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Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction

by

MARY M. CHEH*

I. Introduction

Today, the distinction between criminal and civil law seems to be collapsing across a broad front. Although the separation between criminal and civil cases is a legal creation both imperfect and incomplete,' this basic division has been a hallmark of English and American jurisprudence for hundreds of years.

The Constitution, statutes, and the common law all draw fundamental distinctions between criminal proceedings, which emphasize adjudication of guilt or innocence with strict adversarial protections for the accused, and civil proceedings, which emphasize the rights and responsibilities of private parties. We have separate criminal and civil courts, employing different rules of procedure, burdens of proof, rules of discovery, investigatory practices, and modes of punishment.2 This distinction is cemented in every law student’s mind by the division of the law school curriculum into criminal and civil categories.

Now, however, there is a rapidly accelerating tendency for the government to punish antisocial behavior with civil remedies such as injunctions, forfeitures, restitution, and civil fines. Sometimes civil


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2. See, e.g., Smith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. CHI. L. REV. 1, 3 (1990) (in criminal cases, unlike civil ones, a defendant can appeal a conviction by alleging legal error favorable to the government, but the government cannot appeal an acquittal by alleging error favorable to the defendant).

[1325]
approaches completely supplant criminal prosecutions as certain behavior is "decriminalized," or as offenders are treated as ill instead of guilty. 3 More frequently, civil remedies are blended with or used to supplement criminal sanctions, as evidenced by the widespread use of forfeiture in drug cases. 4

Many states are using civil law techniques to check domestic violence, 5 drug trafficking, 6 weapons possession, 7 and racial harassment. 8 The federal government, through the Racketeer Influenced and Corrupt Organizations Act (RICO), 9 is using divestiture and treble damage actions to strike at businesses run by white collar criminals and members of organized crime. 10 The federal government also has


6. E.g., Florida Contraband Forfeiture Act, FLA. STAT. ANN. §§ 932.701-704 (West 1985 & Supp. 1990) (allowing seizure of property on probable cause it was used to transport contraband).

7. E.g., CAL. WELF. & INST. CODE § 8102 (Deering 1990 Supp.) (authorizing confiscation of firearms in the possession of mental patients).

8. E.g., MASS. GEN. LAWS ANN. ch. 12, § 11H (West 1986 & Supp. 1990) (authorizing civil suits by the state seeking equitable relief to remedy civil rights violations).


10. There is extensive literature addressing both the wisdom and the constitutionality of the civil RICO law. See, e.g., Boucher, Closing the RICO Floodgates in the Aftermath of Sedima, 31 N.Y.L. SCH. L. REV. 133 (1986); Goldsmith, Civil RICO Reform: The Basis
reinvigorated the *qui tam* action, which effectively deputizes private citizens to enforce monetary penalties against persons who have defrauded the government.\textsuperscript{11}

The idea of using civil remedies to redress criminal behavior is not new. A criminal who injured or robbed another traditionally faced two potential trials—a criminal prosecution by the government to adjudge her guilty and punish her for the offense, and a civil action by the victim for recompense.\textsuperscript{12} Similarly, in the administrative or regulatory sphere, the federal government long has pursued antitrust and securities law violators with civil injunctions as well as criminal complaints.\textsuperscript{13} Yet the current phenomenon of civil remedies blending with criminal sanctions never has been more actively or consciously pursued.

Forfeiture is a case in point. The United States Attorney General has declared forfeiture a top priority and even has created the Executive Office of Asset Forfeiture to oversee all aspects of the Justice Department’s forfeiture efforts.\textsuperscript{14} The federal government’s use of forfeiture to seize the proceeds and instruments of crime has grown so spectacularly that in 1989 alone the amounts forfeited—over $600 million worth of currency, cars, planes, boats, and even cattle—are twenty times the amounts forfeited just four years earlier.\textsuperscript{15} In the past five years, combined state and federal efforts have stripped more than one billion dollars from drug dealers, and the states are working

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\textsuperscript{11} See 31 U.S.C. §§ 3729-3733 (1988) (False Claims Act). A *qui tam* action is a statutory suit brought by a private person on behalf of herself and the United States government to recover damages, penalties, or forfeitures against a third party. The plaintiff is like a bounty hunter; she has no interest in the controversy other than the statutory opportunity to share the monetary recovery with the United States. See generally Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989).

\textsuperscript{12} W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 2, at 8 (5th ed. 1984); cf. United States v. Dixon, 347 U.S. 381, 385 (1954) ("Clearly Congress may impose both a criminal and a civil sanction in respect to the same act; this is neither unusual nor constitutionally objectionable.").


\textsuperscript{15} U.S.D.J. NUTSHELL, supra note 14, at 1-3.
to adopt a model forfeiture statute that would further expand their power and the opportunities to seize property used in crime. 16

This melding of civil remedies and criminal penalties portends significant changes in both legal doctrine and the institutions which are charged with applying and enforcing criminal law. When officials take into account the objectives of deterrence, recompense, and retribution, as well as the reality of scarce resources, their range of possible responses to antisocial behavior now includes a full spectrum of criminal and civil remedies. Determining the proper mix of these remedies in order to address a particular problem presents subtle policy questions and requires resolution of conflicting goals. 17 Moreover, efforts to mix and match criminal and civil sanctions, especially in a single proceeding, undoubtedly will require procedural and jurisdictional reforms. 18 Indeed, viewing antisocial behavior as a problem to be met, managed, and resolved by whatever civil or criminal tools promising may trigger a reexamination of how prosecutors' offices are perceived and organized. 19

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17. For example, the remedy of restitution can be used in multiple, and not necessarily harmonious ways. Sometimes restitution is enlisted to aid the community, sometimes to assist the offender's rehabilitation, and sometimes to provide recompense to victims. See Goldstein, Defining the Role of the Victim In Criminal Prosecution, 52 Miss. L.J. 515, 521-23 (1982).


19. Most prosecutors' offices, including United States Attorneys' offices, have separate civil and criminal branches. They sometimes bridge the divide between their civil and criminal departments by creating special divisions, offices, or task forces. Many United States Attorneys' offices have created, for example, special prosecution teams or crime task forces that are devoted to specific problems, like corruption in a particular industry. These groups enlist a variety of civil and criminal remedies comprehensively to ferret out crime.

The blending of civil and criminal remedies and strategies may prompt a review of and change in how all prosecutors' offices function. The prosecutor's office and law enforcement generally could be viewed as part of a regulatory process organized around particular subject areas or criminal "businesses." There would be divisions of environmental enforcement, consumer fraud enforcement, and drug enforcement, as well as a division for ordinary common law crimes. Each division would employ both criminal and civil remedies to reach the systemic supports of criminal behavior, as well as the behavior itself.

In a similar vein, there is growing interest in developing police resources to identify the causes or patterns of crimes and to formulate responses designed to contain or eliminate the behavior. See Anderson, The 'Tyranny' of 911, N.Y. Times, Sept. 17, 1990, at A22, col. 1. For example, police in Gainesville, Florida discovered that it was far more likely that convenience stores would be robbed when there was only one clerk on duty. After the
This Article primarily focuses on another consequence of the melding of civil and criminal remedies: the pressures brought to bear on individual rights by the proliferation of civil supplements operating in tandem with the criminal law. Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach antisocial behavior, but also because officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel. A persistent question remains regarding the use of civil remedies to check antisocial behavior: what constitutional limits constrain their use?

One difficulty in ascertaining the appropriate constitutional limitations is determining whether a particular proceeding is criminal or civil. Several protections of the Bill of Rights are expressly limited to "any criminal case" or "all criminal prosecutions," or, conversely, are confined to "suits at common law" or civil cases. Other provisions, though not expressly limited to criminal cases, have been so interpreted by case law.

Commentators have devoted considerable energy to this engaging and nettlesome issue. They frequently recognize that it is extremely difficult to draw principled lines to distinguish between criminal and civil cases. Moreover, attempting to fit all cases neatly...
into one category or the other, though sometimes necessary and useful, can cause a good deal of mischief. If "criminal case" is defined too broadly, then the cumbersome baggage of criminal procedure will be carried into a wide range of government and private lawsuits. If it is defined too narrowly, then the values that underlie various constitutional provisions will be sacrificed simply because they arise in a proceeding denominated as civil. Perceiving this dilemma, the Supreme Court sometimes has struggled to unravel its doctrine from the tangled embrace of the dichotomy. For example, in deciding what constitutes double punishment under the double jeopardy clause, the Court recently declined to rest its decision on whether the punishments arose in a criminal or civil proceeding. It found that such an approach was too "abstract" and not adequately responsive to the "humane interests" safeguarded by the double jeopardy clause.

This Article examines the constitutional issues presented by the criminal-civil "mix and match" phenomenon by offering and applying a workable test for distinguishing between civil and criminal cases. At the same time, it aspires to confine the importance of that distinction to a limited subset of constitutional problems. Part II surveys the types of civil remedies now used both to complement and to supplement the enforcement of the criminal laws. Part III explores and criticizes various bases for distinguishing between civil and criminal cases, and offers an alternative, narrow test that, with few exceptions, will follow the legislature's label.

More specifically, Part III explains why, in all but two kinds of cases, the legislature's declaration must be the exclusive determinant of whether a proceeding is civil or criminal. A legislative label approach is consistent with much of what the courts have done, and it offers a workable, bright-line test. More fundamentally, it recognizes that criminal proceedings are more than just a means of punishing specific persons; they are officially designated ceremonies of guilt adjudication. As such, they express society's ideology of individual free will and personal responsibility and serve as a reaffirmation of moral rules.

This Article explores and ultimately rejects other means of distinguishing between civil and criminal cases, such as comparing the severity of the sanctions involved, assessing the degree of stigma as-
associated with particular proceedings, or ascertaining whether a proceeding operates to punish. Not only are these approaches inconsistent with precedent and almost impossible to implement in a predictable or principled way, but they also fail to take into account society's vital interest in criminal proceedings.

Part IV of this Article argues that, in any event, the criminal-civil distinction should play only a limited role in preserving constitutional liberties. I argue that, on the constitutional level, the distinction only matters where the issues involve the proper procedures or burdens of proof to apply in a particular case. Thus, for example, the sixth amendment's requirements of a trial by jury and appointment of counsel, and the fifth amendment's due process requirements of proof beyond a reasonable doubt and the presumption of innocence, need only apply in criminal cases. Other constitutional provisions, such as the protections against double jeopardy and excessive fines, as well as freedom from self-incrimination, although traditionally limited to criminal cases, should not be so confined. Indeed, one of the consequences of the recent extension of civil responses to criminal behavior has been the nascent refashioning of constitutional doctrine along these lines.26

Part V of this Article observes that, so long as we continue to draw distinctions between civil and criminal cases, there are likely to be unique constitutional harms caused by using both criminal and civil proceedings as parallel means of checking antisocial behavior. That is, if civil and criminal cases, however defined, follow different rules of procedure, burdens of proof, and rules of discovery, the mere prosecution of simultaneous civil and criminal actions may force defendants to compromise constitutional protections in one forum in order to preserve advantages in the other. For example, if a defendant is forced to admit ownership of property in order to resist its forfeiture in a civil proceeding, she may thereby waive her privilege of self-incrimination in a concurrent criminal action.

In Part VI, I show how the unfair and oppressive effects sometimes produced by certain proceedings, despite the fact that they are constitutionally deemed civil, can be checked by a more vigorous judicial application of due process norms. Just as the rise of the "new property"27 in the 1960s and 1970s led to a recasting of due process

26. See infra text accompanying notes 268-275.
27. See Reich, The New Property, 73 YALE L.J. 733 (1964). In 1964, Professor Charles Reich, observing that an individual's freedom and security very much depends on her ability to hold and possess property free from irrational or procedurally unfair government interference, noted that this freedom was being seriously eroded by government's manipulation
and an eclipse of older ideas; so now, the rise of the "new penalties" may trigger a more vigorous application of due process protections.

Finally, the Article concludes with a look at one particular civil remedy, the use of civil protection orders in domestic violence cases. Such orders, now widely available, are obtained in civil proceedings but, like criminal law proscriptions, are enforced with arrest, prosecution, and incarceration. By looking at the use of these orders, we can see how a new understanding of the distinction between criminal and civil cases, including an understanding of when the distinction is and is not constitutionally relevant, permits a more systematic and complete accounting of the constitutional dangers posed by hybrid criminal-civil proceedings.

II. The Interplay of Civil and Criminal Remedies

A criminal justice system seeks to prevent crime, but, failing that, to find and punish offenders. While there always have been a variety of means to pursue these objectives, the traditional criminal justice response has been arrest, prosecution, and incarceration. For a long time, the conscious and systematic blending of criminal and civil remedies as part of a single law enforcement strategy has been pursued primarily by regulatory agencies in fields such as antitrust, securities trading, and customs control.

That generalization is, however, no longer true. Because of the changing nature of crime, the proven inadequacy of conventional law

of the terms and conditions of dispensing its own largesse. Professor Reich was among the first to recognize that, in the modern welfare administrative state, people are increasingly dependent on all forms of government benefits, such as awards of money, services, contracts, franchises, and licenses. Dependence on this "new property" makes individuals dependent upon the government and subject to its control. In order to preserve the concept of property as a cornerstone of freedom, he argued that it was imperative to recognize the "new property" of government largesse as a form of entitlement subject to procedural and substantive safeguards akin to those protecting conventional property.

28. For example, the Supreme Court's rejection of the right-privilege distinction permitted the government to fire its employees, cancel contracts, or terminate benefits at its sole discretion. E.g., Graham v. Richardson, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"). See generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968). Nevertheless, the right-privilege distinction retains some vitality. See Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 STAN. L. REV. 69, 69-82 (1982).

29. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 1.2(e), at 10-11 (2d ed. 1986).

30. For a discussion of alternative theories of punishment, see id. § 1.5, at 22-29.
enforcement methods, and the demonstrated success of laws like RICO and the asset forfeiture rules for drug cases, criminal justice officials are energetically pursuing multiple strategies to prevent and punish criminal acts. The following section catalogs the ways that civil remedies can be used to achieve criminal justice goals. And it shows that these instances are not isolated, unrelated phenomena; rather, taken together, they represent a new way of looking at criminal justice issues.

A. How Civil Remedies Complement Criminal Law Objectives

The civil law is rich in remedies. It offers compensatory damages, punitive damages, restitution, specific performance, injunctive relief, constructive trusts, abatement of nuisances, and forfeitures. In the regulatory sphere, the government has adapted all of these remedies as means of enforcing a wide range of rules and regulations. In the criminal justice arena, the same adaptive process is underway.

There are three distinct ways to accomplish this adaptation. First, civil remedies can be incorporated into a criminal proceeding. Forfeiture or restitution, for example, can be prescribed as part of a criminal sentence. Second, the civil remedy can be chosen as an explicit alternative to criminal prosecution. A legislature may consider certain antisocial behavior, such as motor vehicle driving offenses, too petty to be criminal, and yet seek to deter or punish infractions. Or a legislature may consider certain offenses, like racial harassment, too difficult to prove under the strict procedural rules applicable to the criminally accused. It even may believe that some harms, like spousal abuse, are better dealt with as mental health or family law matters. Third, civil remedies may be used as supplements to criminal sanctions. In this case, the government may seek a civil remedy, a criminal penalty, or both. The same activity that forms the basis for a criminal prosecution also serves as the basis for a civil sanction. In other words, the civil remedy is linked directly

to the underlying criminal activity. What follows is a brief survey of particular civil remedies and a description of how each is now used to complement enforcement of the criminal law.

B. Varieties of Civil Remedies

(1) Restitution and Recompense

Persons injured by the criminal conduct of others may bring a civil action for damages. In such actions, as in any other form of civil action, the victim must initiate the suit and bear the costs and burdens associated with maintaining and enforcing it. The legal system has responded to the victim's plight by trying to lighten these burdens. The federal government and most states permit courts to require restitution by criminal defendants either as part of their sentences or as a condition of probation. Less formally, the fact that a criminal has made restitution often figures in police and prosecutorial decisions to reduce charges or not to charge at all.

When restitution remedies are incorporated into the criminal justice system, an important question arises: must the amount of restitution be limited to the sum that is the basis of the conviction? State courts and commentators have taken many approaches to this question and have answered it differently. But, whether or not limited in total amount, restitution may take forms other than money damages. For example, courts may order restitutionary relief in the form of a constructive trust on property fraudulently transferred, a ref-

35. See, e.g., 42 U.S.C. §§ 300i, 300i-1 (1988) (authorizing civil penalties in addition to criminal sanctions for tampering with or attempting to tamper with public water systems).


37. Some states, for example, have adopted victim compensation statutes. See, e.g., CAL. GOV'T CODE §§ 13959-13966 (West 1980); HAW. REV. STAT. §§ 351-1 to -70 (1985 & Supp. 1989).


39. See Goldstein, supra note 17, at 531.

ormation of instruments, or the reconveyance of property fraudulently transferred.41

A variety of statutes permit the government, like ordinary citizens, to recover the damages and costs it incurs as a result of a criminal act. The government may have "rough compensatory justice" or "remedial recovery" for destruction of government property,42 losses from fraud or theft of government property,43 interest and costs associated with collecting back taxes,44 or damages to public interests such as to the environment.45 Governmental recovery via restitution, compensation, and remediation,46 like that of an ordinary citizen, can be effected through a separate lawsuit, or directly incorporated into the criminal justice system.

Sometimes the government's recovery, through compensation or remediation, includes the criminal's gains received as a result of her unlawful conduct.47 The recovery of such profits and proceeds can be viewed broadly as compensatory, even though there may not be a specific victim beneficiary. The idea is more to deprive the wrongdoer of her ill-gotten gains than it is to restore any particular person to a status quo ante. In some cases, however, the pursuit of proceeds may become so far removed from the underlying wrong that it no longer retains its compensatory nature.48 Rather it becomes a punitive measure akin to a statutory penalty or fine.

46. In the regulatory sphere, the government sometimes seeks a party's cooperation in remedying the particular harms she has caused—hence the term "remediation." The remedy can be as varied as the harm itself, and it may operate as a kind of specific performance. For example, the President may enter into consent decrees with a responsible party to clean up toxic waste sites, 42 U.S.C. § 9622 (1988), and the Securities and Exchange Commission may require a corporation to issue a corrective statement to clarify earlier proxy solicitation material found to be false or misleading, 17 C.F.R. § 240.14a-9 (1990). See also Studebaker Corp. v. Allied Products Corp., 256 F. Supp. 173 (W.D. Mich. 1966) (court ordered production of stockholder list, set new record date, new annual meeting date, and ordered supervision of proxy materials when it could not grant preliminary injunction); Central Foundry Co. v. Gondelman, 166 F. Supp. 429 (S.D.N.Y. 1958) (SEC and an incumbent board of directors entitled to injunction restraining exercise of proxies by insurgents during proxy contest).
47. See Fried, supra note 4, at 375-80.
48. See infra text accompanying notes 90-91.
(2) Statutory Fines and Penalties

There exists a variety of statutory regimes that prescribe or prohibit certain conduct and impose monetary penalties or fines for violations. Examples include tax laws, environmental regulations, securities trading statutes, and workplace safety rules.

Sometimes the fine or penalty under these laws takes the form of a double or treble damage award.\(^49\) In other cases, there may be a fine for each day of violation or simply a flat fee for each infraction.\(^50\) Sometimes a private citizen can initiate and litigate the penalty action against the offender,\(^51\) though the government ultimately enforces the penalty.

Civil fines or monetary penalties are used frequently as alternatives to criminal prosecution. If, for example, a legislature decides to decriminalize certain conduct, such as possession of small amounts of marijuana,\(^52\) it may, nevertheless, maintain some punishment to deter such behavior. A schedule of money penalties may seem more appropriate than a misdemeanor prosecution. Or, the regulated conduct may never have been deemed criminal but always have been considered sufficiently undesirable to warrant some form of deterrence. The common system of motor vehicle parking citations and fines presents a good example.\(^53\)

Sometimes the proscribed activity, such as nonpayment of taxes, insider trading, or restraint of trade, is subject to both civil and criminal sanctions. In such cases the civil regime directly supplements the criminal law, and an offender faces two separate systems of sanctions.\(^54\) The linkage between civil and criminal law may be so direct


\(^{51}\) The legislature can enlist a citizen's aid by making her an agent for the recovery of monetary sanctions, e.g., 31 U.S.C.A. §§ 3729-3731 (1988) (qui tam); or it may enlist citizen enforcers by creating new causes of action. Congress has created various "citizen suits" whereby new legal interests are recognized and private citizens are permitted to protect these interests by bringing lawsuits for damages and injunctive relief. The citizen sues to redress a wrong committed against her and, at the same time, she enforces rules and regulations benefitting the public. See, e.g., Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365 (1988); Clean Air Act (CAA), 42 U.S.C. § 7604 (1988).

\(^{52}\) See, e.g., OR. REV. STAT. § 475.992(4)(f) (1987) (fine for possession of less than one ounce of marijuana).


that recovery under the civil law is made dependent upon the plaintiff proving that the defendant committed the criminal act with criminal intent. In a civil RICO suit, for example, a private person may recover treble damages for harms caused by a pattern of racketeering, but only if she can show that the defendant committed certain "predicate" crimes such as murder, arson, or fraud.55

Although civil fines and other equivalent monetary penalties—much like liquidated damages—can operate as a form of restitution or recompense, many are meant to punish. They operate as a kind of punitive damages exacted for society's benefit.

(3) Loss of Government Benefits and Privileges

In our modern administrative state the government controls valuable opportunities through its power to confer benefits, employment, and licenses.56 Ordinarily, the loss of government benefits is not incorporated directly into a criminal proceeding as part of the defendant's sentence. Rather, the loss occurs collaterally. A recipient can lose a benefit or privilege automatically upon conviction of a crime.57 A conviction also can be used as evidence of lack of "good moral character" or "unfitness" in a later disbarment, license revocation, or disqualification proceeding.58 For example, three airline pilots recently were convicted under a new federal law that makes it a crime to fly a jetliner while under the influence of alcohol.59 The convictions followed the pilots' dismissal by the airline and the suspension of their licenses by the Federal Aviation Administration.60

There is almost no limit to the creativity of Congress in thinking of ways to sanction participants in government-regulated activities. Consider, for instance, recently proposed amendments to the Federal


56. Reich, supra note 27, at 746. This may mean investigating an applicant's qualifications, conditioning receipt of a benefit on the performance of or compliance with certain conditions, or suspending a licensee for some transgression.


60. Id.
Food, Drug, and Cosmetic Act. The proposals provide for debarment, civil monetary penalties, and suspension of drug approvals for fraud or corruption occurring in connection with applications to the Food and Drug Administration.

Regulatory sanctions can and often do operate wholly outside of the criminal law. Nevertheless, regulatory enforcement can complement criminal law enforcement in two ways. First, in those areas where antisocial behavior violates both regulatory and criminal law norms, the regulatory sanction can provide an alternative to prosecution, such as where prosecution seems too expensive or presents insurmountable proof problems. Second, even if the government prosecutes, it also may seek regulatory sanctions to remove a criminal offender (and perhaps her associates and her business) from the regulated industry.

