Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations

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INTRODUCTION

Recent controversy over man's efforts to protect and improve his environment has centered around the problem of priorities. Specifically, this country has been forced to balance economic and environmental considerations in order to determine how much environmental protection it can afford consistent with competing problems of inflation, unemployment, and energy production. Even were a proper level of environmental protection agreed upon, however, there is little assurance that it could be attained. To date, the most frequently used methods of implementing environmental policies have been largely ineffective. Neither injunctions nor criminal sanctions have proven to be effective deterrents to polluters. Attempts to internalize pollution costs have been frustrated by the inability to quantify those costs.

The thesis of this article is that the civil money penalty may well provide a technique that will prove to be an effective means of enforcing environmental laws and implementing their policies. The civil penalty has been employed by the federal government and many states to aid in the enforcement of environmental laws only recently, and the efficacy of the sanction has not yet been meaningfully tested. The federal government, however, has utilized the civil penalty in other fields for some time. Recently, the Administrative Conference of the United States recommended that civil penalties be more extensively employed by federal agencies to enable them to more effectively pursue their statutory goals.

This article will first review some of the methods presently employed to implement environmental policies, discussing the general nature, strengths and weaknesses of each. It should be noted that this discussion is based primarily on the theoretical nature of the
various techniques. Practical problems, such as insufficient agency funding, manpower, expertise, commitment, or freedom from political pressures, will greatly influence the efficacy of any technique. The role of the civil money penalty in environmental policy implementation will then be discussed, as will various factors which relate to its intelligent and efficient use. Lastly, this article will examine two important constitutional issues surrounding the imposition of the civil money penalty: does the imposition of a civil penalty by an administrative agency violate the separation of powers doctrine, and is such a penalty actually criminal rather than civil in nature? Confusion over these questions is believed to be the major obstacle to widespread and effective use of the civil penalty in the enforcement of environmental laws.

I. Present Methods of Implementing Environmental Policy

Environmental policies may be implemented by schemes designed either to reduce pollution from current levels by directly regulating the amount discharged, or to shift the cost of pollution from society to the polluter himself by requiring him to pay for the environmental damage that he causes. The most desirable systems will tend to accomplish both goals.

A. Cost Internalization

The economist views pollution not as a societal or moral wrong, but as an economic problem. In economic terms pollution is the result of economic dislocations which can best be remedied by a properly functioning market system. Such dislocations have occurred because air and water traditionally have been treated as free disposal systems. The polluter has not borne the cost of his waste disposal, but has passed it on to other users of the air and water. As a result, the price of the polluter's product does not reflect its true cost to society. Such unreflected costs are generally referred to as "external costs." From an economic standpoint, a polluter will abate his discharges only when it costs less to do so than to pollute. As long as pollution costs are external, there is no incentive for the emitter to reduce his pollution. Furthermore, in a free market economy there is an economic disincentive to the assumption of these external costs through pollution abatement. Inclusion of waste disposal costs would cause the abater's production costs and product prices to be greater than those of his non-abating competitors, who would continue to pass on their pollution costs to the rest of society.
To remedy these problems, a system is needed that will “internalize” pollution costs (i.e., include them in the polluter's production costs and product prices). The goal of such a system should be the internalization of waste disposal costs, rather than environmental protection as such. Of course, the two goals are interrelated, and the achievement of one most often would aid in the achievement of the other. Where internalization occurs, the real costs of industrial wastes to society will be accounted for in the prices of goods produced by polluting processes. As “made with pollution” goods rise in price to reflect their higher costs, demand for such goods, and subsequently supply, will decrease and less pollution will result. Theoretically, pollution will decrease to the level where the marginal cost of further abatement measures is equal to the marginal cost of environmental damage avoided. At this level the total cost that society must bear for its wastes will be minimized. Although various methods have attempted to achieve such internalization, none have yet been successful.

1. The Private Damage Suit:
   Probably the oldest attempt to shift the cost of pollution from society to the polluter is embodied in the damage suit for a private nuisance. The damage suit should be encouraged, since it directly compensates the injured party. It should not, however, be relied upon as a major means of internalizing pollution costs. As the time, cost, and effort required to conduct such a suit are usually beyond the resources of most individual citizens, the remedy is not frequently utilized. The resources of the state are needed to effectively reallocate pollution costs.

2. Emission Charges:
   A program which is theoretically capable of fully internalizing pollution costs is the emission charge system. Under such a system, the appropriate environmental authority will calculate the damage done by the emission of incremental amounts of pollutants and assess a corresponding fee against the emitter. For administrative convenience, this might be done by means of a fee schedule rather than by individual assessment. Under this system a polluter might monitor his own discharge rates, calculate what his pollution bill would be for the various rates, and then choose the rate which would cost him the least in terms of both abatement costs and emission charges.
   Such a system has much theoretical appeal. It is capable of shifting the cost of pollution from society to the polluter and his customers. Management, rather than government officials, would bear
much of the burden of investigation and decision-making. The sys-
tem would not set uniformly applicable pollution abatement stan-
dards or procedures, but would allow management to choose the
best solutions to its individual pollution problems. The lack of emis-
sion standards would also provide a continuing incentive to search
for a way to abate discharges beyond the level which might have
been set as an emission standard. The fees collected might also be
used to finance governmental abatement efforts.

From a practical standpoint, there are two primary methods by
which the effluent charge system might be implemented. Charges
might be based on the damage done to the environment, or they
might be based on the cost required to treat the discharged waste
and return it to an environmentally neutral state. Unfortunately,
neither method is as yet feasible.

Charges based on environmental damages are impractical mainly
because currently there is not sufficient data to permit an accurate
measurement of such damage. Without an accurate determination
of environmental damage as a function of pollutant discharge rates,
the fee schedule would be rather arbitrary. Cost internalization
will not be achieved, and the pollution levels determined by the
interaction of the market and the fees will not represent minimum
cost levels. Furthermore, the difficulty of relating damages to dis-
charges will require an extensive governmental decision-making sys-
tem, vastly reducing the theoretical efficiency of the emission
charge system.

A system based on treatment costs also suffers from serious defi-
ciencies. It is totally inapplicable to airborne emissions, as there is
no known way to clean the air once it is past the stack outlet. The
treatment approach is better suited to water pollution, although
problems still exist. First, the water pollutants may cause environ-
mental damage before they reach the treatment facility. Further-
more, it is highly doubtful that current methods of water treatment
clean the water sufficiently to prevent environmental damage fur-
ther downstream. Finally, it is extremely difficult to allocate to
individual polluters their respective share of the total treatment
cost attaching to an affected water basin.

Until these problems are solved, neither method of emission
charges will represent a feasible system of internalizing pollution
costs. At this time, therefore, direct methods to reduce pollution
should be favored. Although the sanctions and regulations pre-
scribed by these methods may possibly be too stringent—forcing the
polluter to pay more in abatement costs than society gains from
increased environmental quality—it appears that presently the cost
of property damages and personal injury from pollution is much greater than amounts devoted to its abatement. The more likely danger appears to be that the measures will not be stringent enough.

B. Environmental Protection

Consistent with the above reasoning, the usual goal of environmental laws has been the reduction of environmental pollution to an acceptable level and maintenance of this level. To accomplish this goal of environmental protection, a certain level of air or water quality is legislatively or administratively determined. In most air pollution control schemes, maximum allowable discharge rates are then set for various industries to facilitate the achievement of the chosen environmental quality level. Under water pollution control programs, every polluter is required to obtain a discharge permit, which fixes the maximum allowable rates at which he may discharge various pollutants. The rates prescribed in the permit are generally based on industry performance standards, but may be varied according to individualized factors such as the location, present degree of pollution, and amount of flow of the accepting body of water. Under both the air and water programs, the polluter will monitor his own discharge rates and report them to the environmental enforcement agency, which may initially and occasionally thereafter visit the polluter's plant to verify the reported rates. If the polluter violates any applicable emission standards or any conditions of his discharge permit, he may be enjoined from continuing such violations or subjected to various civil and criminal penalties.

It should be noted that the above discussion is generally applicable to the continuous type of discharge. Some pollutants, however, are considered a great enough hazard that no discharge is permitted. In such a case the typical violation will be a non-continuous discharge, such as an oil spill. Such violations generally are neither foreseeable nor easily preventable. Therefore, the response to this type of violation should focus on compensation rather than deterrence.

1. The Injunction:

The injunction directly focuses on the prevention of future pollution, avoiding the inflexibility of some other sanctions that look to punishment of past acts. In dealing with future acts, a court may develop the best course of action by balancing the various equities in light of the public policy issues involved. Injunctive relief may thus be tailored to bring a polluter into compliance with environmental laws over a period of time, where the situation so warrants.
It may also be used to compel a violator to cease illegal discharges immediately, where the threat to the public is severe and immediate, or where all other enforcement attempts have failed.

Use of the injunction, however, is subject to important limitations. Obviously, it is inapplicable to those violations which have already occurred or are not expected to recur. Although its flexibility allows individualized approaches to specific problems, use of the injunction should not unduly involve the courts in the legislation of environmental policy. Similarly, courts should be reluctant to involve themselves in the management decisions of those they enjoin. Implementation of a court abatement order usually will be better supervised by management or by a specialized administrative agency.

