-11. See also *Califano v. Webster*, 430 U.S. 313, 321 (1977).

150. 356 U.S. 86 (1958). See notes 138-143 and accompanying text *supra*.

each case must turn on "its own highly particularized context."¹⁵¹ He suggested both that the severity of a sanction was irrelevant to its civil or criminal status, and that the sanction in question was not punitive because it was relatively mild, without explaining why lack of severity could be utilized in making one determination but not the other.¹⁵² He also asserted that Congress did not intend to punish the *acts* triggering deportation because "even if a beneficiary were saved from deportation only through discretionary suspension by the Attorney General . . . [the benefit cut-off] would not reach him."¹⁵³ Finally, he did not even hesitate before the fact that the challenged provision specifically exempted four other classes of deportees from termination, that the acts of those deportees were plainly treated as non-blameworthy and that the challenged provision had repeatedly been described as penal during its progress through Congress.¹⁵⁴ Instead, he disregarded both objective and subjective indicia of congressional purpose, stating that:

It is impossible to find in this meagre history *the unmistakable evidence of punitive intent which . . . is required* before a Congressional enactment of this kind may be struck down. Even were that history to be taken as evidencing Congress' concern with the grounds, rather than the fact, of deportation, we do not think that this, standing alone, would suffice to establish a punitive purpose. This would still be a far cry from the situations involved in such cases . . . *where the legislation was on its face aimed at particular individuals.*¹⁵⁵

151. 363 U.S. at 615-16.

152. *Id.* at 616-17 & n.9.

153. *Id.* at 619-20. The majority's reliance on such clemency to avert a conclusion of penalty necessarily implied that the acts being excused were otherwise meant to be punished. *See Trop v. Dulles*, 356 U.S. 86, 98 (1958) (plurality opinion), describing the nonpenal view of deportation itself as "highly fictional." Moreover, such reliance by the majority in *Nestor* seemed analytically bankrupt. It could scarcely be contended, for example, that the executive's power to pardon a convicted murderer changes the penal nature of the sanction imposed. A fortiori, the mere ability to exercise clemency cannot produce a "civil" result.

154. *See* 363 U.S. at 618-20 & nn.10, 12-13 (majority opinion); *id.* at 638-39 (Brennan, J., dissenting, joined by Warren, C.J. and Douglas, J.). The four classes of deportees exempted from the cut-off were those admitted as nonimmigrants who failed to maintain that status, those institutionalized for mental disease within five years of entry, those becoming public charges within five years of entry and those knowingly aiding others to enter illegally within five years of their own entry. *Id.* at 620 n.13. The last category was especially suggestive of punitive intent. It was the only exempted category involving deportation for knowing guilty conduct. As Justice Brennan pointed out, its failure to trigger benefit cut-offs could only be justified by an inference that Congress believed this particular conduct less blameworthy than the other grounds for deportation for which termination was specified. *Id.* at 639 (Brennan, J., dissenting, joined by Warren, C.J. and Douglas, J.).

155. *Id.* at 619 (emphasis added).

The Court in *Nestor* accordingly sustained the benefit cut-off on the basis of an attributed congressional intent to avoid supporting foreign economies by continued payment of benefits to individuals residing overseas.¹⁵⁶ *Nestor's* contention that this inferred "intent" was completely incompatible with the actual scope of the challenged provision was dismissed because, said the majority, he had not proven beyond a reasonable doubt that the sole intent of Congress was punitive:

Inferences drawn from the omission of [four whole classes of deportees] cannot establish, to the degree of certainty required, that Congressional concern was wholly with [punishing] the acts leading to deportation, and not with the fact of deportation The same answer must be made to arguments drawn from the failure of Congress to apply [the benefit cut-off] to beneficiaries residing abroad Congress may have failed to consider such persons; or it may have thought their number too slight, or the permanence of their voluntary residence abroad too uncertain, to warrant application [W]e cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute.¹⁵⁷

As the dissenters pointed out, this approach not only obscured the evident fact that the challenged sanction was directed at specific acts committed by particular individuals, but drew into question the whole attribution theory by assuming that any inferential link between the sanction and its legislative scheme would suffice to defeat a claim that the questioned sanction was punitive.¹⁵⁸ However, if the challenged

156. *See id.* at 611-12, 617.

157. *Id.* at 620-21 (footnote omitted). *See also id.* at 612 & n.5, where the majority asserted that "it is irrelevant that the sanction does not extend to all to whom the postulated rationale might in logic apply," but admitted that Congress might "have concluded that the public purse should not be utilized to contribute to the support of those deported *on the grounds specified in the statute.*" (Emphasis added) (footnote omitted).

158. *Id.* at 625-28 (Black, J., dissenting); *id.* at 632-33 (Douglas, J., dissenting); *id.* at 635-40 (Brennan, J., dissenting, joined by Warren, C.J., and Douglas, J.). Justice Black stated that: "Whether this Act had 'rational justification' was . . . for Congress; *whether it violates the Federal Constitution is for us to determine . . .*" *Id.* at 626 (Black, J., dissenting) (emphasis added). Justice Brennan noted acerbically that the majority:

escapes the common-sense conclusion that Congress has imposed punishment by finding the requisite rational nexus to a granted power in the supposed furtherance of the Social Security program I do not understand the Court to deny that but for that connection, . . . [the challenged provision] would impose punishment [The Court] rejects the inference that the statute is "aimed at the person or class of persons disqualified" by relying upon the presumption of constitutionality. This presumption might be a basis for sustaining the statute if in fact there were two opposing inferences which could reasonably be drawn from the legislation

. . . . [The Court] however, does not limit the presumption to that use. Rather the presumption becomes a complete substitute for any supportable finding of a rational connection . . . [of this provision] with the Social Security program. *Id.* at 636 (Brennan, J., dissenting, joined by Warren, C.J., and Douglas, J.). He then pro-

sanction did not rationally further the aims of legislation passed pursuant to a granted power, that sanction was invalid regardless of whether it was civil or punitive.¹⁵⁹ That such a nexus might be inferred for broader due process purposes could not settle the issue of whether a particular sanction was civil or criminal, as Justice Harlan's reliance on a dispositive presumption of nonpenalty to bridge this logical gap clearly showed.

4. *Recent Forfeiture Cases*

Nestor was decided less than six months before the first round of oral arguments in *Mendoza-Martinez*,¹⁶⁰ and difficulties presented by the ruling in *Nestor* may have stimulated the Court's attempt in *Mendoza-Martinez* to reconcile conflicting precedents by formulating general, objective tests for determining the civil or criminal status of a challenged sanction. But the Court was unwilling or unable to pursue in a principled fashion the implications of its objective criteria, and subsequent cases only compounded this confusion.

In *One 1958 Plymouth Sedan v. Pennsylvania*,¹⁶¹ a unanimous Court held "quasi-criminal," and hence subject to the Fourth Amendment's exclusionary rule, a civil forfeiture proceeding authorized by state law against any automobile used for illegal transportation of liquor.¹⁶² The forfeiture in question had resulted in the loss of a vehicle having a market value of \$1,000, which was twice the maximum fine that could be imposed for the crime of illegal transportation itself.¹⁶³ Though the Court's opinion relied primarily on the fact that "the forfeiture is clearly a[n additional] penalty for the criminal offense and can result in even greater punishment than the criminal prosecution,"¹⁶⁴ it neither cited nor distinguished *Helvering v. Mitchell*¹⁶⁵ or *United States ex rel. Marcus v. Hess*,¹⁶⁶ which appeared to mandate a contrary result.

In *United States v. United States Coin and Currency*,¹⁶⁷ the Court

ceeded to show that in light of the provision's facial distinctions and legislative history, only the inference of vengeful intent could be maintained. *Id.* at 637-40. *See also* *Rogers v. Bellei*, 401 U.S. 815, 837-45 (1971) (Black, J., dissenting).

159. *See* 363 U.S. at 611-12 and cases cited.

160. 372 U.S. 144 (1963). *See* notes 28-66 and accompanying text *supra*.

161. 380 U.S. 693 (1965).

162. PA. STAT. ANN. tit. 47, § 6-601 (Purdon 1964 Cum. Supp.).

163. 380 U.S. at 694-95 & n.2; *id.* at 700-01 & nn.8-9.

164. *Id.* at 701.

165. 303 U.S. 391 (1938). *See* notes 105-123 and accompanying text *supra*.

166. 317 U.S. 537 (1943). *See* notes 124-133 and accompanying text *supra*.

