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Walter Gellhorn
Columbia University School of Law

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ADMINISTRATIVE PRESCRIPTION AND IMPOSITION OF PENALTIES

WALTER GELLHORN*

Legislation authorizing administrators to promulgate rules or to adjudicate specific cases is commonplace. Rarely do contemporary courts hear serious argument that the legislature has improperly transferred its own lawmaking responsibility or that it has, in disregard of constitutional allocation of functions, given into the hands of executive officials tasks meant to be performed only by judges. Abstract doctrine about the distribution of governmental powers has been reshaped by practical necessities.

To what extent have those same necessities modified the conventional view that the legislature defines wrongful conduct and its consequences while the courts determine case-by-case whether the forbidden conduct has occurred?

Whether or not the power to prescribe conduct and the power to state the consequences of disobeying the prescription are analytically different, sensitivity concerning legislative delegation does mount when administrators become penalizers. At the same time, however, a trend continues toward empowering administrators to set penalties by rule or to impose them in individual instances. The efficacy of conventional penal processes is far from being universally acknowledged. The search for other means of enforcing desired standards of behavior therefore remains active. The law is in a somewhat turbulent state of flux between the traditional and the not yet extensively tested.

1. Legislative Prescription of Criminal Sanctions

If the legislature authorizes an administrator to adopt regulations and adds that any violation of his regulations will be a crime, who has determined what conduct shall be deemed criminal? At the moment of statutory enactment the substance of the regulations is, of course, not known, since the administrator has not yet exercised the power about to be delegated to him. Is the administrator, then, the definer of the penal offense?

* Betts Professor of Law, Columbia University. This article draws heavily on material embodied in earlier editions of an administrative law casebook prepared by the author and Professor Clark Byse of Harvard Law School. The topic discussed here is not included in their ADMINISTRATIVE LAW—CASES AND COMMENTS (5th ed. 1970).

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Many decades ago, in *United States v. Grimaud*,[1] the Supreme Court found this an easy question to answer. There, the statute provided that violators of the Secretary of Agriculture's rules about using forest reservations should be punished by a fine of not more than $500 or imprisonment for not more than twelve months, or both, at the discretion of the court. Grimaud was prosecuted for ignoring a regulation the Secretary had promulgated. He sought dismissal of the charges against him because, he argued, Congress alone had power to determine what acts would be criminal and, hence, could not constitutionally delegate to someone else the responsibility of defining and establishing what would constitute the elements of a crime against the United States. The Court rejected these arguments: "[T]he authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense. A violation of . . . [the rules] is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

This continues to be the generally accepted view: the legislature decides what is a penal offense, namely, disobeying a rule whose content may be changed by administrative amendment even after it first becomes known. "Today," Professor Jaffe believes, "we would probably say that Congress and the officer together make the crime, the officer acting within the intelligible limits established by Congress."[2]

Very rarely a state court has asserted, in cases resembling *United States v. Grimaud*, that the legislature must never delegate to persons not elected by the People the "precious power" to decide what acts shall be regarded as criminal.[3] But, of course, this misses the point. The "act" held in Grimaud's case to be criminal was disregarding the Secretary of Agriculture's regulation. Congress, not the Secretary, had declared that act a crime. Certainly, the Supreme Court's view has not wavered a millemeter during the six decades since Grimaud's case came before it.[4]

The only doubtful point now perceptible in this general area occurs

1. 220 U.S. 506 (1911).

2. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 110 (1965).

3. *See, e.g.*, Casey v. People, 139 Colo. 89, 336 P.2d 308 (1959); State v. Maitrejean, 193 La. 824, 192 So. 361 (1939).

4. *See* United States v. Howard, 352 U.S. 212 (1957), upholding a prosecution for violating a federal law that made unlawful the interstate transportation of fish in violation of a state law in the state from which the fish were to be transported. A Florida statute had made it a crime to violate the rules of a Florida fish and game commission. This was enough to satisfy the Supreme Court about *state* law upon the basis of which *federal* law came into play.