Unlike other regulatory sanctions, the injunction prevents pollution only by prohibiting it in specific instances. An injunction can operate as a deterrent only where it may be used to close down a polluter's operation. In the vast majority of cases, the polluter need not fear such a shutdown, as a court rarely utilizes this sanction in the absence of a severe, immediate, and proven health threat. The reluctance of courts to order a plant shutdown is understandable, as the expense to society of such a shutdown may often be greater than the environmental benefits to be realized.

These problems are graphically illustrated by several recent cases. In *Reserve Mining Co. v. United States*, a large industrial plant which was central to the economy of an entire region was discharging taconite tailings from its operations into adjacent Lake Superior. The United States District Court for the District of Minnesota found a serious health threat, and ordered Reserve to immediately cease all discharges into the lake. The Eighth Circuit Court of Appeals, considering a motion to stay the District Court's injunction, found small likelihood of an eventual showing of a substantial health threat, and due to the great economic impact of an immediate shutdown on Reserve, its 3000 employees, their families, and their communities, granted the stay. In *Boomer v. Atlantic Cement Co.*, the New York Court of Appeals was faced with a similar situation. A large cement plant was emitting dust and raw materials into the air, causing property damage to nearby landowners. The court denied an immediate injunction, choosing instead to grant an injunction to be vacated on the payment of permanent damages to the landowners. This denial was partially based on the court's belief that it should not attempt to legislate and implement a policy for the elimination of air pollution. The court also felt that the substantial benefit which the plant gave to the region's economy out-
weighed the injury complained of, which was to property rather than health. In both cases, although the defendant was causing serious pollution problems, the appellate court found an injunction to be inappropriate. The important factors in each decision were the economic importance of the defendant’s activity and the legislative nature of the judicial action required.

Some environmental statutes provide for the revocation of operating licenses or pollution discharge permits for violations of permit conditions or emission standards. Permit or license revocation, of course, has the same effect as an injunction—it forces a polluter to close down. Although this all-or-nothing type of sanction may be appropriate in cases of particularly hazardous or flagrant violations, it is often likely to cause more damage to society than it prevents.

2. Criminal Sanctions:

Criminal sanctions traditionally have been used to deter anti-social conduct, including that detrimental to the environment. Unfortunately, such sanctions have been generally ineffective in reducing violations of environmental protection laws. The major defect in a system of criminal sanctions used to enforce environmental laws is conceptual. The subject matter of these and other health and safety laws is considered to be malum prohibitum. The prohibited act is a crime not because it is considered morally wrong, but merely because it has been declared unlawful. Therefore, the real deterrent value of the criminal sanction, the stigma of moral blame, is greatly reduced.

The second difficulty is more practical. A great amount of unlawful pollution is caused by corporations which, of course, cannot be imprisoned. A monetary fine can only be effective where it is greater than the cost of compliance. When imposed, however, criminal fines have been very small, and have effected no real deterrence. Another type of penalty is to prohibit environmental violators from receiving government contracts or other benefits, such as grants or loans. This sanction might be best employed against municipalities by conditioning state and federal aid on compliance with environmental laws. Unfortunately, the sanction cannot affect the many polluters who do not depend significantly on such benefits.

An alternative to fixing liability upon the corporation itself is to hold responsible an individual within it. The immediate actors, however, are usually lower echelon employees, who are merely carrying out the orders of the higher policy makers ultimately responsible for the violation. It is extremely difficult to pinpoint the officials responsible for the policy or decision which leads to the
violation, and courts have been very reluctant to do so. Because of this reluctance and the difficulty of proving criminal intent beyond a reasonable doubt, some environmental laws have reduced the accountability problem by making negligent omission, or simply omission, the basis of liability.

In practice, these problems have rendered the criminal sanction ineffective as a means to enforce environmental laws. Without the usual requirement of criminal intent, and without any attachment of moral culpability to the unlawful act, administrators and prosecutors are reluctant to invoke criminal sanctions, jurors are reluctant to find guilt, and judges are reluctant to impose strong penalties. Because most violators are businessmen, such tendencies are only reinforced. Businessmen violating environmental laws are often viewed as acting merely in the respectable pursuit of profit. In any case, they are not generally thought of as criminals, and society is hesitant to so brand them. The same phenomenon occurs in cases in which municipalities and the elected officials who run them are responsible for pollution.

The substantive problems with the use of criminal sanctions are exacerbated by procedural drawbacks. For a money penalty to be an effective deterrent, the procedure for its imposition and collection must be as speedy as is consistent with protection of the defendant's procedural rights. The polluter must be forced to assume his costs when they are incurred, and should not be allowed to defer them. Such speed is not possible in a criminal prosecution. Generally, courts are slow and overcrowded, and streamlined administrative procedures are unavailable for constitutional reasons. The many procedural safeguards, which are largely inappropriate in environmental money penalty cases, only serve to further lengthen the criminal proceeding.

Thus, where no criminal intent is required, jury nullification and related problems cripple the efficacy of the criminal sanction. The sanction is appropriate, however, in cases involving demonstrably intentional, wanton, or reckless violations. Here, some measure of moral culpability is involved and the sanction may act as an effective deterrent.

3. The Civil Penalty:

A civil penalty is simply a monetary sum that is assessed and recovered in a civil proceeding for a violation of law. Although the civil penalty may be viewed as a sanction in the sense that it is imposed to produce obedience to environmental laws, it is not designed to punish the violator. Its purpose is deterrence or compen-
sation, not retribution.\textsuperscript{50} It is not designed as a revenue measure, although the money collected might be used to finance the government’s environmental protection efforts. Rather, the primary objective is to avoid collection of the penalty by inducing the polluter to abate excessive emissions.\textsuperscript{51} An alternative rationale for the civil penalty is compensation to society in the form of liquidated damages for the environmental harm caused by the violation. This alternative rationale is particularly suited to fortuitous, one-time discharges, where the deterrent effect of the penalty may be relatively insignificant.

Briefly, the civil penalty functions as follows. If a polluter violates applicable emission standards or permit conditions, he will be liable to pay a money penalty to the state in a civil action brought by either the attorney general or the environmental enforcement agency. The legislature may fix the amount of the penalty to be imposed in any given situation,\textsuperscript{52} or it may prescribe the limits of the penalty, leaving the administering agency or the court with discretion to fix the amount in individual cases.\textsuperscript{53} To insure that the civil penalty will deter a polluter from discharging wastes at excessive rates, its amount must be greater than the violator’s compliance or abatement cost.\textsuperscript{54} As with any sanction, it is also important that enforcement be uniform, swift, and certain.

The greatest attribute of the civil penalty is its effectiveness in a wide variety of situations where neither injunctions nor criminal sanctions are appropriate.\textsuperscript{55} It may function as a deterrent in cases where an injunction cannot. Thus, where it is not in the public interest to enjoin the entire operation of a plant which is important to the local economy, the civil penalty is the more appropriate remedy. The threat of the penalty would act as a deterrent or at least as a disincentive to further discharges. Should the penalty become necessary, it would more accurately reflect a balancing of societal interests. In situations such as the above, where the enforcement authority currently has only the choice of no remedy or a drastically harsh one, the Administrative Conference of the United States has recommended use of the civil money penalty.\textsuperscript{56}

Except in the case of intentional, wanton, or reckless violations, a civil penalty has distinct advantages over a criminal sanction. Since the civil penalty effects deterrence by the use of economic disincentive rather than by fixation of moral blame, it avoids the problems inherent in the use of criminal sanctions to prevent acts such as pollution which are not considered morally culpable. Furthermore, imposition of a civil penalty avoids subjecting the offender to the stigma of a lifetime criminal record for conduct which
The economic effect of the civil penalty may best be illustrated by its comparison with a theoretical variation of the pure emission charge system discussed previously. This variation acts primarily as a deterrent to excessive pollution, rather than as a cost internalization device. Such deterrence would be accomplished by setting the fee schedule according to a polluter’s abatement cost instead of the environmental damage caused. Although the two emission charge systems are similar in form, the above variation will be referred to as “emission deterrence charges.”

The civil penalty is directly analogous to this emission deterrence charge. In both cases the optimal level of environmental quality is determined by the government rather than the market. Specific emission standards are then set to facilitate achievement of this level. Where the civil penalty is used, the standards are directly set by the government. Violations of these standards are enforced by the imposition of civil penalties. In the emission deterrence charge system, the government would indirectly determine the emission standards through the setting of a fee schedule. Although the polluter would make the decision as to how much waste he can afford to discharge, the fees would ideally be set to make the governmentally desired discharge rates his least-cost choice. This would be done by making payment of fees for emissions in excess of the desired standard more costly than abatement. Thus, under one system, excessive emissions would cost the violator a “civil penalty,” and under the other, an “emission deterrence charge.” As the penalties or fees are set to achieve the optimum level of environmental quality, they have the potential to incidentally approximate environmental damage and thus aid in the internalization of pollution costs. It should be recognized, however, that the penalties as set are not direct approximations of environmental damages, but are economic deter­rents to excessive pollution discharges.