167. 401 U.S. 715 (1971).

held criminal, and hence subject to the Fifth Amendment privilege against self-incrimination, a civil in rem proceeding to forfeit \$8,674 possessed by one Angelini, a professional gambler who had been convicted for failing to remit the requisite gambler's tax.¹⁶⁸ The proceeding was authorized by section 7302 of Title twenty-six of the United States Code, which provides that "[i]t shall be unlawful to have or possess any property intended for use in violating provisions of the internal revenue laws . . . and no property rights shall exist in any such property"¹⁶⁹ Angelini asserted the Fifth Amendment as a complete defense to the forfeiture proceeding, insisting that the government could not punish indirectly through section 7302 his failure to declare an illegal status that could not be punished directly.¹⁷⁰ The Court unanimously agreed, stating that:

"proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reasons of offenses committed by him*, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes From the relevant constitutional standpoint there is no difference between a man who "forfeits" \$8,674 because he had used the money in illegal gambling activities and a man who pays a "criminal fine" of \$8,674 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.¹⁷¹

The government's claim that section 7302 was not meant to punish because it reached even innocent owners¹⁷² was met with the response that "a forfeiture statute, with such a broad sweep [would] raise serious constitutional questions" of due process and just compensation.¹⁷³

168. *Id.* at 716. See 26 U.S.C. §§ 4411-4412, 4901 (1970).

169. 26 U.S.C. § 7302 (1970).

170. See 401 U.S. at 716-17; *United States v. United States Coin & Currency*, 393 F.2d 499, 500 (7th Cir. 1968). The Court had recently held that the government could not prosecute gamblers who properly asserted their Fifth Amendment privilege against self-incrimination as a defense to their failure to comply with the gambling registration provisions requiring them to declare their illegal occupation. *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968). The incrimination clause was involved in *United States Coin* because the basis of the government's claim that Angelini's money was intended for use in violating the revenue laws was his failure to declare book-making activities. See 401 U.S. at 716, 722 n.9. Since *Marchetti* and *Grosso* were said to deal with conduct that cannot be constitutionally punishable in the first instance, the Court was willing to apply retroactively the rule announced in those two decisions. See *id.* at 722-24.

171. 401 U.S. at 718 (emphasis in original) (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

172. See *id.* at 718-19.

173. *Id.* at 720-21. The government noted that the challenged forfeiture action was an

Moreover, the Court continued, as a matter of statutory construction, such forfeiture plainly was "intended to impose a penalty only upon those . . . significantly involved in a criminal enterprise,"¹⁷⁴ since the Treasury was required to remit any forfeiture incurred without willful negligence or violative intent.¹⁷⁵ This approach recalled the assumption underlying *Helwig v. United States*¹⁷⁶ and its progeny that any sanction meant to regulate conduct and deter wrongdoing was inherently penal regardless of Congress' expressed intent; again *Mitchell* and *Marcus* were not cited.

Yet in *One Lot Emerald Cut Stones v. United States*,¹⁷⁷ an equally unanimous Court relied on both these earlier rulings in holding civil and compensatory a more severe federal forfeiture statute. The intervenor in *Emerald Cut Stones* had been indicted and acquitted under a felony provision proscribing willful and knowing smuggling of articles into the country without submitting to required customs procedures.¹⁷⁸ The government then instituted a civil forfeiture proceeding pursuant to section 1497 of Title nineteen of the United States Code, which more broadly provides that any undeclared item "shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article."¹⁷⁹ As a defense to this action, the intervenor raised a claim of double jeopardy. The structure of the statutory scheme suggested, as did the relevant legislative history, that Congress viewed the forfeiture provision as a lesser included offense and had enacted stronger felony sanctions to deter knowing violations of customs

in rem proceeding in which the money itself was the formal respondent charged with the commission of an actionable wrong. *Id.* at 720 & n.5. In response to the contention that in light of the historical nature of such forfeiture proceedings, section 7302 applied to innocent property owners, the Court admitted that this historical view was not without support, *id.* at 720, but observed that it had in the past "recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment." *Id.* at 721. The precise constitutional question was not pursued, however, because the Court rejected the government's claim on the basis of its construction of section 7302 in conjunction with other relevant statutes. *See* note 174 and accompanying text *infra*.

174. *Id.* at 721-22 (footnote omitted).

175. *See* 19 U.S.C. § 1618 (1976), authorizing the Secretary of the Treasury, upon a showing of lack of willfulness or intent, to return the seized property "upon such terms and conditions as he deems reasonable and just." While this remission provision appears in Title nineteen of the United States Code, which regulates forfeitures under the customs laws, the remission provisions of that title are made expressly applicable to forfeitures under the internal revenue laws. 26 U.S.C. § 7327 (1970). *See* 401 U.S. at 721 n.8.

176. 188 U.S. 605 (1903). *See* notes 67-79 and accompanying text *supra*.

177. 409 U.S. 232 (1972).

178. 18 U.S.C. § 545 (1976). *See* 409 U.S. at 232-33.

179. 19 U.S.C. § 1497 (1976).

laws.¹⁸⁰ That suggestion was reinforced by the fact that a separate provision of Title nineteen authorized remittance of forfeitures "incurred without willful negligence or without any intention . . . to violate the law."¹⁸¹ The opinion in *United States Coin* had construed this provision as conclusive evidence of a penal intent to reach only blameworthy conduct.¹⁸² But the Court in *Emerald Cut Stones* simply recited the *Mitchell* formula that Congress could and did order both civil and criminal sanctions, clearly distinguishing them, and added that section 1497 merely afforded the government liquidated damages for the expenses of enforcement, which despite their comparative severity were not "so unreasonable or excessive" as to be penal.¹⁸³ The forfeiture-remittance provision deemed important in *United States Coin*¹⁸⁴ was not even mentioned; and both *United States Coin* and *Plymouth Sedan* were distinguished on the illogical basis that the forfeiture laws involved in those decisions, unlike section 1497, required proof of a criminal offense.¹⁸⁵

Despite their divergent results, *Plymouth Sedan*, *United States Coin* and *Emerald Cut Stones* all indicated that proof of criminal conduct, excessive severity and Congress' intent to punish as indicated by the face of the challenged provision were at least relevant to a sanction's civil or criminal status. But in *Calero-Toledo v. Pearson Yacht*

180. The forfeiture provision of section 1497 was originally enacted as part of the Tariff Act of 1922, 46 Stat. 964. It was re-enacted in the Tariff Act of 1930, 46 Stat. 728, which added a criminal sanction, 46 Stat. 751, that later became 18 U.S.C. § 545 (1976). See note 178 *supra*. Section 1497 appeared in Part III ("Ascertainment, Collection, and Recovery of Duties") of Title IV ("Administrative Provisions") of the 1930 Act. In contrast, section 545 was part of the "Enforcement Provisions" of the Act and was later incorporated in the federal criminal code. See 409 U.S. at 236.

181. 19 U.S.C. § 1618 (1976).

182. *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971). See notes 174-175 and accompanying text *supra*.

183. 409 U.S. at 235-37.

184. See notes 174-175 and accompanying text *supra*.

185. 409 U.S. at 236 n.6. The Court's conclusion that no criminal offense was required to trigger a forfeiture under section 1497 rested on the assumption that a single act of importation without following customs procedures could result in the "civil" forfeiture. *Id.* In contrast, a knowing, fraudulent failure to declare was required for a "criminal" forfeiture under 18 U.S.C. § 545 (1976), the criminal counterpart of section 1497. See 409 U.S. at 232-35 & nn.1-2. As a threshold matter, the Court's assumption was correct. But under 19 U.S.C. § 1618 (1976), see note 175 and accompanying text *supra*, the Treasury was required to remit, upon petition, all customs forfeitures or penalties except those incurred through willful negligence or deliberate violative intent. Thus, the practical difference between sections 545 and 1497 was not apparent. The Court in *Emerald Cut Stones* never attempted to explain what more was necessary to establish a knowing, fraudulent criminal forfeiture, beyond the finding of violative intent needed to make a "civil" forfeiture permanent.

Leasing Co.,¹⁸⁶ the Court appeared to discard even these criteria, holding "punitive and deterrent,"¹⁸⁷ but completely beyond pertinent constitutional protections, a Puerto Rican law that prescribed the forfeiture of a \$20,000 yacht leased to an occupant who had been found to possess a single marijuana cigarette.¹⁸⁸ The relevant provision of the commonwealth's code authorized summary seizure of any instrumentality used to transport controlled substances and the challenged seizure was effected without prior actual notice to the yacht's lessor.¹⁸⁹ Forfeiture became automatic when the lessor, whose innocence was admitted, understandably failed to contest the seizure within fifteen days.¹⁹⁰ The Court acknowledged the legislature's intent to enforce criminal drug sanctions through such forfeitures, but rejected both the owner's innocence and the sanction's severity as grounds for overturning the challenged provision, stating that:

Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold . . . the application of other forfeiture statutes to the property of innocents. Forfeiture of conveyances that have been used . . . in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.¹⁹¹

This reasoning explained neither how illegal behavior could be rendered unprofitable by penalizing an owner who had not acted illegally, nor what legitimate purpose was served by inducing that owner to exhibit greater care in selecting lessees where no notice of the proscribed activity could conceivably have been obtained.¹⁹² Instead, the Court relied on the unique historical status of deodand and similar in

186. 416 U.S. 663 (1974).