(4) Forfeitures

The most popular "new" remedy for law enforcement officials is the very old remedy of forfeiture. Federal and state authorities have seized houses, boats, cars, apartment leaseholds, guns, and

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63. Persons with criminal records are barred from certain occupations or organizations. See, e.g., DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (no bill of attainder problems with § 8 of the New York Waterfront Commission Act of 1953 which disqualified any person who had been convicted of a felony from serving in a waterfront organization).
64. One particularly controversial leasehold forfeiture program is the federal government's Public Housing Asset Forfeiture Demonstration Project. The program, initiated in 1990, targets housing projects in 23 cities around the country. Its statutory basis is 21 U.S.C. § 881(a) (7) (1988), as amended by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The law permits forfeiture of any leasehold interest that is used or intended to be used to violate federal drug laws. It specifically permits public housing authorities to evict tenants if they, members of their families, or even their guests engage in drug-related criminal activities.

In Richmond, Virginia, groups representing public housing tenants brought suit in United States district court, alleging that the federal government was planning to evict entire families without any prior notice or opportunity to be heard. The evictions were to be based only on an ex parte showing before a federal magistrate of probable cause to believe that a member of the household was using a housing unit to sell drugs. Family members would be left with only the opportunity, after eviction, to prove that they did not know about, or did everything they could to stop, the criminal conduct. Although the federal statute contemplates this exact procedure, the court enjoined the government from carrying out the program in Richmond without affording prior notice and an opportunity to be heard. Richmond Tenants Org. v. Kemp, 753 F. Supp. 607, 610 (E.D. Va. 1990). Accord United States v. The Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, New York, 760
even entire businesses, under laws that permit forfeiture of property that is used for or derived from criminal activity.

Currently, the prominent targets for forfeiture are assets used by those who engage in drug trafficking and narcotics use. But the breadth of state and federal forfeiture statutes permits the seizure of property acquired in violation of antitrust laws, property used for illegal gambling, vehicles used in violation of liquor laws, guns or other equipment used unlawfully in national parks, and property smuggled in violation of customs laws. Many states have generalized forfeiture statutes that permit the seizure of virtually any property used as an instrumentality of a crime.

Since forfeiture is the "divestiture without compensation of property used in a manner contrary to the laws of the sovereign," property can be forfeited even if the underlying activity is not defined by law as criminal. Examples of this type of activity include selling adulterated food and importing banned products from disfavored


Since Kemp, the Department of Housing and Urban Development has developed criteria that go beyond what federal law requires for proceeding against particular tenants. These include requiring: that the drug offender be the leaseholder of the property; that compelling evidence be developed that the violator has participated in at least two felony drug offenses; that the property be "an open and notorious site of drug distribution," and that efforts be made to help and relocate the elderly and minors who may be affected by eviction. Dep't of Housing and Urban Development and Dep't of Justice, Forfeiture of Leases for Drug Free Neighborhoods 3 (1990). The federal program is based on similar programs established by state and local agencies in New York, Chicago, and Bridgeport, Connecticut. Id. at 2. The federal government claims these programs are successful in ridding public housing of drug dealers. Id. Nevertheless, affected tenants continue to argue that the means chosen unduly and unfairly harm innocent and often helpless third parties. See Leasehold Interest, 760 F. Supp. at 1032-33.


67. E.g., 15 U.S.C. § 1177 (1988); 18 U.S.C. § 1955(d) (1988). The Eighth Circuit recently held that the Organized Crime Control Act authorizes the seizure not only of gambling paraphernalia and other personal property, but also extends to seizure of real estate, including personal residences, that are connected to gambling operations. United States v. South Half of Lot 7 and Lot 8, 910 F.2d 488, 489-91 (8th Cir. 1990) (en banc). The Second Circuit has reached a similar result. See United States v. Premises and Real Property at 614 Portland Ave., 846 F.2d 166, 167 (2d Cir. 1988).


countries. Thus, forfeiture can be used as an alternative to the criminal justice system; indeed, forfeitures are a pervasive mode of regulatory enforcement.

Under both state and federal law, property may be forfeited either as a punishment imposed in a criminal proceeding (criminal forfeiture), or as part of a separate civil proceeding (civil forfeiture). There are important differences between these two types of forfeiture.

Criminal forfeitures are in personam proceedings instituted as part of the criminal case against a defendant. The forfeiture affects only the interests of the defendant in the property. Because criminal forfeiture is a part of the criminal process, all of the rights defendants enjoy in criminal cases, such as proof beyond a reasonable doubt, attend the proceeding. Generally, the property may not be seized until the defendant has been found guilty of the offense and there is a finding of forfeiture by the trier of fact.

A civil forfeiture is an in rem proceeding. It is an action brought against the property, not against any particular person having an interest in the property. Historically, the proceeding was justified by the legal fiction that the property itself was guilty of wrongdoing. In a civil forfeiture action, the government seizes property, often summarily, and persons with an interest in the property must sue to recover it. In order to do so, they may either prove that the property is not subject to forfeiture, or show that, although subject to forfeiture, the property should be returned to the owner because she had no knowledge of its illicit use.

75. Fried, supra note 4, at 381.
76. There are, however, proceedings incident to criminal forfeitures which are not subject to the usual burdens of proof and other protections surrounding trials of the criminally accused. These proceedings are the means to preserve property which then may be subject to forfeiture as part of the defendant's sentence. See, e.g., 18 U.S.C. § 1963(e)(2) (Supp. III 1985); 21 U.S.C. § 853(e)(l)(B) (Supp. III 1985). A temporary restraining order, for example, may be entered on a showing of "probable cause to believe that the property . . . would, in the event of conviction, be subject to forfeiture." 18 U.S.C. § 1963(d)(2) (Supp. III 1985).
78. The U.S. Customs laws, for example, outline a detailed process for seizure, forfeiture, and recovery of seized goods. See 19 U.S.C. §§ 1609-1615 (1988).
79. For a more detailed description of how forfeitures work, see U.S.D.J. NUTSHELL, supra note 14, at 1-3; see also Fried, supra note 4, at 329-57; infra notes 416 and accompanying text.
Forfeiture can be divided into three separate categories based on the kind of property seized and the rationale for seizing it. First, there is "contraband": anything prohibited by law from being imported, exported, or even possessed. Forfeiture is allowed because the property itself is "guilty," being a prohibited article in which there may be no traffic. The customs and import laws, for example, are enforced by summary forfeiture both of contraband and of any vehicle in which contraband is transported. Just about anything can be contraband if the legislature so designates it. Some examples are: adulterated and misbranded products, narcotics, counterfeit money, firearms, and cars with falsified identification numbers.

Second, there are "instrumentalities": any property used to produce, store, or transport contraband. This category also includes "any property intended for use in violating the provisions of the internal revenue laws." The definition of instrumentality has been expanded considerably in recent years. Originally intended to reach property that actually was used to commit a crime, it now includes any property having even the most tangential connection to criminal activity, such as real property where a crime was planned. Under this broad definition, the government has gone so far as to seize leaseholds as "instrumentalities."

Third, there are "proceeds" or "profits" derived from illegal activity. This category includes the profits from a business fraudulently obtained, as well as any enterprise or goods in which money from criminal activities has been invested. The idea is to recover the ill-gotten gains of criminal behavior and not permit the criminal to profit from her misconduct. As has been the case with the definitions of "contraband" and "instrumentalities," however, the concept of "proceeds" or "proceeds," especially in relation to enterprise

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83. Id.
84. Id.
87. See Fried, supra note 4, at 382.
88. See United States v. Various Parcels of Real Property, 650 F. Supp. 62, 63 (N.D. Ind. 1986); see also United States v. South Half of Lot 7 and Lot 8, 876 F.2d 1362, aff'd on rehearing, 910 F.2d 488 (8th Cir. 1990) (en banc) (finding that real property is forfeitable under 18 U.S.C. § 1955(d) (1988) which permits the government to gain forfeiture of property used in illegal gambling operations).
forfeiture, has been stretched far beyond its original boundaries so that the value of profits or proceeds may exceed the criminal's ill-gotten gains.\textsuperscript{90} For example, an entire business enterprise can be forfeited if the defendant has committed crimes in his management or conduct of it.\textsuperscript{91}

Civil forfeiture is quick, easy to use, and expansive in scope. It is also highly lucrative. In 1988, for example, Broward County, Florida seized property valued at almost four million dollars.\textsuperscript{92} About one fourth of that total was kept by county law enforcement agents for use in their departments.\textsuperscript{93} Florida, like many other jurisdictions, permits law enforcement agencies to benefit directly from aggressive forfeiture efforts.\textsuperscript{94} These features have made civil forfeiture enormously attractive to law enforcement personnel. However, the harsh effects of forfeiture, particularly on innocent persons, have drawn increasing attention and critical review.\textsuperscript{95}

(5) Injunctions and Civil Protection Orders

Despite the seeming variety, many of the recent innovations in using civil proceedings to address criminal or antisocial behavior actually draw upon an ancient and familiar remedy: the injunction. An injunction is a court order that directs a particular defendant to do or to refrain from doing specific acts.\textsuperscript{96} The order is enforced through a contempt proceeding.\textsuperscript{97} Injunctions take many forms, including: civil protection orders used to protect persons from domestic violence; orders to abate nuisances caused by maintaining premises where illegal activity, such as drug dealing, has occurred; and orders to cease gang activity or interference with another's civil rights. Indeed, many of the "new" law-enforcement schemes are simply modern adaptations of statutes which have been on the books for decades.


\textsuperscript{91} 18 U.S.C. § 1963(a)(2)(A), (D) (Supp. III 1985); see also United States v. Busher, 817 F.2d 1409, 1411 (9th Cir. 1987) (RICO conviction for subcontracting government contract work to defendant's own fictitious corporation in another state; court ordered forfeiture of both businesses).

\textsuperscript{92} Strasser, Forfeiture Isn't Only for Drug Kingpins, The Nat'l. L.J., July 17, 1989, at 1, col. 1.

\textsuperscript{93} Id.


\textsuperscript{95} See, e.g., Schmidt, Chicago's Housing Raids Challenge, N.Y. Times, Dec. 17, 1988 § 1, at 8, col. 1; Strasser, supra note 92, at col. 1.

\textsuperscript{96} D. Dobbs, Remedies: Damages-Equity-Restitution 105 (1973).

\textsuperscript{97} Id.
Injunctive relief also has been incorporated into criminal proceedings in the form of conditions imposed before a confined person will be released. Judges long have used the imposition of conditions to qualify a criminal defendant's release pending trial and as part of a criminal defendant's sentence of probation. Defendants, on pain of losing their freedom, sometimes are required to undergo drug tests, stay at home after dark, get a job, make restitution to the victim of the crime, or perform community service.

Increasingly, injunctive relief is being used as an alternative or as a supplement to criminal prosecution. For example, some states have enacted statutes that permit abused spouses to seek a court order enjoining further mistreatment. Sometimes an injunction can be sought for activity that alone is not criminal, in which case the regime operates as a remedy apart from the criminal law. Sometimes an order may be sought even though the conduct on which it is based constitutes a crime, such as simple or aggravated assault. In such circumstances, the injunction operates as a supplement to the criminal statutes.

(6) Detention and Civil Commitment

Although we ordinarily associate the loss of physical liberty, through confinement, detention, or jailing with criminal sanctions, such deprivations also may be permitted in what the United States Supreme Court has called "regulatory" contexts. The Court has approved such regulatory measures as pretrial detention.


100. See infra text accompanying notes 422-433.


104. Id. (upholding the Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (1988), which requires the detention prior to trial of arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence that no release condition can "reasonably assure" the community's safety).
during wartime and insurrection,\(^{105}\) detention of resident aliens pending deportation proceedings,\(^{106}\) post-arrest detention of juveniles,\(^{107}\) detention of criminal defendants who are incompetent to stand trial,\(^{108}\) and the involuntary commitment of mentally ill persons who are a danger to themselves or to others.\(^{109}\) Although most of these types of confinement last for a relatively short period of time, some, such as the confinement of the mentally ill, can turn out to be life sentences.\(^{110}\)

The linkage between the involuntary commitment of a person who is mentally ill and the criminal justice system often can be quite close. Some statutes recognize the commission of a criminal act as a predicate for commitment and have even been interpreted to permit committed individuals to be housed in the state penitentiary.\(^{111}\) Involuntary civil commitment can be used to confine and treat a person who is not competent to stand trial or is found not guilty by reason of insanity.\(^{112}\) More generally, commitment of the dangerously mentally ill may be the only means of protecting society when proving a criminal case is impossible.

\(^{105}\) See Ludecke v. Watkins, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor during time of insurrection).

\(^{106}\) See Carlson v. Landon, 342 U.S. 524, 537-42 (1952); Wong Wing v. United States, 163 U.S. 228, 236-37 (1896).


\(^{110}\) See Jones v. United States, 463 U.S. 354, 370 (1983) (the Constitution permits the government to commit persons to mental institutions even though they have been acquitted of a crime by reason of insanity). Involuntary civil commitment of the mentally ill has declined over the past several decades due, in part, to constitutional procedural restrictions adopted by the Supreme Court. E.g., O'Connor v. Donaldson, 422 U.S. 563 (1975) (state cannot confine non-dangerous individual who will only receive custodial care); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (commitment of a criminal defendant solely due to incapacity to stand trial may violate due process); Robinson v. California, 370 U.S. 660 (1962) (suggesting that punishment of certain status offenses, such as drug addiction and mental illness, would constitute cruel and unusual punishment if treatment is not provided). See also Bagby, The Effects of Legislative Reform on Civil Commitment Rates: A Critical Analysis, 6 BEHAV. SCI. & L. 45 (1988); Durham & La Fond, A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill, 40 RUTGERS L. REV. 303, 306-10 (1988).

\(^{111}\) See, e.g., ILL. ANN. STAT. ch. 38, para. 105-1.01 (Smith-Hurd 1980); WIS. STAT. ANN. § 51.20 (West 1987); see also Allen v. Illinois, 478 U.S. 364 (1986) (defendant declared a "sexually dangerous person" after committing crimes of unlawful restraint and deviate sexual assault).

C. The Appeal of Civil Remedies

There are many reasons why legislators and other governmental officials are embracing greater use of civil remedies to respond to criminal or antisocial behavior. Civil remedies can increase the degree of punishment inflicted on a wrongdoer. If the offender faces both a civil and a criminal sanction, the double liability may satisfy a perceived need for greater retribution or enhanced deterrence. In some instances, however, double punishments may not be constitutionally permissible. In that event, a legislature need not rely on parallel civil proceedings to increase punishment. It can simply prescribe a harsher criminal sanction.

The wider use of civil remedies also may increase the incidence of punishment by increasing the likelihood that offenders will be pursued. In general, civil remedies are easier to use, more efficient, and less costly than criminal prosecutions. When authorities can act with a greater potential for success and with less expense and use of resources, there is greater likelihood that they will act. The theory here may be that half a loaf really is better than none. That is, although an offender may not face the full force of the criminal law because a prosecution is too costly or guilt beyond a reasonable doubt cannot be proved, she will still be held accountable in some fashion.

If due process and other constitutional guarantees are refashioned or simply applied more rigorously to civil proceedings, the benefits of greater efficacy and efficiency may be somewhat diminished. And if the government elects to pursue both a criminal and a civil action against an offender, the civil proceeding actually may prove to be inefficient. There is evidence, for example, that Congress expanded the use of criminal forfeiture in drug cases to include property of the defendant "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation" precisely because it would be more convenient to avoid holding both a criminal trial and a civil forfeiture proceeding.

Furthermore, certain civil remedies offer opportunities to respond directly to politically active groups, including groups of vic-

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113. See infra text accompanying notes 268-275.
114. This likelihood may be diminished, at least temporarily, by an enforcing authority's unfamiliarity with a novel or untested civil remedy. Or, there may simply be—on the part of police or prosecutors—an unwillingness to use alternatives to the criminal process because such alternatives are viewed as the tools of regulators, not "crime fighters."
tims' rights of spousal abuse and racial harassment. The expanded use of the restitution remedy, for example, is a direct response to the victims' rights movement.\textsuperscript{117} Of course, civil remedies are not the only way, and may not always be the best way, to provide relief or demonstrate that special efforts are being made on a group's behalf.\textsuperscript{118} The criminal justice system can achieve these goals by creating special offices or special prosecution priorities.

The special contributions of civil remedies would seem to lie elsewhere. First, when civil remedies are used as an alternative to criminal remedies, it is possible to reserve a special province for criminal justice and the criminal sanction. Criminal law can focus on serious transgressions and harms involving culpable conduct, not merely negligent or impaired action. Civil remedies are a means to impose strict liability for offenses and to identify behavior as antisocial without invoking the full procedural and moral artillery of a criminal case. The idea is that, to maintain its moral force, the criminal law should address only seriously antisocial behavior and only behavior involving persons who are responsible for their actions.\textsuperscript{119}

Second, when civil remedies are used as supplements to the criminal process, they permit the government to take actions and enlist citizen resources that are not generally available to the criminal justice system. In terms of action, remedies such as forfeitures, injunctive relief, and constructive trusts enable the government to reach the systemic supports of criminal activity—the organizations and businesses that underlie ongoing criminal enterprises. Law enforcement personnel long have recognized that the arrest and prosecution of individuals, even on a massive scale, is often not enough to end political corruption, organized crime, or the operation of illicit businesses.\textsuperscript{120} Civil remedies, such as a constructive trust imposed on a

\textsuperscript{118} For example, if the civil remedy is perceived as relegating the victim to a "lesser" remedy, or being "put off" by authorities, victims' rights groups will not be satisfied.
\textsuperscript{119} See H. PACKER, supra note 3, at 62-70, 249-50.
\textsuperscript{120} For example, in various reports issued between 1984 and 1986, the President's Commission on Organized Crime repeatedly emphasized that criminal law enforcement—no matter how energetically pursued—was inadequate to ferret out the influence of organized crime and corruption in the American economy. In its extensive report on the influence of organized crime over labor unions and businesses, the Commission said:

Despite many major prosecutorial successes, the government's efforts to remove organized crime's influence over unions and legitimate businesses have been largely ineffective.

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To be successful, an attack on organized crime in our mainstream economy
corrupt union, offer flexible means of targeting the organizational supports for crime. In fact, some criminal activity only can be addressed through such systemic reform.

In terms of expanding available resources, civil remedies permit the government to enlist and even conscript citizens to prosecute, sue, and shun criminals. Under *qui tam* statutes, citizens essentially are converted into bounty hunters and paid handsomely, out of the offenders’ pockets, to sue those who have defrauded the government. With civil RICO, plaintiffs can reap multiple damage awards if they prove that enterprises are engaged in a pattern of racketeering. RICO plaintiffs thus vindicate the harm done to themselves, and at the same time, they exact heavy financial penalties from transgressors. Moreover, civil forfeiture makes citizens, on pain of losing their property as an instrument or proceed of crime, monitor the behavior of guests in their cars, family members in their homes, or anyone who borrows or leases their property.

Similarly, since the proceeds of crime are subject to forfeiture in the hands of innocent persons who have knowing business dealings with criminals, business people such as lawyers, doctors, or landlords cannot rely solely on the enforcement of federal criminal laws. Organized crime has established economic cartels which eliminate marketplace competition by maneuvering businesses and labor officials through a kind of ownership not recognized by the law. The Commission believes that a strategy aimed at the legitimate economic base of organized crime must build upon the recent successes of law enforcement, and must be based upon intervention measures as broad-based as the nature of the threat posed by organized crime. A strategy in this area should also rely upon civil and regulatory measures tailored to the specific problems confronted in labor and management racketeering.

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121. See United States v. Local 560 Int'l Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984) (civil RICO used to impose a trusteeship on a union found to have been "captured" by organized crime).


124. One recent example of asset forfeiture, the March 1990 drug arrests and property seizures at the University of Virginia, shows how forfeiture can affect the lives of ordinary citizens. There, the local police department sent letters to all of the fraternities on campus, months before the raid, warning that the police had information that drug activity was taking place and that, if this information proved to be correct, the fraternity houses could be subject to forfeiture. Ayres, No Regrets, Says Organizer of Drug Raid at Virginia, N.Y. Times, Mar. 28, 1991, at A20, col. 3; Isikoff, Drug Raids Net Much Valuable Property, The Washington Post, Apr. 1, 1991, at A1, col. 1.
must cease such dealings or run the risk that money earned in an arm's length transaction may be forfeited under a "profits and proceeds" theory.\textsuperscript{125} Citizens and businesses also act as monitors when threatened with vicarious liability carrying regulatory penalties such as loss of a license or debarment. Criminal sanctions, focused as they are on culpable individuals, have neither the scope nor the flexibility of civil remedies.

\textbf{III. The Criminal Law-Civil Law Distinction}

\textbf{A. Why It Matters}

Arguably, a legal system need not distinguish between criminal and civil cases at all.\textsuperscript{126} It simply could establish a "law of wrongs" with each transgression separately defined and carrying its own penalty and method of enforcement. Under such a system, society might rely on government officials, like police and prosecutors, to enforce the law. Alternatively, it could permit private citizens, like victims or their families, to bring an offender to justice.\textsuperscript{127}

Nevertheless, with the rise of the modern nation state, governments assumed the general duty of ensuring the public peace\textsuperscript{128} and the specific duty of prosecuting individual wrongdoers.\textsuperscript{129} Thus was born the idea of offenses against society: so-called "public wrongs."\textsuperscript{130} An offense may have had a specific victim, but what made it a crime was the fact that it violated peace, order, and societal norms.\textsuperscript{131}

By the time the United States Constitution was adopted, the distinction between criminal law and civil law was well accepted. The Bill of Rights clearly reflects this division: more than half its protections apply primarily to the criminally accused. The self incrim-

\begin{itemize}
\item \textsuperscript{125} See Fried, \textit{supra} note 4, at 350-51.
\item \textsuperscript{126} See, e.g., S. Schafer, \textit{Compensation and Restitution to Victims of Crime}, 3-12 (2d ed. 1970); Boldt, \textit{supra} note 39, at 989.
\item \textsuperscript{127} Historically, private prosecutions were the norm. See, e.g., J. Stephen, \textit{A General View of the Criminal Law of England} 8 (2d ed. 1890) ("Crimes in Early Anglo-Saxon Law seem to have been regarded as private wrongs, revenged rather than punished by those who were injured by them ... ").
\item \textsuperscript{128} R. Pound, \textit{The Formative Era of American Law} 13-16 (1st ed. 1938).
\item \textsuperscript{129} See Hall, \textit{The Role of the Victim in the Prosecution and Disposition of a Criminal Case}, 28 VAND. L. REV. 931, 932 (1975).
\item \textsuperscript{130} Nelson, \textit{Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective}, in \textit{American Law and the Constitutional Order} 70 (Friedman & Scheiber eds. 1988).
\item \textsuperscript{131} Id. at 165.
\end{itemize}
ination clause of the fifth amendment, for example, expressly applies to "any criminal case."\textsuperscript{132} Similarly, the sixth amendment rights to a speedy trial, trial by jury, confrontation of witnesses, compulsory process, and assistance of counsel are available to the "accused" in "all criminal prosecutions."\textsuperscript{133} Other constitutional protections, such as the requirement that guilt be proven beyond a reasonable doubt, while not explicitly limited to criminal cases, have been substantially confined to that context by precedent.\textsuperscript{134} Given these distinctions, an important question arises: for constitutional purposes, how do we distinguish between criminal and civil proceedings when both seek to deter and punish antisocial behavior?