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when a legislature is not sure that *every* violation of *every* rule (not yet promulgated, and contents therefore as yet unknown) should be denominated a crime. May the legislature then delegate to the rulemaker the power to say that some violations should be regarded seriously enough to be tagged as penal offenses, while others should be viewed in some other light?

A negative answer was suggested some years ago by the New York courts.[5] The Alcoholic Beverage Control Board had been authorized to promulgate rules concerning the sale of beer. The statute also provided that violation of a rule promulgated by the Board would be a misdemeanor "*if such rule so provides* and if such rule shall be published. . . ." The Board adopted and published a rule prohibiting the sale of beer to minors. The rule stated that violation would be a misdemeanor. Grant violated the rule and was convicted of a misdemeanor. He appealed. The court said that:

> The legislature may delegate to administrative agencies power to make reasonable rules and regulations for administrative purposes and give to such rules and regulations the force and effect of law. United States v. Grimaud, 220 U.S. 506 (1911). . . . It may declare the violation of these rules to be a crime and provide the punishment for their violation. In so doing it is exercising the legislative power committed to its discretion by the People through the Constitution.[6]

But although the legislature may delegate power to make rules and regulations and give them the force and effect of law,

> [I]t may not delegate the power to create crimes and prescribe the penalties therefor. The declaration of the crime and the prescription of the penalty for the violation rest in the ultimate discretion of the Legislature. . . . Here the Legislature has delegated to an administrative board the power to make rules and declares that a violation thereof shall be a misdemeanor 'if such rule so provides. . . .' Thus the Board is made the final arbiter as to which acts shall be criminal and which shall not. The ultimate determination as to whether a violation shall constitute an offense is not made by the Legislature in the statute itself, but is delegated to the discretion of the board. . . . The legislative discretion to declare a crime has thus been attempted to be delegated to the Board. This is not only the delegation of the substantive power to determine a crime. We hold this attempted delegation to be a violation of the legislative article of

5 People v. Grant, 242 App. Div. 310, 275 N.Y.S. 74 (1934), *aff'd per curiam*, 267 N.Y. 508, 196 N E 553 (1935).

6 *Id.* at 311-312, 275 N.Y.S. at 77.

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> the Constitution. The legislative power to create an offense may not be so delegated.[7]

This places somewhat too great an emphasis upon the legislature's choice of means to reach a desired goal. Suppose for a moment that the New York legislature had declared every violation of a Board rule to be a misdemeanor, except that the Board could state in any particular rule or rules that a penal sanction would not attach to violations. If that had been done, the legislature would have created the punishable crime, with only a power of dispensation (the power to declare something *not* to be a crime) left in administrative hands.[8] The result would have been the same as was sought in the New York situation described above, but without delegating the "legislative discretion to declare a crime." Perhaps the courts would have found fault also with an attempted delegation of power to declare a non-crime, but assuredly the opinion would have had to have been drastically rewritten had the draftsman couched the statute in a different form having precisely the same effect.[9]

2. Administrative Prescription of the Penalty Attaching to An Offense

Suppose that a legislature is ready to declare violations of regulations to be an offense, but hesitates to put a fixed price tag on an offense whose precise nature cannot be foretold. May it, then, regard this as one of the legislative "details" it may delegate to its subordinate, the administrative agency which has responsibility for effectuating the legislature's policy?

A still-cited case of the last century indignantly rejected that possibility. The California Legislature had authorized harbor commissioners to make rules for whose violation penalties not to exceed $500 could be imposd; in order to fit the penalty to the offense, the rule-makers were empowered to set the amount of the penalty (within the

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7. *Id.* at 312, 313-314, 275 N.Y.S. at 77-79.

8. Examples of the "dispensing power" abound. *See, e.g.*, United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932); State v. Davis, 178 Ark. 153, 10 S.W.2d 513 (1928); State *ex rel.* Boynton v. Board of Education, 137 Kans. 451, 21 P.2d 295 (1933).

