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**Redrawing the Criminal-Civil Boundary**  
Susan R. Klein

**Buffalo Criminal Law Center**  
STATE UNIVERSITY OF NEW YORK AT BUFFALO

# Redrawing the Criminal-Civil Boundary

Susan R. Klein\*

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## INTRODUCTION - THE PROBLEM

"[T]he idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every American lawyer and to most citizens."<sup>1</sup>

Law is fundamentally about boundaries. One of the most profound boundaries our justice system has drawn is that between the terrain of civil and criminal law. Conventional wisdom tells us that public criminal law punishes those who wrong society, in order to impose "just desserts" upon the wrongdoer and deter others from engaging in similar behavior. On the other hand, private civil law provides a remedy to individuals or entities harmed

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\* Baker and Botts Professor of Law, University of Texas at Austin. My thanks to Michael Churgin, Douglas Laycock, Robert Weisberg, and my research assistant, Krisan Patterson

1. *United States v. United Mine Workers*, 330 U.S. 258, 364 (1974) (Rutledge, J., dissenting).

by other individuals or entities, in order to make them whole. There are at least two critical consequences of falling on the criminal side of this great divide. The criminal label carries with it the moral condemnation of the community, a stigma generally not accompanying a civil judgment against the defendant. Because both the stigma from being labeled a "felon" and the harm suffered by the defendant from the punitive sanction is so great, the federal Constitution grants a criminal defendant a vast array of procedural protections not afforded a defendant in a civil action.

I say that "conventional wisdom" tells us that we can easily draw such boundaries because, though this may have been so at one time, it is true no longer. To maintain a system that grants special procedural protections only to defendants in criminal proceedings, we must be able to distinguish the criminal from the civil. This task has become impossible, as we develop so-called "hybrid" actions. These actions, unforeseeable to the framers of our Constitution, combine features from the civil and criminal sides of the divide. For example, does the state revoke a drunken driver's license to punish the driver and deter him and others from similar conduct, or to ensure highway safety, or a little bit of both? Is debarment from one's livelihood as a stock broker by the Securities & Exchange Commission a public action stigmatizing the defendant, or a private remedy? I maintain that these new actions are neither wholly civil nor entirely criminal, but are more like an old style Chinese menu, where the patron selects one entree from column A and two from column B. Instead of recognizing this, the Court has attempted to maintain the bright line between civil and criminal actions, taking on a greater philosophical challenge than it can handle.

The Court has long struggled with the issue of whether a state-initiated proceeding imposing a sanction ought to require some or all of the procedural protections ordinarily reserved for criminal trials. However, the recent and enormous increase in the enactment of, and litigation surrounding, nominally "civil" statutes which impose what appear to be "punitive" sanctions requires a definitive, or at

least intelligible, response. Unfortunately, the Court has been inconsistent both in declaring whether the imposition of punishment is the feature which marks a given proceeding as "criminal" rather than "civil," and in providing a definition or developing a theory of "punishment." Early in the history of our Republic,<sup>2</sup> and again briefly during the Warren Court's heyday,<sup>3</sup> the Supreme Court exhibited a willingness to find that certain sanctions that the legislature denominated "remedial" and attempted to impose in civil proceedings were actually punitive, and therefore could not be imposed absent the full array of criminal procedural protections required by the Constitution. By the late 1970s, the Court completed a shift in the other direction. While it still believed that the imposition of punishment would require a criminal trial, it docilely accepted at face value the "civil" label attached to a proceeding: if the legislature said the sanction had a non-punitive purpose, the Court agreed.<sup>4</sup>

2. *Boyd v. United States*, 116 U.S. 616 (1886) (compelled production of documents in civil forfeiture action violated Fourth and Fifth Amendments because sanction was punitive), questioned and limited by *United States v. Ward*, 448 U.S. 242 (1980) ("This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd*, noting . . . 'Boyd's express or implicit declarations have not stood the test of time.'" (citation omitted); *Coffey v. United States*, 116 U.S. 436 (1886) (holding that acquittal on criminal charge concerning taxes on distilled liquor barred subsequent civil forfeiture suit because latter had punitive purpose), overruled by *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). But see *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (deportation, however severe its consequences, is not punishment and is therefore a civil proceeding).

3. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963) (invalidating a statute that revoked the citizenship of those evading the draft, stating that "this punishment cannot be imposed without a prior criminal trial and all its incidents"); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (Fourth Amendment's exclusionary rule applies to civil forfeiture because imposition of punitive sanction for commission of offense made proceeding quasi-criminal in nature); *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971) (privilege against self-incrimination applied to civil tax proceeding because purpose of the forfeiture was to penalize persons involved in criminal enterprises). Though these three cases are part of the Warren Court's legacy, the last was written under Chief Justice Burger. The two forfeiture cases, *One 1958 Plymouth Sedan* and *U.S. Coin and Currency*, have not withstood the test of time.

4. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938) (statute imposing an additional 50% penalty on the amount of delinquent taxes only when the deficiency is due to taxpayer's criminal fraud held not to be punitive); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment is not a punitive sanction and therefore does not

Though this passive acceptance of legislative will appears to be the Court's present attitude, from 1989 to 1994 we witnessed two exciting developments: (1) an attempt to draw independent and principled distinctions between punitive and non-punitive sanctions; and (2) the imposition of select criminal procedural protections in otherwise civil proceedings. These developments were in part a response to the increase in the number of administrative agencies and their growing penchant for imposing sanctions for the violation of criminal statutes in civil fora, and in part a response to (or more accurately, a backlash against) severe abuses by the federal government in the civil *in rem* forfeiture area. Through a trio of cases (*United States v. Halper*,<sup>5</sup> *Austin v. United States*,<sup>6</sup> and *United States v. Kurth Ranch*<sup>7</sup>), the Court developed a rough test for determining whether a sanction was punitive, and applied some, (the Fifth Amendment's Double Jeopardy and the Eighth Amendment's Excessive Fines Clauses) but not all criminal procedural protections to nominally civil actions which imposed these punitive sanctions. For a time, it appeared that the Court might develop what Professor Kenneth Mann called "middleground jurisprudence,"<sup>8</sup> and permit certain

punitive sanctions to be imposed in civil actions with heightened procedural protections.

Unfortunately, for the last few terms, beginning with *United States v. Ursery*,<sup>9</sup> *Bennis v. Michigan*,<sup>10</sup> and *Kansas v. Hendricks*,<sup>11</sup> and concluding ultimately in the 1997 term with *Hudson v. United States*<sup>12</sup> and *United States v. Bajakajian*,<sup>13</sup> a more conservative Court has again chosen to abandon or at least muddy these efforts. In the face of the modern melding of the distinction between crimes and civil wrongs, and the Court's realization that it cannot always sensibly distinguish a punitive from a non-punitive sanction, it now routinely blesses whatever label a legislature places on a sanction, and appears to have returned to an "all-or-nothing" approach to the imposition of criminal procedural guarantees to a proceeding. Thus, lifelong imprisonment in a penal institution for those the state determines to be "mentally abnormal" based upon proof of likely future dangerousness,<sup>14</sup> confiscation of virtually all of an owner's personal and real property because they are related to his commission of a criminal offense,<sup>15</sup> confiscation of property legally owned by an innocent property owner because such property was related to a criminal offense committed by someone without the owner's knowledge or consent,<sup>16</sup> and the permanent deprivation of one's livelihood<sup>17</sup> are currently remedial sanctions that can be imposed in civil proceedings, before or after a criminal trial for the same misconduct, without violating the Double Jeopardy Clause, the Ex Post Facto Clause, or substantive due process.

One can readily understand why the Court might wish to defer to the legislature in these cases. Such deference permits the Court to avoid answering difficult questions—

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require that state bear the burden of proof beyond a reasonable doubt); *United States v. Ward*, 448 U.S. 242 (1980) (rejecting claim that civil penalty of \$5,000 for each "grave" violation of criminal water pollution control statute was punitive and that therefore the self reporting requirement violated the privilege against self-incrimination); *Vance v. Terraza*, 444 U.S. 252 (1980) (expatriation proceedings are civil and therefore do not require proof beyond a preponderance of the evidence); *United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention of dangerous arrestees serves remedial purpose of protecting the community).

5. 490 U.S. 435 (1989) (civil in personam fine for Medicaid fraud that was 220 times government's actual loss served retributive and deterrent rather than solely remedial purpose).

6. 509 U.S. 602 (1993) (civil in rem forfeitures under the federal controlled substances statutes are punitive for purposes of Excessive Fines Clause because of retributive or deterrent purpose).

7. 511 U.S. 767 (1994) (state tax on marijuana after criminal conviction for same offense barred by double jeopardy clause).

8. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992) (suggesting that we move to some compromise or combination of criminal and civil procedures for those civil actions which attempt to impose punitive sanctions).

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9. 518 U.S. 267 (1996) (argued 1996 term).

10. 516 U.S. 442 (1996) (argued Oct. 1995 term).

11. 521 U.S. 346 (1997) (argued Oct. 1996 term).

12. 522 U.S. 93 (1997) (argued Oct. 1997 term).

13. 524 U.S. 321 (1998) (argued Oct. 1997 term).

14. *Hendricks*, 521 U.S. 346.

15. *Ursery*, 518 U.S. 267.

16. *Bennis*, 516 U.S. 442.

17. *Hudson*, 522 U.S. 93.

what is the nature of a punitive versus a remedial sanction? Should the label depend solely upon the intent of the legislature, the effect of the sanction upon the recipient, the view of society as a whole, or some combination thereof? If we can distinguish a remedial from a punitive sanction, should all or select constitutional criminal procedural guarantees be mandated for a proceeding seeking to impose a punitive sanction? If we cannot sensibly distinguish remedial from punitive sanctions, what kinds of procedures should we use before imposing sanctions that are arguably punitive?—to name just a few. I will not provide answers to these questions by formulating a comprehensive theory to distinguish “criminal” from “civil” actions. In fact, I believe such a distinction to be exceedingly difficult as a conceptual matter for a philosopher to draw, and next to impossible as a practical matter for a judge to implement. My goal in this essay is much more modest: I simply intend to point out some of the serious repercussions of the Court’s decision to cabin all actions into one of these two categories, and suggest that we begin to consider alternative conceptualizations of forms of actions and the procedures that accompany them.