Commentators have labored mightily to equate various civil remedies, including fines, forfeitures, and treble damage actions, with criminal proceedings.\textsuperscript{135} The importance of this issue is apparent: if these efforts are successful, then the constitutional provisions ordinarily associated with criminal proceedings presumably will apply to many civil proceedings.\textsuperscript{136} Indeed, the Supreme Court has observed that "[t]he distinction between a civil penalty and a criminal penalty is of some constitutional import."\textsuperscript{137} The issue has arisen in matters as diverse as the involuntary commitment of the mentally ill,\textsuperscript{138} punitive damage awards in private lawsuits,\textsuperscript{139} juvenile proceedings,\textsuperscript{140} pretrial detention,\textsuperscript{141} statutory fines and penalties,\textsuperscript{142} forfeiture of property,\textsuperscript{143} loss of citizenship,\textsuperscript{144} and deportation proceedings.\textsuperscript{145}

B. Some Approaches to Drawing the Criminal-Civil Distinction

In thinking about how to distinguish criminal and civil proceedings, several plausible and appealing approaches come to mind. We might simply identify punishments that are distinctly associated with the criminal law, such as fines or incarceration, and then label

\begin{flushleft}
\textsuperscript{132} U.S. Const. amend. V. \\
\textsuperscript{133} U.S. Const. amend. VI. \\
\textsuperscript{135} See, e.g., Note, Civil RICO is a Misnomer, supra note 22, at 1298-1300. \\
\textsuperscript{136} Id. at 1301. \\
\textsuperscript{137} Ward, 448 U.S. at 248. \\
\textsuperscript{138} Allen v. Illinois, 478 U.S. 364, 368-69, 374 (1986). \\
\textsuperscript{140} In re Gault, 387 U.S. 1, 49-50 (1967). \\
\textsuperscript{141} United States v. Salerno, 481 U.S. 739, 746-47 (1987). \\
\textsuperscript{142} United States v. Ward, 448 U.S. 242, 248-49 (1980). \\
\textsuperscript{144} Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164 (1963). \\
\textsuperscript{145} Fong Yue Ting v. United States, 149 U.S. 698, 722 (1893).
\end{flushleft}
as criminal any proceeding in which those punishments may be inflicted. Or we might focus on the condemnation or stigma associated with conviction for a criminal offense, and label as criminal any proceeding which carries equivalent opprobrium. Finally, we might simply view the criminal law as primarily aimed at inflicting punishment and the civil law as primarily aimed at facilitating regulation and compensation, and divide proceedings according to which of these aims they primarily serve. This section examines, but ultimately rejects these bases of distinction, principally because they fail to take complete account of the societal stake in the process of guilt adjudication.

(1) Sanction Equivalencies in Criminal and Civil Cases

It is clear that certain proceedings, even though statutorily or judicially labeled "civil," in reality exact punishments at least as severe as those authorized by the criminal law. Arguably, such proceedings should be treated as criminal proceedings for the purposes of constitutional safeguards since, in the end, the punishment inflicted on the defendant is the functional equivalent of a criminal sanction. This idea is appealingly straightforward and, sometimes, equitably compelling. If a contractor who has filed false claims against the government can be assessed thousands of dollars in civil fines, why should the proceeding be any different from a criminal prosecution for the same misdeeds that carries the same monetary penalty.146

Some commentators have argued that criminal constitutional safeguards should apply to all civil punishments which are not de minimis or petty.147 Yet, though the severity of a civil sanction may be an important consideration in applying various constitutional

146. In the same vein, consider cases in which a property owner is subject to the forfeiture of expensive possessions like her house, her car, or her yacht because others, without her knowledge or consent, used the property to possess or transport small amounts of marijuana. Should not the defendant in such a case enjoy the same constitutional protections as she would in a parallel criminal case carrying far lesser penalties? See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

147. See, e.g., Comment, The Concept of Punitive Legislation and the Sixth Amendment: A New Look at Kennedy v. Mendoza-Martinez, 32 U. CHI. L. REV. 290, 292 (1965) (authored by George Fletcher) (arguing that constitutional criminal procedure protections ought to be afforded "whenever a person is threatened with a grave sanction"); but see Charney, The Need for Constitutional Protections for Defendants in Civil Penalty Cases, 59 CORNELL L. REV. 478, 507-12 (1974) (arguing that the civil-criminal distinction should be based on the purpose of a penalty, without regard to severity).
safeguards, the Supreme Court has never adopted this approach.\textsuperscript{148} This \textit{sanction equivalency} approach has many serious flaws, not the least of which is the longstanding acceptance of the civil label even as applied to huge punitive damage awards and fabulous forfeitures. Even if one were to confine the argument to only those sanctions that involve losses of liberty equivalent to the quintessential criminal sanction of incarceration, it is clear that the courts consistently have treated certain deprivations of physical liberty, such as imprisonment for civil contempt and involuntary commitment of the mentally ill, as civil in nature.\textsuperscript{149}

But, mindful of Holmes’s admonition that we should have better reasons than just history to support our legal rules,\textsuperscript{150} we also should reject the sanction equivalency approach because of practical, common sense concerns. The criminal procedural protections set out in the Constitution are extremely costly and time consuming. In fact, they may add nothing to and even frustrate the goals of fairness, accuracy, and truth-finding. One can view the Bill of Rights itself as a balancing of interests between the costs of procedures and the benefits they confer.\textsuperscript{151} Any decision to extend procedural protections beyond those instances where they clearly apply requires a similar calculation.

Moreover, if the Court were to follow an equivalency approach, it would necessitate the development of an entirely new jurisprudence in order to identify sanctions that count—those that are not petty or de minimis. While this task would not be impossible—after all, the Court has drawn a bright line separating petty from serious criminal offenses with regard to the sixth amendment right to trial by jury—it would be daunting.

\textsuperscript{148} See, e.g., Allen v. Illinois, 478 U.S. 364, 368 (1986) (“The question of whether a particular proceeding is criminal for the purposes of the Self-Incrimination Clause is first of all a question of statutory construction.”); United States v. Ward, 448 U.S. 242, 248-49 (1980) (civil-criminal distinction turns on congressional intent; once intent has been determined, further inquiry into whether the statutory scheme is so punitive as to negate such intent would only occur where the court had “the clearest proof to establish the unconstitutionality of a statute on such a ground”).


\textsuperscript{150} See Holmes, \textit{The Path of the Law}, 10 HARV. L. REV. 457, 469 (1896-97) (“It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.”).

(2) The Matter of Stigma

Often the basic objective of the criminal law is to deter and punish socially deviant or harmful behavior. In this there may be substantial overlap with many civil proceedings. One major difference between the two is that the criminal justice system and the law of criminal procedure constitute society's formal means of determining and pronouncing guilt and innocence, right and wrong. One distinction between criminal and civil sanctions, then, lies in the criminal law's "judgment of community condemnation" on a transgressor. For some commentators, therefore, the ultimate difference between civil and criminal proceedings is that a criminal conviction, unlike civil judgment, carries with it the stigma, or brand, of societal condemnation.

Although the Supreme Court has expressed sympathy for this idea, there are difficulties with this proposition. Perhaps the most serious is deciding what is meant by stigma. Stigma can mean condemnation or opprobrium, but some civil wrongs are condemned more seriously than are many criminal lapses. For example, a negligent, but not criminal, discharge of deadly toxic wastes into the environment may carry an extremely high measure of social stigma. If stigma depends upon public reaction, then courts are neither well-

152. See infra notes 168-171 and accompanying text. One example of overlapping civil and criminal proceedings is found in the federal civil rights laws. Conspiring to prevent an individual from exercising her constitutional or federal rights is a crime punishable by fine or imprisonment. 18 U.S.C. § 241 (1988). An injured individual also has a cause of action for damages for substantially the same conduct that 18 U.S.C. § 241 criminalizes. See 42 U.S.C. § 1985 (1988).

Federal statutes that regulate widespread behavior commonly incorporate a private cause of action in the statute thus creating private attorney generals. Allowing private citizens to sue for damages—sometimes double or triple damages or attorney fees—serves to deter the undesirable conduct more effectively than if only government prosecutors pursued the lawbreakers. The federal antitrust laws are the classic example of the private attorney general concept. See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987) (Clayton Act brings to bear the pressure of private attorney generals on a problem for which public prosecutorial resources are deemed inadequate).


154. E.g., In Re Gault, 387 U.S. 1, 23-24 (1967). But stigma has not been enough to convert a proceeding from civil to criminal. See Note, Enforcing Criminal Laws Through Civil Proceedings, supra note 23, at 1061-62 (concluding that, while "stigmatization is not itself a criminal penalty that is protected by the fifth amendment, . . . it remains a factor to be considered in determining whether the proceeding is civil or criminal").
equipped nor especially competent to assess whether a defendant truly is to be stigmatized.

Stigma sometimes is viewed relative to the severity of the punishment imposed in a particular proceeding. This approach is different from the punishment equivalencies theory. At the heart of this approach is the idea that some punishments are so severe or infamous that, even if they are imposed under a civil label, they represent societal condemnation and ostracism—branding the defendant a wrongdoer. Punishments such as capital punishment, long-term incarceration, and, presumably, loss of citizenship would qualify under this approach. But consider long-term loss of liberty through involuntary commitment, corporal punishment, or loss of the custody of one's children: all of which the courts routinely have regarded as civil in nature. What shall be the measure of severity in these cases?

Alternatively, stigma might be measured by the legislature's intention. In fact, the cases indicate that the key factor used to separate civil from criminal proceedings is the label affixed by the legislature. If stigma is to be our benchmark, this is how it should be determined. The very act of labeling certain behavior as criminal clearly reflects the community's moral judgment that it is deviant, unacceptable, and, therefore, to be officially and publicly condemned. By affixing this label, society binds itself to the stringent procedures applicable to criminal proceedings; it does so both to protect individual rights and to give its final judgment much more certainty, power, and finality. A person is branded as a criminal, punished, and subjected to the collateral consequences of having the status of "convicted felon." This approach explains outcomes that have intuitive appeal: civil fines of even large sums do not denote the commission of crime; but a criminal conviction, even with the sentence completely suspended and no fine imposed, obviously does.

The legislative label approach thus has a good deal to commend it: acceptance by the courts, intuitive appeal, and it offers a bright line test and, thus, an easily applied solution to the civil law-criminal law conundrum. There are, however, two significant failings in exclusive reliance on legislative labeling. One is that if we allow the legislature's label to be conclusive regarding the nature of a proceeding, such a formalistic approach might easily lead to legislative abuse. The legislature presumably could label the crime of bank robbery as a civil offense, provide for "civil" imprisonment and fines,

155. See infra notes 208 and accompanying text.
156. See infra text accompanying notes 177-180.
157. Id.
and thereby sidestep Bill of Rights protections for the criminally accused. A second and closely related problem is that no matter how severe or infamous the punishment, no proceeding clearly and purposefully labeled as civil would be considered as criminal for the purposes of constitutional protections. As this Article will demonstrate, a fuller understanding of why the legislative designation is so central to classifying a proceeding as criminal—an understanding which transcends the matter of stigma—will provide a response to these two objections.

(3) A Legislative Purpose to Punish

Commentators have suggested another approach to the criminal-civil distinction, one that focuses on how the goals of the criminal process are distinct from those of the civil process. If we know the answer to this question, it is thought, we can then look at a proceeding, ask whether it serves criminal law or civil law purposes and apply constitutional protections accordingly. This approach relies on the fact that different proceedings often are driven by different legislative purposes.

All criminal and civil proceedings are designed to serve certain underlying goals. Sometimes the objectives are multiple, sometimes they are unclear, but the major goals can be discerned. And, although criminal and civil cases tend to have different emphases, they can and do serve many of the same objectives, including compensation, deterrence, rehabilitation, treatment and protection, coercion to perform specific acts, and retribution.

At one end of the spectrum, civil and criminal cases most clearly diverge when the objective is recompense of the injured, which is the hallmark of a civil proceeding. Although a criminal sentence may include restitution and the criminal process can impose restitution as a condition of probation, criminal procedure is not designed primarily to aid the victim of a crime. Indeed, there is a growing

158. See, e.g., Clark, supra note 22, at 382-85.
161. Indeed, one commentator argues that it should not be so designed. Boldt, supra note 38, at 1014-16. In this regard, it is useful to distinguish between recompense as restitution to the person harmed on the one hand, and penalties exacted by and paid to the government on the other. The criminal law may separate a criminal from her unjust gains, but its primary purpose is not to aid the crime victim. In fact, criminal forfeiture may actually frustrate the goal of victim recompense by depleting the assets a criminal has available for civil restitution.
literature decrying the fact that the victim of crime is a forgotten person in the criminal process.\textsuperscript{162} 

At the other end of the spectrum, the criminal and civil law most clearly diverge when the goal is to exact a penalty capable of expressing condemnation—commonly termed retribution. Although some civil sanctions, particularly punitive damages, can be partially retributive in nature, criminal law alone has the retributive characteristics associated with lengthy incarceration or execution.

In contrast to recompense and retribution, when it comes to deterrence, civil and criminal remedies are essentially indistinguishable and interchangeable.\textsuperscript{163} The goal of deterrence is to prevent or discourage individuals from engaging in certain undesirable conduct. It requires a calculation of what punishment, given the likelihood of being "caught," will suffice to make a person conform his conduct to a certain norm.\textsuperscript{164} Whatever the final calculation, the punishment must amount to more than recompense or restitution.\textsuperscript{165} The theory is that humans, as rational weighers of the risks and benefits of their actions, will risk being penalized if the worst they face is having to pay market value for their illicit gains.\textsuperscript{166}

Finally, with respect to the goals of treatment and rehabilitation of an individual, there is little intrinsically to distinguish between

\textsuperscript{162} See, e.g., Goldstein, supra note 117, at 245-46 ("A major tenet of the victims' movement and the [Victim and Witness Protection Act of 1982] is the belief that the victim has been too much removed from the prosecution of the crime against him, that such removal underlies the common failure of victims to report crime and to cooperate in its prosecution . . . ."); Lamborn, Toward a Victim Orientation in Criminal Theory, 22 Rutgers L. Rev. 733 (1968); Schaefer, The Proper Role of a Victim-Compensation System, 21 Crime & Delinq. 45 (1975); Note, But What About the Victim? The Forsaken Man in American Criminal Law, 22 U. Fla. L. Rev. 1 (1969).

\textsuperscript{163} See R. Posner, Economic Analysis of Law 187, 190 (3d ed. 1986) (tort remedies, as well as criminal sanctions, can be effective deterrence).


\textsuperscript{165} Id.

\textsuperscript{166} Deterrence can vary in how directly it operates. Direct deterrence includes all forms of incapacitation such as preventative detention or incarceration. This sometimes is called "specific deterrence." See J. Andenaes, Punishment and Deterrence, 1765-81 (1974). General deterrence, in contrast, includes the in terrorem effects of just announcing to all the world the consequences that will follow discovery of proscribed conduct. The effect of threat may be weak or strong, depending on the nature of the potential penalty (loss of a job, money, or liberty are examples) and the likelihood that a person actually will be caught and subjected to the penalty. Deterrence through threats can, of course, be made more potent if a particular person is singled out, as in the case of an injunction, and told to do or not do an act or face the consequences. Finally, deterrence can be quite indirect, as when those who aid the wrongdoer or fail to prevent the undesirable conduct are penalized. This is one theory behind the forfeiture of property such as cars, leaseholds, and houses of innocent persons who have permitted, or did not prevent, the use of their property in an illegal or wrongful transaction.
criminal and civil remedies. Historically, the institutionalization of the mentally ill, 167 juvenile court proceedings, protective custody, and actions establishing or withdrawing custody of a child, have been thought to serve these goals. But the criminal process also can advance non-retributive aims. Indeed, until recently many thought that rehabilitation and treatment were the primary objectives of criminal sanctions. 168

In order to distinguish between criminal and civil cases, it has been argued that if a proceeding, regardless of its label, aims at punishment, then it should be deemed to be at least presumptively criminal. 169 Punishment, however, generally is defined as a penalty or burden imposed as a result of an offense against legal rules, usually for the purpose of rehabilitation, deterrence, incapacitation, or retribution. 170 Under this definition, which generally is accepted by courts and commentators, it is impossible to distinguish criminal and civil cases according to whether or not they involve punishment. Both civil and criminal cases "punish."

Indeed, punishment is a common objective of many civil proceedings. We operate in an administrative, regulatory state that depends upon comprehensive and complex systems of rewards and penalties. Therefore, any approach that classifies as criminal all proceedings that punish could subject a vast array of actions to the inefficiency and expense of a criminal trial. Moreover, this approach would require a revolutionary reworking of the law. This fact alone is reason enough to reject it.

167. The Supreme Court, in Jackson v. Indiana, 406 U.S. 715, 736-37 n.19 (1972), recognized that among the states' varying purposes for civil commitment, the protection of the individual to be committed and the need of that individual for care or treatment are the two most often stated reasons. In Jackson, the Court held that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Id. at 738. See also Comment, Involuntary Civil Commitment of the Non-dangerous Mentally Ill: Substantive Limitations, 18 S.D. L. Rev. 405, 415 (1973) (authored by Derald W. Wiehl) (asserting that the purpose of civil commitment is generally to protect the individual, and citing South Dakota law that allows commitment of an individual for her own protection).

168. E.g., Plattner, The Rehabilitation of Punishment, 44 PUBL. INTEREST 104 (1976) ("For over a century, American penology had subscribed to the rehabilitative ideal and its practical concomitant, the indeterminate sentence, which tailors the length of a convict's prison term to his prospects for and progress toward the cure of his criminal tendencies.").

169. See, e.g., Clark, supra note 22, at 404.

170. See United States v. Brown, 381 U.S. 437, 458 (1965) ("It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent and preventative."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968). Government's capacity to punish is thought to be distinct from its efforts to treat illness, provide compensation, or administer regulatory programs. H. PACKER, supra note 3, at 31.
Punishment could be considered a term of art and its application limited to only those sanctions imposed solely as retribution. Retribution would be defined to include any punishment imposed beyond the purposes of recompense, rehabilitation, or deterrence—a penalty imposed solely to punish. This approach would limit the need to extensively rework chunks of settled doctrine because few, if any, civil proceedings serve solely retributive purposes. But, by the same token, few criminal proceedings serve solely retributive purposes. The retribution approach would, in the end, identify so few proceedings as "criminal" that it would be analytically trivial.

(4) Putting It All Together

Even if sanction equivalence, stigma, and the intent to punish are by themselves inadequate to mark a proceeding as criminal, might not all three features, weighed together, be sufficient? There is certainly great force to this approach, since it comprehensively balances complex and interactive factors. If this balancing test clearly indicates that a proceeding is a criminal matter, the argument runs, we should treat it accordingly. The Supreme Court has come close to adopting this approach, but with a twist.

In *Kennedy v. Mendoza-Martinez*, the Court struck down a provision of the Nationality Act of 1940 that prescribed loss of citizenship for any person who, to evade military service, lived or remained outside of the United States during time of war. The Court reviewed the legislative and judicial history of the law and noted that Congress employed forfeiture of citizenship as a punishment for behavior that had been identified as a crime in another legislative provision. The Court then held that the loss of citizenship is a criminal punishment that may not be imposed without all of the safeguards which attend criminal trials. In making this determination, the Court specifically identified seven factors that should be analyzed to assess whether, for constitutional purposes, a punishment is criminal:

1. Whether the sanction involves an affirmative disability or restraint,
2. Whether it has historically been regarded as a punish-

171. This is because the idea of deterrence is so encompassing that even grossly disproportionate civil penalties can be justified as deterreants. Consider, for example, that a community may want to deter double parking, and yet it does not want to commit any significant resources to preventing it. It would be perfectly rational and consistent with the objective of deterrence to impose even a one million dollar fine for the offense if the chances of actually getting caught were minuscule. See A. POLINSKY, supra note 164, at 73-74.
173. Id. at 186.
174. Id. at 184-86.
(3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment - retribution and 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 . . . . 175

Although this comparative factor test has been invoked repeatedly,176 it is doubtful whether the Court is prepared to apply it seriously. The Court never actually relied upon it in Mendoza itself,177 and there has been no subsequent case in which the factors have ever added up to a finding that a proceeding was criminal for all constitutional purposes. But perhaps more fundamentally, and here is the twist, the Court in Mendoza made clear that it would shift to the multi-factor or comparative approach only if there was real doubt about whether the legislature intended a proceeding to be civil or criminal.178 As the Court has stated repeatedly: "whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction."179 Only if there is marked uncertainty over what the legislature intended, or if the defendant provides "clear proof" that "the statutory scheme [was] so punitive either in purpose or effect as to negate [the State's] intention," will the court engage in the factor analysis.180

The Court has never provided a coherent account of why the comparative analysis has been relegated to such a subordinate role. Such an account, however, can be rendered and through it, a more complete theory of what makes a proceeding distinctively criminal can be posited. The Court correctly downplays the comparative analysis because even when relevant factors such as sanction, stigma, and punitive intent are considered together they capture only part of what criminal cases are all about. These factors are incomplete. All of the

175. Id. at 168-69 (citations omitted).
177. See Mendoza, 372 U.S. at 169:
(**"Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive."
(citations omitted).
prior "solutions" to the civil-criminal law distinction, including the comparative factor analysis, are helpful yet ultimately flawed because they focus primarily or exclusively on the effect of a proceeding on the offender. Even where a legislature’s purposes have been explored, the exploration has been in terms of what the legislature meant to do to the offender—punish, deter, or condemn.

Criminal cases, however, involve much more than punishing or regulating a specific person's actions. The adjudication of guilt, as a process, is a public restatement of societal boundaries and a public reinforcement of the concept of individual responsibility.\(^{181}\) Admittedly, the criminal law does focus on the individual offender when it seeks to punish and deter. Yet it also serves a broader and more constructive function.\(^{182}\) Guilt adjudication is a ceremony through which society expresses the ideology of individual free will and responsibility, reaffirms moral rules, and forges a social consensus.\(^{183}\) The process of guilt adjudication is more than just the predicate for imposing punishment; it is the very essence of a criminal proceeding.

The central importance of guilt adjudication as a social process often is reflected in the reaction of the public to reported wrongdoing by public officials or noted or wealthy citizens. The central desire is to bring such a person to justice, no matter how high his station or how great his wealth or power. Even where there is great sympathy or admiration for the wrongdoer, the need to publicly call to account is overriding.

Consider, for example, the case of Oliver North, who was charged with a variety of offenses in connection with the Iran-Contra affair. Many believed that he was a fall guy, a true patriot, or a soldier who just followed orders. There were, nevertheless, many who believed that he should be criminally tried for his alleged wrong-doing.\(^{184}\) This was true even though there was also considerable sentiment that, if found guilty, he should not be punished in any significant way.

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182. See Boldt, supra note 38, at 1004-14.