9. The importance of good draftsmanship in this field can scarcely be overstated. *See, e.g.*, State v. Curtis, 230 N.C. 169, 52 S.E.2d 364 (1949), where the legislature indicated willingness to call every violation of a local health regulation a crime, but conferred on the health board a perhaps too embracively stated power to fix by rules the penalties which "in its judgment shall be necesary to protect and advance the public health." This, the court said, ran "counter to the principle that the legislature cannot delegate its power to make a law." In all probability the legislature meant merely to leave room for reducing penalties rather than for enlarging them, but it did express itself ineptly. A subsequent and far more rigid statute, which declared *every* violation to be a misdemeanor punishable by fine or up to thirty days in jail, caused no judicial concern.

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permitted maximum) that would attach to various kinds of infractions. This, the California court declared, was absolutely unconstitutional; "the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature."[10]

A more recent Massachusetts case, however, was more tolerant of legislative efforts to make the punishment fit the crime. *Commonwealth v. Diaz*[11] upheld a statute authorizing the commissioner of airport management to adopt "reasonable and expedient" rules for use of state-owned airports and to provide in his rules penalties for their violation "not exceeding five hundred dollars for any one offense." The commissioner subsequently adopted comprehensive rules and regulations. One of them required taxicab drivers who were lined up awaiting passengers to remain within six feet of their vehicles. Another rule stated broadly: "Any person who violates the provisions of these rules and regulations, shall be subject to the penalty not exceeding five hundred ($500.00) dollars for any offense." Diaz was convicted in the lower court on a complaint that he had violated the rule against straying from his cab; he was sentenced to pay a fine of $25; and he appealed on the grounds that both the statute and the commissioner's rules were invalid.

Addressing itself first to the issue of legislative delegation, the court said:

> The fact that the statute empowered the commissioner . . . to provide penalties for the violation of the regulations did not render it invalid. This is not a case where the statute authorized the commissioner to fix such penalties as he saw fit. Had the statute attempted to do that it would have been an excessive delegation of power. . . . But the statute here did not do that; it empowered the commissioner . . . to 'provide penalties for the violation of said rules and regulations not exceeding five hundred dollars for any one offence.' While the commissioner could prescribe penalties he could do so only within limits definitely prescribed by the Legislature.[12]

The court cited other instances in which a local governing body or board had been empowered to prescribe penalties within statutorily fixed limits. In those instances, the court added,

> [T]he power to prescribe penalties was within narrower limits than those

10. Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375, (1891). *Accord*, Gilgert v. Stockton Port Dist., 7 Cal.2d 384, 60 P.2d 847 (1936); Davis v. State, 126 Ark. 260, 190 S.W. 436 (1916) (dictum).

11. 326 Mass. 525, 95 N.E.2d 666 (1950).

12. *Id.* at 529, 95 N.E.2d at 669.

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> granted here. It is one thing to give to a board or municipality power to fix penalties not in excess of $20 or even $100 and quite another to empower it to fix them up to $500. The authority which may be granted to a local governing body to fix penalties, even when a maximum limit is prescribed, is not unrestricted. Such bodies cannot be granted a roving commission to establish within broad limits such penalties as they see fit. That is essentially a legislative power which cannot be delegated. The question is one of degree. The 'use, operation, and maintenance of state-owned airports' could conceivably necessitate rules and regulations relating to much more hazardous activities than those arising from the operation of taxicabs and limousines. The power to determine penalties granted to the commissioner here goes to the very verge of what is permissible, but we are not prepared to say that it crosses the line.[13]

The court offered no tools to assist in determining the whereabouts of "the very verge of what is permissible" or in drawing "the line" that must not be crossed. The opinion leaned heavily on the historical fact that power to prescribe penalties had in the past been delegated to municipalities; but the court gave no apparent thought to whether the justifications for municipal delegations were different from those that would support a legislative delegation of power to an airport commissioner.[14] The decision would have been more illuminating for the future had the court considered, as it presumably would have done with other types of delegations of legislative power, first, whether practical need for delegation could be discerned and, second, whether the legislature had provided guidance for its agent, the airport commissioner.