In Part I of this essay, I will describe our shared historical understanding of what makes a trial criminal rather than civil and a sanction punitive rather than remedial. I will then outline the social and legal changes that have served to make our traditional distinctions unstable and untenable. In Part II, I will review and critique the various sea changes by the Court in interpreting when a sanction is sufficiently punitive to warrant constitutional criminal procedural protections, focusing on the Court’s 1995-1997 Terms. In Part III, I will note two probable effects of the Court’s decisions in this area. Given that criminal procedural protections are expensive and time-consuming, I predict an increasing number of formerly punitive sanctions imposed in criminal proceedings will be magically transformed by legislatures into remedial sanctions appropriate for civil fora. Less cynically, new and innovative proceedings will receive the “civil” appellation from legislatures as a matter of course. This, in turn, may lead to

surprising developments in Fourth, Fifth, and Sixth Amendment jurisprudence. For example, if those statutes labeled civil by the legislature are indeed treated as civil by the Court, then the more lenient fourth amendment tests designed for civil investigations and proceedings may be applicable, the privilege against self-incrimination may be unavailable when such proceedings are threatened, and the right to counsel would not attach once such a proceeding is initiated.

I conclude that the Court’s current approach of labeling an action entirely civil or entirely criminal for purposes of determining a defendant’s procedural rights is misguided. If we force the Court to choose, history teaches us that the Court will almost always confirm a civil appellation rather than turning novel and often useful types of proceedings into criminal trials. Moreover, the Court will do so regardless of how it has to define “punishment” in order to reach that result. Finally, such a choice is theoretically unsound, as the sun has set on the day when statutes possessed all of the attributes of a criminal or civil action, rather than a few features that appear civil and a few that appear criminal. I believe that we can best protect against a slow but steady shrinkage in the scope and content of the procedural protections we have come to expect and rely upon by accepting compromise procedures in hybrid actions.

#### I. THE CRIMINAL-CIVIL DIVIDE AND ITS LEGAL AND SOCIAL COLLAPSE

Conventional wisdom, impressed upon every first-year law student, is that criminal and civil law are distinct. Though the cynical or naive might suggest that the sole difference is the procedure used for investigation and trial, the law professor response is that this difference is a result rather than the cause of the criminal/civil law dichotomy. The modern American<sup>18</sup> paradigm of criminal law is the

18. Though I limit this discussion to the framers’ conception of the distinction between criminal and civil law, I note that most scholars agree that every mature legal system in the world uses this distinction. See, e.g., Paul H. Robinson, *The*

legislative purpose to punish a person for committing a morally culpable act that injures society.<sup>19</sup> Today, such punishment generally consists of the social stigma of being branded a felon along with a potential period of incarceration and fine. This punishment can be imposed only after a criminal trial with all of its attendant procedural trappings—a grand jury indictment, government proof of guilt beyond a reasonable doubt, appointment of counsel, the privilege against self-incrimination, and the exclusion of evidence obtained in violation of the fourth amendment, to name a few. The modern American paradigm of civil law, on the other hand, is the legislative purpose to remedy the commission of a harmful act against an individual or entity. This remedy can take the form of compensation, restitution, or an injunction, and is imposed after a civil adjudication without criminal procedural guarantees.<sup>20</sup>

This division, enshrined in our Bill of Rights, was never quite so neat. For example, in a recent case sanctioning the imposition of exemplary damages, the Court tells us that such damages in civil tort actions were known to the founding fathers in 1791.<sup>21</sup> If true, this obviously takes the plaintiff well beyond the remedial function of civil law. As early as 1922, the Court permitted legislatures to define

“strict liability” crimes which impose punishment, including imprisonment, in the absence of *mens rea*.<sup>22</sup> The Court held that where the penalty is small and the stigma attached to a conviction for one of these “public welfare” offenses is not great, the Due Process Clause permits the government imposition of punishment absent the ordinary criminal law requirement of a culpable state of mind. These few exceptions, however, were relatively minor, and served only to reinforce the general rule. It is only over the last four decades that the criminal-civil destabilization has become comprehensive and problematic. During this time period, we have seen a significant disintegration of the wall between criminal and civil proceedings on a number of fronts. For simplicity’s sake, I will briefly outline these developments by dividing the statutes into three categories: those that permit private parties to obtain punitive damages which they share with the government; those that permit private parties to intervene in criminal cases; and those that permit the government to use civil fora to impose sanctions upon individuals for behavior that is also proscribed by the criminal law.

The first category, not yet tested by the Court, are new statutes, enacted primarily through state tort reform acts, that mandate that exemplary damage awards in civil tort actions be shared with the state government. The availability of punitive damages in most tort cases is a question of state and not federal law. Though a number of state courts in the 1800s rejected punitive damages in tort cases based on a distinction between the punitive function of criminal law and the compensatory function of civil law,

22. *United States v. Balint*, 258 U.S. 250 (1922); see also *United States v. Park*, 421 U.S. 658 (1975) (prohibiting delivery of adulterated or misbranded drugs in interstate commerce); *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558 (1971) (interpreting statute criminalizing the knowing violation of regulations prohibiting the interstate transportation of sulfuric acid without the necessary shipping papers to require only the defendant knew he was transporting; crime presumes that defendant is aware of the regulations despite his protestations otherwise); *United States v. Freed*, 401 U.S. 601 (1971) (holding imprisonment for ten years for strict liability crime of possessing hand grenades not registered under the National Firearms Act was valid regulatory measure).

Criminal-Civil Distinction and the Utility of Desert, 76 B.U.L. Rev. 201 (1996) (finding criminal-civil distinction in widely disparate legal systems around the world). But cf., James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U.L. Rev. 29 (1996).

19. The overarching purpose of the criminal law is to prevent crime, if possible. It is believed that punishing an individual for violating a criminal statute will convince both her and others not to do so in the future (specific and general deterrence). Even if crime prevention is impossible, however, the retributive and expressive theories justify punishment. See, e.g., J. Baler Jr. et al., *Hall’s Criminal Law* 839-54 (1993).

20. See, e.g., 3 William Blackstone Commentaries 2 (dividing wrongs in civil injuries which infringe upon private rights and crimes which breach public duties); Jerome Hall, *Interrelations of Criminal Law and Torts* (pts. 1 & 2), 43 Colum. L. Rev. 753 (1943) (reviewing fundamental differences between civil and criminal law); Mann, *supra* note 8, at 1813 (providing summary of principal paradigmatic distinctions between civil and criminal law).

21. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989) (Eighth Amendment’s Excessive Fines Clause inapplicable to punitive damages in tort, as the “fine” must be imposed by a governmental authority).

almost all states presently allow these types of damages. The United States Supreme Court, in *Smith v. Wade*,<sup>23</sup> authorized punitive damages in federal civil rights cases, and, as mentioned earlier, recently pronounced that such damages have been imposed since the founding of our Republic.<sup>24</sup> In a series of recent cases regarding procedural and substantive due process limits on punitive damages, the Court assumed that the basic choices about punitives are matters of state law, though there are constitutional boundaries beyond which the States may not go.<sup>25</sup> The issue of whether these new statutes mandating the sharing of bounty with the government exceed constitutional boundaries has generated conflicting lower court opinions.<sup>26</sup> Here we are mixing a number of features from both sides of the divide: civil procedures coupled with punitive sanctions, and a private plaintiff who is, in a sense, acting on behalf of the state government.

The second category, generated by the recent Victims' Rights movement, formally grants to non-governmental actors the right to participate in what are otherwise public criminal matters. Victims now wish to represent themselves in criminal proceedings, rather than rely upon a public prosecutor to represent the entire community. They further wish to utilize the criminal rather than civil process to be

23. 461 U.S. 30 (1983).

24. See *Browning-Ferris*, 492 U.S. 257.

25. See, e.g., *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996) (substantive due process prohibits a state court from imposing a "grossly excessive" and therefore "arbitrary" award against a defendant); *TXO Prod. Corp. v. Alliance Resource Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

26. *Mack Trucks v. Conkle*, 436 S.E.2d 635, 637-40 (Ga. 1993) (upholding a provision that gave the state 75% of a single punitive damage award in products liability cases); *Perk v. Denver Publishing Co.*, 1818 P.2d 262 (Colo. 1991) (striking down a generally applicable statute that gave one-third of all punitive damage awards to the state as violative of the takings clause); *Gordon v. State*, 608 So.2d 800 (Fla. 1992) (upholding a general applicable statute that gave 60% of punitive damage awards to the state); *Shepherd Components v. Brice Petrides-Donohue & Assoc.*, 473 N.W.2d 612, 618-19 (Iowa 1991) (upholding statute awarding 75% of punitive damages in products liability cases to the state because a mass-produced project endangers the whole public, and thus the lucky first plaintiff should share the single award of punitive damages with the public).

made whole. For example, the federal criminal justice system now mandates the imposition of restitution against a criminal defendant for the victims of his crime.<sup>27</sup> The federal government and many states now also require that victims, or their families, be given the opportunity to submit a "victim impact statement" prior to a federal judge's acceptance of a guilty plea or imposition of sentence.<sup>28</sup> The federal government has even considered amending the U.S. Constitution to include a victims' bill of rights, and several states have already amended their constitutions in this manner.<sup>29</sup> These developments begin to transform a proceeding that is supposed to be about a wrong to society into a proceeding about the harm to and compensation of individual private victims. It seems to me that criminal sentencing ought to be concerned primarily, if not exclusively, with determining a defendant's moral culpability. Issues such as whether the victim is a drug dealer rather than the family breadwinner, whether the survivors, if any, can eloquently evoke sympathy,<sup>30</sup> and whether or not a defendant has the ability to reimburse a victim for damages he caused,<sup>31</sup> have little bearing upon the defendant's guilt.

The last and most significant category is the government's increasing use of the civil setting to sanction individuals for behavior that is also proscribed by the criminal law. Much of the burgeoning litigation in this area

27. 42 U.S.C. § 10606(b)(4) (1995); 1996 Mandatory Victims' Restitution Act, 18 U.S.C. Code 3663(a)-3664; upheld in *United States v. DuBose*, 146 F.3d 1141 (9th Cir. 1998).

28. 18 U.S.C. § 3593(1) (1994); *Payne v. Tennessee*, 501 U.S. 808 (1991); Cal. Penal Code § 1191.1 (Deering Supp. 1997).