187. *Id.* at 686.

188. *See id.* at 664-68 & n.4 (majority opinion); *id.* at 693 (Douglas, J., dissenting).

189. P.R. LAWS ANN. tit. 24, § 2512(a)(4) & (b) (Supp. 1976); *id.* tit. 34 § 1722 (1971 & Supp. 1976). Possession itself was a crime under the Controlled Substances Act of Puerto Rico, P.R. LAWS ANN. tit. 24, §§ 2101-2607 (Supp. 1976), under which the lessee was subsequently prosecuted. *See* 416 U.S. at 665.

190. 416 U.S. at 667-68. *See* P.R. LAWS ANN. tit. 34 § 1722(a) (1971). Although the statute provided for notice to either the "owner of the property seized or the person in charge thereof," only the lessee had registered the vessel with harbor authorities and, as a result, only he was notified. *See* 416 U.S. at 665 n.2, 667-68 & n.3.

191. 416 U.S. at 686-88 (footnote omitted). *See id.* at 679, 685.

192. Indeed, with respect to secured creditors, the Court's remarks regarding greater care

rem forfeiture proceedings that had been sustained even though innocent parties suffered as a result.¹⁹³ But as the Court itself acknowledged, the more recent forfeiture cases that it discussed involved federal laws that imposed no permanent loss on innocent parties because those laws were uniformly subject to statutorily-prescribed remittance for non-blameworthy conduct.¹⁹⁴ Since the Puerto Rican statute lacked such a remittance feature, it presented precisely the type of indiscriminate forfeiture that the Court in *United States Coin* had abjured.¹⁹⁵

Indeed, the logic of *United States Coin* would seem to have mandated invalidation of the statute at issue in *Calero-Toledo*. If a forfeiture limited in effect to those responsible for criminal conduct¹⁹⁶ required procedural safeguards, an expressly punitive forfeiture drafted to impose sanctions upon innocent parties would seem even more clearly to require similar protections. Yet the Court converted the overbreadth of the Puerto Rican law into a reason for sustaining it, distinguishing the statute at issue in *United States Coin* on the ground that the commonwealth's code provision was "not limited in application to persons 'significantly involved in a criminal enterprise.'"¹⁹⁷ It admitted that serious due process problems might result from such sweeping application of this provision, noting that:

it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him [by the illegal actor] without his privity or consent . . . the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that

seemed entirely inapposite, since such creditors neither possess transferred property nor are empowered to transfer it.

193. See 416 U.S. at 680-86. At common law, the value of an inanimate object causing the accidental death of a King's subject was forfeited to the Crown as a deodand, *i.e.*, something given to God. See O. HOLMES, *THE COMMON LAW* 7-28 (1881). The practice did not become part of American common law, but as the Court in *Emerald Cut Stones* pointed out, similar in rem proceedings enforcing forfeitures of commodities and vessels used in violation of customs and revenue laws had long been recognized. 416 U.S. at 683 (citing *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 145-48 (1943); *Boyd v. United States*, 116 U.S. 616, 623 (1886)).

194. See 416 U.S. at 689-90 & n.27.

195. See *United States v. United States Coin & Currency*, 401 U.S. 715, 720-21 (1971), mentioning both Blackstone's condemnation of such innocent forfeitures as a "superstition" springing from "blind feudalism," 1 W. BLACKSTONE *COMMENTARIES ON THE LAWS OF ENGLAND* c.8 *300 (3d ed. 1884), and the "difficulty" of reconciling the "broad scope of traditional forfeiture doctrine" with the strictures of the Fifth Amendment.

196. See *United States v. United States Coin & Currency*, 401 U.S. 715, 719, 721-22 (1971).

197. 416 U.S. at 688 (emphasis added).

he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.¹⁹⁸

But the Court made no effort to explain why the instant forfeiture did not fit within this “oppressive” rubric. Despite the fact that the yacht’s owner was precluded by the lapse of fifteen days from raising any non-constitutional defense and had shown not only that he was “uninvolved in and unaware of the wrongful activity” in question, but also that he had included in his lease a provision barring the commission of unlawful activity by lessees, the Court dismissed his claims of oppressiveness with the cavalier remark that he “voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use.”¹⁹⁹ Thus, notwithstanding *Trop v. Dulles*²⁰⁰ and subsequent cases, *Calero-Toledo* seems to hold not only that Congress may avoid criminal restraints by deliberately seeking to punish innocent parties, if not guilty ones, but also that a rational relation to a *punitive* purpose may suffice to sustain, as civil, sanctions that cannot be justified on any nonpenal ground.²⁰¹

198. *Id.* at 689-90 (emphasis added) (footnote omitted). As this passage seemed to acknowledge and as Justice Douglas pointed out, *see id.* at 692-93 (Douglas, J., dissenting), the same objection might have been raised with respect to the Court’s reliance on other cases sustaining forfeitures of the property of innocent owners as the only adequate means of suppressing the proscribed offense or as establishing a secondary defense against a forbidden use. *Id.* at 684, 686 (citing *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 238 (1844)). If express criminal sanctions levied against the proscribed conduct did not deter that conduct, it is difficult to understand what legitimate governmental purpose might be furthered by imposing an additional derivative forfeiture on owners who possessed neither notice of such conduct nor any reasonable means of interdicting it.

199. 416 U.S. at 690. *See also id.* at 693 (Douglas, J., dissenting). Justice Douglas would at least have remanded the case in order to require the state to prove, as a condition of forfeiture, that “the illegal use was of such magnitude or notoriety that the owner cannot be found faultless in remaining ignorant of its occurrence.” *Id.* at 694.

200. 356 U.S. 86 (1958). *See* notes 137-143 and accompanying text *supra*.

201. *See also* *Ingraham v. Wright*, 430 U.S. 651 (1977), where the Court again divided, in an Eighth Amendment context, over the constitutional nature of “punishment.” The issue was whether the Eighth Amendment’s ban against cruel and unusual punishments barred the paddling of school children. The majority held that such paddling was not “punishment” within the ambit of the Amendment, because that Amendment had traditionally been limited to punishments imposed through criminal process. Consequently, the majority continued, there was “an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in public schools.” *Id.* at 669. This conclusion effectively adopted the approach of *Helvering v. Mitchell*, 303 U.S. 391 (1938), *see* notes 105-123 and accompanying text *supra*, by holding that such paddling was not “punishment” because the legislature had not sought to impose it through

Calero-Toledo might partially be explained as resulting from the Court's belief in the special, separate nature of in rem forfeitures, an explanation supported by the opinion's failure to cite any of the normal civil-criminal precedents discussed earlier. The case's result might also be attributed to the relatively limited impact of money penalties. Such sanctions do not threaten personal reputation or liberty, and there is no indication in *Calero-Toledo* or the other forfeiture rulings that governmental attempts to impose derivative *imprisonment* could proceed without criminal safeguards. But those explanations founder on the logical force of the Court's own remark that "from the relevant constitutional standpoint, there is no difference" between a man who forfeits a sum of money and one who pays that sum as a criminal fine imposed for the same course of conduct.²⁰² Functionally speaking, this statement appears inarguable; and if *Kennedy v. Mendoza-Martinez*²⁰³ constituted a tacit effort to develop a principled general theory of civil-criminal classification, it is difficult not to conclude that *Calero-Toledo* significantly abandoned that attempt. Notwithstanding Justice Holmes' faith in the ability of old bottles to receive new wine,²⁰⁴ it remains pro-

explicit criminal process. Nevertheless, the majority admitted that "[s]ome punishments, though not labelled 'criminal' by the State may be sufficiently analogous to criminal punishments to justify application of the Eighth Amendment." 430 U.S. at 669 n.37. But it made no attempt to reconcile this possibility with its holding; and it quite remarkably cited *Trop v. Dulles*, 356 U.S. 86 (1958), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), both of which had turned on functional or purposive analyses of whether a given sanction was penal, in support of the proposition that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." 430 U.S. at 671-72 n.40.

The dissenters took sharp issue with this use of *Trop*, stating that the majority failed to apply the doctrine of that case:

The majority would have us believe that the determinative factor in *Trop* was that the petitioner had been convicted of desertion; yet there is no suggestion in *Trop* that the disposition of the military court-martial had anything to do with the decision in that case. Instead, while recognizing that the Eighth Amendment extends only to punishments that are penal in nature, the plurality adopted a purposive approach for determining when punishment is penal.