The outcome of the case would no doubt have been unaltered had the somewhat more functional approach been taken. The need for flexibility in penalty levels is apparent. Certainly the taxicab driver who strays

13. The court held for the defendant, however, as to the validity of the commissioner's rules. It said, in effect, that the commissioner had acted arbitrarily in declaring that every violation of every rule would subject the violators to a possible fine of $500. The legislature had obviously meant to vary the penalty in accord with the relative seriousness of the offense involved. If it had wanted every violation to be punishable by a fine up to $500, it could have said so itself, without delegating to the commissioner any power to be more moderate.

14. Grants of power to municipalities, whether in the form of municipal charters, general laws, or enactments of special applicability, tend to be very broadly phrased; yet delegations of this character "commonly go unchallenged in the courts, and when any comment is made it is referred to as an exception to the general rule prohiiting the delegation of such power." Foster, *The Delegation of Legislative Power to Administrative Officers*, 7 ILL. L. REV. 397, 398 (1913). *Compare* Smallwood v. District of Columbia, 17 F.2d 210 (D.C. Cir. 1927). For a discussion of the municipal corporation doctrine, *see* Note, *The Violation of a Municipal Ordinance as a Crime*, 1 VAND. L. REV. 262 (1948); Annot., 174 A.L.R. 1343 (1948).

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from his vehicle is less a menace to airport operations than is an airplane pilot who ignores landing instructions or blocks a runway. If different penalties are to attach to violations of rules, either the administrator must prescribe variable penalties or a court must be empowered to exercise its discretion when penalizing violators brought before it. Does the Constitution compel the legislature to choose the judicial rather than the administrative means of achieving flexibility in the scale of applicable penalties?

As for legislative guidance in the form of "standards" which will shape a delegate's actions, one might perhaps contend that the Massachusetts statute was deficient. It authorized the delegate to "provide penalties . . . not exceeding five hundred dollars for any one offence," without setting forth the factors that were to lead to lesser penalties for some infractions than for others. But in all probability a modern court would quickly dispose of the point. Although no legislative direction had in this instance been formally stated, the standard was implicit in the subject matter, namely, that the severity of the penalty was to be affected by the seriousness of the conduct prohibited.[15]

3. Administrative Imposition of Penalties in Individual Cases

We turn now from rulemaking that defines the acts to be penalized or that prescribes the possible penalties. This section of the discussion pertains instead to the administrative application of rules or statutes in individual instances of alleged wrongdoing.

The sanctions that administrators may utilize in order to effectuate general policies are indeed broad—almost as broad as the subject matters involved.[16] The legislature may empower administrators, for example, to seize physical objects (such as foods or drugs believed to be tainted), issue cease and desist orders that resemble injunctive decrees, deport aliens, restrict use of the mails, dismiss public servants, and suspend or revoke occupational or commercial licenses. Obviously the consequences may be drastic. Even a brief suspension of a license, for instance, may possibly cost a licensee thousands of dollars. May the legislature instead validly give the administrator the power to utilize an economic sanction of lesser severity? Specifically, may it authorize the administrator to impose a money penalty when he deems this an appropriate means of law enforcement?

15 As to the adequacy of implicit standards, *see* Paterson v. University of the State of New York, 14 N.Y.2d 432, 252 N.Y.S. 2d 452 (1964).

16 *See generally* McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441 (1964).