29. S.J.Res. 6, 105th Cong., 1st Sess. (1997) (sponsored by Senators Jon Kyl and Dianne Feinstein); Cal. Const. art 1, § 28.

30. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996) (arguing that victim impact statements encourage invidious distinctions based upon the personal characteristics of the victims).

31. George P. Fletcher, *With Justice for Some; Victim's Rights in Criminal Trials* 198 (1995) (arguing that victim impact statements, by pitting the defendant against the victim's family, revive a version of privatized justice and, by suggesting that different victims call for different levels of compensation, insert the tort law concept of valuation into the criminal law).



has been undertaken by administrative agencies, whose numbers have risen exponentially. These entities have become necessary to enforce the ever-multiplying and increasingly complex statutes and regulations that Congress and the states continue to enact, particularly in the areas of fraud against the government, and corporate and other business control.<sup>32</sup> On the other hand, a significant percentage of this litigation has been brought by criminal investigative and prosecutive agencies. Like the administrative example, some of these cases are pursued to recover government or private money lost through fraud. A growing number, however, are brought to stop those who violate criminal prohibitions from enjoying their ill-gotten gains. For example, Congress and the states are enacting and enforcing new and more draconian civil forfeiture statutes, money laundering offenses, and nuisance laws.<sup>33</sup> Given the high cost associated with criminal trials, both in terms of money and time, it was inevitable that Congress would turn to civil alternatives. Some view this development as necessary to ensure compliance with the myriad of laws in our complex society. Others view these proceedings less charitably as naked attempts to avoid criminal procedural guarantees.<sup>34</sup> Whichever one's view, however, it cannot be

32. See, e.g., Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 3349 (1994) (permitting administrative penalties of up to \$25,000 per day against covered financial institutions); Insider Trading Sanctions Act of 1984, 15 U.S.C. § 78u-1(a)(2) (1988) (providing for a civil penalty of up to three times the profit made on a trade using illegal inside information); Civil False Claims Act, 31 U.S.C. §§ 3729-3731 (1994) (imposing double damages for government loss through fraud). The General Accounting Office conducted a study of fraud against the government by agency employees and persons receiving benefits from these agencies, and found that administrative sanctions greatly outnumber criminal prosecutions. United States General Accounting Office, *Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled* 28-36 (1981).

33. See, e.g., 18 U.S.C. § 924(d) (1994) (providing for forfeiture of unlawfully distributed firearms); 21 U.S.C. § 881(a)(1) (1994) (provided for forfeiture of controlled substances); 18 U.S.C. § 981 (1994) (provided for civil in rem forfeitures predicated upon violation of money laundering and currency transaction reporting laws); 31 U.S.C. § 5317(c) (1994) (providing for civil in rem forfeitures predicated upon failure to file or inaccurate filing of International Currency or Monetary Instrument Report).

34. See, e.g., Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82

denied that such actions go far beyond *Balint*, where the defendant received the full panoply of criminal procedural protections outlined in the Bill of Rights; and far beyond exemplary damage awards in tort, where the plaintiff is a private party.

Of the various ways Congress and state legislatures have attempted to mix and match elements from the civil and criminal paradigms, it is the government imposition of punishment in a civil setting which gives us the most pause. The first category of statutes, which allow a private party to deter bad behavior by obtaining punitive damages against a defendant, does not involve the government in a proceeding with a criminal purpose that lacks criminal procedural guarantees. After all, the framers wished to protect individuals from the government, not from private parties and juries of their peers. On the other hand, when the government attempts to punish an individual in a civil forum, it should give us pause, as our federal Constitution guarantees certain procedural protections to defendants in criminal trials. Likewise the second category of statutes, which allow a private party to intervene in a criminal trial, such as was done with the mandatory Victims' Restitution Act, does violence to the symbolic aspect of a criminal trial being solely for the betterment of society, but still requires that the government meet the stricter procedural requirements of a criminal trial.<sup>35</sup> Thus, I will focus on the

Iowa L. Rev. 183 (1996) (suggesting that prosecutors bring parallel civil in rem and criminal forfeiture actions to reap unfair procedural advantages); Marc B. Stahl, *Asset Forfeitures, Burdens of Proof and the War on Drugs*, 83 J. Crim. L. & Criminology 274 (1992) (suggesting that these proceedings violate the due process clause); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 n.2 (1993) (noting with distaste the extent of government's financial stake in civil drug forfeiture actions).

35. The victim both gains and loses by using the Victim's Restitution Act rather than suing in tort. On one hand, she gains no procedural advantage from this act, as the higher standard of proof and all the other constitutional guarantees apply in the criminal trial, and they would not if the plaintiff instead tried to recover in tort. On the other hand, the victim is able to ride on the coattails of the prosecutor when her claim is joined to the criminal proceeding. Moreover, she benefits from a far better collection mechanism—the threat of probation revocation instead of generally futile civil collection methods.



third category of statutes for the remainder of this essay.

## II. A BRIEF HISTORY AND CRITICISM OF THE SUPREME COURT'S RESPONSES

The Court had open to it a number of possible responses to a legislative attempt to achieve criminal justice goals in a civil setting. First, it could disallow all punishments by the government absent a criminal trial; second, it could permit the state free reign to punish and stigmatize in a civil setting; or third, it could allow some of the sanctions that appear punitive to be imposed in a civil setting and apply some of the constitutional protections normally reserved for criminal trials. At first blush, the first option appears to be the cleanest, both practically and theoretically. However, it requires that the Court independently define "punishment" and otherwise distinguish criminal from civil actions, a feat beyond its ability. The second path may appear illegitimate when framed as punishment without appropriate procedures. However, it can be accomplished with more subtlety—instead of admitting that the government is allowed to punish in civil fora, the Court could define "punishment" as a sanction imposed only after a criminal trial. This would still permit the state to impose what we would normally consider punishment, or something close enough to punishment, by a semantic shift. This is where the present Court is headed. I believe that the third option, considered briefly but ultimately rejected by the Court, is the best of the lot.

### A. *The 1880s to The 1980s.*

From the late 1800s, up until almost 1990, the Court considered only the first two "all-or-nothing" alternatives. In the few instances where it found that the State was attempting to impose punishment in a civil proceeding, it labeled that proceeding "essentially criminal" and applied *all* criminal procedural guarantees to it.<sup>36</sup> The number of cases

36. See cases cited *infra* notes 37 and 38. The one exception to this statement is

that fell into this category can be counted on one hand, and included denaturalization proceedings<sup>37</sup> and civil forfeiture proceedings,<sup>38</sup> though those civil forfeiture cases have since been repudiated.<sup>39</sup> The great majority of the time, the Court labeled as "civil" actions that looked suspiciously like they were imposing punitive sanctions, and applied *none* of the criminal procedural protections to such actions. Examples here include statutes imposing large monetary penalties upon an individual for the commission of a crime,<sup>40</sup> providing for involuntary commitment of dangerous mentally ill individuals,<sup>41</sup> establishing expatriation proceedings,<sup>42</sup> and authorizing pretrial detention of dangerous arrestees.<sup>43</sup>

Those few modern cases where the Court did not bow to the civil appellation placed upon an action by the legislature were rendered, not surprisingly, by the Warren Court.<sup>44</sup> In

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the manner in which the Court has treated juvenile proceedings. In a series of cases, the Court has applied most, but not all, constitutional criminal procedural protections to these nominally "civil" actions. See *Breed v. Jones*, 421 U.S. 519 (1975) (bar against double jeopardy prevents a criminal trial against the defendant for the same offense that had formed the basis of an earlier juvenile action against him); *In re Winship*, 397 U.S. 358 (1970) (beyond a reasonable doubt standard of proof applies to juvenile proceedings, as they are essentially criminal); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (juvenile delinquency proceedings are not criminal prosecutions, therefore juvenile has no constitutional right to trial by jury). In a sense, then, this is a hybrid action, where only the most "important" criminal procedural guarantees are imposed. However, this exception does not invalidate the general rule because juvenile adjudications are *sui generis*; they are truly criminal cases in civil clothing.

37. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963) (invalidating a civil statute that revoked the citizenship of those evading the draft because "this punishment cannot be imposed without a prior criminal trial and all its incidents.")

38. See *Boyd v. United States*, 116 U.S. 616 (1886) and *Coffey v. United States*, 116 U.S. 436 (1886).

39. See *United States v. Ward*, 448 U.S. 242 (1980) (limiting *Boyd*) and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (overruling *Coffey*).

40. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938), *United States v. Ward*, 448 U.S. (1980).

41. *Addington v. Texas*, 441 U.S. 418 (1979).

42. *Vance v. Terraza*, 444 U.S. 252 (1980).

43. *United States v. Salerno*, 481 U.S. 739 (1987). The statute at issue in *Salerno* did provide counsel, but the Court never opined whether this was constitutionally mandated.

44. See cases cited *supra* note 3. Of the three cases cited in that footnote, I discuss only *Mendoza-Martinez* in the body of my essay. This is because *One 1958 Plymouth Sedan* and *United States v. U.S. Coin & Currency* appear to have lost their validity, though neither has been explicitly overruled. *One 1958 Plymouth Sedan*

*Kennedy v. Mendoza-Martinez*, the Court held that a "civil" action revoking the citizenship of draft dodgers imposed punishment, and therefore required "a criminal trial with all of its incidents."<sup>45</sup> The Court developed a seven-factor test which looked beyond the civil appellation, and attempted to determine whether a civil action "should" have been enacted as a criminal one. These factors were (1) whether the sanction involved an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only upon finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution or deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.<sup>46</sup> Though the Court never explained from where these seven factors derived and why they were definitive, at least it attempted to use independent judgment to prevent legislatures from circumventing criminal procedural guarantees.

This test did not survive long, however. Reluctant to apply the full array of procedural guarantees to actions that were at least nominally civil, the seven factors laid out in *Mendoza-Martinez* were contracted by the Burger Court in *United States v. Ward*.<sup>47</sup> The *Ward* majority essentially eliminated one of the factors—whether the behavior to which the penalty applied is already a crime, because "civil and

criminal sanctions may apply to the same conduct." More significantly, the Court again began to distinguish criminal from civil actions by relying almost exclusively on legislative intent. A legislative labeling of an action as a "civil penalty" was presumed accurate, unless the defendant was able to provide "clear proof" that the proceeding was "so punitive either in purpose or effect that it negated [the State's] intention."<sup>48</sup> Only after the provision of such proof would the Court engage in the multi-factor analysis.<sup>49</sup> Needless to say, such proof was not forthcoming.