The two systems, however, do have important differences. The civil penalty, as it now exists, is not a true equivalent of an emission deterrence charge, as factors other than abatement cost enter into the determination of the amount of the penalty. Another important difference is that the civil penalty is a much more direct method of environmental quality enforcement. Despite these differences, the civil penalty and the emission deterrence charge are very similar, and one may probably be used as effectively as the other. In view of growing federal and state acceptance of the civil penalty, however, it may be wiser to stay with the civil penalty, at least until a
clearly superior and feasible emission charge system can be developed.

II. Factors Influencing the Efficacy of the Civil Money Penalty

To assure that the theoretical efficiency and flexibility of the civil money penalty is realized, criteria used to determine the amount of the penalty and procedures for its imposition must be carefully selected. The following sections will discuss the relative merits of the various criteria and imposition procedures available.

A. Criteria Used to Determine the Amount of the Penalty

In prescribing a civil money penalty, the legislature must provide the adjudicatory body with a framework for determining the severity of the penalty in a given case. It should prescribe both a minimum and a maximum penalty for the violation in question. The minimum should function to deter polluters from smaller, non-trivial violations, but should not be so large as to cause administrators and courts to hesitate to impose it. On the other hand, the maximum penalty must be sufficiently substantial to exceed the cost of compliance of the largest polluters.81 The proper basis on which to impose the penalty must also be selected. As most air and water pollution violations are repetitive, a per diem penalty is much more desirable than a per violation penalty. A per diem penalty helps to deter continuing violations by allowing sums to accumulate over time. The penalty more closely approximates the cost of abatement and thus acts as a superior deterrent.62

To protect against arbitrary imposition of the penalty, the legislature should provide the adjudicatory body with criteria to guide it in setting the amount, as well as the upper and lower limits, of the penalty. In cases of continuous discharges, the critical guideline necessary to insure real deterrence is that the penalty exceed the cost of pollution abatement.63 A second basis for computing the penalty is the damage to the environment caused by the violation.64 The employment of this basis may help to shift the cost of pollution from society to the polluter in cases where the environmental damage is susceptible of approximation, but any deterrence depends upon the relation of the polluter’s cost of abatement to the amount of environmental damage caused. It may be useful, however, to portray the civil penalty in some cases as a form of liquidated damages. This rationale is particularly appropriate in cases of non-repetitive violations, such as oil spills.65 The penalty’s predominant function here is not deterrence, but rather compensation for the harm caused to society.
A third criterion involves the ability of the polluter to pay either the penalty or the full cost of compliance. It may be a better policy to assess a penalty that the violator can afford, and hope that he will attempt to comply to the extent that his resources allow. From a broader perspective, however, it may be unwise to subsidize marginal operators whose pollution rates are relatively high as a result of antiquated and inefficient facilities. In addition, expenditures made by the polluter in compliance or clean-up efforts should be considered in mitigating the penalty. Such efforts are not only evidence of a violator's good faith, but also represent a voluntary partial internalization of pollution costs by the violator. For the same reasons, some states now provide for the remission of all or part of the penalty if the polluter promptly corrects the violation. This position is commendable as it induces compliance after the penalty is collected, and helps to emphasize that the primary purpose of the civil money penalty is to improve the quality of the environment, not to punish the violator.

Unfortunately, other criteria have been used which tend to produce the opposite effect. For instance, the amount of care exercised by the violator is sometimes considered in computing the penalty. In the case of a continuous violation, the consideration of due care, apart from expenditures made in attempted compliance, goes to the violator's moral culpability and is more properly reserved for a criminal prosecution. Other statutes penalize the violator who has a past record of violations. It may be argued that the increase of a penalty on the basis of past violations, which theoretically have been "paid for," can only be interpreted as punishment. Some environmental statutes possess the drawback that a penalty cannot be assessed for statutory or regulatory violations which occur prior to the issuance of a cease and desist order. Such a penalty will have negligible deterrent value compared to one that may be assessed commencing with the day that the polluter first receives notice of the violation. Cease and desist orders should not function so as to allow the violator to escape responsibility for his harmful waste discharges until such time as the government orders him to stop violating the law.

B. Methods of Imposition and Collection of the Penalty

The flexibility, and thus the efficacy, of a civil money penalty is profoundly affected by the choice of procedure used in assessing and collecting the penalty. Two basic types of procedure have been utilized most frequently. They may be designated as judicial imposition and administrative imposition.
A number of state statutes provide for the judicial imposition of environmental civil money penalties. This is the least flexible of possible procedures. The appropriate enforcement agency will first make its assessment of the defendant’s liability for the violation of an environmental statute, rule, regulation, standard, or order. The agency must then bring a civil action in court seeking the imposition of whatever penalty is provided by statute. The court has complete discretion as to whether or not to impose any penalty, and of the amount of any penalty it chooses to impose. Under a slight variation of this procedure, the agency may determine the defendant’s “apparent liability” and fix the amount of the penalty. The defendant, however, has the right to a de novo trial on both the merits and the amount of the penalty.

A more flexible procedure is administrative imposition of civil penalties. Here the agency determines liability and fixes the amount of the penalty in an administrative hearing. The defendant is entitled to judicial review, which is essentially limited to a determination of whether the agency’s action, with respect to both the defendant’s liability and the amount of the penalty, is supported by substantial evidence; and is neither an abuse of discretion nor an error of law. If the defendant does not seek such review and does not pay the penalty, the agency may either enforce the penalty as if it were a court judgment, or it may have to institute a streamlined collection proceeding in the courts where the issues of the defendant’s liability and the reasonableness of the penalty may not be raised.

A variation of the administrative imposition procedure described above is employed in several states. It is similar to the above procedure in that the agency determines both the defendant’s liability and the amount of the penalty assessed. Here, however, if the defendant does not voluntarily pay the penalty, the agency must institute a court proceeding to compel payment, at which the defendant is entitled to limited judicial review of the agency’s action. The only real difference in the two administrative imposition procedures is a shift in the burden of “appeal” from the defendant to the agency. The difference between this second administrative procedure and judicially imposed penalties is much more significant. Instead of a de novo trial on the merits, the defendant is entitled to only a limited form of judicial review.

The main advantages of the judicially imposed penalty are that it is more familiar to enforcement institutions and it is clearly constitutional, avoiding some of the legal questions which might arise when an administrative agency performs tasks of a legislative or
The judicial imposition system, however, lacks much of the flexibility that makes the civil penalty a desirable sanction.

In order for the civil penalty to be an effective economic deterrent, penalty cases must be adjudicated quickly, efficiently, and at relatively low cost. This is possible only under an administrative imposition system. Under judicial imposition, speedy adjudication of violations and imposition of penalties is impossible because court procedures, which are necessarily slow, are required. Furthermore, the courts are already overloaded and might have difficulty handling the strain which a system of environmental civil penalties would impose. The severity of this strain would be enhanced by two factors. First, environmental litigation is typically lengthy and complex. Also, the number of cases added to the docket would be large, as the assessment of a civil penalty would be appropriate and necessary for the majority of environmental violations.

An extensive evaluation of how the system of court imposed penalties has functioned on the federal level has recently been conducted for the Administrative Conference of the United States by Associate Professor Harvey Goldschmid of the Columbia University School of Law. The severe problems encountered by the federal agencies with this system are partially manifested in the greater than 90% settlement rate that these agencies have experienced. Although there is nothing wrong with settlements per se, under the judicial imposition procedure settlements are usually of such poor quality that the penalty loses all real deterrent value. This happens because the agencies tend to settle for "what the traffic will bear," rather than for what is appropriate from the standpoint of effective enforcement policy. Since the courts are overburdened and the cost of court litigation may well exceed the amount of the penalty assessed, the agency often accepts meager settlements, believing it has no other choice. These circumstances particularly favor the large corporation which can more easily afford to contest the agency action, knowing that if a settlement is not reached, the agency may not be able or willing to go to court.

Under the administrative imposition system, artificially low settlements which do not reflect sound enforcement policy will be avoided by eliminating the pressures created by the unavailability of overburdened courts or the high cost of utilizing them. Furthermore, there will be no opportunity for wealthy violators, who might refuse to settle under a judicial imposition system, to evade assumption of their pollution costs.
Another drawback inherent in the system of judicially imposed penalties is that judges often do not possess the technical competence required to effectively administer a system of environmental civil penalties. More effective enforcement may be provided by administrative agencies, which are able to specialize in a particular field and may employ a staff of expert personnel. An agency is also better suited to administer the penalties in a consistent fashion pursuant to a specific policy, providing a fairer system and one capable of greater deterrence.

As with other governmental actions dealing with the rights of private parties, due process should be the governing standard. Essentially this requires only that the defendant receive a fair and impartial hearing, which need not be before a court. A defendant is just as likely to receive a fair hearing before an administrative agency, particularly because he has the right to judicial review of the agency action. Specific safeguards should include adequate notice, right to counsel, opportunity to answer charges through the presentation of evidence and cross-examination of witnesses, and the publication of agency findings and reasoning in order to preserve a reviewable record for the appellate court. The standard of judicial review should allow inquiry into whether errors of law have occurred, whether the agency has abused its discretion, and whether agency findings are supported by substantial evidence.