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The New York Legislature apparently thought that this was a feasible and desirable method of forcing licensed insurance companies to toe the mark. Revoking their licenses to do business was a sanction so disastrous in its consequences that it could not be used except at the risk of injury to the public at large. Yet some means was needed to make insurance companies mindful of the state's rules concerning filing information about their business operations. In 1952 the legislature authorized the Superintendent of Insurance, after notice and hearing, to impose a penalty of not to exceed $1000 for willful violation of provisions of the Insurance Law relating to filings. The statute makes the Superintendent's order imposing the penalty reviewable by the courts. Unless the penalty order is stayed by a court, failure to pay the penalty within thirty days is a misdemeanor. Imposition of a penalty of $13,000 has been upheld by the courts without perturbation.[17]

Giving federal officials the power to enforce penalties without invoking the aid of courts has similarly been upheld. As long ago as 1909, the Supreme Court sustained the administrative imposition of fines upon ship owners whose vessels had brought diseased aliens to this country.[18] Some years later, when the amount of the money penalty had been increased ten-fold, the Court adhered to its view that "due process of law does not require that the courts, rather than administrative

17. Old Republic Life Ins. Co. v. Thacher, 12 N.Y.2d 48, 234 N.Y.S.2d 702 (1962). The statutory provision in question is N.Y. INS. LAW § 225 (1966). Professor Bernard Schwartz says of the statute just cited:

> It is difficult to imagine a statutory provision more repugnant to the basic principles upon which our administrative law is grounded. It violates the fundamental rule that the imposition of a money penalty is, with us, a judicial, not an administrative function. The dangers inherent in allowing administrative authority to extend to the imposition of monetary penalties seem clear, and because of them, statutes like the New York law under discussion are comparatively rare, the usual thing being for the legislature itself to prescribe that the infraction of administrative rules or orders shall be subject to a stated penalty as a breach of the act. This principle is said to date back to Stuart times and the objection to penalties imposed by royal proclamation.

Schwartz, *1952 Survey of New York Law—Administrative Law*, 27 N.Y.U. L. REV. 928-29 (1952).

18. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909). The statute required ship owners who bring to the United States aliens afflicted "with a loathsome or with a dangerous contagious disease" to pay to the collector of customs $100 in each such case "if it shall appear to the satisfaction of the Secretary of Commerce and Labor" that the existence of the disease might have been detected by a medical examination at the time of embarkation. The statute also provided that "no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid . . ." A shipowner, contesting interference with its operations, argued that a penalty could not be "authorized and its collection committed to an administrative officer without the necessity of resorting to the judicial power." Chief Justice White, speaking for the entire Court, rejected the argument.

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officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends."[19]

The decisions just discussed had rested in part on the authority of cases arising under the internal revenue laws, which have long authorized administrative officials to impose civil penalties in the form of additions to a taxpayer's bill for taxes due the United States. The validity of the revenue penalty system came squarely and dramatically before the Supreme Court when an administrative penalty in the tidy amount of $364,354.92 was sought to be imposed on Charles Mitchell, a prominent banker.[20] He had previously been acquitted of charges that he had wilfully attempted to defraud the revenue. Section 293 (b) of the Revenue Act of 1928 provided, "If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid. . . ." Mitchell, having been unsuccessfully prosecuted for tax evasion, contended that this proceeding to collect the 50 per cent fraud assessment was barred under the doctrine of double jeopardy because the 50 per centum addition was not a tax, but a criminal penalty as punishment for allegedly fraudulent acts. "The question for decision," said Mr. Justice Brandeis, "is thus whether § 293(b) imposes a criminal sanction." The opinion then developed the reasons why the sanction is "remedial" or "civil" rather than "criminal."

> In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. . . . Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789. . . . The remedial character of sanctions imposing additions to a tax has been made clear by this court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. . . .[21] That Congress provided a distinctly civil procedure for the

19. Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932).