### B. A Brief Experiment with Hybrid Actions

In 1989, the Court began to embrace what I have called the third alternative to a legislature's attempt to combine elements from the civil and criminal paradigm: that is, to permit punitive sanctions to be imposed in civil settings and to apply some but not all of the constitutionally required criminal procedural protections to these actions.<sup>50</sup> In *Halper v. United States*, a unanimous Court held a civil proceeding under a statute which resulted in a monetary sanction 220 times the government's loss imposed a punitive sanction. Since this penalty was for the same offense of filing false claims for which the defendant had been previously criminally convicted, it was barred by the multiple

48. *Id.* at 245.

49. *Allen v. Illinois*, 478 U.S. 364, 369 (1986).

50. I am excluding from discussion in this essay those cases where the Court held that a proceeding is civil in nature and requires none of the constitutionally mandated criminal procedural protections, but is important enough to require heightened civil procedural protections. These include *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966) (deportation proceedings, though civil in nature, require proof by clear, unequivocal, and convincing evidence); *Schneiderman v. United States*, 320 U.S. 118 (1943) (denaturalization proceedings are civil actions, yet they require proof by clear, unequivocal, and convincing evidence). I am also excluding from discussion *Bagwell v. United Mine Workers*, 512 U.S. 821 (1994), a case rendered within the 1989 - 1994 time period. In *Bagwell*, the Court held that a contempt proceeding that had plausibly been labeled civil required the protections of criminal procedure. This may have been the last gasp of the mood that produced *Halper*, just before the zig back in *Bennis* and *Ursery*. More importantly, the proceeding in *Bagwell* was not based upon a statute, unlike the cases rendered during the 1995 - 1997 Terms, discussed in Part II, Section C *infra*.

was based on an outdated Pennsylvania liquor tax forfeiture statute, and its holding that forfeiture proceedings are "quasi criminal in nature" probably does not survive more recent forfeiture cases. But see *One 1995 Corvette v. Mayor of Baltimore*, 724 A.2d 680 (Md. 1999) (Plymouth Sedan is still good law and the Fourth Amendment exclusionary rule applies to civil forfeiture proceedings). *U.S. Coin & Currency* was a forfeiture pursuant to an unconstitutional statute requiring gamblers to register and pay an occupational tax. Lower federal courts do not presently follow the reasoning in these cases when ruling on modern forfeiture statutes. It is only in Justice Stevens' lone dissent in *United States v. Ursery*, 518 U.S. 267 (1996) that we even see any reference to them.

45. 372 U.S. at 167.

46. 372 U.S. at 168-69.

47. 447 U.S. 242 (1980).

punishment prong of the Double Jeopardy Clause.<sup>51</sup> What made this case so surprising is not only that it applied the Double Jeopardy Clause to a civil proceeding, which it had twice before refused to do,<sup>52</sup> but that the Court appeared to sanction a new "hybrid" action, one that used primarily civil procedures but permissibly imposed punitive sanctions. The Court did not castigate the use of a civil action for imposing a punitive sanction, nor did it require that other criminal procedural guarantees apply to the action. It imported only the Fifth Amendment's Double Jeopardy protection from the criminal side of the divide. Thus, presumably, the government could have brought the civil action against Mr. Halper and recovered the full punitive sanction against him, had it not previously brought its criminal case.

The Court was able to find that the sanction imposed upon Mr. Halper was "punitive" despite the Congressional label of "remedial" only by revising its test for distinguishing between the two. Thus, in a second surprising move, the *Halper* Court abandoned both *Mendoza's* seven-factor test and *Ward's* two-part test for determining Congressional intent. Perhaps the Court felt less inhibited about selecting a less-deferential test when the consequence for labeling the action "punitive" was not to transform it into a criminal trial, but simply to apply a single constitutional criminal procedural protection to the action. In any case, Congress's intent to make the action criminal or civil was no longer of paramount importance, instead, the Court developed an independent test and made its own determination. Rather than the mushy multi-factors outlined in *Mendoza*, where the answers to different factors point to opposite conclusions and no single factor is determinative, the new test was

51. 490 U.S. 435 (1989), overruled by *Hudson v. United States*, 522 U.S. 93 (1997).

52. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam) (holding that civil forfeiture of undeclared emerald cut stones, after prior criminal acquittal for violation of tariff law, was not barred by the double jeopardy clause because "it involved neither two criminal trials nor two criminal punishments"); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (gun owner's acquittal on criminal charges for dealing in firearms without a license did not preclude a subsequent civil forfeiture of the weapons).

slightly more definitive. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."<sup>53</sup> *Halper's* application of the Double Jeopardy Clause to civil actions imposing punitive sanctions was reaffirmed in 1994, albeit by a divided Court, in *United States v. Kurth Ranch*.<sup>54</sup>

In the 1993 case *Austin v. United States*,<sup>55</sup> the Court again permitted a "hybrid" civil/criminal action, and again selected *Halper's* definition of punishment. Mr. Austin sold a small amount of cocaine to a confidential informant. The sale took place in the defendant's body shop, after he retrieved the cocaine from his mobile home a short distance away. The auto body shop and the mobile home became the subjects of a federal civil *in rem* forfeiture action after the defendant was indicted in state court for the drug sale. There was unanimity for the proposition that the forfeiture statute at issue in *Austin* was punitive in that it could not "fairly be said to serve a remedial purpose, but rather could only be explained as also serving either retributive or deterrent purposes."<sup>56</sup> Further, the Court fleshed out the definitions of retribution and deterrence. It rejected the government's claim that the forfeiture was remedial, in advancing the goal of protection of the community, by noting that none of the property at issue in the case was dangerous or illegal. It also rejected the government's claim that the forfeiture was remedial in compensating the government for the expense of law enforcement activity, as the value of the property in any particular case will have no correlation to the government's actual cost.

Finally, the Court held that the Eighth Amendment's Excessive Fines Clause, a procedural guarantee normally

53. *Halper*, 490 U.S. at 449.

54. 511 U.S. 767 (1994) (civil action for tax on marijuana barred by double jeopardy clause after criminal conviction for the same offense).

55. 509 U.S. 602 (1993).

56. *Austin*, 509 U.S. at 610, 621 (majority opinion); *id.* at 623 (Scalia, J., concurring); *id.* at 628 (Kennedy, J. concurring, joined by Rehnquist, C.J., and Thomas, J.).

reserved for criminal trials, was applicable in a civil proceeding. Prior to *Austin*, most Circuit courts had held the clause inapplicable to civil forfeiture proceedings, even where the government was the plaintiff.<sup>57</sup> They reasoned that a sanction could only be called a "fine" if it punished the defendant, and civil forfeiture actions were remedial.<sup>58</sup> In permitting punitive forfeiture actions like the one in *Austin* to go forward as civil proceedings, albeit with the punitive "fine" reduced to a non-excessive level, the Court again sanctioned a "hybrid" action. The government could punish Mr. Austin in a proceeding lacking most (but not all) constitutional criminal procedural guarantees.

### C. A Hasty Retreat

It now appears that the "retribution and deterrence" test for determining which sanctions are punitive, and, unfortunately, the whole endeavor of carving out the contours of hybrid actions, have been abandoned by the Court in a series of five cases heard in the 1995 through 1997 Terms. Whether this is because many of the new actions we see today, such as civil commitment of dangerous offenders and debarment, defy a label as purely punitive or remedial; because the Court is unable to fashion a conceptual framework for making the "punitive" determination; because the Court has foreseen the daunting task of determining which constitutional criminal procedural guarantee will apply to hybrid actions; or simply because the Court has grown more conservative, it is impossible to say. The fact is, however, that the Court is no longer trying to define punishment, and no longer attempting to decide which criminal procedural guarantees will apply to civil proceedings which impose punitive sanction, but is instead giving the government free reign to circumvent

57. See, e.g., *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992), rev'd sub. nom. *Austin v. United States*, 509 U.S. 602 (1993); *United States v. Plat 20*, 960 F.2d 200, 206-07 (1st Cir. 1992); *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991).

58. Id.

constitutional criminal procedure altogether.

The death knell began with *Bennis v. Michigan*<sup>59</sup> and *United States v. Ursery*,<sup>60</sup> both rendered within months of each other during the 1996 Term. In the first case, Mrs. Bennis contested Michigan's forfeiture of a jointly owned automobile that her husband used as the site for an illegal tryst with a prostitute. She claimed that her substantive due process right not to be punished in the absence of wrongdoing was violated because the state nuisance abatement statute had no innocent owner defense. Five members of the Court rejected her claim, stating that the forfeiture at issue "also serves a deterrent purpose distinct from any punitive purpose."<sup>61</sup> This was a stunning departure from *Austin's* holding that a deterrent purpose marks a statute as punitive.<sup>62</sup> If the Court truly means that the government's attempt to deter people from violating criminal prohibitions is a remedial purpose justifying a civil action, then there are few government initiated actions that would be inappropriate candidates for a civil appeal.

The Court solidified its re-definition of punishment and signaled the beginning of the end of imposing heightened procedural guarantees to hybrid criminal/civil actions in *United States v. Ursery*.<sup>63</sup> In that case, the Sixth Circuit had reversed Mr. Ursery's federal criminal conviction for manufacturing marijuana on double jeopardy grounds, because that proceeding followed a federal civil *in rem* forfeiture against Mr. Ursery's property as facilitating that same drug offense.<sup>64</sup> Reversing the Sixth Circuit, the Court

59. 516 U.S. 442 (1996).

60. 518 U.S. 267 (1996).

61. *Bennis*, 516 U.S. at 452. (Rehnquist, C.J., joined by O'Connor, Scalia, Thomas & Ginsburg, JJ.).

62. For an in depth analysis of the *Bennis* case, see Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale Of Two Vehicles*, 1997 U. Ill. L. Rev. 453 (1997).

63. 518 U.S. 267 (1996).