Some of the problems inherent in the judicial imposition system may be mitigated by statutes which allow the agency to recover, through the penalty action, reasonable costs and expenses in detecting, controlling, and abating pollution violations, and by statutes which allow the agency to recover the penalty in an action brought to obtain an injunction. Furthermore, judicial imposition of civil penalties will be more effective in states where there is little or no court backlog, and in cases where the penalties sought are large. Despite these mitigating factors, the use of judicially imposed civil penalties in the enforcement of environmental laws possesses serious shortcomings, and it is submitted that administrative procedures are much more appropriate for imposition of civil penalties.

III. CONSTITUTIONAL QUESTIONS REGARDING THE CIVIL MONEY PENALTY

In view of the advantages offered by the administrative procedure of imposing civil money penalties, it seems puzzling that so many state environmental statutes have provided for the judicial imposition procedure. The reason seems to be that many states have
viewed the procedure of judicial imposition as a safe and sure way to assure the legality of the civil penalty by avoiding "constitutional doubts" about administrative imposition. These doubts have centered around two related questions. Does the administrative imposition of variable civil money penalties violate the separation of powers doctrine, and are the penalties actually criminal rather than civil in nature?

A. The Separation of Powers Doctrine

The doctrine of separation of powers has been implied from the United States Constitution and is expressly provided for in most state constitutions. The following is a typical statement of the doctrine as found in many state constitutions:

The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to any of the others, except as expressly provided in this constitution.

The purpose of the doctrine is to prevent the tyranny and loss of civil liberties that would result from the concentration of governmental power in one person or body. Therefore, the manifest objective of the doctrine is to maintain the balance of power between the three branches of government. The doctrine was never intended to be strictly interpreted as requiring rigid classification and compartmentalization of all governmental action as either legislative, executive, or judicial. If courts had so construed it, the very existence of an administrative agency would be unconstitutional. Since governmental powers have not been scrupulously separated, but have always overlapped to some extent, the determination of whether a power is "legislative," "executive," or "judicial" cannot be made by seeking the inherent nature of the power. Therefore, the similarity in form of legislative or judicial procedure to administrative rule-making or adjudicator procedure is not determinative of possible constitutional deficiencies. As Professor Davis has stated: "The danger is not blended power. The danger is unchecked power."

Much of the case law is consistent with this view of the separation doctrine. It is well settled that a legislature may lawfully delegate to an administrative body the power to make rules and regulations, as long as the legislature sets forth sufficiently specific standards to indicate to the agency the limits of the power delegated. According to Professor Davis, the current law is in agreement with
Sunshine Anthracite Coal Co. v. Adkins,119 where the United States Supreme Court stated:

Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. . . [T]he effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of law and deprive the agency of that flexibility and dispatch which are its salient features.120

Thus courts have often paid little more than lip service to the "sufficient standards" rule,121 and have upheld statutes which provide very broad standards122 or none at all.123 Courts have generally recognized that as society becomes more complex, the requirement of rigid and detailed legislative standards is unrealistic and counter-productive.124 It is therefore not surprising that courts have consistently upheld environmental and public health laws which grant broad authority to an administrative agency to promulgate rules, regulations, and emission standards.125

The United States Supreme Court has also held that adjudicatory powers to conduct hearings and issue orders may be conferred upon administrative agencies.126 The real danger of arbitrary agency power here is that the defendant may be denied due process through the lack of a fair and impartial hearing. Thus, modern cases have tended to examine the sufficiency of the procedural safeguards and the availability of judicial review more carefully than the specificity of legislative standards.127 Where adequate review and safeguards are available, courts generally have allowed delegation of quasi-judicial128 powers to administrative agencies.129

To enhance the effectiveness of administrative rule-making and adjudicatory powers, they must be backed by sanctions. The courts have recognized this fact and have held that the legislature may provide penalties collectible in a court proceeding for violations of administratively promulgated rules, regulations, and orders. In United States v. Grimaud,130 the United States Supreme Court rejected the contention that such a procedure unlawfully delegated power to the administrator to create new crimes.131 The state decisions are in general accord with Grimaud.132 Thus, there is no doubt that judicial imposition of civil penalties for the violation of environmental statutes, rules, regulations, or orders is constitutionally permissible.

Once it is accepted that an administrative agency may perform
adjudicatory and rule-making functions pursuant to its grant of power from the legislature, the question whether the agency may validly be granted the power to assess civil money penalties comes into sharper focus. As other forms of delegation are permissible, it would seem that the power to impose money penalties might also be validly delegated to an agency. Such, however, has not always been the case.

It has been accepted since Oceanic Steam Navigation Co. v. Stranahan that a civil money penalty fixed in amount by the legislature may be imposed by an administrative agency. In that case the United States Supreme Court upheld an immigration statute which allowed the Secretary of Labor to impose a $100 penalty if he determined that a statutory violation had occurred. In rejecting the defendant's claim that the penalty could be imposed only by the judicial process, the Court held that the plenary power of Congress over the admission of aliens included the power to enact statutes pursuant to that power, to provide penalties for violations thereof, and to delegate to an administrator the authority to impose such penalties. Significantly, the Court rejected the argument that administrative imposition would necessarily lead to abuses, stating that it was incorrect to assume that only courts may safely be entrusted with power. In Lloyd Sabaudo Societa Anonima Per Azoni v. Elting, the Supreme Court, in upholding the same statute with a ten-fold increase in the penalty, made it clear that it was more concerned with the fairness and reasonableness of the penalty imposition procedure than with the amount of the penalty.

It may be inferred from federal decisions that Congress may also delegate the power to impose variable penalties, allowing the administrator to fix the amount of the penalty. In N. A. Woodworth Co. v. Kavanaugh, the Sixth Circuit Court of Appeals upheld a penalty assessed by the National War Labor Board against an employer who had made certain wage payments in violation of the Stabilization Act of 1942. By regulations adopted pursuant to the Act, the Board was required to consider mitigating circumstances in calculating the amount of the penalty. Today, such a procedure in which an administrative agency imposes an agency-determined monetary penalty as a result of an agency-conducted adjudicatory proceeding is an accepted feature of many federal enforcement schemes.

State courts, however, have not always upheld the administrative imposition of variable civil money penalties. Although most courts have interpreted the separation doctrine as allowing administrative bodies to utilize non-monetary penalties to effectuate general statu-
tory policy, some courts have balked at the administrative use of variable monetary penalties.\textsuperscript{141} The courts of at least four states have held that delegation of the power to impose a civil money penalty and fix its amount violates the separation of powers doctrine.\textsuperscript{142} Furthermore, decisions in two other states cast some doubt on their acceptance of such a procedure.\textsuperscript{143} The majority of states, however, have upheld the administrative imposition of civil penalties in one form or another.\textsuperscript{144}

The reasoning in the few cases striking down administrative imposition schemes has been rather divergent. In \textit{State ex rel. Lanier v. Vines,}\textsuperscript{145} the North Carolina Supreme Court was faced with an insurance statute authorizing the Commissioner of Insurance, at his discretion, to deal with statutory violations by the assessment of civil penalties not exceeding $25,000 per violation and by the suspension or revocation of an insurance agent’s license. The court interpreted the state constitution as prohibiting administrators from being vested with power of a judicial nature unless it was “reasonably necessary as an incident to the accomplishment of the purposes for which” the Department of Insurance was created.\textsuperscript{146} The court found that this provision applied as well to quasi-judicial powers, as the constitution provided that all judicial power, not just supreme judicial power, shall be vested in the courts. The court held that the power to revoke or suspend an agent’s license was “reasonably necessary” to protect the public from fraudulent activities by an agent and clearly within constitutional bounds. Without explanation, however, the court then held that the seemingly lesser power to impose civil money penalties was not reasonably necessary and therefore unconstitutional.

It may be forcefully argued that there is no material constitutional difference between license revocation or suspension and the imposition of money penalties. License revocation may be in many circumstances an excessive penalty which does not further the public interest. Very possibly, the legislature felt that in such situations money penalties would be “reasonably necessary” to effectuate the Commissioner’s statutory purpose, because such penalties would provide him with a more effective and flexible sanctioning tool.\textsuperscript{147} In any event, it is doubtful that the \textit{Vines} reasoning will seriously affect environmental civil penalties. In an environmental context, where the effect of revoking a permit might be to close down a factory, causing unemployment and other economic problems, the civil money penalty would appear to meet the requirement of reasonable necessity.
In Broadhead v. Managhan, the Mississippi Supreme Court invalidated a statutory provision allowing the State Tax Commissioner at his discretion to impose a penalty of between 10% and 25% for delinquency in payment of any income tax installment. The court held this provision to be an unconstitutional attempt to delegate legislative power to an administrative body. The court relied not upon the uniqueness of its constitutional separation of powers provision, but upon case law from other jurisdictions, particularly a Utah decision which was overruled sub silentio two years later.

The court found that to allow the commissioner to fix the amount of penalties for violations of law without adequate statutory standards for guidance, would be to allow the delegation of "unrestricted power." Provision of a fair and impartial administrative hearing, along with the right of a court hearing on the merits, was held insufficient to save the statute.