Id. at 687 n.3 (White, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.). Thus, the dissenters argued, "[t]he relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment. . . ." *Id.* at 686-87. That the Eighth Amendment reached more than "criminal" sanctions, and that the determination that a sanction constituted punishment was accordingly the beginning rather than the end of analysis did not, in the dissenters' view, alter the importance of that threshold determination. *See id.* at 686 & n.2. Thus, *Wright* also turned on the type of scrutiny—subjective versus objective consideration, review of legislative history versus statutory construction, analysis of intent versus analysis of effect—with which a sanction's status was approached.

202. *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971).

203. 372 U.S. 144 (1963). *See* notes 28-66 and accompanying text *supra*.

204. *See* O. HOLMES, *THE COMMON LAW* 5 (1881).

foundly disturbing that a mechanical law of deodands that long preceded our concept of substantive criminal law should continue to limit constitutional protections. *Helvering v. Mitchell*²⁰⁵ and its descendants raised the troubling possibility that the legislature's sanctioning power might be virtually unlimited so long as the proper "civil" signals were used. *Calero-Toledo* suggested that the same lack of constraint might follow where the legislative intent was clearly to punish. This suggestion was scarcely tempered by possible arguments that the civil forfeiture proceeding in *Calero-Toledo* neither imputed blame nor punished wrongful conduct with imprisonment. The final passages of *Calero-Toledo* plainly did impute blame and civil imprisonment as part of our jurisprudence as well.

In sum, after as well as before *Calero-Toledo*, the question remains whether, and to what extent, there exist principled limits on the legislature's power to impose sanctions without criminal safeguards. That question was directly reflected in the OSHA decisions to which this article now turns.

III. Application of the Civil/Criminal Distinction to OSHA

A. The *Irey* Case

The leading appellate decisions sustaining the civil nature of OSHA's "civil" money sanctions divided perceptibly along these crossed lines between "objective" and "subjective" analysis, between inferred and actual legislative purpose, between the effect of a sanction and its intrinsic nature. In *Frank Irey, Jr., Inc. v. OSHRC*,²⁰⁶ the Third Circuit essentially applied the approach utilized in *Helvering v. Mitchell*,²⁰⁷ treating the civil-criminal issue as a matter of statutory construction controlled by the objective intent to create a "remedial" sanction evinced by Congress' use of "civil" terminology in the statute's text and by its placement of penalty provisions in OSHA's civil section. The Court acknowledged tacitly the functional difficulties created by *United States Coin* in light of the fact that "as to a corporation, the criminal punishment of a fine of \$10,000.00 is precisely the same as a civil penalty for a willful violation"²⁰⁸ It also noted that the

205. 303 U.S. 391 (1938). See notes 105-123 and accompanying text *supra*.

206. 519 F.2d 1200 (3rd Cir. 1974), *aff'd on this issue*, 519 F.2d 1215 (3rd Cir. 1975) (en banc), *aff'd without considering the point sub nom.* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).

207. 303 U.S. 391 (1938). See notes 105-123 and accompanying text *supra*.

208. See 519 F.2d at 1204 & n.8 (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971)). Since the "civil" willful violation at hand had resulted in an

label attached to a sanction by Congress does not, *ipso facto*, preclude the possibility that the procedures used to enforce such a sanction might infringe rights guaranteed by the Constitution.²⁰⁹ But the court made no attempt to go beyond such labels, suggesting that because larger penalties had been sustained as civil in nature under other statutes, "no such infraction has occurred here."²¹⁰ Instead, the Third Circuit concluded that Congress could impose both civil and criminal sanctions for the same conduct, and that "while the punitive aspects of the OSHA penalties, particularly for a 'willful' violation, are far more apparent than any 'remedial' features . . . [w]e have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy."²¹¹ Moreover, the Third Circuit added, it was unnecessary to apply the seven factors listed in *Kennedy v. Mendoza-Martinez*²¹² "because the congressional intent is clear."²¹³ This statement was apparently based on the assumption that Congress' intent to create a *civil* sanction was clear on the face of the statute.

The analysis undertaken by the appellate panel in *Irey* actually never came to grips with the problem. The fact that Congress is empowered to assess civil penalties for acts that are also punishable as crimes provides no assurance that the "civil penalties" exacted by section 666 of Title twenty-nine of the United States Code²¹⁴ are, in fact, nonpenal. In light of this observation and the appellate panel's own admission that those penalties lacked readily identifiable remedial features, its failure to engage in a far more exacting scrutiny of the structure and legislative history of section 666 appears inexplicable. Equally inexplicable was the panel's curt refusal to apply the criteria of *Mendoza-Martinez* on the ground that congressional intent to create a civil sanction was clear. This approach ignored the fact that by the

employee's death when an improperly shored trench collapsed on a worker, *id.* at 1201-02, the criminal provision might also have been invoked. See 29 U.S.C. § 666(a), (e) (1970).

209. 519 F.2d at 1204. While the court mentioned the axiom that labels alone could not be dispositive, it cited *American Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 515 (8th Cir. 1974), which had briefly rejected a similar Sixth Amendment complaint with the remark that: "[c]ivil penalties are not uncommon in federal law, and Congress here clearly intended to create a civil sanction. *Helvering v. Mitchell*. . . ."

210. 519 F.2d at 1204.

211. See *id.* at 1204 & n.9. This passage seemed effectively to conclude, as had *Helvering v. Mitchell*, 303 U.S. 391 (1938), that money penalties were inherently civil regardless of their severity. At the very least it indicated that money penalties in the limited amounts prescribed under OSHA possessed such civil characteristics.

212. 372 U.S. 144 (1963). See notes 28-66 and accompanying text *supra*.

213. 519 F.2d at 1205 (footnote omitted).

214. For a detailed discussion of section 666, see note 5 *supra*.

Court's own terms, those criteria could only be discarded where there was clear evidence of a subjective *intent to punish* as demonstrated by the relevant legislative history.²¹⁵ Absent such evidence, a court was obliged to apply the seven factors to the face of the statute itself before arriving at any conclusion. Perhaps most puzzlingly, the panel in *Irey* seemed aware that, judged in light of either the criteria expressed in *Mendoza-Martinez* or Senator Dominick's actual statement of legislative purpose, congressional intent to create a civil sanction was itself less than clear.²¹⁶ Thus, the approach taken by the court in *Irey* raised but did not resolve the question of what type of "intent," as evinced by what type of legislative materials, was relevant to the drawing of civil-criminal distinctions in a given case. Instead, the court disposed of the Sixth Amendment challenge by a series of ipse dixits that were, if anything, less illuminating and more troublesome than those employed by the Supreme Court in *Helvering v. Mitchell*²¹⁷ itself.

B. The *Atlas* Case

In *Atlas Roofing Co. v. OSHRC*²¹⁸ a panel of the Fifth Circuit attempted to adopt a contrasting approach. It acknowledged external limits on Congressional power no matter how clearly the "civil" intent of the legislators was expressed: "although Congress has enormous flexibility in the selection of enforcement measures, the existence of both civil and criminal alternatives does not alone suffice to validate the statute. Similarly, the absence of any mention of punishment in the legislative history does not immunize the statute from further review."²¹⁹ The court noted that absent clear evidence of *punitive* intent, the distinctions appearing on the face of the challenged enactment itself could not be dispositive, and that the functional analysis of *Mendoza-Martinez* accordingly provided "[t]he starting place . . . to test Congressional intent and permissible Congressional latitude in prescribing civil rather than criminal consequences."²²⁰ It then embarked on a similar functional analysis that once again demonstrated the inability of the Supreme Court's seven factors, standing by themselves, to serve as an effective means of resolving concrete cases.

215. See 372 U.S. at 168-70. The opposite result would subordinate constitutional protections to Congress' intent—precisely what the *Mendoza-Martinez* factors were designed to avert. See 519 F.2d at 1205 & n.12.

216. See note 19 and accompanying text *supra*.

217. 303 U.S. 391 (1938). See notes 105-123 and accompanying text *supra*.

218. 518 F.2d 990 (5th Cir. 1975), *aff'd without considering the point*, 430 U.S. 442 (1977).

219. 518 F.2d at 1000 (footnotes omitted).