20. Helvering v. Mitchell, 303 U.S. 391 (1938).

21. The explanation that penalties are reimbursement for investigative expenses and losses caused by the taxpayer's fraud, seems far-fetched, since the amount of the penalty is in no way related to

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> collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal sanction . . .[22] [T]he determination of the facts upon which liability is based may be by an administrative agency instead of a jury . . .[23]

Economic regulation as well as tax collection has engendered litigation about administrative fines. Under the authority of the Wage Stabilization Act of 1942 and Executive Order 9250, the Economic Stabilization Director promulgated regulations empowering the National War Labor Board to conduct hearings to determine whether wages had been paid without adherence to applicable laws and rules. If the Board found a violation of the stabilization regulations, it could then direct the Commissioner of Internal Revenue to disregard for the purpose of calculating deductions under the revenue laws the entire amount of such wages or an amount reduced "in the light of such extenuating circumstances as are found to be present in each case and all other pertinent considerations." A panel of the Board found that the Woodworth Company had made payments in violation of the Act and recommended that certain sums be disregarded for the purpose of calculating Woodworth's business expenses that could be set off against income for 1944 and 1945. The Board found certain "extenuating circumstances" and determined that the sum of $50,000 for each of the two years should be disregarded. The Commissioner of Internal Revenue assessed a deficiency, which the taxpayer paid. Suit was then brought by Woodworth to recover $80,614, the amount of the deficiency plus interest. The suit failed; Congress was held to have power to provide "civil sanctions as an aid to effecting its purposes in fields in which it has constitutional power to act . . . and . . . it can delegate that power to administrative agencies."[24]

The quantitative significance of this decision can readily be suggested. During 1944 and 1945, the years here involved, the National War Labor Board's regional office for New York and Northern New Jersey closed

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the amount of the Government's costs. More realistically, heavy penalties are imposed so that the fear of loss will deter would-be defrauders of the public.

22. The "distinctly civil procedure" here provided was collection by distraint. *Compare* Rex Trailer Co. v. United States, 350 U.S. 148 (1956), where a monetary exaction from a person who had defrauded the United States was called a "civil" rather than a "criminal" remedy because the underlying statute had spoken of "liquidated damages" instead of "fine" as a penalty for wrongdoing.

23. Helvering v. Mitchell, 303 U.S. 391, 399-402 (1938).

24. N.A. Woodworth Co. v. Kavanaugh, 102 F. Supp. 9, 11 (E.D. Mich. 1952), *aff'd* 202 F.2d 154 (6th Cir. 1953).

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781 enforcement cases involving potential disallowances. The disallowances amounted to $2,012,729.58. This may be compared with the figure of $1,249,835.30, which represents the total of fines assessed in all types of criminal cases during 1945 by the very active United States District Court for the Southern District of New York.

Yet cases can be found which tend to reverse the usually accepted proposition that the greater includes the lesser. Probably every court would readily agree that a public official can validly be empowered to administer an economic death sentence to a privately operated business by license revocation or by refusal to enter into contracts or by shutting off some other advantage.[25] But some courts apparently believe that an administrative imposition of a minor monetary penalty, having far less disastrous consequences for the private business, would subvert the Constitution. Thus, for example, the Illinois court held unconstitutional as an invalid delegation of judicial power a statute which required public works contractors to pay not less than the prevailing wage, imposed a penalty of $10 per day for each laborer receiving substandard wages, and authorized the penalties to be deducted from the contract price by the political body awarding the contract.[26]

Judicial hostility toward administrative entry into competition with the courts is also exemplified by a Utah decision which, though now somewhat antique, has not yet been eroded by newer currents of thought in that state. A statute had authorized the state tax commission to impose a penalty of not less then $10 nor more than $299 for failure to

25 L. P. Steuart & Bro., Inc. v. Bowles, 322 U.S. 398 (1944); Arrow Distilleries, Inc. v. Alexander, 109 F.2d 397 (7th Cir. 1940), *cert. denied*, 310 U.S. 646 (1940).