183. Id.

184. This view appeared on the editorial pages of the country's newspapers at crucial points during the Iran-Contra affair—when, for instance, there was talk of a Presidential pardon for Mr. North. See, e.g., Talking Pardons, Unforgivably Early, N.Y. Times, Apr. 12, 1988, at A34, col. 1 (editorial); Kinsey, Pardon Them?, The Washington Post, July 23, 1987, at A21, col. 1.
Viewing criminal cases as ceremonies of guilt adjudication may also explain the disappointment of some groups, such as women or minorities, who consider vindication of harms against them through the civil process as inadequate. When wife beating is not treated as a crime, but instead as a matter for mediation or counseling, or when racial assaults are administratively regulated instead of being criminally prosecuted, society undoubtedly has readjusted its consensus on the moral acceptability of these types of conduct.\textsuperscript{185}

The notion that criminal proceedings are special and different because they serve as "affirmation[s] of shared moral purpose,"\textsuperscript{186} adds force to the public's constitutional right to attend criminal trials.\textsuperscript{187} This idea buttresses the Court's conclusion that a defendant's guilt must be proved beyond a reasonable doubt. This standard, the Court has said, "is indispensable to command the respect and confidence of the community in applications of the criminal law."\textsuperscript{188}

From this assessment, it follows that a matter can only be criminal if formally intended to be and denominated as such: following the form of a criminal trial and calling a person to account for action clearly labeled as criminal by the legislature. Furthermore, a criminal prosecution is marked by several distinctive characteristics: the government proceeds against a "defendant"; the defendant is formally indicted; and the objective is to adjudicate guilt—to have the defendant found "guilty" or declared "innocent." In other words, except in two rare instances which will be discussed shortly, it is correct to say that proceedings are criminal only if so labeled by the legislature. Being so labeled, they must follow the procedures that not only protect the defendant but also give weight and meaning to the ceremonial aspect of guilt adjudication. There is, however, a circularity inherent in this equation: criminal cases trigger certain procedures, but the procedures themselves—trial by jury, guilt beyond a reasonable doubt, right to counsel—highlight the criminal nature of the proceeding.\textsuperscript{189} In other words, the medium is the message.

\textsuperscript{185} In contrast, the federal government now relies more heavily on criminal penalties to enforce environmental laws. This is partly a response to greater public condemnation of polluting activities. See Fromm, \textit{Commanding Respect: Criminal Sanctions for Environmental Crimes}, 21 St. Mary's L.J. 821 (1990) (criticizing the current trend).


\textsuperscript{188} \textit{In re Winship}, 397 U.S. 358, 364 (1970).

\textsuperscript{189} See, e.g., R. Perkins & R. Boyce, \textit{Criminal Law} 12-13 (3d ed. 1982) ("A definition of the term crime cannot practically be separated from the nature of proceedings used to
Under this analysis, there are only two kinds of cases that can be considered criminal, even though they are neither plainly labeled as criminal nor fully prosecuted as such. First, there are those cases that can be termed “shadow proceedings.” These are cases in which the adjudicative processes and final outcomes so nearly trace criminal proceedings that there is little identifiable basis on which to distinguish them. They are characterized by a charge of a criminal act, a prosecution by the government, the condemnation and stigma associated with an adjudication of guilt, and the ultimate incarceration of a convicted offender. These similarities to criminal proceedings notwithstanding, in shadow proceedings, the government contends that the offender holds some special status and states that its objective is not simply to punish but to rehabilitate or treat the individual. Usually the government seeks to withhold one particular constitutional protection in these proceedings—for example, trial by jury or the privilege against self-incrimination. The two classes of persons affected by shadow proceedings are juveniles and the criminally mentally ill.190

The Supreme Court has come very close to treating juvenile proceedings as criminal cases and applying to them all constitutional protections associated with criminal trials. The Court has held that a juvenile is entitled to notice of the charges against him, to be represented by counsel and to have counsel appointed if necessary, and to confront witnesses.191 It also has held that proof beyond a reasonable doubt is the applicable standard in juvenile proceedings.192 In addition, the Court has recognized a juvenile’s right to claim the protection of the right against self-incrimination and not to be twice placed in jeopardy of conviction for the same offense.194

In reaching these conclusions, the Court has looked at how juvenile delinquency proceedings actually function. It has found that, despite the juvenile court system’s good intentions, a juvenile pro-

determine criminal conduct.”); Williams, The Definition of Crime, 8 CURRENT L. PROBS. 107, 123 (1955) (crime is “an act that is capable of being followed by criminal proceedings, having [a criminal] outcome.”).

190. For the purposes of this Article, “the criminally mental ill” refers to persons who are unable to stand trial because of mental illness, persons who have been found not guilty by reason of insanity or diminished capacity, and persons who are accused of committing a crime but are subjected to an involuntary civil commitment proceeding rather than a criminal prosecution.

ceeding is “comparable in seriousness to a felony prosecution.” 195
In this regard, the Court has noted that juvenile proceedings involve
potential “incarceration against one’s will, whether it is called ‘crim-
inal’ or ‘civil.’” 196 It further has recognized that “in terms of po-
tential consequences, there is little to distinguish . . . [a juvenile]
adjudicatory hearing . . . from a traditional criminal prosecution.” 197

Nevertheless, a majority of the Court has balked at actually rul-
ing that a juvenile delinquency proceeding is a “criminal prosecu-
tion” under the sixth amendment. 198 It has refused specifically to
extend the sixth amendment right to trial by jury to juveniles. 199
Rather, the Court has invoked the due process requirements of fund-
damental fairness to say that, as a matter of due process of law,
most, but not all, protections associated with criminal trials apply
to juveniles.200

Individual justices have criticized the Court for not following
the logic of its earlier cases, and failing to require jury trials in ju-
venile cases. The logical implication, as Justice Harlan noted, is that
“juvenile delinquency proceedings have in practice actually become
in many, if not all, respects criminal trials.” 201

The Court has been even less sympathetic to seeing functional
equivalence between civil and criminal proceedings in cases involving
mentally ill individuals who pose a danger to the general citizenry.
This lack of sympathy was most evident in Allen v. Illinois202 where
a bare majority of the Court held that no privilege against self in-
crimination applied in the involuntary civil commitment of a person
deemed sexually dangerous.203 The Court found that the defendant
failed to provide the “clearest proof” that he was treated in a way
incompatible with the state’s asserted interest in treatment.204 The
Court reached this conclusion despite the following facts: the de-
fendant had been deemed “sexually dangerous” in a proceeding that
was virtually identical to the state’s prosecution of sex related crimes;

195. Winship, 397 U.S. at 366 (citation omitted).
196. Gault, 387 U.S. at 50.
197. Breed, 421 U.S. at 530.
199. Id. at 545.
200. Id. at 543-50.
201. Id. at 557 (Harlan, J., concurring) (“I do not see why, given Duncan [Duncan v.
Louisiana, 391 U.S. 145 (1968)] juveniles as well as adults would not be constitutionally
entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit
their original purpose.”).
203. Id. at 374-75.
204. Id. at 369.
the prohibited conduct also was punishable under the criminal law; and the defendant ultimately was committed to the guardianship of the state's Director of Corrections.

Indeed, the facts of *Allen* offered such an ideal opportunity for a finding of functional equivalence with criminal prosecution that one can only conclude, yet again, that the Court remains content to limit the multi-factor, totality of the circumstances analysis of *Kennedy v. Mendoza-Martinez*\(^\text{205}\) to its facts. In his dissent, Justice Stevens emphasized that the Illinois "sexually dangerous person" proceeding was "virtually identical to Illinois' proceeding for prosecution of sex-related crimes."\(^\text{206}\) As he explained:

> [T]he Illinois "sexually dangerous person" proceeding may only be triggered by a criminal incident; may only be initiated by the sovereign State's prosecuting authorities; may only be established with the burden of proof applicable to the criminal law; may only proceed if a criminal offense is established; and has the consequence of incarceration in the State's prison system—in this case, Illinois' maximum—security prison at Menard.\(^\text{207}\)

In addition to shadow proceedings, the other category of cases that may transcend the civil label is that in which the punishment imposed so dramatically expresses societal disapproval that its imposition only can be legitimated through the ceremony of a criminal conviction. These punishments are those that actually separate a person from civilized society and label her as not worthy of being a member of the group. Included in this category of punishments are execution, incarceration, and loss of citizenship, a kind of banishment that represents the ultimate separation from society.\(^\text{208}\)

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207. *Id.* at 379. Justice Stevens continued:

> It seems quite clear to me, in view of the consequences of conviction and the heavy reliance on the criminal justice system—for its definition of the prohibited conduct, for the discretion of the prosecutor, for the standard of proof, and for the Director of Corrections as custodian—that the proceeding must be considered "criminal" for purposes of the Fifth Amendment.

*Id.* In a footnote, Justice Stevens added the following:

> The "sexually dangerous person" proceeding shares other characteristics with criminal law as well. The statute requires that the individual "have the right to demand a trial by jury and to be represented by counsel." Under the Illinois Supreme Court's construction, moreover, an individual has the right to confront and cross-examine witnesses. Significantly, as with the latter set of requirements, many of the criminal law procedures that have been found applicable to the "sexually dangerous person" proceeding have been imposed by courts because of the nature of the proceeding.

*Id.* at n.11 (citation omitted).
208. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (an immigration
In sum, the legislature decides which conduct is criminal and which proceedings are criminal. The key is determining when the legislature has so spoken. It can and usually will make an express declaration. Its statement, however, also can be implied through a clear course of conduct, such as shadow proceedings, or through the imposition of a penalty that is consistent only with the view that the underlying conduct punished was criminal, such as incarceration or loss of citizenship.\textsuperscript{209}

It should be obvious that this definition of a criminal proceeding will encompass few, if any, of the recent efforts to control antisocial behavior through court orders, forfeitures, or monetary penalties. If the legislature has neither labeled the proceeding criminal nor authorized proceedings or punishments that are consistent only with criminal cases, then the proceeding will remain civil in nature regardless of how severe the penalty is, whether the defendant's conduct also may be prosecuted as a crime, and the degree of stigma that attaches to violation of the statutory standard.

C. The Unique Problem of Contempt

When a court issues an order to a party to act or refrain from acting, at times there is noncompliance. In such cases the court has the inherent power, which often is codified in statutes, to hold the disobedient party in contempt.\textsuperscript{210} The court, through the imposition of fines or incarceration, may punish the violation or the court may act to coerce compliance.\textsuperscript{211} The contemnor is subject to a fine and

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\textsuperscript{209} Of course, this is not to say that the legislature's declaration, no matter how divined, will succeed. The legislature might declare that advocating communism is a crime or that being a drug addict is a crime. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (overruling Whitney v. California 274 U.S. 357 (1927) (conviction for membership in Communist Party)); Robinson v. California, 370 U.S. 660 (1962) (conviction for "status" of being a narcotics addict overturned). In such instances, the legislative intent will be frustrated by independent constitutional limits such as the first or fourteenth amendments. While the legislative declaration of what is a crime may not be sufficient to have it ultimately so treated by the courts, such a designation is, nonetheless, necessary.


\textsuperscript{211} See, e.g., G. & C. Merriam Co. v. Webster Dictionary Co., 639 F.2d 29, 40-41 (1st Cir. 1980).
incarceration unless and until she obeys the court’s order.\textsuperscript{212} The conditional nature of the enforcement, and the defendant’s present and continuing ability to avoid any and all adverse action make contempt proceedings unique.

Over time, the courts have grappled with the question of whether contempt proceedings are civil or criminal. With respect to contempt imposed as a punishment for past behavior, the courts ultimately perceived that there is little to distinguish such an action from a criminal proceeding. There is a violation which is deemed a “crime” (whether designated by statute or inherent to the nature of the court’s order), a proceeding to adjudicate guilt, and the imposition of traditional criminal penalties.\textsuperscript{213} Because “criminal contempt is a crime in the ordinary sense,”\textsuperscript{214} the Supreme Court has recognized the need to apply the same constitutional procedural and substantive protections ordinarily available in criminal cases. The individual is entitled, for example, to a presumption of innocence and the proof beyond a reasonable doubt standard, to confront, call and cross examine witnesses, to a trial by jury if the potential penalty is a jail sentence for more than six months, to invoke the privilege against self-incrimination, to the protection of the double jeopardy clause, and to representation by counsel.\textsuperscript{215}

The more problematic question has been how to treat contempts that are imposed to coerce compliance. In compliance actions, for example, there is no right to a trial by jury, a preponderance of the evidence standard may apply, and the contemner may have the burden of production or even the burden of persuasion on the element of whether he is able to comply with the court’s order.\textsuperscript{216} Defendants

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\textsuperscript{212} See, e.g., United States v. Mars, 551 F.2d 711, 715 (6th Cir. 1977) (sentencing of defendant in contempt was delayed to allow him to obey the court order and “purge himself of contempt”).

\textsuperscript{213} See, e.g., Bloom v. Illinois, 391 U.S. 194, 201 (1968) (“Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both”); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

\textsuperscript{214} Bloom, 391 U.S. at 201.


\textsuperscript{216} United States v. Rylander, 460 U.S. 752, 757 (1983); Maggio v. Zeitz, 333 U.S. 56,
have argued that these contempt proceedings are also criminal in nature and that it therefore is constitutional error to apply only those procedural protections that attend a civil suit.

The Supreme Court addressed this issue most recently in a case involving a parent's failure to make monthly child support payments as mandated by a California state court order. The court adjudged the defendant to be in contempt, suspended a twenty-five day jail sentence, and imposed a three-year period of probation. As a condition of probation, the court ordered the defendant to pay fifty dollars per month to erase his accumulated arrearages. At this rate, he would purge himself of the arrearages prior to the end of the probationary period.

The defendant challenged the constitutionality of the hearing as violative of due process of law. He argued that the proceeding was criminal in nature and that, because California required him to shoulder the burden of proof on his ability to comply with the order, the state unconstitutionally shifted to him the obligation to disprove every element of the crime charged. All agreed that the burden of proof rule would be unconstitutional if the proceeding were deemed criminal, but acceptable if the proceeding were labeled civil.

The Court, in a five-three opinion, stated that the test for distinguishing between criminal and civil contempt lies in the character of the relief the proceeding will afford:

If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

The Court specifically declined to inquire into whether the underlying purpose of the proceeding was to vindicate the court's authority or to force the parent to conform his conduct to the original

75-76 (1948); see Hicks v. Feiock, 485 U.S. 624 (1988) (civil contempt defendant may be presumed to be able to comply with the court's order and have the burden to show otherwise). According to Rylander, it would violate substantive due process for a defendant to be coerced by civil contempt if it is clearly established that the contemnor is unable to comply with the terms of the order. Rylander, 460 U.S. at 757.

218. Id. at 639.
219. Id. at 628.
220. Id. at 637-38.
221. Id. at 632 (citations omitted).
order.\textsuperscript{222} That question is difficult, it said, because often a court is attempting to accomplish both objectives.\textsuperscript{223} Such an inquiry also would be "unseemly and improper" because it would require the court "to psychoanalyze a subjective intent of the state's laws and its courts."\textsuperscript{224} Most importantly, the court opted for judging the nature of the proceeding based solely on the character of the relief imposed because such an approach lends itself to the formulation of rules that are clear and easy to follow. According to the Court, application of these rules would allow the state courts to "plan their own procedures around the traditional distinction between civil and criminal remedies," which is a matter of "great importance to the States."\textsuperscript{225}

Beyond clarity, the Court's approach permits us to view a compliance contempt as an essentially regulatory act. That is, a court enforcing a contempt order is not seeking to punish for a past misdeed, rather, it is looking to control future conduct. Furthermore, courts, unlike legislatures or administrative agencies, have limited tools to regulate in this sense. They cannot, for example, deny the defendant a student loan\textsuperscript{226} or withhold a license.\textsuperscript{227}

In this regard, the Court's approach is similar to its analysis in cases challenging a legislative act as an unconstitutional bill of attainder; that is, a legislative punishment without benefit of trial. In \textit{Selective Service v. Minnesota Public Interest Research Group},\textsuperscript{228} the Court rejected a bill of attainder challenge to a congressional Act that denied higher education benefits to male students who had not registered for the draft.\textsuperscript{229} The Court concluded that the statute did

\textsuperscript{222} Id. at 636-37.
\textsuperscript{223} Id. at 632-33. In contempt cases, both civil and criminal relief have aspects that can be seen as remedial, punitive, or both. When a court fines or otherwise punishes a contemner, not only is it vindicating its legal authority to enter the initial order, but it also is seeking to give effect to the law's purpose of modifying the contemner's behavior.
\textsuperscript{224} Id. at 635.
\textsuperscript{225} Id. at 636. Because the majority was unable to determine whether the state court meant its sentence of probation of the parent only to apply unless and until he purged himself of the arrearages, it remanded the case for determination of this point. The dissenters also believed that the nature of the proceeding could be gleaned from the type of the sanction imposed, although their focus was somewhat different. Instead of looking at the sanction to see if it was conditional, and hence civil, or determinate, and therefore criminal, the dissent thought the relevant question was "whether the judgment inures to the benefit of another party to the proceeding." \textit{Id.} at 646 (O'Connor, J., dissenting).
\textsuperscript{227} See \textit{In re Anastaplo}, 366 U.S. 82 (1961) (applicant denied bar admission for refusal to answer questions related to communist party membership).
\textsuperscript{228} 468 U.S. 841 (1984).
\textsuperscript{229} Id. at 847-56.
not single out or punish any identifiable persons because affected persons always remained free to comply with its provisions. There was never a burden that the individuals were unable to avoid. 230 "Far from attaching to . . . past and ineradicable actions," ineligibility for Title IV benefits "is made to turn upon continuingly contemporaneous fact" which a student who wants public assistance can correct. 231 Likewise, when a civil contemner has the keys to the jail cell in his pocket, he, too, faces a burden that is completely avoidable.

Under the Court's approach, it seems quite clear that enforcement of statutes which permit injunctions against bias crimes, drug "nuisances," or protective orders to stop domestic violence will be regarded as criminal in nature if the court orders determinate jail terms or fines for violation[s]. It follows that the procedure will be constitutionally deficient if it does not afford the defendant all of the procedural protections associated with a criminal proceeding. 232 Conversely, fines or incarceration imposed conditionally—unless and until the defendant complies with the relevant court order—are the result of a civil proceeding. That said, it is important to recover the basic point about the basis on which we distinguish civil and criminal proceedings. Even when we integrate the unique problem of contempt enforcement into the equation, it remains the case that few proceedings labeled civil by the legislature will be deemed criminal for the application of constitutional norms. It is now necessary to

230. Id. at 847-51.
231. Id. at 851 (quoting Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961)).
232. The general approach followed by the majority—looking to the conditional or determinate nature of the relief—is consistent with prior cases. Over time, commentators have voiced a number of criticisms of this approach, not all of which are valid. First, some commentators have suggested that efforts to draw a distinction between criminal and civil contempt is a hopeless muddle. See Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 241-46 (1971). Contrary to this assertion, the rules identified by a majority of the Court have been in existence for a long time, are fairly straightforward, and have been "consistently applied." Hicks v. Feiock, 485 U.S. 624, 631-32 (1988). Other critics have noted the confusion that may result when the very same activity can be pursued by criminal as well as civil contempt. See Martineau, Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt, 50 U. Cin. L. Rev. 677, 683 (1981). Such an observation, however, is no more troublesome than recognizing that a whole variety of conduct can be pursued either civilly or criminally.

A more significant ground for objection to the Court's approach is that a defendant may not know whether she is being pursued criminally or civilly until the sentence is actually imposed. There is, however, an easy solution to this problem. Even in jurisdictions like California, which have merged their civil and criminal contempt proceedings, there can be a procedure similar to an election of remedies at the outset of the proceeding which would give all parties proper notice of what sanction may properly be imposed.
explore the significance of this conclusion in terms of specific constitutional protections.

IV. The Limits of the Criminal-Civil Law Distinction

In view of this narrow definition of what constitutes a criminal proceeding, a natural concern arises: what does such a narrow definition mean for the protection of individual liberties? Do we now have reason to fear that the government can impose all manner of "civil" punishments upon us, unchecked by constitutional norms? Plainly not. As important as it may be to distinguish between civil and criminal cases, it may be more important to understand that the consequences of that distinction are limited.

First, although it is true that proceedings designated "criminal" will entitle the defendant to nearly all the protections of the fourth, fifth, sixth, and eighth amendments, it is not true that finding a proceeding to be "civil" necessarily will deprive the defendant of all these protections. Only the strictly procedural protections—indictment, speedy trial, and the like—are or should be limited to criminal cases. Protections against unreasonable searches and seizures, self-incrimination, and double jeopardy have been recognized in some circumstances, notwithstanding the fact that the court unmistakably has concluded that the proceeding at bar was civil in nature.

Second, there are many potent constitutional guarantees, such as the due process clause, that apply to all civil matters.233 Civil procedural due process, while not as extensive as criminal law procedural protections, does impose significant safeguards against arbitrary, oppressive, or erroneous action. Much of the criticism aimed at civil proceedings like forfeitures or statutory fines focuses on government arbitrariness, excess, and disproportionality—all of which can be curbed without necessarily importing the procedural baggage of criminal trials into civil cases. Once this fact is recognized, a narrow definition of criminal proceedings seems more palatable. Indeed, once the significance of the criminal-civil law distinction is relegated to a minor role, courts may be encouraged to give a more functional and less formal reading to the provisions of the fourth, fifth, and eighth amendments. Simultaneously, courts may take greater care in examining how particular civil schemes operate to ensure that they

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233. Moreover, the civil nature of a proceeding will entitle the defendant to far more expansive discovery rights. See note 344 infra. Aware of this possibility, the government may prefer to structure parallel criminal and civil proceedings so that the civil action follows the criminal action.
do, in fact, comport with constitutional norms. Additionally, by narrowly defining what is a criminal proceeding, legislatures are free to think creatively about ways to control antisocial behavior without being saddled with the procedural rules applicable in criminal cases.

A. Confining the Criminal-Civil Distinction to Procedural Protections Only

There are many reasons to confine the criminal-civil dichotomy to procedural issues. First, the language of the Constitution seems to support it. The bulk of criminal procedural protections are found in the sixth amendment, which specifically applies to "criminal prosecutions." With the exception of the privilege against self-incrimination, the substantive constitutional protections, though undoubtedly aimed at criminal cases, are not by their terms so confined. The Court itself has described them as having "broader scope." Second, the norms in constitutional criminal procedure are quite strict and inflexible. They exact heavy, perhaps unnecessary, costs that may not be justified in proceedings where they are not plainly mandated. Third, the civil procedural due process protections offer a flexible safety valve in that, where the stakes are high enough, the courts in a civil proceeding may impose safeguards similar to those mandated in criminal proceedings. In a sense, as far as procedural protections in civil proceedings go, we can have our cake and eat it too. Finally, the very rigorous procedures required in criminal cases give particular moral force and power to the collective judgment of "guilty."