220. *Id.*

Initially, the Fifth Circuit found that section 666 did impose an affirmative disability or restraint because it inflicted a "pocket-book deterrence" upon one compelled to pay the penalty assessed.²²¹ The first of the seven criteria was thus said to favor Atlas. But history was said to work against Atlas because monetary penalties "have long been accepted [as civil in nature] where they served a remedial rather than a punitive function."²²² Any scrutiny of whether the sanction in question had historically been considered punitive would therefore cause the court to confront again the civil-criminal classification issue such scrutiny was supposed to resolve. However, the third factor of scienter presented greater difficulties, since Atlas had been sanctioned under sections 666(b) and (j), which prescribe a penalty of up to \$1,000 for "serious" violations and incorporate some degree of scienter by affording cited employers a defense of lack of knowledge.²²³ The possibility of a "civil" willful violation under section 666(a)²²⁴ was still more troubling, since, as Atlas argued, the state of mind required for such a violation coincided even more clearly with traditional notions of criminal responsibility. The Fifth Circuit avoided both difficulties by expressing no view on section 666(a) and assuming that criminal scienter comprised only deliberately violative acts:

[T]his is not a requirement analogous to the criminal law concept embraced in the conclusory "scienter" concept. The employer has a defense if he did not or should not have known. But this is a far cry from limiting his obligations to situations in which he knowingly and intentionally acted or refrained from acting. The statute itself expressly distinguishes between acts which on usual tort principles are charged to employers and those willfully done.²²⁵

The fourth factor, whether or not the challenged sanction promotes retribution or deterrence, also raised difficulties. Atlas pointed out that a system of "civil penalties" graduated according to the employer's knowledge and the gravity of the violation not only has a retributive effect upon the offending employer but also deters others from committing similar violations. The government responded that such effects

221. *Id.* at 1001.

222. *Id.* (footnote omitted).

223. *See* 29 U.S.C. § 666(b), (j) (1970). While the panel mentioned only section 666(b) as the basis of the citation against Atlas, section 666(j), which defines a "serious" violation, was necessarily included.

224. 29 U.S.C. § 666(a) (1970). *See* note 5 *supra*.

225. 518 F.2d at 1001-02 (footnote omitted). The court at this point erroneously assumed that scienter embodies some single "criminal law concept." In fact the term connotes a variety of states of mind, depending upon the statutory context in which it is used. *See* note 37 *supra*.

also flow from “remedial” statutes because the adjective “‘remedial’ means not only compensatory but a kind of prospective deterrence . . . to encourage compliance with the government regulation.”²²⁶ The court correctly agreed that deterrence is a function of all sanctions and that the mere fact that a penalty is imposed to deter conduct does not make it criminal.²²⁷ This observation suggested that the fourth criterion of *Mendoza-Martinez* was irrelevant, not merely inconclusive. But while the Fifth Circuit appeared to indicate that this factor lent “some weight to both sides,”²²⁸ a close reading of its discussion suggests that on this point the government prevailed.

The next factor was whether the penalty applied to behavior that was already proscribed as a crime. On this point, the Fifth Circuit also said that the government prevailed. It noted that although willful violations of safety standards resulting in the death of an employee could expose an employer to both criminal sanctions and a civil penalty,²²⁹ in the majority of instances, as exemplified by Atlas’ “serious” violation, the “civil penalty” imposed by administrative enforcement procedures was the only possible sanction. While this observation was correct so far as OSHA alone was concerned, the court glossed over the equally pertinent possibility that “serious” conduct might be criminal under a *wholly separate* statute. Atlas in fact argued that OSHA was exacting a sanction for building code violations punishable as crimes under state and municipal law. The appellate panel cited *Helvering v. Mitchell*²³⁰ in dismissing this argument, stating that “[n]ow in the Twentieth Century it is too late to assert that there is anything improper in the election by Congress to impose both its own sanctions—civil, criminal or both—without regard to its treatment by other components of our federalism.”²³¹

226. 518 F.2d at 1002.

227. *Id.* at 1002, 1009.

228. *Id.* at 1002.

229. See 29 U.S.C. § 666(a), (e) (1970). See note 5 *supra*.

230. 303 U.S. 391 (1938). See notes 105-123 and accompanying text *supra*.

231. 518 F.2d at 1010. To the extent that this passage rested on *Mitchell* as authority for the proposition that it is too late to argue that Congress’ regulatory choices are restricted by state action, it doubtless referred to *Mitchell*’s tacit restriction of the older dogma that any federal sanction meant to coerce conduct rather than raise revenue fell within the states’ police powers and was beyond Congress’ authority to impose. That dogma is perhaps best represented by *United States v. Constantine*, 296 U.S. 287 (1935), see notes 93-99 and accompanying text *supra*, in which the Court characterized a federal excise tax on persons violating local liquor laws as:

a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution. We think the suggestion has never been made—certainly never entertained by this court—that the United

The Fifth Circuit then confronted the sixth and most suggestive of the factors listed in *Mendoza-Martinez*—whether a purpose other than punishment may rationally be attributed to the challenged sanction—and refused to apply it. In the apparent belief that application of this test required invalidation of all sanctions except those that most effectively further the goals sought to be achieved by the enacting legislature, rather than providing a principled means for deferring to the regulatory purposes evident in a scheme of enforcement already selected by Congress, the appellate panel explained this refusal as follows:

Unless caution is exercised, [this test] puts the judiciary squarely in the middle of choices as to the kinds of remedies open and those most likely to achieve the legislative aim. What do Judges know about hazards of industry save what they see in the tragic case after the event of death or injury? Congress meant to put an end to the maiming or death of thousands. What facilities do Judges have for making inquiry into or evaluating what is the method best calculated to bring about the saving of life and limb?²³²

Having thus refused to attempt an express rational attribution, the Fifth Circuit nonetheless tacitly proceeded to make such an attribution in its disposition of the seventh and final factor of excessiveness in light of any alternative nonpenal purpose that might be assigned to the challenged sanction. The court purported to find that the \$600 penalty exacted from Atlas for failure adequately to cover roof openings that resulted in the death of one of its employees was calculated carefully with reference to “the gravity of the offense, the size of the business, the good faith of the employer and the history of previous violations.”²³³ But in arriving at this conclusion, the appellate panel admitted that comparative excessiveness is a subjective factor. Instead, it simply asserted that the remedial functions obviously served by the civil penalties of OSHA justified their imposition through administrative process.²³⁴

States may impose cumulative penalties above and beyond those specified by state law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens.

Id. at 295-96. See also *United States v. Kahriger*, 345 U.S. 22, 25-26 (1953) (distinguishing *Constantine's* Tenth Amendment discussion on the ground that that case involved a federal tax imposed for violation of state law while the gambling tax sustained in *Kahriger* applied to all persons engaged in the business of wagering, regardless of whether their activity also violated state law).

232. 518 F.2d at 1010 (footnote omitted).

233. *Id.* at 1011.

234. *Id.* at 1010. The court also stated that “we cannot say that [Atlas' \$600] penalty is

Having considered individually each of the factors listed in *Mendoza-Martinez*, the Fifth Circuit should have proceeded to balance them carefully in reaching a decision. It did not do so, however. Instead, it abandoned further reliance on such criteria and elected abruptly to rest on the assumption, advanced by *Helvering v. Mitchell*,²³⁵ that because Congress may impose both civil and criminal sanctions, administrative money penalties are inherently classifiable under the former category. This assumption led directly to the conclusion that Atlas had failed to demonstrate that Congress meant the statute to reprimand rather than regulate:

The focus of the statute—the control of job site safety practices and health conditions—has a demonstrable and legitimate government concern. The fact that the civil enforcement sanctions are inherently disabilities does not alter the nature of the Congressional purpose. And finally the Congressional purpose carefully to establish both civil and criminal sanctions and distinguishable procedures for imposing and reviewing them eliminate any question of congressional intent. As Judge Friendly puts it . . . “When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word.” For these reasons Atlas, despite its strenuous efforts to show the punitive character of OSHA, must fail on this issue.²³⁶

Like that of *Mitchell* itself, this reasoning begged the fundamental question because a statute that regulates may also contain sanctions intended to reprimand. Moreover, that reasoning appeared to ignore the point that the mere presence of a legitimate government concern with job safety and health was irrelevant to the civil-criminal classification issue. Merely because Congress has the power to legislate on a certain subject does not mean that the specific way in which it has legislated is presumptively permissible.²³⁷ Thus, the decision in *Atlas* was

excessive if in the considered judgment of the Administrative Agency it results in improved industrial practices that help to prevent future deaths from falls of [Atlas'] employees.” *Id.* at 1011 (emphasis added). This statement made no sense as a matter of either logic or precedent. Criminal penalties would plainly promote safe practices as well or better and have often been sustained on the basis of this rationale in other statutory contexts. *See, e.g.,* *United States v. Park*, 421 U.S. 658 (1975); *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Illinois Cent. R. R.*, 303 U.S. 239 (1938). The authorized penalty was to be tested for excessiveness on its face, not as applied more leniently in particular instances. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 & n.28 (1963). Moreover, to defer to the agency's judgment of excessiveness was to subordinate the Sixth Amendment to administrative discretion. *See* note 215 *supra*.

235. 303 U.S. 391 (1938). *See* notes 105-123 and accompanying text *supra*.