64. In a companion case, *United States v. \$405,089.23*, the order of the proceedings was reversed. 33 F.3d 1210 (9th Cir. 1994), rev'd sub nom. *United States v. Ursery*, 518 U.S. 267 (1996). There, the Ninth Circuit reversed a grant of summary judgment for the government in a federal civil *in rem* forfeiture action against various items of property that had facilitated and constituted proceeds of drug

first abandoned the *Halper* and *Austin* test, which looked not to whether legislature labeled the action “criminal” or “civil,” but at whether the sanction served a remedial rather than a retributive or deterrent purpose, and instead returned to *Ward’s* two-part test: 1) did Congress intend to establish a civil remedial mechanism; and 2) does the clearest proof establish that a statutory scheme is so punitive, either in purpose or effect, as to negate Congress’ intent?<sup>65</sup> A negative response to the second part of this test is especially likely because, quoting *Bennis*, the Court again moved deterrence to the civil side of the divide. Forfeiture encourages property owners to take care in managing their property, and “deterrence. . . may serve civil as well as criminal goals.”<sup>66</sup> Next, the Court appeared to change its collective mind regarding the possibility of a hybrid action, one which uses civil procedures but may impose certain punitive sanctions. Instead, if the answer to the second question in *Ward’s* two-part test is affirmative, that would require “application of the full panoply of constitutional protections required in a criminal trial.”<sup>67</sup>

Any hope that *Ursery* would be limited to *in rem* rather than *in personam* proceedings was dashed the next year in *Hudson v. United States*.<sup>68</sup> The five-member *Hudson* majority “largely disavowed” the remedial versus deterrence/retribution test from *Halper*, and again invoked the two-part test from *Ward*, as resurrected in *Ursery*. Mr. Hudson argued that monetary penalties and occupational debarment imposed by federal banking authorities in an administrative proceeding were punitive and therefore

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offenses because the federal government had previously criminally convicted Messrs. Wren and Arlt, the owners of the property, for the same drug offenses.

65. *Id.* at 287.

The Court distinguished *Halper* as limited to civil penalties rather than civil forfeitures, and distinguished *Austin* by defining “punitive” for purposes of the Fifth Amendment’s Double Jeopardy Clause differently from “punitive” for purposes of the Eighth Amendment’s Excessive Fines Clause. Upon closer reflection, neither of these distinctions hold water. See Klein, *supra* note 34 at 183, 234-41.

66. *Ursery*, 518 U.S. at 288.

67. *Id.* at 278.

68. 62 CrL 2019 (1997).

barred, under double jeopardy principles, a later federal criminal prosecution based upon the same conduct. The Court first found that the sanction was intended by Congress to be civil, and next found that the purpose and effect was not so overwhelmingly punitive such that the legislative label may be overridden. In resolving the latter issue, the Court admitted that the conduct for which the civil sanction was imposed was also criminal, and the imposition of the civil sanction may also serve a deterrent purpose. Again, however, because deterrence is a purpose of civil law, it does not transform the action into an essentially criminal one. Thus, though permanently taking away an individual’s livelihood will serve both traditional goals of criminal punishment: deterring others from emulating that individual’s misconduct and intentionally harming that individual, it is not punitive. As the Court put it, “the sanctions at issue here, while intended to deter future wrongdoing, also serve to promote the stability of the banking industry.”<sup>69</sup>

It seems to me that such reasoning applies equally to all laws and regulations, whether civil or criminal, that involve the banking industry. The same argument, moreover, could be made regarding any prohibition of any nature, as it always promotes the stability of society in general. The Court’s warning that to call such sanctions criminal would “severely undermine the government’s ability to engage in effective regulation of institutions such as banks”<sup>70</sup> is simply untrue. One could, as I have previously suggested, regulate by requiring the government to choose either a criminal or civil forum for sanctioning misconduct. Another method, suggested by Professor Mann in an earlier work and championed by me in this essay, would be to admit such sanctions are punitive, but develop middleground procedures for their imposition.

Continuing to muddy the waters, a divided Court returned “deterrence” to the criminal side of the divide the

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69. *Id.* at 2025.

70. *Id.* at 2025.

next Term in *United States v. Bajakajian*.<sup>71</sup> Mr. Bajakajian plead guilty to attempting to leave the United States without reporting \$357,144.00 in United State's currency, and additionally suffered criminal *in personam* forfeiture of the entire sum because it was "involved in" the offense.<sup>72</sup> The District Court found that the money was not the product or in any other way connected to any criminal offense, but that Mr. Bajakajian was transporting the money to repay a lawful debt. A five-member majority of the Court upheld the Ninth Circuit's holding that all but \$15,000 of the fine was barred by the Eighth Amendment's Excessive Fines Clause. Curiously, the majority rejected the government's contention that full forfeiture of all unreported currency serves to "deter elicit movements of cash," finding instead that deterrence has "traditionally been viewed as a goal of punishment."<sup>73</sup> Apparently "deterrence," like "punishment," means something different for excessive fines purposes than for double jeopardy purposes.<sup>74</sup> Where a sanction has the goal of deterrence it is not on the criminal side of the divide for double jeopardy purposes (*Urserly* and *Hudson*), but it is on the criminal side of the divide for Eighth Amendment purposes (*Austin* and *Bajakajian*).

The *Bajakajian* Court did hint that it may be possible for the government to escape Eighth Amendment prohibitions. It rejected the government's argument that the forfeiture was constitutional because it fell within the class of historic forfeitures of property tainted by crime, on the grounds that those older forfeitures were civil *in rem* actions, which are not considered punishment against the individuals for an offense. This could suggest to a clever prosecutor that she simply bring the forfeiture under 18 U.S.C. Section 981, a civil *in rem* action, rather than using 18 U.S.C. Section 982,

71. 524 U.S. 321 (1998).

72. The defendant plead guilty to a violation of 31 U.S.C. § 5316(a)(1)(A)(1983). The government sought forfeiture under 18 U.S.C. § 982(a)(1) (1986), which provides that a person convicted of willfully violating § 5316 shall forfeit any property involved in that offense.

73. 524 U.S. at 385.

74. See *supra* note 65 for a brief description of the Court's differing use of "punishment" in *Halper* and *Urserly*.

a criminal *in personam* action. Perhaps the Court would not allow this; it seems to me that the real difference between *Austin* and *Bajakajian* versus *Urserly* and *Hudson* is that the latter set of cases bar the second action entirely. Messrs. *Urserly* and *Hudson* were asking the Court to dismiss the proceedings against them on double jeopardy grounds, whereas Messrs. *Austin* and *Bajakajian* were admitting that the forfeiture cases should be permitted to go forward, they simply wanted the amount reduced to a non-excessive level. The Court may simply be more inclined to grant the latter, less lavish remedy.

The last case I will discuss, *Kansas v. Hendricks*,<sup>75</sup> is the most significant in a number of ways. First, the stakes are greatest for the defendant. Second, the divided Court squandered the opportunity to definitively resolve the questions of what test determines "punitiveness," and what procedural protections must be imposed in a proceeding that only the most hardy can accept as "civil." Mr. *Hendricks* challenged a Kansas civil commitment statute as violative of the Double Jeopardy and Ex Post Facto Clauses, arguing that the sanction was punitive. Kansas, as well as twenty other states,<sup>76</sup> have statutes authorizing civil commitment or other mandatory treatment for sexually dangerous persons. The Kansas statute permits the state to seek the civil commitment of persons who are either "convicted of or charged with a sexually violent offense," are found to suffer from a "mental abnormality" or "personality disorder," and are likely to engage in "predatory acts of sexual violence."<sup>77</sup> Mr. *Hendricks* was a particularly unappealing defendant. After being convicted of molesting two young boys and serving ten years, he was scheduled for release when the state instituted the commitment proceeding under this new act. Mr. *Hendricks* testified that he had earlier been convicted of indecent exposure to two young girls, molesting a young girl and two young boys while he worked for a

75. 521 U.S. 346 (1997).

76. *Id.* at 396 (Appendix of "Selected Sexual Offense Commitment Statutes") (Breyer, J., dissenting).

77. Kan. Stat. Ann. § 59-29a02(a) (1994).



carnival, sexually assaulting another young boy and girl, and taking indecent liberties with two adolescent boys. He also admitted to a number of criminal acts for which he was not convicted, including forcing his own stepdaughter and stepson to engage in sexual activity with him over a period of approximately four years. Mr. Hendricks further testified that he "can't control the urge" to molest children, and that the only way he could keep from abusing children in the future was "to die."<sup>78</sup> He admitted to being a pedophile, and stated that treatment is ineffective.<sup>79</sup>

As in *Hudson* and *Urserly*, both the five Justices in the majority and the four in the dissent returned to the two-part test outlined in *Ward* to determining whether this was a civil or criminal action. As to the first part of the test, the Court found that the Kansas legislature obviously intended to create a civil proceeding, as evidenced by its placement of the act within the Kansas probate code rather than the criminal code.<sup>80</sup> As to the second part of the test, did the defendant provide the clearest proof that this scheme is so punitive in purpose or affect as to negate Kansas' attempt to deem it civil? Mr. Hendricks offered the following proof that involuntary confinement under the statute was punishment: the act requires the conviction (in his case) or at least the charging of a very serious criminal offense, it leads to confinement of potentially indefinite duration, it fails to offer any legitimate treatment, and it would place him back into the state prison system (confined to the psychiatric wing of a secure prison hospital where civil committees and criminal prisoners are treated alike). Despite this, the Court held that the proceeding was not punitive enough. In making this determination, the Court again returned to *Austin's* retribution or deterrence versus remedy test. The Court found that the act is not retributive because the commitment is not to punish Mr. Hendricks for his past deeds; the past criminal conduct is used for the evidentiary purpose of showing that he has a mental abnormality and will be

78. Hendricks, 521 U.S. at 353.

79. Id. at 354 (defendant's actual testimony was that "treatment is bull—").

80. Id. at 357.

dangerous in the future. The act is obviously not meant to function as a deterrent, since pedophiles are unable to exercise control over their behavior.<sup>81</sup>

The dissent, using the same two-part test, found that the act is indeed punitive.<sup>82</sup> Though they opined that incapacitation can be a goal of criminal law, as in imprisonment, and a goal of civil law, as in the confinement of the mentally ill, this particular statute constitutes punishment for two reasons. First, it fails to provide any treatment. This finding that the act's purpose is segregation, not treatment, was supported by the fact that "the state had not funded treatment, it had not entered into treatment contracts, and it had little if any qualified treatment staff."<sup>83</sup> Second, insofar as the act does offer treatment, it intentionally delayed such treatment until after an offender had served his entire criminal sentence. If the state's true purpose was to treat, rather than impose an additional period of confinement, it would treat offenders as soon as they began to serve their sentences.