234. U.S. CONST. amend. VI.
236. For example, one such safeguard is the imposition of a higher burden of proof. Although the Supreme Court has not required proof beyond a reasonable doubt in a civil context, it has imposed the stringent requirement of proof by clear and convincing evidence in certain circumstances. E.g., Santosky v. Kramer, 455 U.S. 745, 748 (1981) (risk of error in action to terminate parental rights because of child neglect mandates a "clear and convincing" standard of proof); Addington v. Texas, 441 U.S. 418, 433 (1979) (balancing of state's interest in providing care to mentally ill citizens with individual's interest in avoiding deprivation of liberty requires a "clear and convincing" standard of proof for involuntary civil commitment). Another safeguard might be the appointment of counsel. See Lassiter v. Department of Social Serv., 452 U.S. 18, 31 (1981) (although the due process clause does not require appointment of counsel in every parental rights termination hearing, such an appointment may be required in individual cases).
237. The procedures, more than any other feature—even the penalty imposed—express the significance of guilt adjudication. Strict and rigorous protections for the defendant mark the proceedings as a matter taken so seriously that we want to have overriding confidence in the ultimate determination, and, at the same time, we want to give the accused every benefit of the doubt. See Underwood, supra note 186 at 1306-08 (1977).
Therefore, in applying constitutional provisions not expressly tied to a criminal or civil context, we should ask what values underlie these protections and whether they are implicated in a particular proceeding, even though it may be "civil." 238 In many cases, the Court has struggled to conduct this provision-by-provision analysis. This fact accounts for the salutary outcome, mistakenly lamented by some commentators, that the very same civil proceeding can enjoy the protections of the fifth amendment and yet not enjoy the protections of the sixth. 239 Forfeiture proceedings provide a good example. Forfeiture proceedings have not been deemed "criminal prosecutions" with respect to the right to a grand jury indictment or to appointment of counsel, yet they have been deemed sufficiently punitive in some circumstances to trigger the privilege against self-incrimination. 240

This functional sensitivity to the values underlying a particular constitutional provision, rather than a wooden and formal declaration that certain constitutional provisions simply do not apply in the civil context, tracks the evolution of search and seizure doctrine under the fourth amendment. Initially, the Supreme Court concluded that non-criminal regulatory inspection programs like municipal fire, health, and safety inspections of home or businesses "touch at most upon the periphery of the important interests safeguarded by the fourteenth [and fourth] amendment's protection against official intrusions." 241 Later cases, however, repudiated this notion, and it is now comfortably settled that noncriminal regulatory or administrative searches fall squarely within fourth amendment protections. 242 This is because the fourth amendment's concern with invasions of privacy and arbitrary governmental intrusions can arise in both criminal and noncriminal contexts.

238. The criminal-civil distinction continues to bedevil the courts in many areas, but doctrinal shifts in interpreting the protections against double jeopardy, excessive fines, and self incrimination may point to a less formal reliance on the dichotomy. In some areas, however, such as cases involving the ex post facto clause, the courts may be unwilling to weigh themselves from the simplicity the distinction offers. In the ex post facto cases, the Supreme Court has ignored inconsistent history and a functional reading of the provision in favor of a bright line test that limits the ex post facto clause to criminal cases only. See L. Tribe, AMERICAN CONSTITUTIONAL LAW 632-41 (2d ed. 1988).
239. Clark, supra note 22, at 385-91.
Of course, the fact that a search or seizure arises in furtherance of a criminal or civil investigation may have a material effect on the Court's ultimate calculation of what is "reasonable" in fourth amendment terms. But this result does not obtain because of the nature of the proceeding *per se*; it results because in a regulatory setting an individual may have a diminished expectation of privacy, the degree of intrusion involved in the search or seizure may be minimal, or the regulatory need to conduct the search or seizure may be overriding.²⁴³

With respect to the substantive constitutional safeguards, including double jeopardy and the protection against excessive fines, the Court recently has signalled that these protections also apply in civil proceedings.²⁴⁴ Consistent with the underlying values of these constitutional provisions, the ultimate distinction the Court seeks to draw in these areas is whether the governmental act seeks to punish. Sometimes the criminal or civil nature of a proceeding will be helpful in answering that question, but it will not automatically be determinative.²⁴⁵ Thus a criminal prosecution followed by a civil action to recover a monetary penalty for the same offense can trigger the double jeopardy protection against being punished twice for the same offense. Similarly, a civil monetary penalty may be a fine that is, constitutionally speaking, excessive.

B. The Double Jeopardy Clause

The double jeopardy clause provides protection against being tried twice or punished twice for the same offense.²⁴⁶ The prohibition


In addition, the noncriminal regulatory setting of search and seizure cases may also influence the Court's decision to invoke the exclusionary rule after it has found that an unreasonable search and seizure has occurred. See INS v. Lopez Mendoza, 468 U.S. 1032, 1033 (1984); United States v. Janis, 428 U.S. 433, 433-34 (1976); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 693 (1965). See also LAFAVE & ISRAEL, CRIMINAL PROCEDURE 89-90 (3d ed. 1985).


against double prosecutions applies whether the defendant has been previously convicted or previously acquitted. 247

Traditionally, double jeopardy was not applicable if the second trial against a defendant was civil. 248 Thus, as a protection against multiple prosecutions, the clause contemplated two criminal proceedings for the same offense. When an individual already criminally prosecuted faced a civil suit for damages, monetary penalties, or forfeiture predicated on the same conduct that was the basis of the criminal prosecution, this was not considered a violation of double jeopardy. As one commentator explained, "Jeopardy does not attach at proceedings which are essentially civil, on the ground that the recognition of both civil and criminal claims for the same incident reveals a legislative intent that both be allowed." 249 The rationale offered to support this rule was that the government, like a private individual, was entitled to a civil remedy for its losses even if the defendant previously had been criminally convicted. 250 The essential question under such a straightforward approach was whether the second proceeding was criminal, and barred as unconstitutional, or civil, and presumptively constitutional.

The matter became more complicated, however, after Breed v. Jones. 251 In Breed the Court held that the defendant could not be tried criminally for the same offense that had formed the basis of an earlier juvenile court action against him. The Court rejected the formalistic contention that the double jeopardy clause was inapplicable simply because a civil label had been attached to juvenile cases. 252 Instead the Court said: "[I]n terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." 253 This was because the adjudicatory hearing's "potential consequences include[d]
both the stigma inherent in [a] determination [that defendant had violated the criminal law] and the deprivation of liberty for many years.254 Thus, the psychological, physical, and financial burdens attending such a proceeding were comparable to those incident to a criminal prosecution.255

The Breed analysis seemed to put certain civil proceedings and administrative hearings within the reach of the double jeopardy prohibition, and the Court in the past had warned that a civil label would not necessarily negate a multiple prosecution claim.256 Yet, subsequent to Breed the Court has not decided a case where the civil proceeding was "so punitive in purpose or effect" that it constituted a second criminal prosecution for double jeopardy purposes.257 In effect, the Breed decision has been isolated and confined to juvenile cases as a part of the "constitutionalization" of the juvenile court process.

Since Breed, lower courts simply have continued to follow the Supreme Court's earlier approach in double jeopardy cases. This traditional treatment was exemplified in One Lot Emerald Cut Stones v. United States.258 There the Court held double jeopardy inapplicable in a proceeding to forfeit undeclared imports. The Court asked whether the purpose of the proceeding in question could be characterized as "remedial rather than punitive."259 If so, double jeopardy was not in issue. Using the same approach, the double jeopardy guarantee has been held inapplicable to: involuntary civil commitment proceedings;260 disciplinary proceedings against prisoners affecting their release date;261 civil contempt proceedings;262 civil paternity actions;263 civil lawsuits recovering treble damages or punitive damages;264 and proceedings to suspend or terminate government employment,265 a government contract,266 or a license to engage in profession or business.267
This was the state of the Supreme Court's jurisprudence regarding the double jeopardy clause until its recent decision in United States v. Halper.\textsuperscript{268} In Halper the Court held that the government may not proceed civilly against a defendant already criminally convicted for the same offense if it seeks a punitive rather than remedial sanction.\textsuperscript{269} The government, like a private citizen, may be entitled to recompense, but the imposition of a punitive sanction would violate the double jeopardy protection against multiple punishments.\textsuperscript{270}

Irwin Halper worked as a manager of a laboratory providing service to Medicaid patients. He filed sixty-five separate false claims for reimbursement by inflating the rate of his claims to twelve dollars from an allowable three dollars. As a result, the government overpaid his firm a total of $585. Since each submission was a separate fraudulent act, the government indicted him on sixty-five separate counts of making false claims. After obtaining a criminal conviction, the government also sought the full $2,000 civil statutory penalty for each separate act of fraud for a total of $130,000 in penalties.

Under these circumstances, the Court found that the statutory penalty constituted "punishment" because the amount sought was entirely disproportionate to any reasonable amount the government could claim for damages and costs incurred because of the defendant's acts. The Court stated:

The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.\textsuperscript{271}

Despite extremely cautious language,\textsuperscript{272} and important unanswered questions,\textsuperscript{273} Halper is a major doctrinal breakthrough. In the

\textsuperscript{267} Emory v. Texas State Bd. of Medical Examiners, 748 F.2d 1023, 1027 (5th Cir. 1984).
\textsuperscript{268} 490 U.S. 435 (1989).
\textsuperscript{269} Id. at 448-49, 451.
\textsuperscript{270} Id. at 446.
\textsuperscript{271} Id. at 449-50 (footnote omitted).
\textsuperscript{272} For example, the Court called its holding "a rule for the rare case," id. at 449, and said, "[w]e do not consider our ruling far reaching . . . ." Id. at 449-50.
\textsuperscript{273} The Court had no occasion to consider whether double jeopardy would bar a subsequent civil proceeding when a previous criminal proceeding had resulted in acquittal. Under such circumstances the defendant could not complain of a double punishment, as in Halper, but only of a double prosecution or a second attempt to impose punishment. The issue on these facts is whether the double jeopardy rule against "repeated attempts to
context of double jeopardy jurisprudence, it renders irrelevant the
distinction between criminal and civil proceedings. That distinction,
the Court said, is an "abstract approach," perhaps useful in some
contexts, but "not well suited to the context of the 'humane interests'
safeguarded by the Double Jeopardy Clause's proscription of mul-
tiple punishments." A violation of double jeopardy's intrinsically
personal protection "can be identified only by assessing the character
of the actual sanctions imposed on the individual by the machinery
of the state." Thus, Halper rejected formalism in favor of a func-
tional, interpretive methodology. Rather than rely on the dichotomy
between civil and criminal cases, the Court interpreted the double
jeopardy clause in light of the evils it was intended to prevent. If
double jeopardy protects a defendant from double punishment, she
should enjoy that protection even if one of the proceedings used to
punish her was civil and not criminal.

Of course, the rule of Halper does not necessarily open all civil
proceedings to double jeopardy claims. It will have no application
at all where only a civil proceeding is pursued. If, for example, the
government discovers cocaine in a car it may elect to initiate civil
forfeiture proceedings to seize the car and decline to commence a
criminal prosecution. In that event, the government has chosen the
civil proceeding as an alternative to criminal prosecution. The de-

convict an individual for an alleged offense," Green v. United States, 355 U.S. 184, 187
(1957), applies even if the second attempt to punish is not through the medium of a criminal
proceeding. The resolution of the issue turns on whether the double jeopardy clause's
protection is against the special burdens imposed on a defendant in cumulative criminal
actions—notoriety, risk of incarceration, pretrial detention, or bail conditions—or whether
it extends simply to the inequity of compelling a defendant to fend off repeated attempts
to punish her, no matter what the form.

On the one hand, it could be argued that the burden imposed as a result of having to
defend oneself in a second civil proceeding is not sufficiently onerous to trigger a double
jeopardy bar because it neither subjects a defendant to the same "embarrassment, expense
and ordeal" as is associated with a criminal trial nor compels "him to live in a continuing
state of anxiety and insecurity." Id. at 187. Moreover, since a subsequent civil proceeding
certainly would be allowed if it were an action to recover compensatory damages, it also
could be argued that the proceeding itself does not become more of an ordeal simply because
the government is seeking a larger recovery. Furthermore, principles of res judicata limit
the government to only one subsequent civil proceeding—whether to recover compensatory
or punitive sanctions. Consequently, the specter of repeated trials designed to wear down
and wear out the defendant will not materialize.

On the other hand, it seems inequitable to bar double punishment against a convicted
defendant but to permit two attempts at punishing someone who has been found not guilty
of the criminal offense. One commentator has offered the solution of permitting a subsequent
civil suit after a criminal acquittal, but only for amounts in the nature of recompense. Note,
Crossing the Line, supra note 18, at 454.

274. Halper, 490 U.S. at 447.
275. Id.
fendant, therefore, is not in "double" jeopardy, but only "single" jeopardy.

Double jeopardy also is not in issue if the government pursues conventional criminal penalties like incarceration coupled with punishments like forfeiture in a single criminal proceeding, where the additional penalties actually are incorporated into the criminal sentence. In such instances, the punishments may, in some fashion, be "excessive" but they are not multiple in the double jeopardy sense.

_Halper_ also may be irrelevant where, although it looks as if someone is being punished twice (whether criminally or civilly) for the same offense, the punishments nevertheless are allowed because the same offense actually is not in issue in the separate actions. As an illustration, the courts have wrestled with the question of whether punishment for contempt of court will bar a later prosecution for some or all of the acts that constituted the contempt.

Whether such "double" punishments are permitted depends on whether "the same act or transaction constitutes a violation of two distinct statutory provisions . . . [and] whether each provision requires proof of a fact which the other does not." Under this test, a lesser included offense ordinarily is considered to be the same offense as the more serious one. However, multiple _different_ acts, even if they arise out of the same transaction, can be the basis for multiple punishments. Thus, a defendant can be punished for one count of illegal importation of drugs and also for a criminal conspiracy to import based on her involvement in a series of drug importation transactions over a five and one half year period. In such a case, the conviction for importation does not require proof of an illegal agreement with others, and the conviction for conspiracy does not require proof of importation. In contrast, in _Halper_ the same false reimbursement claims that provided the basis of the criminal action against the defendant also were the basis of the later statutory penalty proceeding against him.

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276. See _infra_ text accompanying notes 464-467.
278. Brown v. Ohio, 432 U.S. 161 (1977) (conviction of offense of operating a car without the owner's consent barred subsequent prosecution for auto theft because the same facts were needed to prove both offenses); Harris v. Oklahoma, 433 U.S. 682 (1977) (conviction for felony murder barred subsequent prosecution for robbery; the greater crime of felony murder necessarily depended on conviction for the lesser felony of robbery).
280. Some state courts take a different view of what constitutes the same offense and are more willing to limit subsequent proceedings based on a "same transaction" test. This test goes beyond looking at the evidence needed to prove each offense and focuses on the
The most significant limit on Halper, however, is that we may not always know whether a given civil proceeding actually operates "to punish." For monetary penalties, Halper gives us a useful albeit broad formula: the government is entitled to rough remedial justice, including actual damages and costs or any rough approximation of that amount.Anything beyond this generously phrased allowance will be equivalent to a fine. For adverse actions that are not measured in currency, however, the matter is less clear. Is it a double punishment to be convicted of a crime such as fraud and later to be banned from the list of government contract bidders, or dropped from the rolls of attorneys, or committed to a mental institution? Here we need further guidance as to what punishment is for double jeopardy purposes.

In this context, any definition of punishment must enable us to distinguish between punishment on the one hand and regulation or treatment on the other. Common experience and common sense dictate that a criminal conviction for aggravated assault should not bar a departmental proceeding to suspend the police officer for the same conduct, or that a conviction for bribery should not prevent the dismissal of a housing inspector for accepting bribes. Indeed, if we allowed the fact of a previous conviction to bar administrative action against an individual for the same conduct, felons would enjoy immunity from regulation to which others are not subject. Moreover, history suggests that the multiple punishments against which double jeopardy protects are those traditionally associated with criminal proceedings, such as fines and incarceration.

defendant's actions that have given rise to multiple prosecutions. If the charges or proceedings against a person all arise out of the same act, occurrence, episode, or transaction, then the government generally will be limited to a single prosecution or proceeding to punish. See, e.g., Cowart v. State, 461 So. 2d 21, 23 (Ala. Crim. App. 1984); Boyette v. State, 172 Ga. App. 683, 684, 324 S.E.2d 540, 541 (1984).

281. The Court acknowledged that it will be difficult, if not impossible, to determine the precise damages suffered by the government through fraud or another wrong. Accordingly, the government is to be given the benefit of the doubt and permitted to have what are, in effect, reasonable liquidated damages. This would include, the Court noted, such imprecise but roughly remedial devices as a "fixed-penalty-plus-double-damages" provision. Procedurally, if a defendant can make a plausible second punishment double jeopardy claim, he will be entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.


282. See Sigler, supra note 246, at 4-34. Increasingly, double jeopardy issues are arising
The conventional definition of punishment is thus inadequate here. That definition equates punishment with a burden imposed in response to an offense against legal rules and for the purpose of rehabilitation, deterrence, incapacitation, or retribution. Under that definition, regulation can be, and often is, punishment.

For double jeopardy purposes, then, sanctions will not be deemed to be "punishment" if they are reasonably calculated to constitute a rough compensatory remedy, reasonably serve regulatory goals adopted in the public interest, or provide treatment for persons unable to care for themselves. As Halper itself indicated, however, the courts actually must determine, on a case-by-case basis, whether a given burden is reasonably calculated to achieve and actually does achieve the non-punishment goals of recompense, regulation, or treatment.

The general definition of punishment as a burden imposed because of a past offense against legal rules helps to show why some burdens—specifically, involuntary commitment or fines for civil contempt—are not punishment for double jeopardy purposes; indeed, they are not punishment at all. Both are forward-looking and indeterminate, depending as they do upon the individual's future behavior.

in criminal RICO cases. See, e.g., United States v. Esposito, 612 F.2d 60 (3d Cir. 1990); United States v. Grayson, 795 F.2d 278 (3d Cir. 1986). The questions raised in these cases are whether an acquittal on a RICO racketeering charge bars a prosecution for one of the predicate acts and whether conviction for a predicate act bars a later prosecution for racketeering. Although the Third Circuit answered no in both instances, there is reason to doubt the soundness of the court's conclusions in light of the Supreme Court's recent decision in Grady v. Corbin, 110 S. Ct. 2084 (1990). In Grady, the Court held that double jeopardy prevented the subsequent criminal prosecution of a man for reckless manslaughter, negligent homicide, and reckless assault when he already had been convicted of misdemeanor driving while intoxicated and failing to keep to the right. Since the later charges were to be proven by the same conduct that constituted the misdemeanor offense, double jeopardy was a bar. Contrary to the Third Circuit's view, the Grady "same conduct" rule would appear to bar a double prosecution—two bites at the apple—for racketeering and a predicate act, at least to the extent that the same conduct was in issue in both cases.

This is not to say, however, that a defendant could not be convicted of both a RICO racketeering offense and the predicate offenses on which it was based. Since Congress has made clear that these are separate offenses, prosecution for both is possible, and consecutive sentences may be imposed. See Blockburger v. United States, 284 U.S. 299 (1932). Successive prosecutions to achieve that result, however, would be barred. The Supreme Court undoubtedly will be called upon to clarify this matter.

283. See supra note 170.

284. Reliance on the definition of punishment derived from other constitutional provisions is not always appropriate. Foundational definitions must always be rooted in the values of each particular provision. For example, punishment may have a broader meaning for bill of attainder prohibitions than for double jeopardy protections. This is because the bill of attainder clause is concerned not only with individual liberty but also with separation of powers.
In the final analysis, *Halper*'s significance lies precisely in those areas involving monetary exactions such as tax penalties, securities penalties, statutory fines of all varieties, and forfeitures, which like *Halper* itself extend beyond contraband or crime proceeds. Prosecutors now will have to consider better coordination of their actions with those of regulatory agencies that have enforcement powers. Some federal agencies, the Securities and Exchange Commission for example, routinely seek civil penalties in matters that they handle. Such regulatory actions now run the risk of foreclosing a later prosecution based upon the same conduct. Furthermore, if *qui tam* actions are found to fall within the *Halper* rule, prosecutors will have to monitor more closely suits brought by citizens to enforce statutory penalties against those who have harmed or defrauded the government.285 Of course, if the agency limits itself to seeking actual damages, or to a rough approximation thereof, then the *Halper* rule will not require a change in enforcement practices.286

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285. In *Halper* the Court expressly noted that its ruling was inapplicable to "litigation between private parties," and it specifically declined to decide whether its new double jeopardy protection would apply to *qui tam* actions. *Halper*, 490 U.S. at 451.

In this regard, the root of the problem lies in the state action doctrine. The protections of the Bill of Rights only apply against government actors. Nevertheless, lawsuits brought by private individuals to vindicate harms done to themselves may trigger the protections of due process of law, because the government is providing the forum and prescribing the rules of dispute adjudication. The mere fact that a person sues another, however, does not make that suit an action involving state action for purposes of double jeopardy or excessive fines protection. Thus in Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257 (1989), the Supreme Court rejected an excessive fines challenge to a punitive damages award in litigation between private parties.

Except in form, a *qui tam* suit is not a lawsuit between private parties. The reality is that the citizen plaintiff—not harmed herself or claiming any personal cause of action—is simply the agent or bounty hunter for the government. In a *qui tam* suit, the citizen "has no interest whatever in the controversy other than that given by statute." United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943) (citation omitted) (impliedly acknowledging *qui tam* as a government suit by applying double jeopardy analysis in that context). It is as if the government, for the purpose of a particular lawsuit, deputizes the private citizen as a special assistant United States Attorney.

The structure of the *qui tam* action under the False Claims Act also lends support to the view that a *qui tam* suit is a government action. See 31 U.S.C. §§ 3729-3731 (1988). The Act gives the Department of Justice significant control over the action. In particular, notice of the suit must be given to the government, which can take over the litigation entirely or intervene within 60 days. 31 U.S.C. § 3730(b)(2)-(4) (1988). Moreover, a *qui tam* action bars suits by other citizens seeking recovery for the same conduct of the defendant. 31 U.S.C. § 3730(b)(5) (1988). Thus, it seems clear that a *qui tam* action constitutes state action.

Whether private citizen RICO suits—which provide recovery for individual harms and a means to enforce government penalties—are "state action" for the purpose of double jeopardy or excessive fines protections is uncertain.

(1) The Excessive Fines Clause of the Eighth Amendment

The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Although the amendment by its terms is not limited to criminal cases, the focus on bail, fines, and punishment strongly suggests that the Framers intended such a construction. To date, the Supreme Court largely has confined application of the amendment to criminal matters.

Nevertheless, in a recently decided case the Court signaled that, although it would not apply the excessive fines clause to a punitive damage award between private parties, it might apply it in some civil contexts. The majority specifically contrasted private punitive damages awards with government imposition of monetary penalties—whether in the criminal or civil context:

Here [with a private punitive damage award] the government of Vermont had not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.

There is ample historical evidence to support the view that the excessive fines clause derives from English Law limitations on the imposition not only of criminal fines and penalties but also of statutory penalties and amercements (payments for civil wrongs against the King). This history, combined with the clause's general purpose of preventing abusive governmental exaction of monetary penalties, strongly supports application of the clause to statutory penalties and forfeitures. The Court itself has characterized a fine as any forfeiture or monetary penalty or sanction exacted by the government as a punishment. Furthermore, a punishment includes any "civil

287. U.S. Const. amend. VIII.
292. See Browning-Ferris, 492 U.S. at 266-71.
293. Id. at 265.
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."

To date, the lower courts have refused to apply the excessive fines clause to civil forfeitures, although they have applied it to criminal forfeitures. The usual rationale is that forfeitures are in rem proceedings against property, a fiction that has justified excessive and abusive government action through the centuries. As many commentators have noted, the entire subject of forfeiture needs re-examination and overhaul. The in rem fiction no longer masks the reality that forfeitures are often the equivalent of monetary fines.

As to what is excessive, courts have relied upon the proportionality rules utilized in eighth amendment cruel and unusual pun-

296. E.g., United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987).
297. See, e.g., Fried, supra note 4, at 434-36. A major complaint regarding existing forfeiture law is that completely innocent parties may forfeit property when someone else uses it in a crime. See Note, Federal Civil Forfeiture: An Ill-Conceived Scheme Unfairly Deprives an Innocent Party of Its Property Interest, 62 U. DET. L. REV. 87 (1984) (authored by Bruce C. Conybeare, Jr.) (unfairness of forfeiture of innocent third party’s property dictates a change in federal forfeiture laws to make them more like the Uniform Civil Forfeiture law used by most states).