Other courts have also focused on the sufficiency of legislative standards in scrutinizing administratively imposed civil penalties, but have applied the test much less strictly. For example, in County Council v. Investors Funding Corporation, the Maryland Court of Appeals extensively discussed the separation of powers doctrine. The act in question established a commission which was vested with various enforcement powers, including the power to award money damages to an injured party and the power to impose civil penalties not to exceed $1000 per violation. The act's enforcement provisions were challenged as vesting in an administrative body judicial powers reserved exclusively to the courts. The court found that the separation doctrine was designed to prevent the exercise of unchecked, not merely blended, power. Therefore, administrative bodies were not prohibited from exercising power of a judicial nature so long as that power was not beyond check or court review. With the single exception of the civil money penalty, the enforcement procedures were upheld. With respect to the civil penalty provision, the court stated:

[It is readily apparent that the Commission has unrestricted, unbridled discretion in fixing the amount of the penalty, within broad limits, up to $1000 without regard to the nature or gravity of the violation. While we conclude that the authority to impose a civil monetary penalty is not a power beyond constitutional delegation to an administrative agency, we think the discretion vested in the Commission to fix the amount of the penalty in any amount up to $1000, for any violation of the Act, in the absence of any legislative safeguards or standards to guide it in exercising its discretion, constitutes an invalid delegation of...
legislative powers and otherwise violates due process of law requirements.\textsuperscript{133}

Due to the complete lack of legislative safeguards or standards, the court concluded that meaningful judicial review of the commission's imposition of the penalties was impossible. Without such review, the commission's power to impose such penalties was unrestricted and thus unconstitutional.

Some courts have indicated that procedural safeguards, rather than specific legislative standards, are the most important means of protection from arbitrary administrative imposition of money penalties. In \textit{Rody v. Hollis},\textsuperscript{134} for instance, the Washington Supreme Court upheld the delegation of power to the state Human Rights Commission to order violators of antidiscrimination laws to pay monetary damages in amounts up to \$1000 to the wronged complainant, emphasizing the importance of adequate "... procedural safeguards to control arbitrary administrative action and guarantee due process of law to individuals and entities affected by such administrative action."\textsuperscript{135} The court rejected the contention that this procedure constituted an invalid delegation of legislative power, stating that all that was needed were standards which defined in general terms what was to be done and which administrative body was to do it. The court further acknowledged that the power exercised in making awards was quasi-judicial, and to assure that each case was treated on an individual basis, the standards should, accordingly, not be too specific.\textsuperscript{136} It felt that the statute should only describe the wrongful conduct, set out the normally acceptable limits of the sanction, and then allow the administrative agency to determine the appropriate amount of the sanction "by applying general principles of morality and traditional concepts of justice."\textsuperscript{137}

The only state decision to date ruling on the validity of a civil penalty provision in an environmental statute is the recent Illinois case of \textit{Waukegan v. Pollution Control Board}.\textsuperscript{138} Until \textit{Waukegan}, \textit{Reid v. Smith}\textsuperscript{139} had been considered authority in Illinois for the proposition that administrative imposition of a civil money penalty, coupled with the power to determine its amount, constituted an invalid conferral of judicial authority on the administrative body. The statute in \textit{Reid} authorized the Illinois Department of Labor to provide a penalty of \$10 per day against any state contractor for each employee that was not paid the "prevailing wage." The Illinois Supreme Court simply stated that this provision conferred judicial power on administrative bodies contrary to the separation of powers provision of the Illinois constitution.\textsuperscript{140}
Subsequently, the constitutional validity of Section 42 of the Illinois Environmental Protection Act, which granted the Pollution Control Board authority to impose civil money penalties for statutory and regulatory violations, was vigorously debated before the Illinois district courts. Against the background of this unsettled debate, the district court in *City of Waukegan v. Environmental Protection Agency*, heard the appeal from a Board order assessing a penalty of $1000 against the City of Waukegan and $250 each against two Illinois corporations pursuant to an Environmental Agency complaint charging various refuse violations. The district court, with one judge dissenting, reversed the Board’s action, finding the statutory civil penalty provision unconstitutional. After reviewing Illinois case law, the court merely stated that "the imposition of a discretionary fine is a distinctly judicial act and one that cannot be exercised by an administrative body." The vigorous dissenting opinion pointed out that the discretionary nature of the penalty was not conclusive of its unconstitutionality as an invalid delegation of judicial power. The dissent reasoned that the court’s function was to determine whether the authority conferred on the agency was incidental to administering the law, whether procedural safeguards and limits on delegation were sufficient to preclude the arbitrary exercise of power by the agency, and whether the most essential check, meaningful judicial review of the lawfulness of the agency’s action, was available. Finding that the Environmental Protection Act contained adequate safeguards against arbitrary agency action, the dissent maintained that the Act was constitutionally valid.

On appeal, the Illinois Supreme Court ended the debate by agreeing with the lower court dissent and upholding the statute. The court supported the view that the separation doctrine does not prevent an administrative agency from exercising powers conventionally utilized by the judicial or legislative branches. After a review of leading commentary and federal and state case law, the court found that the clear "...trend in State decisions is to allow administrative agencies to impose discretionary penalties." *Reid* was distinguished on the ground that the statute considered in that case neither defined nor furnished a standard for ascertaining the conduct which rendered one liable for a penalty. Furthermore, the court in *Waukegan* found that earlier Illinois decisions had upheld the delegation of power to administrative agencies to impose what are really penalties, such as the denial or revocation of a license, in cases where judicial review was available, and indicated that such power is not different from the power to impose monetary penalties.
Turning to the Illinois Environmental Protection Act, the court noted that it required notice and a public hearing at which the usual civil rules of evidence applied, and at which parties had the right to be represented by counsel, to cross-examine witnesses, and to exercise subpoena power. The Act also provided for judicial review of the findings and orders of the hearing board as to all questions of law and fact presented in the record. The statute contained guidelines for the Board in determining the amount of the civil penalty, including the character and degree of injury to the health, general welfare, and physical property of the people, the value of the pollution source, and the technical practicability and economic reasonableness of reducing or eliminating the emission from the pollution source. The court then found that the statutory authority granted to the Board to impose civil penalties was reasonably necessary and appropriate to the accomplishment of the purpose of the statute, which was to provide a specialized and uniform statewide program of environmental enforcement. Finally, the court held that the provision of adequate judicial review, the procedural safeguards embodied in the statute, and the mandatory statutory guidelines for the Board's imposition of civil penalties were sufficient to render the Environmental Protection Act valid.\(^{188}\)

It would appear that an administratively imposed environmental civil money penalty should be constitutionally acceptable in most states as long as adequate safeguards are provided to prevent administrative exercise of arbitrary power and to protect the defendant's right to a fair and impartial adjudicatory hearing. The legislature should also provide adequate standards by fixing the limits of the penalty and by enumerating appropriate criteria to guide the agency in setting the penalty. As several courts have upheld the administrative award of money damages,\(^{189}\) it may be useful to emphasize the liquidated damages aspect of the civil money penalty. Finally, as an ultimate check against arbitrary agency power, judicial review must be an integral part of every environmental civil money penalty scheme.

**B. The Prohibition Against Administrative Imposition of Criminal Penalties**

Traditionally, the power to decide guilt or innocence in a criminal case has been exercised exclusively by the judicial branch.\(^{170}\) Although court decisions invalidating administratively imposed money penalties have rarely characterized the penalty as criminal in nature,\(^{171}\) a close reading of these opinions reveals that the courts
may have actually been more concerned with the similarity of a civil money penalty to a criminal fine than with the separation of powers doctrine. Is the assessment of a "civil" money penalty actually criminal in nature and therefore solely within the jurisdiction of the courts? Professor Jaffe feels that the answer is clearly "no." The United States Supreme Court apparently agrees, although the law on the subject is rather confusing and non-definitive.

As early as 1909 in Oceanic Steam Navigation Co. v. Stranahan, the Supreme Court rejected the claim that a statute authorizing the administrative imposition of a $100 penalty for a statutory violation defined a criminal act, and had impermissibly authorized an administrative official to determine whether a crime had been committed and then to inflict "punishment." The Court relied on Hepner v. United States in holding that a penalty may be collected in a civil proceeding where the statute on its face makes clear that it is not intended to define and punish a crime.

A few years later, however, in several cases dealing with Section 35 of the National Prohibition Act, the Court decided that the penalties provided, which were recoverable in a civil action, were actually criminal in nature. The Act provided that a person who illegally manufactured or sold intoxicating liquor pay a double "tax" plus an additional money penalty assessed by revenue officers and enforced by distraint. The same activity was punishable as a crime by fine and imprisonment. In Lipke v. Lederer, the Court found that Congress had allowed the revenue officer to assess a "civil" penalty for an alleged criminal act, reasoning that the penalty was not truly aimed at civil violations of the tax laws, but at criminal violations of the prohibition laws. Since the Court decided that the penalty was intended to be punitive, it could not be labeled "civil." In finding a denial of due process, the Court relied heavily on the lack of provision of notice or a hearing to the defendant.