It seems to me that the return to *Ward's* two-part test in *Hendricks* raises far graver concerns than the Court's determination that the statutes in *Bennis*, *Urserly*, and *Hudson* were not punitive, because Mr. Hendricks' liberty was at stake. If confronted with the choice between the loss of a car, the loss of significant amounts of money and property, or the loss of one's livelihood, versus a potential life long confinement in a unit of a state prison, few of us would pick the fourth option. *Hendricks* also raises greater concerns than those raised in previous preventive detention and civil commitment cases. It is different and more troubling than the preventive detention of an accused person, such as in *United States v. Salerno*,<sup>84</sup> because the statute authorized only a brief detention (pending a speedy judicial determination of guilt or innocence), and the detention could occur only after a finding that the defendant had probably

81. Id.

82. Id. at 373 (Breyer, J., dissenting).

83. Id. at 384.

84. 481 U.S. 739 (1987).



committed a crime that would justify further imprisonment. It was more troubling than other recent civil commitment cases, such as *Addington v. Texas*,<sup>85</sup> *Allen v. Illinois*,<sup>86</sup> *Foucha v. Louisiana*,<sup>87</sup> and *Heller v. Doe*,<sup>88</sup> because at least in those cases health professionals agreed that the disorders for which the individual was committed could be called "mental illnesses."<sup>89</sup> Contrariwise, the American Psychiatric Association, while recognizing pedophilia as a mental disorder, concluded that it is not a mental illness.<sup>90</sup>

Though both the majority and the dissenters in *Hendricks* would allow the commitment of those without mental illnesses, given an appropriate statute (one that defines a disorder as a mental abnormality and attempts to provide treatment), it seems to me a dangerous thing to allow the legislature to decide what behavior constitutes a "mental abnormality," and then permit the state to indefinitely commit any abnormal person whom the state can show is likely to be a danger in the future. I do not mean to suggest that I have complete confidence in psychiatry. I merely have even less faith in the ability of legislators to define mental illness, as they lack the necessary training and are more likely to affix the term to troublemakers. However labeled, criminal or civil, the statute in *Hendricks* imposes preventive detention for life or until old age because society fears the defendant's irresistible impulse to repeated and seriously harmful crimes. If life imprisonment for a crime actually committed requires criminal procedure, life imprisonment for

85. 441 U.S. 418 (1979) (civil commitment of "mentally ill" was not punitive and therefore did not require the state bear the burden of proof beyond a reasonable doubt).

86. 478 U.S. 364 (1986) (commitment proceeding to provide treatment to "mentally ill" individual is not punitive, and therefore the privilege against self-incrimination does not apply.)

87. 504 U.S. 71 (1992) (after an insanity acquittee had recovered from his "mental illness," he could no longer be held by the state on the grounds that he was dangerous).

88. 509 U.S. 312 (1993) (Kentucky requires that an individual be both dangerous and "mentally retarded" or "mentally ill".)

89. See supra notes 85-88.

90. *Hendricks*, 521 U.S. at 375 (citing brief for American Psychiatric Association as Amicus Curiae).

a crime anticipated but not committed surely does as well.<sup>91</sup>

There is, however, one saving feature in the *Hendricks* case which I believe may permit the Court to return to "middleground jurisprudence," rather than cabining every proceeding into the entirely civil or entirely criminal category. The statute in *Hendricks* does, in fact, mandate most of our constitutional criminal procedural protections be applied in the civil commitment proceeding. For example, the Kansas statute mandates a jury trial, places the burden of proof upon the state, requires that the state prove its case beyond a reasonable doubt, offers free assistance of counsel to indigent persons, provides free examination by defense-selected mental health experts, and gives the potential committee the right to present and cross-examine witnesses. The issue of whether such procedural protections are constitutionally required was simply never raised. If the Court were to require such protections, then that civil commitment proceeding would be a hybrid action—requiring most of the protections of the Sixth Amendment, but not imposing the Self-Incrimination<sup>92</sup> or Double Jeopardy Clauses of the Fifth Amendment, the Ex Post Facto Clause, nor the substantive due process requirement of criminal conduct before punishment.<sup>93</sup>

### III. POTENTIAL LEGISLATIVE AND PROCEDURAL RAMIFICATIONS FROM THE COURT'S RESPONSES.

I will focus here on what I suggest are the two primary ramifications of the Court's decision to enlarge the "remedial" label at the expense of the "punitive" one, and to declare such "civil" actions to be constitutional. The first is the practical one; we can expect to see more and more such "hybrid" actions. Just as we get more of what we subsidize and less of what we tax, legislators will give us more of the "cheaper" (in

91. Putting aside, for a moment, the Supreme Court's admonition in *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968) that one cannot be punished for status, but only for wrongful conduct.

92. Mr. Hendricks was forced to testify.

93. See supra note 91.

terms of time and resources) civil actions in response to social problems and less of the more expensive criminal actions. For example, now that the Court has blessed the Kansas sexual predator scheme, we would expect to see more states follow suit and institute such actions as civil rather than criminal matters. In fact, the number of states having statutes authorizing the civil commitment of sexual predators has increased as a result of the decision.<sup>94</sup> Legislators in my own state of Texas have recently drafted a sexual predator civil commitment act in the wake of *Hendricks*, modeled after the Kansas statute.<sup>95</sup>

If we can civilly commit dangerous sex offenders, can dangerous drug abusers, spouse beaters, and child abusers be far behind? What about a one-week-per-month commitment of women suffering from severe pre-menstrual syndrome? How about the commitment of sexually active individuals infected with HIV? Perhaps we could require that a convicted rapist take medication that reduces sexual appetite based on a judicial finding that he will more likely than not rape again? If confiscating a specific piece of property (as in *Ursery*) and a professional license (as in *Hudson*) is accepted by the Court as a remedial sanction, will the forfeiture of all of an individual's present assets, attachment of future earnings, and barring participation in entire areas of commerce also fall on the civil side of the divide? Will the Court accept shaming devices such as "I am a drunk driver" T-shirts after a civil DWI trial utilizing a preponderance of the evidence standard of proof? What about the civil status of so-called public protection regulations such as sex offender registration and notification statutes? Though I hesitate to predict what the Court will do with such cases, I have no doubt we will see more, not fewer,

94. Tanya M. Montano, Comment, Will California's Sexually Violent Predators Act Survive Constitutional Attacks? 39 Santa Clara L. Rev. 317, 334 (1998) (noting that legislatures in New York, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, Nevada, and North Dakota are developing similar statutes following the *Hendricks* decision).

95. 1999 TX H.B. 544, Texas 75th Legislature, Pre-filed Dec. 16, 1998 by Senator Florence Shapiro.

of such actions, and that the Court will thus be forced to grapple with these questions.

Those who believe such scenarios far-fetched might look at some recent examples of the competition between Democratic and Republican lawmakers to be the toughest on crime, and to enact the harshest criminal legislation. California's "Three Strikes and You're Out" law,<sup>96</sup> with a life sentence for the theft of a slice of pizza,<sup>97</sup> and Alabama's recent experiment with chain gangs,<sup>98</sup> readily come to mind. I would further predict little public protestation over even the most draconian legislation. Most (non-minority member) citizens correctly conclude that they are highly unlikely to be targeted by law enforcement and end up a defendant in such an action. Thus, they naturally adopt the view of the victim in considering anti-crime legislation. Moreover, citizens have come to expect the Court to review legislation for fairness, and are therefore unconcerned with procedures.

The second ramification I foresee is a purely legal one; we can expect the Court, in a series of cases, to decide the thorny question of which constitutional criminal procedural guarantees, if any, apply in these nominally civil actions. Let's start with the destabilizing effect that the criminal/civil collapse will have on Fourth Amendment values. The Court presently utilizes a strict test where an investigation is a criminal one: law enforcement officers cannot ordinarily search an area in which a person has a reasonable expectation of privacy<sup>99</sup> absent a judicial warrant based upon probable cause.<sup>100</sup> Evidence gathered from a defendant in violation of this rule is excluded from her criminal trial.<sup>101</sup>

96. Cal. Penal Code § 667 (West Supp. 1996).

97. Eric Slater, *Pizza Thief Gets 25 Years to Life; Crime—Judge Cites Five Prior Felony Convictions in Sentencing Jerry DeWayne Williams Under "Three Strikes Law,"* L.A. Times, Mar. 3, 1995, at Metro B3 (detailing 25 year to life sentence given to Jerry DeWayne Williams for stealing a slice of pepperoni pizza).

98. See Sara Sigelman, *Don't Be Cruel*, Insight Mag., July 29, 1996, at 4.

99. *Katz v. United States*, 389 U.S. 347 (1967) (reasonable expectation of privacy protected by fourth amendment).

100. *Johnson v. United States*, 333 U.S. 10, 14-15 (per se warrant requirement) (1948).

101. *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary sanction imposed upon states).

However, the Court uses two very different and more lenient tests for the applicability of the exclusionary sanction in a criminal proceeding where the investigation had a civil rather than a criminal purpose. First, where a search is conducted pursuant to the regulation of a "pervasively regulated industry,"<sup>102</sup> or involves an administrative health and safety inspection of a business or residence,<sup>103</sup> neither probable cause nor an ordinary judicial warrant is required. The government can search based simply upon the existence of a regulation or statute authorizing it. Second, where there are "special needs, beyond the normal need for law enforcement" to conduct the search, then again neither probable cause nor a warrant is required.<sup>104</sup> The government may search, in some cases, based upon reasonable suspicion that they will find pertinent evidence,<sup>105</sup> and in other cases, based upon no justification whatsoever.<sup>106</sup> Finally, the Fourth Amendment's exclusionary sanction does not bar the admission of evidence obtained in violation of the Fourth Amendment if it is offered in a civil proceeding.<sup>107</sup>

What will happen to Fourth Amendment jurisprudence under these tests as more and more new proceedings are created as "civil" ones, and formerly criminal proceedings are redesignated as civil ones? Let's start with the heavily regulated industries test. Once we supplement most of our

102. *New York v. Berger*, 482 U.S. 691 (1987) (statutorily authorized warrantless search of automobile junkyard).