Commentators have proposed two main categories of solutions. The first group proposes limiting the use of forfeiture. See, e.g., Smith, Modern Forfeiture Law & Policy: A Proposal for Reform, 19 WM. & MARY L. REV. 661 (1978) (proposing that forfeiture only be used as a penalty in criminal cases, imposed under the discretion of the judge); Comment, Civil Forfeiture and Innocent Third Parties, 3 N. ILL. U. L. REV. 323 (1983) (authored by Dennis R. Hewitt) (arguing that civil forfeiture should only apply to contraband and that all other forfeitures should be characterized as criminal).

The second group proposes creating additional procedural safeguards. See, e.g., Kandaras, Federal Property Forfeiture Statutes: The Need to Guarantee a Prompt Trial, 33 U. FLA. L. REV. 195 (1981) (forfeiture ought to be barred when the government unreasonably delays initiation of proceedings after seizure); Kandaras, Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing, 34 Sw. L.J. 925 (1980) (due process requires that an immediate post-seizure hearing be held to determine whether probable cause exists to believe the property is subject to forfeiture); Note, Constitutional Rights and Civil Forfeiture Actions, supra note 4, at 399 (use immunity should be granted to claimants in civil forfeiture cases who face a possible criminal prosecution because claimant has burden of proof in forfeiture action); Current Topic, Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment, 5 YALE L. & POL’Y REV. 428 (1987) (seizure of property pursuant to forfeiture laws should be subject to the fourth amendment warrant requirements).

A broader solution for the problems in forfeiture law has been proposed by Professor Clark. He criticizes the suggestion that some constitutional protections should apply to civil forfeiture, but not others. He suggests a new definition of punitive that, when met, would trigger all protections: "If the law places special burdens specifically on a group of persons who have violated some legal prohibition, then there should exist a presumption that the law is punitive, absent convincing evidence of some other purpose." Clark, supra note 22, at 385.

298. It should be noted that the Supreme Court never has applied the excessive fines
ishment jurisprudence, most notably those posited in Solem v. Helm. The Court in Solem stated:

[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

If the Court's dictum in Browning-Ferris Industries v. Kelco Disposal, is to be taken seriously, the same approach should be taken in civil forfeiture cases. Indeed, although the application of the excessive fines clause to civil cases can operate to place ceilings on statutory fines and other monetary penalties, its real impact will come in the area of civil forfeitures because of the magnificent disproportionality between culpability and amounts seized.

Of course, some care must be taken to specify how proportionality rules would apply in forfeiture cases. Forfeitures extend to different kinds of property—contraband, proceeds, and instrumentalities. Any proportionality rule inherently would be satisfied if the property seized were contraband or proceeds. The law prohibits possession or ownership of contraband and an individual should have no greater rights simply because she has more of the illegal material than someone else. As to the proceeds of illegal activities, the idea of preventing someone from profiting from his wrong presumably carries its own sense of proportion—that is, no profit, no matter how small or large, may be retained if it was generated by a wrongful act.

The situation is quite different, however, with respect to instrumentalities. Many statutes permit the government to seize property used in the commission of a crime. For example, if a car or

clause specifically to the states through the due process clause of the fourteenth amendment. Since 1962, however, the cruel and unusual punishment clause of the eighth amendment has been applied to the states, most notably in sentencing cases. See Robinson v. California, 370 U.S. 660, 666-67 (1962). The Robinson court cited Francis v. Resweber, 329 U.S. 459, 463 (1946), for the proposition that the fourteenth amendment prohibits cruel and unusual punishment by the states. The matter of the incorporation of the Eighth Amendment was settled in Robinson and the Court has assumed that the excessive bail clause of the same amendment also applies to the states. See Schilb v. Kuebel, 404 U.S. 357, 365 (1971); see also Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting). There appears to be no reason to treat the excessive fines clause differently.

299. See, e.g., United States v. Littlefield, 821 F.2d 1365 (9th Cir. 1987).
301. Solem, 463 U.S. at 292. With respect to the gravity of the offense, the Court further explained that factors such as whether the offense was a violent crime or merely a crime against property, whether the magnitude of the harm was great or small, and the level of culpability of the offender would be appropriate considerations. Id. at 292-94.
303. See supra notes 86-88.
yacht is used to transport illegal drugs, or an apartment or house is used as the *situs* of prostitution or drug trafficking, it is subject to forfeiture. In these cases, the application of proportionality rules make sense because the amount of loss visited upon the property owner may have no relationship to the seriousness of the underlying offense, the extent of harm caused, or the owner’s culpability or degree of involvement in the offense. The property owner might be a drug kingpin or merely an inattentive lessor. The car owner might be transporting several kilos of cocaine or a small amount of marijuana, and the car itself might be a new $50,000 vehicle or a worthless jalopy. The home owner may be someone who, although culpable, was, by happenstance, a member of the group that allowed her home to be the place where the crime was planned. Forfeitures are excessive fines when the amount exacted turns on the accidental and irrelevant details of how the crime was carried out and not on the nature of the crime or the owner’s connection to it.\(^{304}\)

C. The Fifth Amendment Privilege Against Self-Incrimination

Extending the privilege against self-incrimination to civil cases presents a much more difficult interpretive problem than applying double jeopardy or excessive fines protection to such cases. The express language of the amendment itself appears to confine the privilege to criminal cases: “No person . . . shall be compelled in any *criminal* case to be a witness against himself.”\(^{305}\) Despite this seemingly definitive language, courts long ago transcended any literal or narrow historical reading of the clause.\(^{306}\) The Supreme Court has flatly rejected the idea that the privilege is confined to protecting a defendant at her criminal trial. The privilege applies to proceedings leading up to the criminal trial, including grand jury proceedings\(^{307}\) and custodial police questioning.\(^{308}\) The Court also has held that a witness in any governmental proceeding—civil or criminal—can invoke the privilege if her answers will lead

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304. See Fried, *supra* note 4, at 387-88 (criticizing “the extreme and arbitrary disproportion between offense and remedy” as violative of both due process of law and the excessive fines clause).


306. Moreover, most commentators concede that “[t]he history of the privilege does not settle the policy of the privilege.” 8 J. Wigmore, EVIDENCE § 2251, at 295 (J. McNaughton rev. ed. 1961).


to or provide evidence that could be used in a subsequent criminal case.\textsuperscript{309} In civil cases, however, this use of the privilege is limited by the requirement that the evidence concealed must in fact tend to incriminate the witness.\textsuperscript{310} Invoking the privilege in a civil case may have adverse consequences if, for example, the party invoking the privilege is prevented from using the concealed evidence on her own behalf\textsuperscript{311} or if the court draws an adverse inference from the party’s refusal to divulge information.\textsuperscript{312}

Finally, the Supreme Court has protected the privilege in civil settings, such as legislative investigations, where the state has called a witness to testify and threatened her with sanctions if she invokes her privilege against self-incrimination.\textsuperscript{313} The state in these cases, though conceding the existence of the privilege, has attempted to induce a waiver by threatening the witness with immediate job loss or some other serious penalty.\textsuperscript{314} Where the threats were successful, the Court has held that such a forced waiver is coerced and therefore invalid.\textsuperscript{315} Where the threats were unsuccessful, the Court has barred the state from carrying out its threats.\textsuperscript{316}

In all of these applications of the privilege, there is a link between the forced disclosure and a potential criminal liability. The question for our purposes, however, is narrower and more difficult. May a person invoke the privilege in a civil proceeding even if disclosure cannot possibly lead to a criminal prosecution? That is, may a person invoke the privilege against self-incrimination in a civil proceeding simply because the nature of the proceeding is itself so punitive that the individual’s forced cooperation implicates the policies behind the privilege as directly as if it were a criminal case? Is the privilege necessary in such cases to strike a proper “state-individual balance” and to avoid the same “cruel trilemma” of choosing between self-incrimination, perjury, and contempt?\textsuperscript{317}

\textsuperscript{310} E.g., Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (the burden is on one who challenges the privilege to show it would not have this tendency).
\textsuperscript{312} Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976); see infra Part V (discussing parallel proceedings).
\textsuperscript{313} Lefkowitz, 431 U.S. at 805.
\textsuperscript{314} See id. at 805-06.
\textsuperscript{315} See Garrity v. New Jersey, 385 U.S. 493, 497-98 (1967).
The Court has faced this issue in a number of cases, with mixed results. In *Boyd v. United States*\(^{318}\) the Court recognized the privilege in a forfeiture proceeding, declaring that "suits for penalties and forfeitures incurred by the commission of offenses against the law, are . . . quasicriminal."\(^{319}\) The Court, while following *Boyd* in other cases involving forfeitures, has balked at extending the protection in civil commitment cases,\(^{320}\) probation revocation hearings,\(^{321}\) and non-capital sentencing proceedings.\(^{322}\)

More recently, in *United States v. Ward*,\(^{323}\) the Court concluded that the privilege did not apply in a proceeding by the government to impose a 500 dollar penalty against a businessman for discharging oil into the Arkansas River. The defendant claimed that the government required him, under pain of criminal-like penalties, to report the spillage. Therefore, he argued, this "coerced" statement could not be used against him in the penalty proceeding.\(^{324}\) Since he already had been granted immunity from actual criminal prosecution, his argument could be successful only if the proceeding was deemed "criminal" for fifth amendment purposes.

In *Ward*, the Court began its analysis by recognizing that the protection against self-incrimination is given broader application than the procedural protections that are applicable only in "criminal prosecutions."\(^{325}\) The Court stated, however, that if the purposes of the

\(^{318}\) 116 U.S. 616 (1886).

\(^{319}\) *Id.* at 634.


\(^{323}\) 448 U.S. 242 (1980).

\(^{324}\) *Id.* at 247, 251.

\(^{325}\) *Id.* at 248-49. As to whether the proceeding could be deemed criminal in general, the Court said that the primary determinant had to be congressional intent. Congressional design would control unless there was "the clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). In effect, the Court asked whether the defendant could prove that the statutory proceeding was the functional equivalent of a criminal proceeding. In so holding, the Court again endorsed the seven factor test of *Kennedy v. Mendoza-Martinez*, 372 U.S. 194 (1963), as "helpful." *Id.* at 249-51. The *Ward* Court noted that the fact that the defendant's behavior was also a crime under other provisions of the statute alone was inadequate to demonstrate functional equivalency to criminal cases. *Id.* at 250. Although the Court discussed the case in terms of determining whether the legislative purpose was sufficiently punitive, it again was clear that for a proceeding to be deemed criminal for all constitutional purposes, notwithstanding legislative denomination to the contrary, it must effectively mirror a criminal prosecution in purpose and effect. In this sense, the Court follows what has been referred to as a "shadow proceeding" approach. *See supra* text accompanying notes 189-207.
proceeding were arguably remedial in nature (that is, if the proceeding simply resulted in a penalty generally commensurate with the harm caused by the defendant, and not punitive in nature), then even given its greater breadth, the self-incrimination clause would not apply. Specifically, the Ward Court found that the genuine remedial purpose of a penalty that was apportioned according to the harm done and then donated to a fund to help clean oil spills was not clearly disproved by evidence of a punitive purpose.

The Court has not provided a clear or detailed justification for the conflicting results of Ward and Boyd. Sometimes it simply has stated that because a proceeding, like a probation revocation hearing, is civil, the privilege does not apply. In other cases, the Court simply has accepted that a proceeding can be viewed as "quasi-criminal"; that is, although not "criminal" enough to trigger other constitutional protections, it could be "so far criminal in [its] nature" as to trigger the self-incrimination clause. In order to attain quasi-criminal status, however, the person claiming the privilege must show, by the clearest proof, that the proceeding in question is punitive in nature—that the state’s goals are flatly inconsistent with any rehabilitative, compensatory, or regulatory aim.

There may be a more satisfying way to harmonize these contradictory results. A close look at the language used in the forfeiture case of United States v. United States Coin & Currency provides the key. There the defendant had been convicted of gambling offenses, and the United States instituted a forfeiture proceeding to obtain the money used in the crimes. In the forfeiture action, the defendant, already having been convicted, could not invoke his fifth amendment privilege on the basis that his answers might lead to future criminal prosecution. Yet he could still prevail if the Court agreed that the civil forfeiture proceeding itself was as punitive as a criminal case. The Court so concluded and pointed to two ingredients that make some civil cases sufficiently like criminal cases to fall within the am-

326. See Ward, 448 U.S. at 253-54.
327. Id.
328. See Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984) ("Neither, in our view, would the privilege be available on the ground that answering such questions [regarding violation of probation conditions] might . . . result in the termination of probation. Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding.").
329. Ward, 448 U.S. at 253-54.
330. Id. at 248-49.
332. Id. at 718.
bit of the fifth amendment protection: "When the forfeiture statutes are viewed in their entirety, it is manifest that they are [1] intended to impose a penalty [2] only upon those who are significantly involved in a criminal enterprise."

Extrapolating from these factors, the following rule emerges: A person may invoke the privilege against self-incrimination in any civil proceeding where she is accused of having engaged in conduct that constitutes a crime or a public offense and in which she faces penalties traditionally associated with criminal punishment—that is, fines or incarceration. This rule is consistent with a long line of cases. As the Court has said:

[T]he guaranty in the 5th Amendment to the Constitution against compulsory self-incrimination, . . . as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions, and is of broader scope than are the guaranties in article 3 and the 6th Amendment governing trials in criminal prosecutions.

This rule also would be generally consistent with the historical background of the clause.

Under this test, the privilege would not be applicable to monetary sanctions that are equivalent to recompense (rough remedial justice). Nor would it apply to probation revocation hearings where the alleged probation violation is the failure to maintain a job or some other behavior not itself a crime, nor to an involuntary civil commitment, so long as it is for treatment and not, in fact, a shadow criminal proceeding. It would apply, however, to proceedings to exact statutory penalties which, like those in United States v. Halper, are grossly disproportionate to the harms caused, to forfeiture actions aimed at seizing contraband or the proceeds or instrumentalities of crime, and to pretrial detention hearings. In all of these scenarios, the imposition of a penalty is triggered by the individual's partici-

333. Id. at 721-22 (footnote omitted).
334. It is settled that a person may not invoke the privilege simply because her response would be degrading, subject her to scorn, cause mental anguish, betray a nonprivileged confidence, injure friends, or subject her to civil liability, loss of employment, or disqualification from certain professions. The privilege is available only when the response would tend to incriminate the individual in a crime or public offense. See Ullmann v. United States, 350 U.S. 422, 430-31 (1956) (privilege does not protect witnesses for "loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium"); Brown v. Walker, 161 U.S. 591, 598 (1896) (answer may be compelled despite its tendency to disgrace witness or bring him into disrepute).
336. Id. at 50 (emphasis added).
pation in criminal activity (whether of a de minimis nature, as in certain forfeiture cases, or not yet proved, as in pretrial detention cases), and the punishment is of a kind traditionally associated with criminal proceedings. These, then, are "criminal cases" for the purposes of the fifth amendment privilege against self-incrimination. As in the approach followed in analyzing the excessive fines clause and the double jeopardy clause, it is the underlying values served by the constitutional provisions, and not the criminal or civil label attached to the proceeding in which the matter arises, that determine whether they are applicable.

V. The Unique Constitutional Problems Presented By Parallel Proceedings

Even if the constitutional protections against double jeopardy, excessive fines, and self-incrimination are extended to certain civil proceedings, the use of civil proceedings to enforce criminal law objectives raises still other constitutional concerns. Indeed there are unique constitutional problems that arise simply because defendants are subject to concurrent civil and criminal proceedings arising out of the same conduct. This can occur, for example, when the government simultaneously or seriatim pursues a civil action to recover a statutory penalty or seeks an injunction while it also presses a criminal prosecution. 339

These dual proceedings, often referred to as parallel proceedings, tend to raise three sets of constitutional problems. First, parallel proceedings can put special pressure on a defendant's fifth amend-

339. There are many types of such supplementary proceedings. Some examples are: taxpayer suits for refunds during prosecutions for tax fraud; wrongful death damage actions against persons accused of criminal negligence; actions to require criminal defendants to forfeit ownership of property used in crime; business or professional license revocation proceedings resulting from criminal indictments; and civil actions for violations of antitrust laws, securities laws, banking laws, or laws regulating the use of drugs or cosmetics. Note, Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions, 98 HARV. L. REV. 1023, 1023 n.5 (1985) [hereinafter Note, Equitable Powers]; see also Donnici, The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues, 3 U.S.F. L. REV. 12, 12 (1968-69); Heidt, supra note 317, at 1065 & n.10; Patton, The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination In Concurrent Civil and Criminal Child Abuse Proceedings, 24 GA. L. REV. 473 (1990); Pickholz, Parallel Enforcement Proceedings: Guidelines for the Corporate Lawyer, 7 SEC. REG. L.J. 99 (1979); Note, Parallel Civil and Criminal Proceedings, 24 AM. CRIM. L. REV. 855 (1987) (authored by Carol E. Longest); Comment, Federal Discovery in Concurrent Criminal and Civil Proceedings, 52 TUL. L. REV. 769 (1978) (authored by Robert B. Mitchell).
ment privilege against self-incrimination.340 For example, even if the defendant is permitted to invoke the privilege, and does in fact invoke it in a civil proceeding,341 she may impair her ability to litigate the civil claim because she will be denied beneficial use of the evidence.342 Moreover, a civil court may draw an adverse inference from a party’s refusal to testify on fifth amendment grounds.343

Second, parallel proceedings can weaken a defendant’s due process rights because the government, as simultaneous prosecutor and plaintiff, may benefit from the more generous discovery opportunities afforded by civil proceedings.344 Sometimes the benefits are


341. If the defendant fails to invoke her fifth amendment privilege, it will be deemed waived. United States v. Kordel, 397 U.S. 1, 10 (1970). Waiver will extend not just to the civil proceeding, but also to any later criminal proceeding, since the evidence in the civil case is available for use in the criminal case. Id. at 11-12.


A special dilemma arises in forfeiture cases. Because the government need only show probable cause to initiate a forfeiture proceeding, thereby shifting to the defendant the burden of proving that the property should not be forfeited, a property owner cannot defend a forfeiture claim without, in effect, testifying to ownership of the property. Pollack, supra note 340, at 206.

It should be noted that courts have held that such pressure on the privilege against self-incrimination does not rise to the level of a constitutional violation. See, e.g., United States v. Kordel, 397 U.S. 1, 10-11 (1970); SEC v. Grossman, 121 F.R.D. 207, 210 (S.D.N.Y. 1987); Gellis v. Casey, 338 F. Supp. 651, 653 (S.D.N.Y. 1972); In fact it is well accepted that the mere existence of a parallel proceeding is not a compulsion to testify prohibited by the fifth amendment. Minnesota v. Murphy, 465 U.S. 420 (1984); United States v. White, 589 F.2d 1283, 1287 (5th Cir. 1979); Diebold v. Civil Serv. Comm’n, 611 F.2d 697, 701 (8th Cir. 1979).

344. The Federal Rules of Civil Procedure provide for “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b).

In contrast to this generous civil discovery standard, the Federal Rules of Criminal Procedure provide for the taking of witnesses' depositions only under “exceptional circumstances” when it is “in the interest of justice” that the testimony be preserved for use at trial. Fed. R. Crim. P. 15(a). Furthermore, Rule 15(d) limits the scope of examination to “such as would be allowed in the trial itself.” Fed. R. Crim. P. 15(d)(2). Rule 16 limits the scope of a defendant’s discovery to any relevant statements the defendant has made and her own prior record. Fed. R. Crim. P. 16(a)(1)(A)-(B). This Rule gives the defendant access to reports of physical examinations and tests, documents, and tangible items provided they are material to the preparation of the defense or are intended to be used by the government as evidence in the case-in-chief. Fed. R. Crim. P. 16(a)(C)-(D). Rule 16 specifically excludes from discovery statements of government witnesses. Fed. R. Crim. P. 16(a)(2). The scope of the government’s discovery is limited to the types of material requested.
obtained inadvertently, but there are instances when the government has brought a civil case as a means of circumventing the limited discovery prescribed in criminal cases.345

Finally, parallel proceedings may undercut a defendant’s sixth amendment right to effective assistance of counsel. This can happen when the government makes use of civil discovery provisions to gain access to information normally protected by the attorney-client privilege.346 Additionally, as one commentator has argued, a defendant’s sixth amendment right to effective counsel can be diluted indirectly when counsel works so vigorously on the production of materials for the civil defense that she neglects to consider how this information can hurt the defendant in a supplementary criminal case.347

Without the benefit of legislative guidance, courts have scrambled to find solutions to these difficulties. Primarily they have drawn upon their equitable powers to issue protective orders or orders staying the civil proceedings.349 Courts also have relied on less com-

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345. See Pollack, supra note 340, at 207. Of course, the government can also be disadvantaged by such tactics. A criminal defendant can file a civil action against the government and gain the benefits offered by broad civil discovery provisions while the criminal case against her is pending.


347. Id. at 1032.

348. When a court uses its equitable power to issue a protective order, it can seal civil court records and bar nonparty access to discovery or trial proceedings. Fed. R. Crim. P. 26(c). There are three major problems with this approach. First, sealing the records impinges on the public interest in open hearings. Second, such an order is subject to modification at any time, thereby draining confidence in the protections which the order is meant to provide. Third, use of seals may increase the inefficiency of the court system by increasing the level of duplicative litigation. See Donnici, supra note 339, at 16; Note, Equitable Powers, supra note 339, at 1036-38.

349. Rather than sealing civil records, many courts prefer using stays to halt the parallel civil trial until the completion of the criminal proceeding. See, e.g., Integrated Generics, Inc. v. Bowen, 678 F. Supp. 1004, 1009 (E.D.N.Y. 1988); C3, Inc. v. United States, 5 Cl. Ct. 659, 661 (1984). There are numerous benefits to this remedy. By relieving the pressure on the defendant to testify or produce evidence during a civil proceeding, the court provides the defendant with less incentive to invoke the fifth amendment in a context where its invocation would affect adversely the production of evidence in the criminal proceeding. Once the criminal trial is completed, the defendant will be much more likely to testify fully in the civil case, knowing that she no longer speaks with the potential for self-incrimination. Note, Equitable Powers, supra note 339, at 1039-40. Additionally, the discovery obtained in the criminal trial may be used safely in a subsequent civil trial without impairing the defendant’s constitutional rights. Finally, a stay of the civil proceedings pending completion of the criminal trial may encourage settlements, since the outcome of the criminal case
prehensive solutions, such as quashing or modifying subpoenas\textsuperscript{350} or limiting the scope of discovery with respect to particular matters.\textsuperscript{351}

In many cases, a court's ad hoc use of these devices to adjust and tailor solutions to particular problems promotes fairness and protects the defendant's interests. Nevertheless, the absence of general rules makes such a process unreliable and the application of such principles uneven. With this in mind, some courts have fashioned guidelines to determine when a stay of proceedings should be ordered. In order for these guidelines to apply, there usually must exist "'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government."\textsuperscript{352} Whether "'special circumstances'" exist depends on a number of factors: (1) the private interest of the plaintiffs balanced against the prejudice to the plaintiffs if the proceedings are delayed; (2) the private interest of and burden to the defendants; (3) the convenience of the courts; (4) the interest of persons not parties to the civil litigation; and (5) the public interest.\textsuperscript{353}

Courts also have developed some rules of thumb regarding stays—such as, the greater the commonality of issues, the greater the need for a stay.\textsuperscript{354} Or they will consider the stage of the criminal proceedings, tending to grant stays only when such proceedings have begun.\textsuperscript{355} Moreover, in weighing the equities, courts will consider

would give the parties a clear idea of the potential outcome of the civil proceeding. On the other hand, the delay of the civil proceeding that would result from a stay diminishes the efficiency of the courts and does nothing to guarantee the parties a speedy resolution of their civil complaints.