236. 518 F.2d at 1011 (footnotes omitted) (quoting *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414, 421 (2d Cir. 1974)).

237. *See* notes 155-159 and accompanying text *supra*.

not merely based on reasons as conclusory as those expressed in *Irey*, but it also rested on virtually the *same* reasons as those expressed in *Irey*, though they were reached by a different route.

C. General Observations

Against the backdrop of prior case law, the *Irey* and *Atlas* decisions raised a distinct possibility that the Supreme Court would consider them in yet another attempt to reconcile its prior efforts to distinguish civil from criminal sanctions. Petitioners for certiorari powerfully asserted that the Fifth Circuit in *Atlas* abdicated its responsibility by refusing to explore rational nonpenal purposes for OSHA's "civil" sanctions,²³⁸ and that the Third Circuit in *Irey* had given unduly conclusive weight to legislative labels. Moreover, petitioners maintained, *Irey* permitted the government to determine their constitutional protections, since the "willful" violation in that case allowed the enforcers of OSHA to proceed either criminally or civilly, despite the fact that the employer's conduct and the resulting corporate sanction would be identical.²³⁹

Perhaps for comprehensive regulatory schemes, the practical test was the formula of Judge Friendly quoted in *Atlas*. That formula essentially implied that the generic impact of money sanctions designated as "civil" was insufficient to require the invalidation of an enforcement structure crafted by Congress.²⁴⁰ This formula could not be completely dispositive of all challenges, however, because even limited civil money sanctions might produce deleterious effects far exceeding those arising from, for example, a ten-day jail sentence.²⁴¹ Nevertheless, short of im-

238. Petition for certiorari at 13-18 & n.8, *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

239. Petition for certiorari at 18-21, *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1975), *aff'd*, 430 U.S. 442 (1977); Petitioners' [Joint] Reply Memorandum in Support of Certiorari at 2-5, *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1975), *aff'd*, 430 U.S. 442 (1977); *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

240. See note 236 and accompanying text *supra*. Cf. *Argersinger v. Hamlin*, 407 U.S. 25, 32-34, 36-37 (1972) (implied no Sixth Amendment right to counsel for "criminal" offenses not resulting in imprisonment or other loss of liberty). See also *Ingraham v. Wright*, 430 U.S. 651, 675-82 (1977) (the "aberration" of occasionally severe corporal punishment in public schools held insufficient, in light of perceived restraints created by state tort law, to require prior due process hearings before all such punishment could be imposed). As these rulings and that of *J.B. Williams* suggest, it is the inherent or generic effect of a prescribed sanction, not the particular effects resulting from its specific applications, with which threshold inquiries should be concerned.

241. Even a \$10,000 penalty—the maximum civil sanction authorized by OSHA for a first-instance offense, see note 5 *supra*—might afflict marginal proprietors with bankruptcy

prisonment, denationalization or sanctions of equal generic impact, Judge Friendly's test might appropriately limit inquiries regarding the constitutional status of sanctions to the issue of their effect as applied.²⁴² Moreover, within that restrictive as-applied framework, which largely precludes successful Sixth Amendment challenges to the civil penalties provided by other regulatory statutes²⁴³ as well as OSHA,²⁴⁴ a

and such secondary effects as mortgage foreclosures on personal homes and property. In view of this country's "traditional aversion to imprisonment for debt," *Spies v. United States*, 317 U.S. 492, 498 (1943), the more drastic specter of working one's natural life to satisfy regulatory penalties exacted for violations of safety and health standards might be difficult to assuage by asserting that civil due process protections are sufficient. *See also* *Argersinger v. Hamlin*, 407 U.S. 25, 51-52 (1972) (Powell, J., concurring). The federal code tacitly recognizes this difficulty by drawing a nonconstitutional distinction between misdemeanors requiring full criminal safeguards and "petty" misdemeanors involving the sanctions of imprisonment for not more than six months or fines of not more than \$500, for which such safeguards are not statutorily required. 18 U.S.C. §§ 1(3), 3006A(b) (1976). *See also* *Argersinger v. Hamlin*, 407 U.S. at 45 n.2; *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970). However, as indicated *infra*, the difficulty is important in the Sixth Amendment context only if severity is the *controlling* consideration, rather than merely one of a cluster of relevant factors. The latter proposition would seem to comport best with the dicta in more recent cases. *See* *Flemming v. Nestor*, 363 U.S. 603, 616 n.9 (1960) (severity of sanction not determinative of penal character); *Trop v. Dulles*, 356 U.S. 86, 96 n.18 (1958) (severity, in conjunction with other circumstances, is relevant in deciding whether a law is punitive). *See also* *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-90 (1974); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

242. In *Muniz v. Hoffman*, 422 U.S. 454 (1975), the Court applied precisely this test. It held that a \$10,000 criminal contempt fine against a union did not warrant Sixth Amendment jury-trial protections because:

we cannot accept the proposition that a contempt must be considered a serious crime under all circumstances where the punishment is a fine of more than \$500, unaccompanied by imprisonment. It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than \$500 is contemplated. . . . This union . . . collects dues from some 13,000 persons; and although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to jury trial it might have

Id. at 477. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court similarly indicated that the proper test for Sixth Amendment counsel requirements was whether imprisonment was likely to occur as the particular provision was applied, rather than whether imprisonment was authorized. *Id.* at 38-39 & n.10.

243. *See, e.g.*, Coal Mine Health & Safety Act of 1969, 30 U.S.C. § 819(a)(1) (1970); Highway Traffic Safety Act, 15 U.S.C. § 1398(a) (1976); Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136/(a)(1) (1976).

244. OSHA's civil penalties must take into account the cited employer's size, good faith safety efforts and past safety history, as well as the gravity of the violation in terms of numbers of employees exposed to danger and the duration of their exposure. *See* 29 U.S.C. § 666(i) (1970). Due to these statutory factors, penalties proposed by the Secretary for first-instance violations have generally been far below the potential maxima prescribed. From July 1, 1975, through April 30, 1976, for example, they averaged \$617 for serious violations, \$409 for repeated and willful violations, and \$12 for non-serious violations. Occupational Safety and Health Admin., Data Center, June 1976. Generally speaking, relatively low

proper rational attribution test can be useful. Where the congressional intent evinced by the legislative history underlying the challenged sanction is not clearly punitive, the presence of a significant nonpenal purpose to which that sanction may realistically be attributed might well be controlling. This result would seem to follow whether the justifying purpose appears on the face of the statute or may be inferred from its legislative development.²⁴⁵

penalties have also been proposed for failures to abate in accordance with prior orders, since the Secretary's policy has been to reinspect swiftly and proceed to file non-abatement notices or seek summary enforcement of outstanding orders, rather than permitting daily penalties to accumulate indefinitely. See 29 U.S.C. §§ 659(b), 660(b), 666(d) (1970). See also *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 321-22 (6th Cir. 1975), *cert. denied*, 425 U.S. 991 (1976). That substantial penalties may nevertheless accumulate between issuance of an order and re-inspection by government agents would appear to create no independent claim to criminal safeguards where continued violation with notice of an outstanding final abatement order is involved. See generally *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 233-38 (1975); *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1118-21 (2d Cir. 1975); *United States v. J. B. Williams Co.*, 498 F.2d 414, 438-39 (2d Cir. 1974). As these cases indicate, such conduct is the administrative analogue of civil contempt, but nevertheless triggers less grave sanctions than the conditional imprisonment occasioned by an act of contempt. Cf., e.g., *Muniz v. Hoffman*, 422 U.S. 454 (1975), *discussed in* note 242 *supra*. Indeed, this context of non-abatement is perhaps the only situation where the argument that flat money penalties are remedial and compensatory—designed to preserve the integrity of the statute's enforcement processes and hence to be construed liberally—possesses some intrinsic merit.

245. Careful application of this rational attribution test, which should consider the sanction's logical effect as well as the relationship of that effect to the statute's goals and the power under which Congress acted, would hopefully minimize the possibility of unprincipled conclusions like those reached in *Flemming v. Nestor*, 363 U.S. 603 (1960), *see* notes 144-160 and accompanying text *supra*.