103. *Camera v. San Francisco*, 387 U.S. 523 (1967) (government may obtain area warrant to inspect apartment building for unsanitary conditions based upon reasonable administrative standards).

104. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (need for safe athletic program permits random urinalysis drug testing of students participating in athletics program); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (special need to insure highway safety make sobriety checkpoints reasonable, absent warrant or individualized suspicion); *National Treasury Employees Union v. Van Raab*, 489 U.S. 656 (1989) (special need of drug interdiction permits drug testing of customs' employees absent warrant or individualized suspicion).

105. See cases *infra* notes 109-11.

106. See cases cited *supra* note 104.

107. *United States v. Janis*, 428 U.S. 433 (1976) (exclusionary sanction inapplicable in civil action by IRS to collect taxes); *INS v. Lopez-Mendoza*, 468 U.S. 1033 (1984) (exclusionary rule inapplicable in administrative deportation hearings). But see discussion of *One 1958 Plymouth Sedan*, *supra* note 44.

criminal regulation of business with civil regulations, and once we accept deterring violations of these regulations as a proper goal of a civil action, then it seems to me that almost any business can be legitimately searched absent the Fourth Amendment's warrant and probable cause preference, and that the fruits of such search will be admissible in both civil and criminal proceedings against its owners and employees. For example, the banking and securities industries are certainly among the most heavily regulated. Since the *Hudson* court held that sanctioning individual members of the banking community serves a civil function, then it seems to me that on-site and computer searches of banks and securities houses should yield evidence admissible in a criminal trial against the corporation, any employee, and target of the search, despite the absence of probable cause or a warrant.

The heavily-regulated business test will probably not extend to private individuals and residences, but such a limit may be overcome using the special needs test. For example, will the civil commitment of sexually dangerous persons serve a special need divorced from a law enforcement function, such that the police search of an individual's residence for pornographic materials involving children and other evidence of dangerous sexual deviancy, unsupported by probable cause or a warrant, would nonetheless yield evidence admissible in a criminal trial?<sup>108</sup> The answer to this question depends upon the answer to another question that the Court has never answered—exactly what is a special need? Though the Court tells us these are "exceptional cases," in actuality, in every case save one where the State argued that the need was special, the Court agreed. Thus, the special need of running an efficient government office justifies searches and seizures of a government employee's desk and office without probable cause or a warrant,<sup>109</sup> the state's special need in supervising probationers allows a

108. This example assumes that a state first enacted a civil commitments statute sufficiently similar to the sexual predator civil commitments statute enacted in Kansas.

109. *O'Connor v. Ortega*, 480 U.S. 709 (1987) (individualized suspicion required).

search of their homes absent probable cause or a warrant,<sup>110</sup> the special need to maintain order in the school environment justifies the search and seizure of a student's pocketbook absent probable cause or a warrant,<sup>111</sup> and a special need for highway safety justifies brief stops and inspections of vehicles without probable cause or a warrant.<sup>112</sup> The only need that was not "special" enough was the need to drug test politicians.<sup>113</sup> Once the Court admits, as it did in *Berger*, that administrative and civil statutes and penal laws "may have the same ultimate purpose of remedying the social problem" involved,<sup>114</sup> the distinction between a normal law enforcement need and a special regulatory need disappears.

By enacting more and more "civil" or "administrative" regulations, the legislature is creating more special needs. Thus, once a previously punitive sanction, such as involuntary detention, is relabeled remedial, the legislature receives a double bonus in terms of procedures. First, if the government is pursuing a need divorced from law enforcement, such as the civil commitment and treatment of sexual predators, law enforcement officers may be able to detain individuals and conduct searches of their effects for evidence of predatory behavior absent probable cause and a warrant. So long as the court deems the civil proceeding a "special need," such evidence would be admissible in any criminal proceeding against the same individual. Second, even if the treatment of sexual predators is not considered a special need, any evidence obtained during a search without probable cause or a warrant would nonetheless be automatically admissible in the commitment proceeding against the individual, since the Court's holding in *Hendricks*

110. *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (reasonable suspicion plus regulation required).

111. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (reasonable suspicion).

112. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (no individualized suspicion necessary for detention).

113. *Chandler v. Miller*, 520 U.S. 305 (1997) (special governmental need to drug test candidates for state offices insufficient to override the individual's acknowledged privacy interest). Perhaps this would have been too difficult to distinguish from drug testing of the judiciary.

114. 482 U.S. at 704.

that such a proceeding retains its "civil" appellation.

Similar problems will arise with respect to other procedural guarantees in the federal Constitution that apply only to criminal proceedings, such as the Fifth Amendment's Self-incrimination Clause, the Sixth Amendment's right to counsel and confrontation, and the Eighth Amendment's Cruel and Unusual Punishment Clause. For example, the Fifth Amendment's privilege against self-incrimination applies only when the compelled testimony may be used in a "criminal" case.<sup>115</sup> Thus, the privilege may be available in civil proceedings, administrative proceedings, grand juries, and even in police stations, but *only* where there is the potential for this testimony to be introduced in a later criminal trial.<sup>116</sup> Were the government to start shifting more and more sanctions from criminal to civil proceedings, it could circumvent self-incrimination protection in a number of ways.

First, an individual could not "take the fifth" in a "civil" debarment proceeding or civil commitment action if that is the only action that the government intends to bring, as there would be no danger of the testimony being used in a subsequent criminal case. Second, even where there is the risk of a future criminal prosecution, the government gains a number of advantages by bringing a civil action first. Should the individual invoke his fifth amendment privilege in the civil matter, the factfinder may draw an adverse inference from his refusal to testify.<sup>117</sup> Moreover, if the individual does put on a case in a civil proceeding, rather than invoking the privilege, he has waived his privilege and given the government the ability to cross-examine him, and to use any

115. U.S. Constitution Amendment 5 provides that no person "shall be compelled in any criminal case, to be a witness against himself." U.S. Const. Amend. V.

116. *Michigan v. Tucker*, 417 U.S. 433 (1971) (allowing the in-court introduction of testimony created by out-of-court coercion would "practically nullify" the Fifth Amendment privilege).

117. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("the Fifth Amendment does not permit adverse inferences against parties for civil actions when they refuse to testify in response to probative evidence offered against them"). In that case, the Court allowed adverse inferences to be drawn in a disciplinary hearing against a prisoner who refused to answer questions unless he was granted immunity.

statements he makes in his subsequent criminal trial.<sup>118</sup> This forces an individual to make the Hobson's choice between protecting himself from the immediate threat of the so-called "civil" sanctions and risking future criminal sanctions, or insuring against a potential criminal sanction only by capitulation in the civil proceeding.

Finally, I note that the now-famous warnings given to those undergoing custodial interrogation, as required by the *Miranda*<sup>119</sup> decision, would presumably not be required where such interrogation was an attempt to elicit information for a non-criminal proceeding. Though ordinarily an individual is not in custody absent the functional equivalent of an arrest,<sup>120</sup> one can imagine a legislature instituting some kind of preventive detention prior to a civil commitment proceeding.<sup>121</sup> Were the *Miranda* warnings not required in such a situation, we could expect to see a resurgence of the same type of strong-arm police tactics that generated the controversial opinion.

Likewise, the Sixth Amendment right to counsel applies only to "criminal prosecutions."<sup>122</sup> Thus, both the right to have counsel present at every critical stage of a criminal proceeding,<sup>123</sup> and the state funding of such counsel,<sup>124</sup> would

118. *United States v. Kordel*, 397 U.S. 1, 7-10 (1970) (rejecting a Fifth Amendment claim made by a corporate officer whose answers to FDA interrogatories on behalf of the corporation in a civil forfeiture proceeding subsequently were used against him in a criminal prosecution).

119. *Miranda v. Arizona*, 384 U.S. 436 (1966). As we all know from *Law and Order*, *NYPD Blue*, and other police dramas, the *Miranda* decision requires that an officer inform a suspect that he has the right to remain silent, anything he says can and will be used against him in a court of law, he has the right to an attorney, if he cannot afford an attorney one will be appointed for him.

120. *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984).

121. Cf. *United States v. Salerno*, 481 U.S. 739 (1987) (pretrial detention of dangerous arrestee for purpose of protecting the community constituted regulation rather than punishment).

122. U.S. Constitution, Amendment 6, provides that "in all criminal prosecutions, the accused shall have the assistance of counsel for his defense." U.S. Const. Amend. VI.

123. *United States v. Wade*, 388 U.S. 218 (1967) ("the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsels absence might derogate from the accused's right to a fair trial").

124. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendant in state

presumably be unavailable to a defendant in a civil proceeding.<sup>125</sup> Even if an individual has hired an attorney and the government is aware of this, government agents may attempt to elicit statements from an individual surreptitiously (for example, by asking a friend to wear a wire) when the attorney is not present.<sup>126</sup> Moreover, an individual may have no right in a civil trial, unlike a criminal one, for the state funding of competent expert psychiatric assistance in the preparation of his defense.<sup>127</sup> Finally, an individual whom the state is attempting to confine against his will may have no right to confront witnesses against him,<sup>128</sup> no right to a public<sup>129</sup> or speedy trial,<sup>130</sup> and no right to compulsory process for obtaining witnesses in his favor.<sup>131</sup> It seems to me this will lead to many verdicts in favor of the government based upon the inequality of the contest, rather than the factual and legal issues surrounding the matter.<sup>132</sup>

The contours of these procedural pitfalls may be heightened more starkly by way of a concrete example.

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criminal proceeding has Sixth Amendment right to free counsel).

125. *Baxter v. Palmigiano*, 425 U.S. at 315 (Sixth Amendment right to counsel not required in prison disciplinary context).

126. *Maine v. Moulton*, 474 U.S. 159 (1985) (wiring of co-defendant violated defendant's right to counsel, where government had already indicted the defendant for theft).

127. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

128. *United States v. Zucker*, 161 U.S. 475 (1896).

129. *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) (Sixth Amendment right to public trial is necessary to "guarantee that the accused would be fairly dealt with and not unjustly condemned").

130. *Barker v. Wingo*, 407 U.S. 514 (1971).

131. *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) (deportation of defense witnesses is not always a violation of defendant's constitutional right to compulsory process).