In the later case of Helvering v. Mitchell, the Court made it clear that Congress may impose both criminal and civil sanctions for the same act or omission, impliedly rejecting any inference in Lipke to the contrary. The defendant in Helvering had been acquitted of the criminal charge of wilful tax evasion but was subsequently assessed a deficiency plus a 50% penalty when the Commissioner found that the defendant had made fraudulent deductions with the intent to evade tax payment. The defendant claimed that this second proceeding was barred by the Fifth Amendment prohibition against double jeopardy, asserting that the 50% penalty was a criminal penalty imposed as punishment. The Court rejected this argument, finding that the penalty was remedial and free from pu-
CIVIL MONEY PENALTY

nitive intent, thus civil and not criminal in nature. In holding the penalty civil, the Court placed much weight on the clear intention of Congress that the penalty be civil in character.182

Although the Court implied that the penalty could be viewed as a liquidated damages provision, it is more realistic to view it as a deterrent.183 This, of course, does not make the penalty criminal, since deterrence has long played a role in civil law.184 The Supreme Court recognized this in United States ex rel. Marcus v. Hess,185 where it stated:

This remedy does not lose the quality of a civil action because more than the precise amount of so called actual damage is recovered. . . Congress could remain fully in the common law tradition and still provide punitive damages.186

In upholding the penalty, however, the Court relied heavily on the theory that it represented liquidated damages.187

In One Lot Emerald Cut Stones and One Ring v. United States,188 the most recent Supreme Court decision on the nature of a money penalty, the Court has maintained the liquidated damages rationale. In One Lot the defendant had been acquitted on a criminal charge of failing to declare imported merchandise with the intent to defraud the United States, whereupon the government instituted a civil forfeiture proceeding pursuant to statute. The Court rejected the defendant's claim that he was subjected to double jeopardy, holding the forfeiture to be a civil sanction which was intended to help enforce the tariff regulations. The Court also upheld the imposition of a money penalty provided in the statute, finding that it was a remedial sanction which was a reasonable form of liquidated damages.189 In its discussion of the reasonableness of the penalty, the Court indicated that a money penalty which is clearly intended to be civil (i. e., designated by Congress as such), is not criminal unless it is so excessive that its reasonableness as a regulatory sanction is highly suspect and thus manifests an intent that could only be punitive.

This latter type of reasoning is consistent with Court decisions dealing with non-monetary penalties, where a sanction has been considered civil if it is imposed “not to punish, but to accomplish some other legitimate governmental purpose.”190 Thus in Fleming v. Nestor,191 the Court upheld a statute that provided for termination of old-age benefits payable to an alien who had been deported, by finding that the statutory purpose was not punitive. The Court indicated that a finding of punitive intent would be unlikely by stating that “unmistakable evidence of punitive intent... is re-
quired before a Congressional enactment of this kind may be struck down.\textsuperscript{112} The Court, however, retreated slightly from this statement by indicating in \textit{Kennedy v. Mendoza-Martinez}\textsuperscript{113} that when the evidence of Congressional intent as to the penal nature of a statute is not conclusive, other factors must be considered. Essentially this consideration amounts to determining whether the sanction is normally considered to be punishment, and whether any purpose other than punishment may be rationally ascertained.\textsuperscript{114}

Under the above type of analysis, the money penalty used to aid in the enforcement of environmental laws should be viewed as civil in nature. The purpose of the penalty is to improve the quality of the environment by making it more costly to emit pollutants, or to shift the cost of pollution from society to the polluter, not to punish the polluter. The sanction should be viewed as an economic deterrent, not as retribution. Even if courts find that the penalty has some punitive nature, the alternative remedial purposes are rationally and readily ascertainable, and the penalty is not excessive in view of these purposes.

Additionally, civil money penalties imposed in the environmental field may be regarded as liquidated damages which compensate the government, and thus society, for the harm resulting from the violator's illegal discharge of pollutants. Certainly this penalty is more in the nature of liquidated damages than the 50\% addition assessed in \textit{Helvering v. Mitchell}. That environmental costs are by nature extremely difficult to ascertain only strengthens the analogy.\textsuperscript{115}

There is very little case law dealing with the proposition that the environmental civil penalty is actually criminal in nature. The federal cases have dealt primarily with the Federal Water Pollution Control Act (FWPCA) provision authorizing the administrative imposition of civil money penalties for illegal oil or chemical discharges into navigable waters.\textsuperscript{116} In the recent case of \textit{United States v. W. B. Enterprises},\textsuperscript{117} the United States District Court for the Southern District of New York adhered to the liquidated damages theory of civil penalties in upholding a penalty against the claim that it was criminal in nature. Several other federal district courts have upheld the assessment of civil penalties under the same provision without any apparent misgivings.\textsuperscript{118}

In \textit{United States v. Le Beouf Towing},\textsuperscript{119} however, the District Court for the Eastern District of Louisiana recently struck down the FWPCA provision of criminal penalties for failure to report an illegal discharge.\textsuperscript{120} Once reported, the discharge itself would render the polluter liable for a civil penalty. The court found that the civil penalty imposed for the discharge itself was criminal enough in
nature to render the self-disclosure provision violative of the Fifth Amendment’s self-incrimination prohibition. The court reasoned that, in effect, the FWPCA provided criminal penalties for failure to disclose a crime. In so holding, the court found that the true nature of the “civil” penalty was to punish the violator, relying heavily on the mandatory nature of the penalty (even though no minimum penalty was prescribed) and its finding that money penalties have traditionally been considered criminal punishment (even though the two cases cited by the court in support of this finding clearly fail to do so).  

The latter finding was particularly remarkable in light of the Supreme Court decisions in Helvering, One Lot, and similar cases. The Le Beouf court attempted to distinguish these cases on the ground that the penalty provision at bar was initiated by a self-disclosure provision. Assuming that both the penalty for the actual spill and the penalty for failing to report the spill were criminal, the court may well have been justified in finding a Fifth Amendment violation. The court in Le Beouf, however, assumed the distinction it claimed to be proving. The nature of the penalty for the discharge is not changed by a self-disclosure provision. Unless the penalty is in fact criminal in nature, the self-disclosure provision is perfectly valid. The Le Beouf decision should not, and in all probability will not, be followed.

IV. Conclusion

Legislators still appear to be searching for an effective enforcement tool to aid in the implementation of environmental policy. The injunction is an invaluable environmental tool because of its adaptability to diverse situations, but it possesses negligible deterrent value. Criminal sanctions may be an effective deterrent to wilful violations of environmental laws, but are inappropriate for the bulk of environmental violations, which are often due to negligence and are not usually considered morally culpable. The emission charge system has great theoretical appeal, but due to the current lack of necessary data on the actual costs of pollution, a workable scheme has not yet been devised. What is needed is a device which will effectively deter excessive pollution in the majority of instances where the polluter is not acting wilfully and the operation cannot, for policy reasons, be closed down.

The civil money penalty appears to be the strongest candidate for the role. It combines much of the flexibility and other theoretical advantages of the emission charge with the familiarity and simplic-
ity of the traditional regulatory sanction. The civil penalty operates on the theory that where the penalty is greater than the polluter's cost of abatement, the polluter will choose to comply with the law and abate his pollution rather than pay the penalty. The penalty is thus designed to reduce environmental pollution, not to punish violators. In addition, it will partially accomplish the internalization of pollution costs, removing the burden of these costs from the rest of society.

To assure its effectiveness, the civil penalty must be administered in a manner calculated to achieve maximum flexibility while providing affected parties with fair and reasonable treatment. This flexibility must be sufficient to allow the penalty in any given case to be set above the polluter's abatement cost, thereby inducing compliance. The system should also allow the consideration of other factors, which, although secondary from a deterrence standpoint, may be desirable for various policy reasons. The degree of flexibility of the penalty is greatly affected by the procedure used to impose and collect it. Where possible, the administering agency should be allowed to determine the polluter's liability and fix the amount of the penalty. Under this procedure, a penalty may be assessed soon after the violation occurs and through consideration of various appropriate factors may be set at the amount that will produce the maximum deterrence consistent with public policy and due process of law. The slow and inflexible procedure of judicial imposition should be reserved for use where state law will not allow administrative imposition.

The constitutional doubts respecting the administrative imposition of civil money penalties may be surmounted in most states by careful and intelligent drafting of environmental legislation. Most case law indicates that agencies may validly impose and fix the amount of civil penalties where (1) adequate statutory guidelines and procedural safeguards are provided, (2) the power to impose the penalties is incidental and reasonably necessary to the accomplishment of the agency's statutory purpose, and (3) the penalty is designed to function as a regulatory rather than punitive sanction. This view strikes a strong balance between the need for administrative enforcement in our complex technological society and the danger of administrative abuse of power. Hopefully, all states will eventually support this viewpoint. Increased employment of the civil money penalty in the enforcement of our environmental protection laws is strongly recommended.
FOOTNOTES

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1 Also known as a civil forfeiture or civil penalty.


4 State employment of civil penalties is partially due to the federal decision to use them in the field of environmental protection. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1251 et seq. (Supp. II, 1972), require that states possess the authority to abate violations of the permit program established pursuant to the Act, including the authority to impose civil money penalties. 33 U.S.C. § 1342(b)(7) (Supp. II, 1972); see also 40 C.F.R. § 124.73(h) (1973).


7 For an extensive review of environmental policy implementation techniques which is beyond the scope of this article, see 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW, § 2.03(7) (1973) [hereinafter cited as GRAD].