In any event, a compelling non-punitive reason for OSHA's "civil" money penalties may readily be identified. The Act covers nearly sixty-five million workers in five million workplaces, but is funded by current appropriations for less than sixteen hundred inspectors to perform its enforcement tasks. See, e.g., PRESIDENT'S REPORT TO THE CONGRESS ON OCCUPATIONAL SAFETY AND HEALTH FOR 1973, at 57-60 (1975); PUB. L. NO. 94-439, 90 Stat. 1418, 1420-21 (1976). The Congress enacting OSHA was acutely aware of the need to provide a powerful incentive for employer self-compliance because adequate numbers of trained inspectors would be in critically short supply for an indefinite time. See, e.g., S. REP. NO. 91-1282, 91st Cong., 2d Sess. 12, 21-22 (1970), *reprinted in* LEG. HIST., *supra* note 7, at 152, 161-62; H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 22, 31 (1970), *reprinted in* LEG. HIST., *supra* note 7, at 852, 861. See also 116 CONG. REC. 36536 (1970) (remarks of Sen. Saxbe). And it recounted in detail the scope of the drastic problem such compliance was meant to ameliorate:

14,500 persons are killed annually as a result of industrial accidents . . . during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes. In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical

With respect to OSHA's limited "civil" money penalties, however, it was probably unnecessary to reach these refinements. Neither the potential nor the actual effects of those penalties on regulated businesses appear to have been unduly severe.²⁴⁶ Moreover, their alternative nonpunitive purpose—encouraging prompt self-discovery and correction of occupational hazards, rather than inviting employers to await an inspector's appearance before taking steps to protect their employees—did not need to be inferred. It was clear on the statute's face.²⁴⁷

In any event, decisions by courts of appeal uniformly sustaining OSHA's civil penalties continued to be handed down.²⁴⁸ The Supreme Court effectively settled the civil-criminal issue as to OSHA, both by denying certiorari on the Sixth Amendment question in *Atlas* and *Irey* while granting it on a Seventh Amendment question also raised in those cases,²⁴⁹ and by attributing a plainly nonpunitive purpose to identical penalties under the Federal Coal Mine Health and Safety Act

expenses. This "grim current scene" . . . represents a worsening trend, for . . . the number of disabling injuries per million man hours worked is today 20% higher than in 1958. . . .

S. REP. NO. 91-1282, 91st Cong., 2d Sess. 2-4 (1970), reprinted in LEG. HIST., *supra* note 7, at 142-44. See also H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 14-16 (1970), reprinted in LEG. HIST., *supra* note 7, at 844-86. As Senator Dominick, among others, noted: "[W]e could not possibly find enough inspectors to impose upon this vast area . . . and . . . number of people . . . a bill which people will not voluntarily comply with in a great majority of . . . cases." LEG. HIST., *supra* note 7, at 471. The Act's civil penalties were simply intended to prod employers to engage in such voluntary self-enforcement. See text accompanying note 247 *infra*.

246. See note 244 *supra*.

247. See, e.g., *Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1292 (6th Cir. 1976); *Brennan v. OSHRC (Interstate Glass Co.)*, 487 F.2d 438, 441 (8th Cir. 1973).

Though differently phrased, Professor Goldschmid's test has the same basic thrust as that suggested by the preceding two text paragraphs:

Money penalties designated "civil" by Congress should be beyond serious [constitutional] challenge if they: (1) are rationally related to a regulatory . . . scheme; (2) do not deal with offenses which are mala in se (i.e., homicide, rape, robbery and other crimes which are traditionally and widely recognized outrages and threats to common security); (3) may be expected to have a prophylactic or remedial effect.

Goldschmid, *supra* note 22, at 914-15.

248. *Mohawk Excavating, Inc. v. OSHRC*, 549 F.2d 859, 862-63 (2d Cir. 1977); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 455-56 (10th Cir. 1976); *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 325 (6th Cir. 1975), *cert. denied*, 425 U.S. 991 (1976); *Bloomfield Mechanical Contracting, Inc. v. OSHRC*, 519 F.2d 1257, 1263 (3d Cir. 1975); *Beall Constr. Co. v. OSHRC*, 507 F.2d 1041, 1044 (8th Cir. 1974); *American Smelting & Ref. Co. v. OSHRC*, 501 F.2d 504, 515 (8th Cir. 1974). Cf. *Underhill Constr. Corp. v. Secretary of Labor*, 526 F.2d 53, 57 n.10 (2d Cir. 1975).

One state supreme court has reached similar results vis-à-vis analogous state provisions, with no more extended explanation. *Fry Roofing Co. v. Colorado Dep't of Health Air Pollution Variance Bd.*, 553 P.2d 800, 805-06 (Colo. 1976) (en banc).

249. *Atlas Roofing Co. v. OSHRC*, 424 U.S. 964 (1976).

of 1969.²⁵⁰ Moreover, in rejecting a Seventh Amendment civil jury trial claim in *Atlas Roofing Co. v. OSHRC*,²⁵¹ the Court appeared actually to adopt the as-applied analysis suggested above, citing *Muniz v. Hoffman*²⁵² for the proposition that “if the fines involved in these [OSHA] cases were made criminal fines instead of civil fines . . . [t]he Sixth Amendment would then govern the employer’s right to a jury *and under our prior cases no jury trial would be required.*”²⁵³ This statement implies that the limited effect of statutorily-restricted money penalties may be sufficient per se to preclude application of *all* the Sixth Amendment’s safeguards, even where the stigmatizing influence of an express criminal label is involved.²⁵⁴ The presence of a nonpenal purpose to which OSHA’s lesser regulatory sanctions may also be referred only strengthens that conclusion.

Conclusion

Issues of classification are always difficult, since the very concept of a class involves abstractions which are inherently arbitrary in the sense that a fairly wide range of distinguishing characteristics is usually available, any of which might be made controlling by mutual agreement. In jurisprudential terms, classification involves linedrawing, and a priori assumptions underlying the lines actually drawn are constantly being challenged by hard cases. Those difficulties are magnified in the

250. 30 U.S.C. §§ 801-878 (1970). Section 109 of the Coal Act, 30 U.S.C. § 819(a)(1) (1970), chiefly authorized imposition of “civil” penalties of up to \$10,000 for each violation of mandatory mine safety or health standards. The Court unanimously stated that this section’s

importance . . . in the enforcement of the Act cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations . . . have been abated . . . before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

National Independent Coal Operators’ Ass’n. v. Kleppe, 423 U.S. 388, 401 (1976).

251. 430 U.S. 442 (1977).

252. 422 U.S. 454 (1975). See note 242 *supra*.

253. 430 U.S. 442, 460 n.15 (1977) (emphasis added). See also *Ingraham v. Wright*, 430 U.S. 651, 677-82 (1977).

254. The Court has repeatedly suggested that the right to a criminal jury trial may be paramount among the protections afforded by the Sixth Amendment. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 152-53, 157 (1973); *Baldwin v. New York*, 399 U.S. 66, 72 (1970); *Williams v. Florida*, 399 U.S. 78, 86-87, 100-01 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Dimick v. Scheidt*, 293 U.S. 474, 485-86 (1935). But cf. *McKeiver v. Pennsylvania*, 403 U.S. 528, 540-41 (1971) (Fourteenth Amendment does not require jury trial in quasi-criminal state juvenile proceedings).

civil-criminal area, where classification becomes necessary to determine whether specific constitutional strictures apply to the procedures used to enforce a given sanction. Indeed, most of the criteria applied by the Supreme Court to determine whether an Act of Congress is "penal or regulatory,"²⁵⁵ and hence outside the ambit of the Sixth Amendment, have not really grappled with the critical problems of congressional and judicial power inherent in that determination. That a statute imposes affirmative restraints for violations of its provisions, or "prescribes the consequence that will befall one who fails to abide by . . . regulatory provisions,"²⁵⁶ can scarcely be dispositive. These functions are performed by all sanctions. Nor, for example, can meaningful classification rest on the fact that the violative conduct is elsewhere made criminal, or that Congress has simultaneously prescribed two sanctions for such conduct and designated only one as penal. Except in the most indirect way, these elements do not define the status of the sanction being challenged. Congress' undoubted power to create civil and criminal sanctions for the same conduct cannot foreclose further analysis, if the Amendment is to remain a meaningful safeguard of individual rights. The decisions purporting to apply these criteria to easy cases in which the challenged sanction was severe by any standard have obscured more relevant modes of analysis, both because they focus upon peripheral factors and because they apply inconsistently the very criteria that they announce.²⁵⁷ Decisions dealing with borderline cases have compounded these difficulties by rote repetition of slogans developed in the easier decisions, without engaging in further reasoning or recognizing the problems inherent in the results such slogans yield.²⁵⁸

Of course, the Court's unprincipled approach to the civil-criminal classification issue may be at least partially explained, if not justified, by reference to the historical setting of its various rulings. Thus, for example, in an era of small government, decisions striking down federal regulatory sanctions because they coerce conduct and hence invade state police powers become at least understandable.²⁵⁹ Decisions like *United States ex rel. Marcus v. Hess*²⁶⁰ or *Flemming v. Nestor*²⁶¹ may be

255. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

256. *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion).