132. For example, there are many documented cases of forfeiture of legitimate property based upon untrue allegations that such property is involved in drug and money laundering offenses. Many of these injustices are due to the owner's financial inability to obtain the attorney necessary to contest the proceeding. Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. Sch. L. Rev. 95 (1994) (detailing nationwide litany of cases of "legalized extortion" where property is seized by officers who offer to return the property and refrain from filing criminal charges in exchange for a fee). Even worse, some law enforcement officials target minority members as subjects of such attorneyless forfeitures. See Carol M. Blast, *The Plight of the Minority Motorist*, 39 N.Y.L. Sch. L. Rev. 49, 50-51 (1994) (recounting numerous examples of forfeiture of legitimate money from minority members).

Consider a hypothetical statute permitting government agents from a state health and human services agency to seek non-voluntary in-patient commitment of substance abusers to the substance abuse treatment wing of a state mental health facility. Such placement could occur only upon a judicial finding that the "patient" is, in fact, a drug addict or alcoholic, and that he is endangering his health. Release would be available upon professional testimony that the patient was "cured." What techniques for investigation of potential patients would be constitutionally permissible, and what procedures would be used during the commitment proceeding? It seems to me that if the Court insists upon designating all proceedings as either criminal or civil, and if they designate this statute a civil one, we would heavily tip the scales in favor of social control and law enforcement and against individual freedom and privacy.

Suppose state agents forcibly entered a putative patient's residence without a warrant, and required the homeowner to stand naked in his bedroom while agents searched the home for evidence that the homeowner was a drug addict. Less drastically, suppose the state agent required an individual to undergo supervised urine testing? If narcotics were found in the individual's home or urine, they would certainly be admissible in the civil commitment proceeding. There is even the possibility that the narcotics and/or the urinalysis result would be admissible in a criminal drug trafficking or drug possession trial against the individual, if the government can convince a judge that eradicating the scourge of drug addiction is a special need divorced from the ordinary needs of law enforcement.

Suppose these same state investigative agents brought the homeowner to their office at the health and human services agency to discuss his situation. If the government planned to criminally prosecute him after the commitment proceeding, he could claim the privilege against self-incrimination in the civil proceeding. However, such an assertion would allow the judge to infer that he is hiding his drug problem. If the government intends to bring only the civil commitment proceeding against him, he would have no

privilege against self-incrimination at all. Thus, the putative patient would not be entitled to *Miranda* warnings even if the interview was determined to be custodial interrogation. Moreover, the individual could be forced to testify against himself at the commitment proceeding. Additionally, he could be forced to discuss his alleged addiction problem with a psychiatrist, despite the psychiatrist's expected testimony against him at the civil proceeding.

If the individual is indigent, he may have no counsel at his side to act as his advocate and help him understand the "civil" proceeding against him. Perhaps even more importantly, he will have no one to assist him in investigating and preparing for his defense. Moreover, the government can question this individual either openly or using confidential informants, in the absence of any attorney he may have hired, even after the government initiates formal proceedings. Finally, the "patient" has no constitutional guarantee of access by the press or even his family to the civil proceeding, cannot subpoena his employer to testify in his favor, cannot demand a state-funded psychiatric expert of his own, and has no right to cross-examine state witnesses against him.

#### CONCLUSION - A COMPROMISE

What are the Court's options in resolving the question of when a government imposed sanction becomes punitive enough to require the imposition of criminal procedural guarantees? One option, the path upon which the Court appears to be embarking, is simply to accept the legislative label placed upon an action, no matter what sanction is threatened. This is the position championed by Professor Mary Cheh.<sup>133</sup> She argues that it is the moral condemnation of the community, and such condemnation attaches only to those action denominated "criminal" by the legislature.<sup>134</sup> I

133. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *Hastings L.J.* 1325 (1991).

134. Curiously, she would apply some of the constitutionally mandated criminal



believe such a course is overly deferential to the legislative branch, and underestimates the ability of the public to see through deceptively labeled actions. The abdication of independent review will encourage legislatures to apply the "civil" label to actions on the margins until, in our race to be tough on crime, we find that we have diluted our procedural guarantees to the point where they no longer serve their function—to decrease the number of false positive results and to protect disfavored groups from state abuse.

Moreover, I doubt her premise—that there is no stigma attached to an action unless the legislature has labeled it "criminal." Some criminal punishments, such as the Texas misdemeanor of driving with an open beer bottle,<sup>135</sup> are considered petty by most people and are thus not particularly stigmatizing. On the other hand, some civil sanctions, such as the forfeiture of an individual's residence because that individual is determined by a judge or jury to be a drug trafficker, are quite stigmatizing. That focusing on stigma will lead to a sliding scale rather than a bright line will be even more apparent as the legislature increases its use of civil proceedings to perfect social control.

On the other hand, the Court could attempt to resurrect the sharp criminal/civil dichotomy of years past, and more diligently police the labeling of each statute a legislature enacts. Such is the position recently suggested by Professor Carol Steiker.<sup>136</sup> This resolution of the problem has overwhelming drawbacks, however. First of all, while some might find it more appealing conceptually than either the first option or the position I will advocate, as a practical matter it will not fly. The momentum which propels us to enact more of these "hybrid" actions is too strong to reverse. The sheer number of such actions, including administrative proceedings for debarment or imposing fines, exemplary damages in tort shared with the state, civil actions brought by the government for forfeiture of property involved in

procedural guarantees to "civil" actions, though this contradicts her theory.

135. TX Penal Code § 49.04(c) (West 1998).

136. Carol S. Steiker, Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 Geo. L.J. 775 (1997).

business fraud or drug trafficking, and victim intervention in criminal trials,<sup>137</sup> is formidable, and the list continues to grow.

Second, Professor Steiker's test for deciding when a sanction is sufficiently punitive to transform the action into a criminal one is indeterminate and overly complex. She defines "punishment" using a four part test: (1) state intent to cause unpleasantness in an individual, that is not merely incidental to another goal; (2) the sanction is for a past offense; (3) the sanction is imposed by the state; and (4) the sanction expresses blame by the community. The fourth part of this test then has a three-part subtest: blame occurs when (1) society resents the bad act; (2) the sanction is designed to tell the offender he misbehaved; and (3) the victim and society feels vindicated. Once it is decided that sanction constitutes punishment, the Court must answer three questions: (1) does the state intend to punish; (2) what is the effect of the state action on the defendant; and (3) how does the community view the state action?

To top it all off, no single answer to any one of the seven subparts of Professor Steiker's test to define "punishment," or to any of the additional three questions, determines the outcome.<sup>138</sup> Like the Court's test in *Mendoza*, this test will not yield a predictable or principled answer. Rather, one ends up with some combination of "yes" and "no" answers to the test and sub-test factors and other questions, and must ultimately choose between a "criminal" and "civil" designation based upon one's own valuation of each factor and intuition regarding which label the action merits. Unpredictability is assured because each legislator and judge will sum up and weigh each factor differently. It seems to me that if the Court chooses the second option, a better test is that offered in *Austin*, for its simplicity and relative definitiveness. However, any test is ultimately doomed to failure. It cannot be claimed that the government enacts a hybrid statutes either to harm the defendant or to protect

137. See Part I of this essay.

138. See Steiker, *supra* note 136.



society. Rather, the motive is both safety and punishment, and the two cannot be separated.

Finally, we could begin to generate middleground jurisprudence, as suggested by Professor Mann in the context of administrative penalties.<sup>139</sup> This option garners my vote. It is simply impossible, at present, to separate all proceedings into criminal and civil actions, as so many now have a combination of features from both. The genie will not return to the bottle. The imposition of certain punishments in "civil" trials may be necessary to ensure immediate compliance with the myriad of statutes and regulations in our increasingly complex world. Moreover, many sanctions, such as debarment and commitment, cannot be labeled punitive or remedial, at least by historical standards, because they are novel. Where the penalties do not include imprisonment, shaming devices, corporal punishment, and execution, the modes favored in colonial times,<sup>140</sup> the Framers of the federal Constitution did not contemplate what procedures should be used.

If the Court selects the third option, the crucial question, of course, will be (1) which civil actions imposing serious sanctions warrant criminal procedural protections; and (2) which criminal procedural guarantees will be required? Answering these questions will be a daunting task. Certainly we should apply the Double Jeopardy Clause whenever the same governmental sovereign pursues both civil and criminal actions against the same individual or entity for the same underlying misconduct, rather than permit the government to reap the numerous and unfair advantages of simultaneous or successive criminal and civil proceedings for the same misconduct.<sup>141</sup> Beyond this, we will need to determine which governmentally-imposed "civil" sanctions are serious enough to require heightened procedures, and develop heightened procedures

139. See Mann, *supra* note 8.

140. See, e.g., Lawrence M. Friedman, *Crime and Punishment in American History* (1993).

141. I have made this claim previously in Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 Iowa L. Rev. 183 (1996).

incrementally. Determining what hybrid procedures might look like and how decisions would be made about how much procedure is required in which context will be terribly difficult, and I can only begin to sketch out the broadest outlines here.

It seems to me that the next step in answering the first question would be to focus on how harmful the penalty is to the recipient. Certainly loss of citizenship, as was the case in *Mendoza*, and loss of liberty, as was the case in *Hendricks*, are sufficiently serious to warrant heightened procedures. The answer to the second question is that proceedings imposing serious sanctions deserve, at least, all those criminal procedural protections that ensure reliability. In fact, that is what was required by the Court in *Mendoza*, and by the Kansas legislature in *Hendricks*. Thus, perhaps we could require those procedures that ensure reliability of factfinding (appointed counsel, beyond a reasonable doubt standard of proof, placement of the burden of proof on the government, right to call and confront witnesses) in cases where the penalty is severe. On the other hand, we might be willing to forgo other procedural protections, such as the right to indictment by grand jury, and even *ex post facto* protection in those cases. A full explanation of this theory of compromise procedures must await another day.

This short essay is not the appropriate vehicle for developing my theory. Not is it the proper place for justifying, as a normative matter, the current interpretation of our criminal procedural guarantees. However, those who agree that the Framers drafted these protections for good reasons, and that the Court's current interpretation of these protections is at least plausible, should view any legislative attempt to evade these protections with some suspicion. I believe a compromise is our best hope for halting what I predict will otherwise be the steady deterioration of those procedural protections we currently enjoy.