Modified versions of the stay may prove particularly useful. "'Tailoring'" the stay, that is, fashioning an order that directly responds to and balances each party's concerns, helps judicial efficiency and reduces the burden on both parties while still affording the defendant some protection from the bias inherent in simultaneous civil and criminal proceedings. See SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (allowing the government to permissibly intervene in a civil case for the sole purpose of staying discovery pending the outcome of a parallel criminal investigation).

\textsuperscript{350}. See, e.g., United States v. Steffes, 35 F.R.D. 24, 27 (D. Mont. 1964) (granting government's motion to quash subpoenas issued for the taking of discovery depositions by party defending in civil and criminal proceedings).


\textsuperscript{354}. See, e.g., United States v. Mellon Bank, 545 F.2d 869, 873 (3d Cir. 1976).

\textsuperscript{355}. See, e.g., Dresser, 628 F.2d at 1375-76.
whether the movant has requested a stay solely to create an impediment to the disclosure of otherwise valid evidence.\textsuperscript{356}

Nevertheless because stays are discretionary and granted on a case-by-case basis, the government is more likely to receive relief from the problems caused by parallel proceedings than is an individual. For example, a defendant’s motion to stay civil proceedings on the grounds of due process will fail if the government can show a legitimate reason for bringing the supplementary civil case.\textsuperscript{357} Even where the more liberal civil discovery rules provide the government with evidence it could not have obtained in a criminal proceeding, as long as there is no showing of bad faith on the part of the government, the court is unlikely to grant a stay of the civil proceedings.\textsuperscript{358} To obtain a stay of civil proceedings on due process grounds, the defendant usually must demonstrate “special circumstances”; that is, that the civil case purposefully was brought to bypass the more limited criminal discovery guidelines.\textsuperscript{359}

The government, on the other hand, has much greater success in obtaining stays or orders to defer the production of evidence in response to the defendant’s request for discovery materials. The government’s motions to stay tend to succeed on the grounds that disclosure might jeopardize ongoing criminal investigations or prosecutions.\textsuperscript{360} Moreover, the Department of Justice invariably is successful in obtaining a stay if it shows that the defendant is attempting to circumvent criminal discovery rules by availing herself of the more liberal civil discovery procedures.\textsuperscript{361}

Because law enforcement authorities are relying more heavily on civil proceedings as part of their systematic efforts to fight crime, the constitutional pressures generated by parallel proceedings are likely

\textsuperscript{357} See, e.g., Dresser, 628 F.2d at 1377 (allowing parallel SEC and Justice Department proceedings for securities laws violations).
\textsuperscript{358} Where the government has the statutory authority to conduct investigations with a view to both civil and criminal proceedings—as does the SEC, for example—a defendant’s attempts to receive a stay of the civil proceedings are unlikely to succeed. See Dresser, 628 F.2d at 1376-77; see also United States v. Kordel, 397 U.S. 1, 11-12 (1970).
\textsuperscript{359} Hearne v. United States, 7 Cl. Ct. 362, 370 (1985).
to increase. Generic solutions are possible. They include: legislative adoption of automatic stays of all civil proceedings if criminal charges are pending or imminent; adoption and implementation of rules requiring the government to make an election of remedies in certain kinds of cases; or experimentation with unitary civil-criminal proceedings, having perhaps bifurcated or phased consideration of issues. At the moment, dual procedural systems simply are not designed to accommodate new law enforcement strategies and, at the same time, assure complete constitutional protections for the defendant.

VI. Reining in the Abuses of Civil Proceedings—The Protections of Due Process of Law

At bottom, many of the objections lodged against using civil remedies to complement criminal law enforcement rest on claims of unfairness, irrationality, and government overreaching. Given the narrow definition of what is a criminal proceeding and the inapplicability of certain constitutional procedures to civil proceedings, it is vital that remedies be disciplined by rigorous civil law due process protections.

Unfortunately, perhaps because so much seems settled once a court decides that a particular proceeding is not a criminal one, the courts have not been particularly vigorous in identifying and preventing unfairness in the imposition of civil penalties. Frequently, due process challenges have been turned away in opinions that have a wooden and formulaic cast—the antithesis of the vigilant, flexible, and equitable spirit of due process of law.

In ordinary civil suits, for example, procedural due process requirements are satisfied under the interest balancing approach of *Matthews v. Eldridge*, which requires notice, an opportunity to be heard, and such other procedures as will ensure an accurate and rational action. Ordinarily this means a predeprivation hearing, allocation of the evidentiary burden to the moving party, a preponderance standard for the burden of proof, and no right to appointment of counsel. Civil proceedings that work in tandem with the criminal laws,
however, include novel remedies: double and treble damage awards, magnificent forfeitures, branding of persons as "racketeers" or "unfit," and summary seizures of property. The enormity of the impact of these "new penalties" calls into question whether the ordinary civil due process formulae adequately fulfill the constitutional promises. The Supreme Court already has demonstrated that, when the stakes are high enough, due process may mean according civil defendants more stringent procedural protections, sometimes even protections akin to those found in criminal cases. Thus, in In re Gault,\(^6\) the Court elevated the preponderance standard of proof to that of clear and convincing evidence,\(^7\) and in Lassiter v. Department of Social Services,\(^8\) it stated that appointment of counsel may sometimes be required in civil cases.\(^9\)

Commentators have taken aim at the new penalties, primarily on procedural due process grounds. Civil forfeitures and civil RICO are recurring candidates in calls for recalibrating the civil due process calculus. Commentators have condemned summary ex parte seizures in civil forfeitures,\(^10\) the burden of proof rules applicable in civil RICO suits,\(^11\) and the denial of appointment of counsel in various settings.\(^12\)

Courts have not been sympathetic. For example, they have rejected: raising the burden of proof in civil RICO cases,\(^13\) pleas for

opportunity to make oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker (if one is retained) and (7) a decision based on the record with statement of reasons for the decision. \(\text{Id.}\)

\(^{366.}\) 387 U.S. 1 (1967) (reversing determination of juvenile delinquency for lack of procedural due process).


\(^{368.}\) \text{Id.} at 55.

\(^{369.}\) \text{Id.} at 32; see also Gault, 387 U.S. at 41.


\(^{373.}\) Liquid Air Corp. v. Rogers, 834 F.2d 1297 (7th Cir. 1987); United States v. Local 560 of The Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1985). Civil RICO permits plaintiffs to recover treble damages against defendants who harm them through engaging in a pattern of racketeering activity. 18 U.S.C. § 1964 (1988). Proving a "pattern of racketeering
appointment of counsel in civil forfeiture, and conflict of interest activity" requires proving the commission of at least two criminal racketeering acts, ranging from murder and kidnapping to mail fraud. *Id.* § 1961. The most commonly relied on criminal act is fraud. See Goldsmith, *supra* note 10, at 832.

Plaintiffs can recover attorneys fees, and they enjoy generous procedural benefits, such as liberal venue and joinder rules as well as the full benefits of civil discovery. Civil RICO has been praised as an effective way to combat and deter widespread business fraud and as an efficient means of affording redress to victims of criminal activity. *Id.* at 834-36. It also has been criticized as an invitation to extort claims and as an unconstitutional imposition of criminal sanctions on defendants. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506 (1985) (Marshall, J., dissenting); Lacovara, Wright & Aronow, *Legislative Reform of Civil RICO: The Business Community's Perspective*, in *Civil RICO Litigation*, 237, 240-41 (1985) ("The mere threat of a private RICO suit produces settlements because of the risk of treble damages, attorney's fees, expensive discovery, and the public label "racketeer."); Note, *Civil RICO is a Misanomer, supra* note 22, at 1303-06. But both supporters and critics occasionally have agreed that it is desirable to change the burden of proof in such actions from a simple preponderance to a clear and convincing standard. Compare Goldsmith, *supra* note 10, at 870-71, with Note, *The Standard of Proof in Civil RICO Actions for Treble Damages: Why the Clear and Convinging Standard Should Apply*, 22 Ind. L. Rev. 881, 889 (1989) (authored by Christopher M. Maine). The agreement proceeds from the recognition that the stakes are higher in a civil RICO action than they are in a conventional civil lawsuit.

Establishing the appropriate burden of persuasion determines how the "risk of error will be allocated." *Santosky v. Kramer*, 455 U.S. 745, 757 (1982). In general, the courts recognize three different burdens of persuasion: proof beyond a reasonable doubt, proof by clear and convincing evidence and, proof by a preponderance of the evidence. See *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). In criminal cases the risk of an erroneous verdict is placed squarely on the state with the beyond a reasonable doubt standard. This is because the defendant's liberty is at risk and society fundamentally prefers that the innocent not be convicted even if some who are guilty go free. In ordinary civil suits involving money damages and property rights, a light burden is placed on the plaintiff to prove his case by a preponderance of the evidence. This is because the plaintiff and defendant are equally at risk—the plaintiff for the harms alleged and the defendant for the amount sought to be recovered—and "society has a minimal concern over the outcome." *Id.* at 423.

In civil RICO actions, the defendant risks not merely compensation but treble damages, attorneys fees, and the label of a racketeer. These risks have led commentators to argue that the clear and convincing standard constitutionally is required. To date, however, the courts remain unsympathetic. See, e.g., *Local 560, 780 F.2d 267*. The matter was faced squarely in *Liquid Air Corp.*, 834 F.2d 1297. There, the court rejected the higher standard, distinguishing cases that had applied it when interests more important than money were at stake. *Id.* at 1303. It likened RICO actions to securities fraud cases and proceedings brought under other federal enforcement statutes. *Id.*

374. *Resek v. State*, 706 P.2d 288 (Alaska 1985). *In re Gault*, 387 U.S. 1 (1967), was the first civil case in which the Supreme Court found a due process right to appointed counsel. The case can be distinguished from other civil cases as part of the general constitutionalization of juvenile proceedings, although it did raise the possibility that a right to counsel could be found in a civil context. In a subsequent case, however, although not completely foreclosing the possibility of a right to counsel in civil cases, the Court explained that there was a presumption against such a right when liberty interests were not at stake. *Lassiter v. Dep't of Social Serv.*, 452 U.S. 18, 26-27 (1981); see *Jackson, supra* note 372, at 513. The *Resek* court is the only one to consider a right to counsel claim in a forfeiture case, and the court rejected it. See *Resek*, 706 P.2d at 291-92.

It is unlikely that any court will order the appointment of counsel in civil RICO forfeiture or monetary penalty cases of any kind. Even where a stigma is associated with the imposition
challenges to victims serving as prosecutors in civil contempt cases.375

Perhaps the best candidate for stringent application of due process protections is civil forfeiture. Civil forfeiture has been described aptly as "a farrago of injustices sanctified by tradition."376 The practices followed in seizing a person’s assets frequently fall below even ordinary due process requirements of prior notice, opportunity to be heard, and burden of proof rules. Indeed, in some cases forfeiture may even violate the substantive due process minimum of rationality.

Under certain forfeiture statutes, property that fits within expansively defined categories of contraband or instrumentalities and proceeds of crime may be seized summarily and without notice.377 Property within these categories is subject to seizure even if the owner is wholly innocent of crime and is without knowledge of the property’s illegal use or origin.378 Although there is usually a requirement that the seizing officer have probable cause to believe that the property is subject to forfeiture,379 the probable cause determination need not have a judicial imprimatur or be accompanied by the issuance of a warrant.380 Moreover, once the government has established probable cause to believe property is subject to forfeiture, the burden falls on the property owner to prove by a preponderance of the evidence that the property is not subject to forfeiture.381 Although there is usually a requirement of a prompt post-seizure hearing where summary seizure has occurred, lengthy delays often occur.382 Indeed, if

of the remedy, as there undoubtedly is in these cases, and even though there is a punitive quality to the remedy, courts have not required appointment of counsel except in instances involving potential loss of basic liberties—either the loss of physical liberty via involuntary commitment or pretrial detention, or the loss suffered from the severing of a fundamental relationship like that of parent and child.


376. Fried, supra note 4, at 331.

377. See supra notes 78-91 and accompanying text.

378. See id.


381. Litigants sometimes have complained about this shift in the burden of proof, at odds with ordinary civil practice, claiming that it is unfair or violates procedural due process. See, e.g., United States v. Premises and Real Property at 4492 S. Livonia Rd., Livonia, 889 F.2d 1267-68, 1290 (2d Cir. 1989), reh'g denied, 897 F.2d 659 (1990); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986); United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied, 465 U.S. 1099 (1984). The courts have shrugged off these objections, noting specific statutory intent to apply, or time-out-of-mind, historical acceptance of, this burden-shifting of in rem practice. Livonia, 889 F.2d at 1267-68. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921); Reed & Gill, supra note 370, at 62-67.

382. E.g., In re United States v. Eight Thousand Eight Hundred and Fifty Dollars
the government is seeking *in personam* forfeiture from a criminal defendant, an innocent third party may have to wait until the outcome of the criminal case, months or even years later, to be heard on her claim that the forfeiture is wrongful.\(^3\)

The courts have found substantial fault with the application of civil forfeitures in particular cases and have struck down various provisions as unconstitutional.\(^4\) No court, however, has taken the novel and perhaps needed step of viewing civil forfeitures as substantively and procedurally unconstitutional because of their cumulative, aggregate unfairness. Yet it is the overall operation of civil forfeiture that most belies its inequity.\(^5\)

Critique of forfeiture practice is already well-trod ground,\(^6\) but it is instructive to take a look at two particular due process lapses,

\(^3\) *United States v. Crozier*, 777 F.2d 1376, 1383–84 (9th Cir. 1985) (provision declared unconstitutional as violative of due process).

\(^4\) *E.g.*, *Livonia*, 889 F.2d at 1262–65.

\(^5\) See *Note, Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768 (1977) (authored by James R. Maxeiner) [hereinafter Note, Bane of American Forfeiture Law].

\(^6\) A due process issue that has yet to be fully aired is the unfairness that may infect forfeiture regimes that permit law enforcement authorities to keep the property they seize. By giving law enforcement a direct interest in aggressive forfeiture, such arrangements may distort police investigatory practices and prosecutors' charging decisions, as well as introduce an adversary element between the government and third parties who have an interest in seized property. At a minimum, they create an appearance of unfairness and invite over-reaching. See *Fried supra* note 4, at 365–66.

In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court invalidated an Ohio procedure under which half of all criminal fines imposed by the Mayor sitting as judge went to the township and to the Mayor for his costs. Although there was no evidence that the Mayor had been influenced by this arrangement, the Court found it unconstitutional because it created a "possible temptation to the average man as a judge." *Id.* at 532. Similarly, in other cases where a judge's interest was found to be "direct personal, substantial, [and] pecuniary" the judge's decision in the case violated due process. *Aetna Life Ins. Co. v. Lavoe*, 475 U.S. 813, 822 (1986). Of course, neither a police officer nor a prosecutor judges; they initiate action, but do not pass final judgment. That, at least, is the theory. The reality can be quite different. A police officer and a prosecutor exercise considerable discretion when deciding whether or not to arrest, to charge, and to prosecute. Each may have the further discretion to compromise forfeiture claims by accepting payment in return for seized property. In some instances, the whole arrangement has about it the air of "let's make a deal." See *Strasser, supra* note 92, at col. 1.

Because of the way asset forfeiture paybacks work, the Supreme Court's decision in *Marshall v. Jerrico*, Inc., 446 U.S. 238 (1980), should not foreclose bias claims along due process lines. In *Jerrico* the Court relied on the fundamental distinction between the different roles a prosecutor and judge play and refused to set aside civil penalties assessed by an administrative official. The law under which the penalties were assessed, the Fair Labor
namely, summary *ex parte* seizure and the seizure of property of innocent owners.

**A. In Rem Summary Seizures**

Procedural due process ordinarily contemplates notice and an opportunity to be heard *prior* to the deprivation of a property interest. Sometimes, however, notice and opportunity to be heard can be postponed until after the seizure is effected. Such a relaxation of the ordinary rule requires an "extraordinary situation" and a "special need for very prompt action." In *Fuentes v. Shevin*, the Court identified three criteria for the exceptional case:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

In applying these rules to civil forfeitures, the courts have acknowledged that only extraordinary circumstances can justify summary seizures. At the same time, however, they have found that the moveable quality of property subject to forfeiture is an extraordinary circumstance. Thus, statutes permit, and the courts have sanctioned, the summary seizure of moveable goods if there is probable cause to believe that the property is subject to forfeiture, and

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Standards Act, permitted sums collected as civil penalties to be returned to the administrative agency as reimbursement for its costs of litigating. The Court, however, principally paid attention to the actual operation of the reimbursement scheme and concluded that the possibility that reimbursement would influence the administrator's decision was "exceptionally remote," there being no "realistic possibility" of distortion of judgment. *Id.* at 250-51. The same kind of conclusion could not necessarily be reached in the forfeiture payback arrangements.


391. *Id.* at 91.

392. But see United States v. A Single Family Residence, 803 F.2d 625, 632 (11th Cir. 1986) (viewing seizure for purposes of forfeiture, without more, to be an extraordinary situation).


394. There is, however, some controversy about the precise way in which probable cause must be established.
if there is a procedural mechanism for a prompt post-seizure hearing. The Supreme Court, for example, validated the summary seizure of a yacht under Puerto Rico's drug forfeiture laws by saying that, procedurally speaking, "this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." Further, the Court has noted that "[t]he property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."

Courts have questioned, however, whether a seizure of real estate can ever be procedurally proper without first affording the property owner notice and an opportunity to be heard. Not only is real property not readily moved or subject to being dissipated but, where the real property is an individual's home, values of privacy and freedom from governmental intrusion are also at stake. As one court noted, the government's interest in preventing real property from being improperly transferred can be satisfied readily by the filing of a *lis pendens* along with a restraining order or bond requirement.

A particularly stark example of real property forfeiture, government overreaching, and the need for procedural protection is provided by *In Re Application of Kingsley*. On the basis of a secret affidavit, Kingsley was dispossessed of his home and all of his personal belongings, including his pets and food. The government alleged, on information and belief, that Kingsley was a veteran cocaine dealer and that all of his property was subject to seizure as proceeds of his criminal business. Despite Kingsley's attempt to challenge the action, the government did not file an application for civil forfeiture and no hearing was held until almost fifty days later. The government did not file a criminal complaint, on which seizure of the house was predicated, until seven months after the original allegations.

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397. *Id.* at 679.
399. *Premises and Real Property at 4492 S. Livonia Rd.*, 889 F.2d at 1265.
400. 802 F.2d 571 (1st Cir. 1986).
401. *Id.* at 572.
402. *Id.*
403. *Id.* at 574.
404. *Id.* at 576.
B. The Irrationality of Certain Forfeitures as Applied to Innocent Owners

When government action is challenged under substantive due process, the outcome ordinarily depends on whether a court applies a vigorous strict scrutiny standard or an easily satisfied rational basis review. Social and economic legislation that does not interfere with specific "fundamental rights," such as rights to raise children, use contraceptives, or marry and divorce, is judged under the lenient rational basis test. That is, the law is presumed constitutional, and if it rationally serves any permissible police power objective (public health, convenience, morals), it will be upheld.405 Thus, legislatures, when not acting to affect fundamental rights, constitutionally are permitted to make all rational choices about how society will be ordered. They are free to decide what conduct will be criminal, what activities will be taxed, and what behavior will be regulated.

As a result, there is ordinarily no meaningful substantive due process basis upon which to attack the use of civil remedies to control, sanction, or regulate antisocial behavior. For example, legislatures rationally may conclude that the integrity of the tax system requires monetary fines for late payments, or they rationally may adopt a measure making the possession of dangerous drugs illegal and providing for seizure and forfeiture.

In rare cases, however, a civil remedy might operate so disproportionately or be applied so irrationally that even this substantive due process standard could impose a limit. Forfeiture and some regulatory sanctions may be potential candidates for this restraint.406


406. For example, the Supreme Court has left open the possibility that an irrational exclusion of a person from an occupation will violate substantive due process. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (violation of due process to deny admission to bar of individual based on prior membership in the Communist Party). Although the legislature is shown great deference, it may not simply decree that conviction of this, that, or the other crime will bar an individual from professions or opportunities which the state regulates. Barsky v. Board of Regents, 347 U.S. 442 (1954) (upholding suspension of a physician's license for conviction of a crime); id. at 470 (Frankfurter, J., dissenting). State qualifications and disqualifications "must have a rational connection with the applicant's fitness or capacity" to engage in the profession or occupation. Schware, 353 U.S. at 239. Thus, a statute that made a drug conviction an automatic bar to all federal employment would violate due process and would constitute a bill of attainder. In the current "war on drugs" it would not be hard to imagine the passage of such a statute.

Another irrationality challenge could rest on the gross disproportionality between amounts subject to forfeiture and the crime to which the property was related. No court has invalidated forfeiture solely because the amount forfeited was grossly disproportionate to the underlying
The Supreme Court consistently has held that forfeiture laws do not violate due process simply because they are made applicable to property interests of innocent owners.\textsuperscript{407} This makes sense if the forfeited property is contraband because, by definition, contraband may not be owned or possessed: the nature of the item itself indicates guilt.\textsuperscript{408} Forfeitures applied to innocent owners also may be reasonable if the property in question is traceable proceeds of a crime, even if such proceeds now rest in the hands of an unknowing third party. This conclusion can be justified by the argument that, as between the harm to the innocent party and closing off avenues for criminals to launder their gain, a legislature may choose to frustrate the criminal. Moreover, a third party, such as a lawyer, is sometimes in a position to consider whether the property she has received was transferred by a known or suspected criminal. The Supreme Court specifically has rejected arguments that due process prevents the forfeiture of attorneys fees paid by criminals and traceable as proceeds of a RICO violation.\textsuperscript{409}

Forfeitures applied to innocent persons whose property is used as an instrumentality of a crime, however, may be irrational under offense to which it was connected. Perversely, some courts even have held that the gross disproportionality supports constitutionality because it makes clear that the forfeiture is designed as a civil, as opposed to criminal, remedy. \textit{See}, e.g., \textit{Resek v. Alaska}, 706 P.2d 288 (Alaska 1985). Gross disproportionality shows "the absence of any correlation between the culpability of the property owner and the size of the penalty." \textit{Id.} at 292. Yet, there is some disquiet. In several cases, courts have expressed doubts about expansive applications of forfeiture laws and the resulting gross disproportionality between the underlying offense and the amounts seized. \textit{See} Fried, \textit{supra} note 4, at 384-96.


\textsuperscript{408} Note, \textit{Bane of American Forfeiture Law}, \textit{supra} note 385, at 784.