8 For an excellent discussion regarding the imposition of civil money penalties by federal agencies, see Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a
Sanction by Federal Administrative Agencies, ACUS Report, supra note 6, at 896 [hereinafter cited as Goldschmid]. Legal issues surrounding the civil penalty are discussed in Gellhorn, Administrative Prescription and Imposition of Penalties, 1970 Wash. U. L. Q. 265.

9 See Grad, supra note 7, at 2-160 to -161.


13 See Hagevik, supra note 11, at 371.

14 Id. at 372.


18 Hagevik, supra note 11, at 372. Accurate damage measurement is not possible in either water or air pollution cases. V. Prakash and R. Morgan, Jr., Economic Incentives and Water Quality Management Programs 39 (1969).

19 Hagevik, supra note 11, at 373.


21 See Hagevik, supra note 11, at 372. Such allocation is particularly difficult where synergistic effects are present. Roughly defined, synergistic effects are those occurring where the total effect attributable to two pollutants acting together is greater than the sum of effects independently attributable to each one acting alone. Cost allocation is also difficult under the damage-based system, but until the total damages are capable of determination, the difficulty is irrelevant.

22 Staff of Senate Comm. on Public Works, 88th Cong., 1st Sess., A Study of Pollution—Air 20 (Comm. Print 1963). See also
Crocker, The Structuring of Atmospheric Pollution Control Systems, in The Economics of Air Pollution 79 (H. Wolozin ed. 1966).

23 This approach is used in the Clean Air Act § 107, 42 U.S.C. § 1857c-2 (1970). The FWPCA, 33 U.S.C. § 1251 et seq. (Supp. II, 1972), primarily relies on emission limitation standards (§§ 1311(b), 1316(a)), but these standards must be consistent with the attainment of water quality standards (§§ 1312, 1313(d)).


26 See, e.g., 40 C.F.R. §§ 52.12, 124.61-.64 (1973).


29 See Grad, supra note 7, at 2-167.

30 498 F.2d 1073 (8th Cir. 1974) [hereinafter cited as Reserve].


34 See generally Mix, The Misdemeanor Approach to Pollution Control, 10 Ariz. L. Rev. 90 (1968); Rosenthal, The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct, 45 So. Cal. L. Rev. 397, 414 (1972); Willick & Windle, Rule Enforcement by the Los Angeles County Air Pollution Control District, 3 Ecology L. Q. 507 (1973).

35 See Grad, supra note 7, at 2-161.


Id. See also Whiting, Anti-Trust and the Corporate Executive, 47 Va. L. Rev. 929, 942 (1961).
42 Kadish, supra note 36, at 436; GRAD, supra note 7, at 2-162.
43 See Kadish, supra note 36, at 436; Ball & Friedman, supra note 36, at 216-17.
44 See, e.g., Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1276-78 (1966).
45 It is an exclusively judicial function to determine guilt or innocence in criminal cases. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 2.13 at 133 (1958) [hereinafter cited as DAVIS].
46 In criminal prosecutions, the defendant’s procedural rights are protected by the following rules: the government cannot appeal from an acquittal; the defendant’s guilt must be proved beyond a reasonable doubt rather than a fair preponderance of the evidence; discovery is limited and available evidence is further restricted by self-incrimination prohibitions, in a situation where the defendant himself may have the best access to information as to the cause and nature of his violation; a judgment cannot be entered by default, and the defendant’s presence must be secured in court, which affords a corporate defendant much opportunity for delay; and finally, a jury trial is provided, which will further slow the proceedings. See Rosenthal, supra note 34, at 414-15; GRAD, supra note 7, at 2-166; Kovel, A Case for Civil Penalties: Air Pollution Control, 46 J. Urb. Law 153, 157-58 (1968).
47 Where money penalties are involved, a loss of personal liberty is not at stake, and the act prohibited, pollution, is not generally considered criminal in nature. Cf. Kovel, supra note 46, at 159.
49 A sanction has been defined as “a penalty or punishment provided as a means of enforcing obedience to a law.” BLACK’S LAW DICTIONARY 1507 (Rev. 4th ed. 1968).
50 Cf. Schachter, supra note 37, at 635.
51 See Schachter, supra note 37, at 631.
52 Legislative computation, however, would destroy the flexibility of the penalty, as the statute could not be sufficiently specific to fix a distinct penalty for every type or degree of environmental violation.
53 An administrative agency or a court may not, however, impose a penalty where none is provided for by the legislature; this would be a clear usurpation of legislative power. L.P. Steuart Bros. v.
CIVIL MONEY PENALTY


54 See Schachter, supra note 37, at 632; Note, 12 Ariz. L. Rev., supra note 10, at 516.

55 See Goldschmid, supra note 8, at 908-10.

56 ACUS Report, supra note 6, Rec. 72-6(A).


59 The procedural aspects of the two systems may also be similar. Both may operate within the framework of either discharge permits or emission standards. The major responsibility for discharge monitoring in both systems is on the polluter. He must report his discharge rates to the appropriate agency which will occasionally verify the accuracy of such reports.

60 See City of Waukegan v. Pollution Control Bd., 57 Ill.2d 170, 311 N.E.2d 146 (1974).

61 See Schachter, supra note 37, at 632. Schachter notes that the minimum fine is important as it is the one most frequently imposed. Such a practice should be discouraged where the resultant penalty is significantly below the polluter's abatement cost.

62 Even where the offense is sporadic, a per diem penalty will be just as fair as a per offense penalty. Schachter, supra note 37, at 632.

63 See, e.g., 40 C.F.R. § 124.73(h) (1973), which provides in part that civil penalties imposed for water pollution permit violations should "represent an actual and substantial economic deterrent to the actions for which they are assessed or levied."


65 For continuous violations, however, civil penalties may best
represent “liquidated damages” in the long run if they are set to exceed the cost of abatement.

87 If a polluter cannot afford to pay the cost of compliance and remain in business, it appears doubtful that even a stiff penalty would induce him to comply.


Use of this criterion should be limited to non-repetitive violations where the encouragement of due care may well help prevent accidental pollution. A closely related criterion is wilfullness. E.g., PA. STAT. ANN. ch. 35, § 691.605 (Purdon Supp. 1974). It is far more appropriate for use in a criminal than in a civil penalty system.

71 The loss of deterrence may be mitigated by provisions which allow the agency to issue the cease and desist order at the time of the original notice of the violation. See, e.g., N.J. STAT. ANN. § 26:2C-19 (1964, Supp. 1974). Connecticut approaches the problem by providing an initial maximum penalty of $25,000 plus $1000 for each day of violation after the final order, which may be entered a minimum of twenty days later. CONN. GEN. STAT. ANN., P.A. 73-665, § 2(c)(4) (App. Pamphlet 1974).


76 See, e.g., CAL. HEALTH AND SAFETY CODE § 39262 (West 1973); N.Y.E.C.L. § 71-1941 (McKinney Supp. 1974).
This apparently is the procedure followed in most federal agencies. Goldschmid, supra note 8, at 907.


For an excellent discussion of substantive evidence review, see Jaffe, Judicial Control of Administrative Action 595-623 (student ed. 1965).


It is possible that a defendant here might wait to pay the penalty until it is clear that the agency is ready and willing to go to court; the defendant would not have this choice when he had the burden of appeal. It is more likely, however, that the use of this "appeal" will not be significant under either procedure, as a defendant will pay the penalty unless he is financially unable to do so, or feels that the agency’s action is clearly erroneous, arbitrary, or has disregarded some of his procedural rights. See Goldschmid, supra note 8, at 930.

See infra, Section III.

See Schachter, supra note 37, at 630; Goldschmid, supra note 8, at 928.

See Goldschmid, supra note 8, at 925-27.


Goldschmid, supra note 8, at 919-27.

Goldschmid, supra note 8, at 919-21.

Goldschmid, supra note 8, at 921, elaborated:

Settlements are by no means objectionable per se. Indeed, neither our administrative nor our judicial system could function without them. But the quality of the settlements being made under the present [judicial imposition] system is of real concern. . . . The most significant finding of this report is that settlements reached under the present system are, as a rule, substantially inferior to those that would occur under an administrative imposition system.

Goldschmid, supra note 8, at 921-923. At 923 n. 50, Goldschmid points out that innocent defendants will also tend to refuse to settle.

Goldschmid, supra note 8, at 928. The availability of fair and realistic settlements is crucial to an effective environmental enforcement policy, as a civil penalty will not reduce environmental violations where the amount assessed is far below the polluter's compliance cost.

Goldschmid, supra note 8, at 929.

Cf. Goldschmid, supra note 8, at 927. For a contrary view of courts' capabilities in the field of federal environmental enforcement, see Smith, The Environment and the Judiciary: A Need for Cooperation or Reform?, 3 ENV. AFF. 627 (1974).

As a practical matter, fair and impartial treatment may be more easily obtained under the administrative imposition procedure. Where a de novo trial is available in court, an agency may tend to forego usual procedural protections and put less emphasis on acting fairly and reasonably. Paradoxically, an ill-treated or innocent defendant who cannot afford to fight the agency action in court, or will not fight it because the proposed penalty is less than court litigation costs, will be likely to accept a settlement, thereby forfeiting the right to even limited judicial review. Goldschmid, supra note 8, at 924, 928 & n.75, 929.