257. See notes 28-159 and accompanying text *supra*.

258. See notes 160-205 and accompanying text *supra*.

259. See, e.g., *United States v. Constantine*, 296 U.S. 287 (1935). See also *Bailey v. Drexel Furniture Co. (Child Labor Case)*, 259 U.S. 20 (1922).

260. 317 U.S. 537 (1943). See notes 124-134 and accompanying text *supra*.

261. 363 U.S. 603 (1960). See notes 144-159 and accompanying text *supra*.

ascribable to external pressures generated by the Second World War and McCarthyism.²⁶² But reference to history explains neither the lack of meaningful analysis in these decisions, nor the Court's continued failure to develop a consistent principle by which to determine the status of sanctions alleged to require criminal safeguards for their imposition. To suggest that monetary sanctions are intrinsically penal,²⁶³ and then deem them to be inherently civil and remedial,²⁶⁴ scarcely furthers the assumption of predictable continuity on which the concept of a judge-made body of constitutional law ought to rest. To say that there is no constitutional difference between criminal fines and civil monetary forfeitures²⁶⁵ or to hold that the safeguards of criminal process are necessary where Congress employs forfeitures to reach guilty conduct,²⁶⁶ but almost immediately thereafter to rule that forfeitures intended to punish both innocent and culpable persons are "civil" in character,²⁶⁷ is to deny the citizen procedural protections to which he appears properly entitled.

However, as in non-constitutional areas,²⁶⁸ much light may be shed by considering what function is performed by the very act of classifying sanctions as civil or criminal. Put starkly, the Sixth Amendment's fundamental purpose is to provide the most stringent procedural safeguards only in those instances where the severity of the sanction being imposed warrants conferring such protection upon the individual being sanctioned.²⁶⁹ Apart from prosecutions for felony and similar

262. Indeed, in *Nestor*, a dissenter observed:

The fact that the Court is sustaining this action indicates the extent to which people are willing to go these days to overlook violations of the Constitution perpetrated against anyone who has ever even innocently belonged to the Communist Party. . . . [Nestor], now 69 years old, has been driven out of the country . . . under an Act authorizing his deportation many years after his Communist membership Now a similar *ex post facto* law deprives him of his insurance . . . in accord with the general fashion of the day—that is, to punish in every way possible anyone who ever made the mistake of being a Communist in this country. . . .

363 U.S. at 622, 627 (Black, J., dissenting). See also *id.* at 632-34 (Douglas, J., dissenting).

263. See, e.g., *United States v. Constantine*, 296 U.S. 287 (1935); *United States v. La Franca*, 282 U.S. 568 (1931); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Helwig v. United States*, 188 U.S. 605 (1903). See notes 67-104 and accompanying text *supra*.

264. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938). See notes 105-134 and accompanying text *supra*.

265. *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971). See notes 167-176 and accompanying text *supra*.

266. See *id.* at 721-22 & n.8.

267. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See notes 186-205 and accompanying text *supra*.

268. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

269. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Frankfurter & Corco-*

situations in which the correct classification is obvious, this principle cannot by itself resolve concrete cases. But in light of this principle, two factors that have been utilized by the courts in this sphere—scrutiny of legislative intent and consideration of the challenged sanction's effect—assume a decisive importance. The Court has often exhibited a willingness to defer to specific expressions of legislative intent in its effort to determine other constitutional issues, notwithstanding the facially suspect nature of the particular provision being challenged.²⁷⁰ Depending on one's perspective, such deference may either be hailed as a return to "the original constitutional proposition,"²⁷¹ or decried as an abdication of the judiciary's responsibility under article three of the Constitution.²⁷² The fact remains that insofar as legislation enacted by Congress reflects the will of society, and insofar as Congress is the forum constitutionally designated to strike the initial balance between those sanctions requiring the procedural safeguards of the Sixth Amendment and those for which "a swift and [more] convenient remedy" should prevail,²⁷³ its intent clearly is relevant. This is particularly true where the sanctions at issue are limited money penalties exacted for regulatory offenses that carry no moral stigma, and that have consistently been treated, in colonial as well as present practice, as "petty" violations having effects that are insufficient to invoke the Sixth Amendment's mandate.²⁷⁴ Indeed, in the area of social regulation intent and effect appear inextricably intertwined, since the purpose of a congressionally-prescribed program and its implementing sanctions will generally determine the extent to which

ran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926) [hereinafter cited as Frankfurter & Corcoran], cited in *Baldwin v. New York*, 399 U.S. 66, 68 n.5 (1970). See also *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975).

270. See, e.g., *Califano v. Webster*, 430 U.S. 313, 317-20 (1977) (social security statute favoring females over males in computation of old age benefits; court deferred to congressional judgment regarding the need to remedy past gender-based discrimination); *United States v. Watson*, 423 U.S. 411, 415-16, 423-24 (1976) (court deferred to congressional judgment that it is reasonable to have a postal agent make an arrest without a warrant).

271. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

272. See, e.g., *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1208, 1213-14 (3rd Cir. 1974) (Gibbons, J., dissenting).

273. Frankfurter & Corcoran, *supra* note 269, at 927. See also *id.*, at 928-33, 936, 953-54, 961, concluding that despite regulatory fines as high as 500 pounds "the settled practice in which the founders of the American colonies grew up reserved for the justices [of the peace] innumerable cases in which the balance of social convenience, as expressed in legislation, insisted that proceedings be concluded speedily and inexpensively." *Id.* at 933.

274. See Frankfurter & Corcoran, *supra* note 269, at 968, 981; *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Schick v. United States*, 195 U.S. 65 (1904). See also 18 U.S.C. § 1(3) (1970); Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401 (1958) [hereinafter cited as Hart].

society will attach a stigma to sanctioned violations.²⁷⁵ In this fully-articulated sense, the Court's somewhat nebulous distinction between "penal" and "regulatory" statutes does have meaning.

This analysis suggests distinct criteria which may generally be employed to determine whether a regulatory sanction that Congress has labeled "civil" is sufficiently criminal in effect to require implementation of the safeguards of the Sixth Amendment as a prerequisite to its imposition. It also suggests ordered relationships between these criteria. Where the sanction's facial impact on those regulated is not so severe as to "shock the conscience"²⁷⁶ and a nonpunitive purpose, reasonably related to the statute's aims and to the constitutional power under which Congress acted, may fairly be inferred from the text of the enactment itself, that determination should end further inquiry. Where a rational nonpunitive purpose may not easily be attributed to the sanction on its face, resort to analysis of subjective congressional intent, as indicated by the legislative history, will usually supply either the justifying inference or a sound basis for it. Of course, the cardinal rule in this area is that the existence of any state of facts that may reasonably be presumed to justify the enactment suffices to validate it, even if Congress never considered such facts at the time of enactment.²⁷⁷ Beyond that presumption, allegations that a regulatory sanction's effect on particular persons warrants the heavy social costs of implementing the Sixth Amendment's safeguards would appear appropriately to be relegated, on an ad hoc basis, to the "gradual process of judicial inclusion and exclusion"²⁷⁸ that has been one of the great bulwarks of our constitutional jurisprudence. That evolutionary, case-by-

275. Where Congress means to impose formal punishment, the sanctions and procedures employed will generally be perceived as invoking the stigma associated with condemnation. *Cf., e.g.,* *Flemming v. Nestor*, 363 U.S. 603, 632-33, 634-35 (1960) (Douglas & Brennan, JJ., dissenting). Where it means only to enforce responsibility rather than attach blame, it seems fair to assume that the same type of stigmatization will not generally result. *See* Hart, *supra* note 274, at 402-06.

276. *Rochin v. California*, 342 U.S. 165, 172 (1952).

277. For general statements to this effect in the context of decisions involving analogous equal protection claims, *see, e.g.,* *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Morey v. Doud*, 354 U.S. 457, 463-64 (1957); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-89 (1955).

278. *Perez v. Brownell*, 356 U.S. 44, 60 (1958) (plurality opinion) (quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877)). *Cf. Ingraham v. Wright*, 430 U.S. 651, 680-82 (1977) (societal burden of requiring a hearing prior to imposition of corporal punishment in public schools precludes the Court from mandating such a hearing as a constitutional requirement). For an example of such a process in the context of the Fourth Amendment, *compare* *See v. Seattle*, 387 U.S. 541, 545-46 (1967) *with* *United States v. Biswell*, 406 U.S. 311, 315-17 (1972).

case approach seems especially fitting where alleged individual grievances may promptly be reviewed by a centralized administrative agency expressly designated to determine the facts on which such allegations are based.²⁷⁹

279. See *N.L.R.B. v. Weingarten*, 420 U.S. 251, 265-67 (1975). See also *Keystone Roofing Co. v. OSHRC*, 539 F.2d 960, 963-64 (3rd Cir. 1976); *In re Restland Memorial Park*, 540 F.2d 626, 628 (3rd Cir. 1976).