\textsuperscript{409} Caplin & Drysdale v. United States, 491 U.S. 617, 622-23 (1989). The Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853, makes forfeitable all proceeds and property derived from proceeds that the defendant obtained from racketeering or continuing criminal enterprise drug activities. The statute creates a governmental right in such proceeds from the time of the commission of the offense. A third person who claims a right in the property that is subject to forfeiture must establish either that she had a superior right in the property before the defendant committed the crime, or that she was a bona fide purchaser for value and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture. 21 U.S.C. § 853(u)(6) (1989). For commentary on the issue of forfeiture of attorneys' fees, see Cloud, \textit{Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights}, 1987 Wis. L. Rev. 1; Note, \textit{Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants}, 61 N.Y.U. L. Rev. 124 (1986) (authored by Lisa F. Rackner); Note, \textit{Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?}, 39 STAN. L. Rev. 663 (1987) (authored by Richard W. Mass); Note, \textit{Forfeitability of Attorney's Fees Traceable as Proceeds From a RICO Violation Under the Comprehensive Crime Control Act of 1984}, 32 WAYNE L. Rev. 1499 (1986) (authored by Calvin Sterk).
due process analysis. The Supreme Court itself implicitly recognized this prospect in *Calero-Toledo v. Pearson Yacht Leasing Co.* In that case, the Court upheld the civil forfeiture of a yacht because a single marijuana cigarette was recovered on board. The yacht was being used by tenants under a long-term lease and the owner-lessee was innocent of any involvement with or even knowledge of the drugs. The Court stated that laws permitting in rem forfeitures of innocents’ property are justified by their “punitive and deterrent purposes.” Although presumably there would be no basis to punish the innocent lessor, the Court noted that on the facts of this case “confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.” The lessor in *Calero*, having offered no evidence as to his degree of care, forfeited the yacht. The significance of *Calero* lies in the Court’s dictum that:

> It would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Although courts have relied on this dictum, *Calero*’s implication that certain extreme and arbitrary forfeitures of property will violate fundamental fairness has had little practical significance. There are two explanations for this fact. First, many statutes permit “innocent” owners to seek remission of their property. Second, and more disappointingly, courts have applied a very narrow meaning to innocence or reasonable care. For example, courts have found lack of reasonable care when a parent loaned the family car to a son who had a minor criminal record. When the son later used the car to...

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411. Id. at 668.
412. Id. at 686.
413. Id. at 688.
414. Id. at 690.
415. Id. at 689-90 (footnote omitted).
416. See Regulations Governing the Remission or Mitigation of Civil and Criminal Forfeitures, 28 C.F.R. §§ 9.1-9.7 (1990). Remission is available if petitioner “had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law.” Id. § 9.5. However, a “lessor who leases property on a long term basis with the right to sublease shall not be entitled to remission or mitigation of a forfeiture of such property unless the lessee would be entitled to such relief.” 28 C.F.R. §§ 9.5(b)(2); 9.6(c)(2).
transport drugs, the car was forfeited.\textsuperscript{418} Forfeiture of "instrumentalities" owned by innocent persons thus retains an air of happenstance and superstition\textsuperscript{419} about it—a little like lightning striking.\textsuperscript{420}

VII. A Case in Context: Civil Protection Orders and Criminal Contempt

Having clarified the distinction between criminal and civil proceedings and outlined the constitutional issues that surround the combined use of civil and criminal remedies, we can now identify more precisely the constitutional weaknesses of particular criminal-civil hybrids. One such combination remedy is the use of injunctive relief and criminal contempt sanctions against domestic violence.\textsuperscript{421}

Most states authorize victims of domestic violence to apply for a civil protection order (CPO) that enjoins an abuser from committing further acts of violence and abuse.\textsuperscript{422} CPO's also may require the abuser to leave her residence, seek treatment for her abusive behavior, and limit child visitation or rescind custody.\textsuperscript{423} Using CPO's

\begin{itemize}
\item \textsuperscript{418} Id.
\item \textsuperscript{419} See Fried, supra note 4, at 388; see also J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921).
\item \textsuperscript{420} See United States v. One 1976 Lincoln Continental Mark IV, 578 F. Supp. 402 (S.D.W. Va. 1984). See generally, United States v. A Single Family Residence, 683 F. Supp. 783, 786 (S.D. Fla. 1988) (dictum) (courts routinely uphold the civil forfeiture of a loaned vehicle used to facilitate a drug transaction against claims of the innocent owner exemption); United States v. One Rockwell Int'l Commander 690 C/840, 594 F. Supp. 133, 139 (D.N.D. 1984) (civil forfeiture proper when innocent owner of airplane leased it without any "plan or procedures for detecting smuggling"), rev'd, 754 F.2d 284, 287 (8th Cir. 1985) (holding that the common carrier was exempt from forfeiture because there was no privity or consent to the transportation of illegal drugs).
\item \textsuperscript{421} There are many statutes, state and federal, that specifically provide for injunctive relief against behavior which might also, but not necessarily, be classified as criminal. For example, there are statutes regulating fraudulent and deceptive trade practices, antitrust violations, securities transactions, pollution-causing activities, and civil rights violations. \textit{E.g.}, 15 U.S.C. § 77t(b) (1988) (permitting Securities and Exchange Commission to seek injunction to remedy fraudulent practices in the offer or sale of securities); 33 U.S.C. § 1319(b) (1988) (authorizing the Administrator of the Environmental Protection Agency to seek injunction for violations of the Federal Water Pollution Control Act); 42 U.S.C. § 6928(a)(1) (1988) (providing for injunctive relief for violations of the Federal Water Pollution Control Act). For years the SEC has relied on a variety of civil sanctions for the enforcement of SEC rules, particularly insider trading prohibitions. Its principal weapon has been an injunction against future violations and for disgorgement of profits. Other equitable enforcement remedies include forcing the defendant to provide information or rectify misleading statements.
\item \textsuperscript{422} All states except Arkansas and New Mexico have civil protection order statutes. \textit{See, e.g.}, ALA. CODE § 30-5-7 (Supp. 1986); MINN. STAT. § 518B.01 (Supp. 1991).
\item \textsuperscript{423} \textit{E.g.}, FLA. STAT. ANN. § 741.30 (West Supp. 1990); \textit{see} Lerman, \textit{A Model State Act: Remedies for Domestic Abuse}, 21 HARV. J. ON LEGIS. 61, 106-14 (1984).
\end{itemize}
to combat domestic violence anticipates a two-step process. First the civil protection order is sought. Because this part of the process is civil in nature, civil procedural protections apply. This ordinarily means proof by a preponderance of the evidence and other conventional civil proceeding rules, though jurisdictions may opt for heightened procedural requirements such as proof by clear and convincing evidence or appointment of counsel. Most jurisdictions permit a court to award immediate and temporary ex parte relief in emergencies.

The second step in the CPO regime is enforcement. Once a CPO is obtained and served on an abuser, violation of the order is a crime, enforced either by contempt proceedings or ordinary criminal process. Although some courts have concluded erroneously that minor punishments for violating a court order (five day sentences imposed on enjoined gang members) are a form of civil contempt, it is clear that any determinate contempt sentence is criminal in nature. It follows that, in these instances, all of the procedural protections applicable to criminal cases must be honored.

Since punishing the violation of a civil protection order via criminal contempt is a criminal proceeding complete with all constitutional criminal procedural protections for the accused, the question arises: why use civil protection orders at all? Why not simply rely on criminal prosecution for the underlying behavior?

There are many reasons. First, the very process of getting a civil protection order serves notice on the offender that her conduct is in question, that the courts are involved, and that serious consequences may ensue if she keeps up her present behavior. This by itself may deter future abuse. A CPO also can be an alternative to prosecution where, although criminal conduct plainly may be involved, the matter presents difficult proof problems, the victim is tentative about prosecution, or other facts—such as higher prosecution priorities—render prosecution impracticable or unlikely.

Second, a civil protection order can be sought, indeed may have to be sought, by the victim. In jurisdictions where the prosecutor is

424. E.g., KY. REV. STAT. ANN. § 403.750(1) (Michie 1984); N.Y. JUD. LAW § 832 (McKinney 1983).
426. E.g., WYO. STAT. § 35-21-103(e) (Michie 1977).
428. See Lerman, supra note 423, at 117, 122-23.
429. See supra Part III.C.
430. Id.
unwilling to proceed against a batterer and where private citizens are prevented from initiating criminal actions, this option offers a self-help alternative. Third, once a civil protection order is entered, violation thereof triggers arrest. Fourth, the use of a civil protection order permits the court, in fashioning the precise terms of the order, to proscribe conduct—under pain of criminal punishment—that in itself is not a crime. For example, some civil protection orders direct the abuser to vacate her home, have no contact with the victim, or stay off certain property.

In delineating these "advantages" and taking a close look at how civil protection orders actually operate—as opposed to simply assessing whether they are criminal or civil in nature—we can distill three particular constitutional weaknesses that attend their use.

A. The Scope of a Civil Protection Order

As with other civil penalty regimes, parties have complained that CPO practice deprives them of procedural due process. Parties have challenged ex parte relief, the preponderance standard of proof, and the absence of appointed counsel. Courts repeatedly have rebuffed these complaints. Applying the due process balancing formula of Mathews v. Eldridge—weighing the interests affected, the risk of error under existing practices, and the public interest—courts invariably have found that conventional civil procedural rules were constitutionally adequate. Viewed in isolation, these results are nei-

431. Almost all domestic abuse protection order statutes permit eviction of the offender from the home. See Lerman, supra note 423, at 106; see e.g., N.J. STAT. ANN. §§ 2C:25-1-16 (West 1982 & Supp. 1991).
433. E.g., IOWA CODE ANN. § 236.5(2)(c) (West 1985).
434. Of course, like any law, a law enforced through an injunction is subject to a due process vagueness challenge if the words of the statute fail to give fair warning to a person of ordinary intelligence of what is proscribed. Furthermore, if the law inhibits protected free expression, unduly burdens or prohibits associational ties, or intrudes into protected privacy spheres, it may run afoul of the first and fourteenth amendments. Obviously a legislature cannot authorize courts to infringe on protected freedoms via injunctions any more than it can affect those rights directly through legislation.
435. See, e.g., State ex rel. Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982).
436. In the analogous area of protective orders used to prevent interference with civil rights, Massachusetts courts have held squarely that the preponderance standard is all that is required in a proceeding to obtain an order. Commonwealth v. Guilfoyle, 402 Mass. 130, 521 N.E. 2d 984, 987 (1988).
439. E.g., State ex rel Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (holding that ex parte order provisions of Missouri Adult Abuse Act satisfied due process requirements);
ther surprising nor necessarily mistaken. Yet they do exacerbate what may be the most serious flaw in CPO remedies: namely, the permissible scope of the orders that may be entered.

Many CPO statutes permit courts to enter orders restraining a party from committing acts that are criminal offenses, such as assault, theft, or threats.440 But, as indicated, these statutes often proscribe acts that are not criminal. Since the court, in effect, is creating criminal offenses by the terms of the order—creating essentially personal criminal codes, if you will—not only must the order survive the requirements of specificity and clarity that apply to criminal statutes, but it also must be within the court’s authority and must constitute a reasonable exercise of discretion.

The starting point is the statutes themselves. If a statute specifically identifies the character of activity that may be prohibited via a civil protection order, then due process of law-making will be satisfied. If, however, a statute lacks specificity or includes a catch-all clause, such as one permitting a judge to order “such other relief as the court deems necessary for the protection of a victim of domestic violence,”441 then it may be inequitable and perhaps unconstitutional to bind a defendant—particularly an uncounseled defendant—to an order that broadly restrains her freedom.

Under many CPO statutes, a defendant can be ordered to leave her residence,442 not communicate with the victim,443 give up custody of her children,444 stay away from certain public places,445 and attend counseling sessions.446 Orders may be modified but, unless modified, they remain in effect for months, a year, or even longer with renewals.447 Although these orders ultimately may not actually abridge constitutional rights relating to the parent-child relationship, freedom of speech and association, or freedom of movement, they do implicate these constitutionally protected values. In other contexts the Supreme Court has made it clear that constitutional values, even

Marquette v. Marquette, 686 P.2d 990 (Okla. Ct. App. 1984) (holding that ex parte order effectively denying ex-husband’s right to visit his child prior to hearing did not violate procedural due process).


447. E.g., TENN. CODE ANN. § 36-3-605(b) (Supp. 1990); WIS. STAT. ANN § 813.12(4)(c) (West Supp. 1990).
if not directly in issue, can and should inform and restrain the scope of court orders enforced through contempt.\textsuperscript{448}

B. Enforcing the Order—The Matter of Private Prosecution

Most CPO statutes contemplate that the victim of domestic abuse not only will seek the original civil order but also will enforce it through a contempt proceeding if there is a violation.\textsuperscript{449} This victim-enforcement feature raises a thorny due process question: may a private party act as prosecutor in a contempt enforcement proceeding?\textsuperscript{450}

\textsuperscript{448} See Spallone v. United States, 110 S. Ct. 625, 633-34 (1990). In Spallone a majority of the Court, relying on traditional equitable principles, held that a district court abused its discretion by ordering contempt citations against individual city council members for failure to vote for an ordinance. The contempt order followed the council members' refusal to vote for legislation implementing a consent decree entered into by the city and plaintiffs after a lengthy lawsuit finding Yonkers guilty of intentional racial discrimination in city housing. In concluding that the district court's order against the councilmembers went too far, the Court reasoned that the order against the councilmembers was "extraordinary" and that a step less drastic, namely imposing fines on the city itself, should have been tried first. \textit{Id.} at 634-35. The action against the councilmembers was extraordinary because, although neither the constitutional speech and debate clause nor common law legislative immunity were at stake, the considerations underlying those protections "must inform the District Court's exercise of its discretion," \textit{id.} at 634, particularly the idea that "any restriction on a legislator's freedom undermines the public good by interfering with the rights of the people to representation in the democratic process." \textit{Id.}

\textsuperscript{449} In enforcement actions there are sometimes questions regarding precisely who may bring an enforcement action—who has "standing" to assert the violation. If the state obtains an injunction against a person prohibiting violation of civil rights, or an order restraining use of a residence as a place for illegal drug sales or prostitution, or secures a protective order on behalf of a battered woman and her family against the husband's return to the household or against further assaults against family members, who may commence and prosecute an action for violation of the injunction? May the victims of the racial attacks, or the neighbors of the drug or prostitution house, or the daughter of the battered woman seek an order to show cause why the wrongdoer should not be held in contempt?

It is clear that if the affected individuals themselves had obtained the original injunction, they would be its beneficiaries and as such they could seek enforcement. If the applicable statutes so provide, these persons still may be "beneficiaries" even though the original injunction was sought by the state. Otherwise the legislature may have contemplated that victims or persons associated with a victim bring facts of noncompliance before governmental authorities and request that the government, in its discretion, go forward to enforce the injunction. These questions are essentially matters of statutory construction.

The question of private prosecution arises against the backdrop of the Supreme Court's decision in *Young v. United States ex rel. Vuitton et Fils S.A.* In the context of a commercial dispute, the Court there acknowledged the authority of courts, on the motion of a party, to initiate prosecutions for criminal contempt. It even acknowledged the courts' authority to appoint private prosecutors to litigate the case. However, the Court, relying on its supervisory power over the lower federal courts, held that the district court erred in appointing as prosecutor counsel for an interested party.

The Court's decision left open the question whether *due process* requires prosecution of contempt by a disinterested prosecutor. The one court that has considered the issue in the context of a civil protection order determined that due process does not impose such a requirement. That court's rationale was that the "interest" at issue in *Young*—which involved extensive investigative tactics and extremely valuable commercial property—was dramatically more compromising than that which exists in an ordinary CPO case. The court stated:

> [P]etitioner has been previously determined to be a victim of domestic violence and now seeks the court's assistance, through the statutorily authorized criminal contempt process, to protect her from respondent because he allegedly failed to comply with the provisions of the court's previous order and abused her again. This court is convinced that the *Young* Court could not possibly have envisioned the application of its rather sweeping language dealing with problems associated with private prosecution of contempt under the federal rules to the instant and most similar cases.

Moreover, in weighing any harm to the defendant, which in this case was thought to be negligible given the criminal procedural pro-

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452. Id. at 793.
453. Id. at 790.
455. Id. at 14.
tections surrounding a contempt proceeding, the court factored in the reality that without private prosecutions CPOs would be largely unenforceable.

Insofar as the court's calculus aimed at due process accuracy concerns, its decision seems correct. Yet, there remains the concern that lies at the heart of a requirement of disinterestedness: a doubt whether the case ever would have been brought at all, and whether it was brought to gain advantage in collateral matters. These concerns are real and not adequately accounted for by a rule that simply declares CPO contempt to be different from other contempt.

It is true, of course, that CPO contempt enforcement involves "crimes" that can be classified as petty, that CPO enforcement will be rendered largely ineffective without some measure of victim enforcement, and that the legislature primarily was interested in creating a CPO regime as a plan of protection for victims and not to protect the integrity of court orders per se. Yet a CPO contempt enforcement remains a criminal prosecution and as such implicates not only justice for a victim and fairness to the accused, but also society's interest in an objective, fair, and reliable process of guilt adjunction. As Justice Brennan noted in Young, "What is at stake is the public perception of the integrity of our criminal justice system." 456

As a result of these concerns, courts and commentators have concluded—though by no means uniformly—that, despite the historical practice of private prosecution by victims, prosecution by an interested prosecutor violates due process of law. 457 Not all forms of interest, however, will render a prosecutor ineligible to prosecute. Although a direct pecuniary interest is always fatal, 458 courts have found some conflicts to be too remote to raise a real danger that the defendant's or the public's interest in impartial prosecution will be compromised in favor of private desires. 459 This suggests that if the nature and extent of the private prosecutor's personal interests can be held in check, or if the influence of personal interest can be minimized, then prosecution by a private party or victim might be tolerated.

456. Young, 481 U.S. at 811.
A victim in a CPO enforcement can have one or more conflicts, ranging from spite and vindictiveness to seeking an advantage in related litigation involving divorce, child custody, or award of alimony and child support. Unless we are willing to establish case-by-case assessments of the existence and extent of these conflicts, assuming we even know how to measure spite or vindictiveness, the only potential solution to the interest problem appears to be a structural solution. The danger from conflict seems to arise at three critical points—the decision to prosecute, the use of investigating machinery, and the decision to dismiss or plea bargain. If a CPO enforcement regime includes the prosecutor’s review of the decision to charge, a ban on the victim’s independent authority to investigate, and the prosecutor’s review of any settlement or plea bargain, the effect of conflict may be neutralized sufficiently to be tolerable from a due process perspective.

C. Double Jeopardy

Defendants who are held in criminal contempt for violation of a protective order sometimes face a subsequent prosecution for a criminal act that gave rise to the contempt proceedings. A defendant, for example, may have been found guilty of contempt and later prosecuted for assault or kidnapping. State courts facing this issue usually have found a way to surmount the double jeopardy challenge and permit the subsequent prosecution to proceed. 460 The results, however, have not always been in accord with double jeopardy principles.

Initially, there can be no question that double jeopardy potentially applies in such situations. Both proceedings are criminal prosecutions; thus, new doctrines, such as that announced in United States v. Halper for civil proceedings, are not relevant. Courts that purport to avoid the double jeopardy issue by simply stating that criminal contempt are not criminal prosecutions are in error. 461 Whether double jeopardy is, in fact, a bar will depend on the nature of the defendant’s action and how the government has chosen to proceed. Double jeopardy’s twin protections—against being twice

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460. See, e.g., Baggett v. State, 15 Ark. App. 113, 690 S.W.2d 362 (1985) (no double jeopardy bar to kidnapping prosecution as to defendant previously held in contempt for violating protective order); People v. Allen, 787 P.2d 174 (Colo. App. 1979) (no double jeopardy bar to assault prosecution as to defendant previously held in criminal contempt).  
punished for the same offense and against multiple prosecutions for the same offense—are implicated in different ways. First, as to double punishments, a defendant may face multiple punishments if the legislature clearly indicates that violation of a protection order is an offense separate from other crimes and if the prosecution of each offense depends on proving a fact that the other does not. Both conditions usually can be established because legislatures have specified that violation of a protection order is a separate crime and, ordinarily, violation of the order will encompass behavior broader than a simple criminal offense like assault. Sometimes, however, there is a single wrong, and it is plain that the same offense is in issue. The Oregon Supreme Court, for example, decided that contempt for violating an injunction against trespassing on a neighbor's property was the same offense as criminal trespass. Moreover, it is doubtful that proof of the existence of a protective order as a necessary element in the prosecution for violation of the order is adequate to distinguish offenses that are otherwise precisely the same.

Double jeopardy, however, protects against more than just double punishments for the same offense. Even if it is true, as some courts have held, that violation of a contempt order and commission of an underlying crime such as assault can be deemed separate offenses, further analysis is necessary. An individual may be subject to two punishments for these "separate offenses," but the government may have to exact that punishment in a single, as opposed to multiple, proceeding. If, in the subsequent prosecution, even if for a "separate offense," the government can only prove the second charge by proving the same conduct for which the defendant already was found guilty, double jeopardy will bar the second action as a multiple prosecution.

The double jeopardy issue is sufficiently serious that prosecutors must take some care lest protection order contempt prosecutions inadvertently preclude prosecution for other, perhaps more serious,

463. See supra notes 246-47 and accompanying text.
467. In United States v. United States Gypsum Co., 404 F. Supp. 619, 622 (D.D.C. 1975), the court held that a prosecution for price-fixing barred a prosecution for criminal contempt for violating an injunction not to fix prices. The same conduct violated both the injunction and the substantive law and the district court belittled the importance of the existence of the injunction as an additional element in the violation. Id.
crimes. This can be achieved by imposing a requirement on parties seeking contempt enforcement to notify the prosecutor and by rules permitting the prosecutor to intervene in or stay the contempt action. These same rules also will tend to soften the due process conflict of interest presented by victim prosecution of contempt.

VIII. Conclusion

We are in the midst of fundamentally altering the way we approach criminal justice problems. Law enforcement authorities are no longer content to fight crime with the traditional methods of arrest, prosecution, and jailing. They have observed that crimes such as fraud, extortion, and drug dealing are often complex phenomena involving networks of criminals, subtle and complex business transactions, and societal acquiescence or tolerance. In response, law enforcement officials have enlisted civil remedies—particularly asset forfeiture—and have begun to rely on private law suits. Encouraged by their initial success, they have pressed the merger of traditional criminal and civil remedies to reach a broad spectrum of antisocial behavior.

The systematic joinder of criminal and civil remedies presents unusual challenges to a legal system largely built on the idea that the criminal and civil law are separate and distinct. This Article has addressed only one set of issues that must be confronted, namely Bill of Rights limitations on the use of hybrid or multiple remedies. It has had to begin by offering a coherent basis on which to distinguish criminal from civil proceedings because the Constitution itself embodies a separation between the two. But, important as that effort is and may prove to be in the future, this Article has also sought to show when, constitutionally speaking, the distinction should be ignored.

More work remains to be done. The widespread blending of criminal and civil remedies strains the capacity of our bifurcated procedural systems to accommodate hybrid forms of action. It obscures the boundary line between governmental and private action in applying constitutional and legislative limits on “state action.” Moreover, it presses us to consider whether prosecutor’s offices formally should be reorganized along problem-solving, regulatory lines. At the moment, law enforcement practices are running ahead of our legal theories and our procedural systems. This Article is just one step toward catching up.