Goldschmid, supra note 8, at 929-30. See also City of Waukegan v. Environmental Protection Agency, 11 Ill. App.3d 189, 200-01, 296 N.E.2d 102, 111 (1973) (Siedenfeld, J. dissenting).

See, e.g., FLA. STAT. ANN. § 403.141 (West 1973).

See, e.g., TEX. WATER CODE ANN. § 21.252-.253 (Vernon 1972);
CIVIL MONEY PENALTY

CAL. WATER CODE § 13386 (West Supp. 1974).

105 See Goldschmid, supra note 8, at 922. A few states have attempted to solve the backlog problem by providing that environmental actions take precedence over other civil sanctions on the court calendar. E.g., CAL. HEALTH AND SAFETY CODE, § 39262 (West 1973).

106 The Administrative Conference of the United States has found that the presence of the following factors tend to commend the administrative imposition of civil penalties:

(a) a large volume of cases likely to be processed annually; (b) the availability to the agency of more potent sanctions with the resulting likelihood that civil money penalties will be used to moderate an otherwise too harsh response; (c) the importance to the enforcement scheme of speedy adjudications; (d) the need for specialized knowledge and agency expertise in the resolution of disputed issues; (e) the relative rarity of issues of law (e.g., statutory interpretation) which require judicial resolution; (f) the importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and (g) the likelihood that an agency (or group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided. ACUS REPORT, supra note 6, Rec. 72-6(B). Factors a-f are clearly present in the environmental civil penalty scheme, and there is no reason why an environmental agency would not provide an impartial forum to those affected.

107 Goldschmid, supra note 8, at 936.

108 Kilbourn v. Thompson, 103 U.S. 168 (1881).


110 N.J. Const. art. III, ¶ 1; see also, e.g., MINN. Const. art. III, § 1.


112 David v. Vesta Co., 45 N.J. 301, 212 A.2d 345 (1965); Massett Bldg., supra note 111.

113 DAVIS, supra note 45, at 65.


116 DAVIS, supra note 45, at 68. At 68-69, he elaborated as follows: In the organic arrangements that we have been making in recent de-
cades in the establishment and control of administrative agencies, the principle that has guided us is the principle of check, not the principle of separation of powers. We have had little or no concern for avoiding a mixture of three or more kinds of powers in the same agency; we have had much concern for avoiding or minimizing unchecked power. The very identifying badge of the modern administrative agency has become the combination of judicial power (adjudication) with legislative power (rule making). But we have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary. As long as we continue to emphasize the principle of check, we may safely continue our increasingly deep-seated habit of allowing the blending of three or more kinds of power in the same agency.


118 DAVIS, supra note 45, at 75.
119 310 U.S. 381 (1940).
120 Id. at 398.
121 See DAVIS, supra note 45, at 81-87.
CIVIL MONEY PENALTY

Supply Co., *supra* note 117.

126 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Reconstruction Finance Corp. v. Banker’s Trust Co., 318 U.S. 163 (1943).

127 *See, e.g.*, Rody v. Hollis, 81 Wash.2d 88, 500 P.2d 97 (1972); *Davis, supra* note 45, at 113-24.


130 220 U.S. 506 (1911). [Hereinafter cited as *Grimaud*].

131 If the legislature had not made provision for the penalty, the result would have been different. As Professor Jaffe has stated: “It appears to be the more or less general rule that an [administrative] officer may not be empowered to determine whether violation of a regulation shall or shall not be a penal offense.” *Jaffe, supra* note 82, at 110.


134 287 U.S. 329 (1932).

135 As the Court viewed the issue:

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

*Id.* at 335.

136 *See* Goldschmid, *supra* note 8, at 941-43. *See also, e.g.*, Allman v. United States, 131 U.S. 31 (1889).

137 102 F. Supp. 9 (E.D. Mich. 1952), aff’d per curiam, 202 F.2d
In upholding this action, the district court stated:

[T]he sanction here involved, as the form of the present action shows, is civil in nature. . . . It is well settled that Congress has the power to provide civil sanctions as an aid to effecting its purposes in fields in which it has constitutional power to act, . . . and, further, that it can delegate that power to administrative agencies.


Statutes cited note 5, supra.


146 *See* N.C. CONST. art. IV, §§ 1, 3.

147 *See* ACUS REPORT, *supra* note 6, Rec. 72-6(A). *See also* City of Waukegan v. Environmental Protection Agency, 11 Ill.App.3d 189, 197-98, 296 N.E.2d 102, 108-09 (1973), where Seidenfeld, J., dissenting, stated:

It may be wiser from a practical point of view to enable an administrative agency to fine according to the seriousness of the infraction and other relevant criteria rather than be limited to an all-or-nothing sanction such as the revocation of a license. . . . On the other hand, the imposition of a non-monetary penalty such as suspension of a license or permit for a period of time to be determined by the agency amounts in effect to a less precise form of a flexible monetary fine. Even with a fixed monetary penalty, administrative discretion as to how many violations to prosecute, which frequently accumulate by days as well as the number of regulations infringed, will determine the ultimate amount of the penalty the violator will have to pay.

148 238 Miss. 239, 117 So.2d 881 (1960).


150 Broadhead, *supra* note 148, 238 Miss. at 263, 117 So.2d at 892.

151 *See*, e.g., Commonwealth v. Diaz, *supra* note 132.

152 270 Md. 403, 312 A.2d 225 (1973).

153 *Id.* at 441, 312 A.2d at 246.

154 81 Wash.2d 88, 500 P.2d 97 (1972).

155 *Id.* at 92, 500 P.2d at 100. The court felt that due process requirements were the same regardless of whether the adjudicatory tribunal was a court or an administrative body.

156 The court elaborated:

Standards to guide administrative action need not, and cannot, be perfectly specific. This is particularly so where the power which is exercised is quasi-judicial in nature, as in the instant case. Judicial power is traditionally and of necessity largely discretionary and standardless. The judicial process operates upon individuals and, in so doing, attempts to treat them as such.

*Id.* at 92, 500 P.2d at 100.

157 *Id.* at 92, 500 P.2d at 100.

158 57 Ill.2d 170, 311 N.E.2d 146 (1974). [Hereinafter cited as Waukegan].
The court held:

[W]e consider that the authority given the Board to impose monetary penalties does not violate the constitutional separation of powers. The interpretations given the separation doctrine by this court and the Supreme Court of the United States, the decisions approving delegations of authority to impose civil penalties, the detailed hearing and related provisions of the statute, the Act's providing for adequate judicial review, and the statute's establishment of protective guidelines that the Board must follow in imposing penalties, direct this conclusion. 

The court held:

[Id. at _____, 311 N.E.2d at 152.


DAVIS, supra note 45, at 133.


See, e.g., Broadhead v. Managhan, 238 Miss. 239, 117 So.2d 881 (1960); Tite v. State Tax Comm’n, 89 Utah 404, 57 P.2d 734 (1936).

JAFFE, supra note 82, at 110.


213 U.S. 103 (1909).


Lipke v. Lederer, 259 U.S. 557 (1922); United States v. La Franca, 282 U.S. 568 (1931).
CIVIL MONEY PENALTY

178 259 U.S. 557 (1922). [Hereinafter cited as Lipke].

179 See JAFFE, supra note 82, at 111-12.

180 303 U.S. 391 (1938). [Hereinafter cited as Helvering].

181 In fact, the Court stated that the provision of two separate sanctions made it clear that Congress had intended the 50 percent addition to be civil. Id. at 404.

182 This intention was evidenced, inter alia, by the Congressional provision of civil procedure for enforcement of the penalty. Id. at 402.

183 Gellhorn, supra note 8, at 273-74 n.21.

184 For example, treble damages in anti-trust and punitive damages in tort law. Goldschmid, supra note 8, at 914-15.

185 317 U.S. 537 (1943).

186 Id. at 550.

187 In Rex Trailer Co. v. United States, 350 U.S. 148 (1956), the Court also utilized the liquidated damages theory of penalties, holding that it is unnecessary to allege specific damages where such damages are difficult to ascertain.


189 The Court, in reference to the civil penalty, stated:

[I]t provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. . . . Moreover, it cannot be said that the measure of recovery fixed by Congress . . . is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty. Id. at 237.


192 Id. at 619.


194 These factors were enumerated as follows:

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

Id. at 168-69.

195 See Rex Trailer Co., supra note 187.


In United States v. Krapf, 180 F. Supp. 886 (D. N.J. 1960), the district court held that a statute which provided a "fine" upon "conviction" for acts "knowingly and willfully done" intended a penal sanction; in further evidence of legislative intent, the court contra-distinched the above language from another section of the statute which imposed a forfeiture of $100 "recoverable in a civil suit." United States v. Futura, Inc., 339 F. Supp. 162 (N.D. Fla. 1972), was concerned with a penalty which was also labelled a "fine," to be imposed for wilful violations of law. The court found that fines have been traditionally imposed as criminal punishment, and stated that the legislative history of the act indicated that the intent was that the sanction be criminal, as another sanction in the act was designated as a civil penalty, imposed without the element of scienter. In both of these cases, the courts clearly considered penalties which were designated as "civil" as being civil in fact.