26 Reid v. Smith, 375 Ill. 147, 30 N.E.2d 908 (1940). In a later case, Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306 (1953), the court declined to extend the *Reid* case beyond its facts. The statute involved in *Vissering* authorized the Labor Department, after notice and hearing and a finding of noncompliance with a minimum wage order, to publish the name of the noncomplying employer. The employer, contending that the statute conferred judicial power on the department in violation of the Illinois constitution, relied on *Reid v. Smith*. The court upheld the statute, reasoning that the "financial loss which might ensue from the publicity is inflicted, not by the administrative agency, as in the Reid case, but by the public, . . ." The dissenting justice argued that it was "entirely unrealistic to treat the publication . . . as anything other than a penalty. . . . The determination and order is no less a judicial act of the Department of Labor simply because the sanctions are employed by the general public."

For an impressive general discussion of the variable impact and possible abusiveness of officially inspired publicity, *see* Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225 (1957). And *see also* McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441, 457-58 (1964). Dean McKay remarks that in health matters, the general public "may be enlisted as effective enforcement allies who are not too concerned about the niceties of the particular charges, but may be readily stimulated to a reluctance to buy amounting to a boycott."

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affix revenue stamps on cigarette packages. The penalty was to be collected by the sheriff in a manner similar to a writ of execution. After taking evidence, the commission imposed a penalty of $250 on the plaintiffs, who sought to prevent collection by the sheriff. The court held the statute unconstitutional:

> Giving to the tax commission the power to determine in its own judgment the amount of the penalty was a legislative function which could not be delegated. It is not the power to enforce or apply a law, but the power to make a law for each particular case, to determine in its judgment the amount of a penalty. . . . The infirmity . . . of the [statute] lies in the fact that the tax commission can in each case name a different sum. It has not set a standard for all cases which fit the rule, but in each case within its mind at its discretion fixes the amount. Only the courts in imposing a fine as a punishment for a crime have this discretion.[27]

Fairly read, the Utah statute conveyed no power to impose monetary penalties in an unbridled, whimsical manner. Clearly, the legislature meant that the punishment should be affected by the nature of the offense and the offender; and failure to exercise discretion fairly—either by ignoring relevant factors or by considering irrelevancies—would presumably be subject to judicial correction.

To be sure, no general phraseology can absolutely assure socially sound or, even, internally harmonious exercises of discretion. One of the most notorious defects in the entire American legal system is the disparity in sentences meted out by judges to offenders of the same type.[28] Possibilities of abusiveness, favoritism, venality, discrimination, absent-mindedness, and sheer silliness do exist when a penalizer has a choice about the severity of the penalty he will utilize. Who can deny this? Must one then conclude that the danger of abuse and the difficulty of correcting it when it does occur are so great that the legislature *must not* confer upon administrators the power to impose variable money penalties, whether they be called fines or something else? Or are these merely factors to be carefully weighed by the legislature before choosing to confer any power of that kind?—to be weighed, one might add, along with such other factors as the danger that inheres in automaticity (as in some of the savage mandatory penalties for narcotics offenses) and the danger that a drastic sanction may not be effective because its side effects on others are too undesirable.

27. Tite v. State Tax Comm'n, 89 Utah 404, 416-18, 57 P.2d 734, 740-41 (1936).
28. The matter is powerfully discussed in K. DAVIS, DISCRETIONARY JUSTICE 133-41 (1969).

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This is not a plea for transferring fine-imposition from judges to administrators. It is, rather, simply a plea for realism in determining how best to apply the pressures which may be needed to make social controls effective. That determination should not be shaped by preconceptions about whose job it is to do what.

A study of the enforcement of housing codes, conducted recently by an able public administrator and a broadly experienced law professor, may serve as a suggestive model.[29] Its authors point out that, traditionally throughout the United States, laws concerning the proper construction or maintenance of multi-family housing properties have been chiefly enforced either by orders to vacate the premises as unfit for human occupancy or by criminal prosecution, usually looking toward imposition of a fine. In most cities today, however, the supply of low rent housing is too limited to permit use of the "vacate order", which would otherwise be a powerful weapon in the hands of the enforcement agency. What, then, about prosecution?

> In New York City there are some 20,000 prosecutions for housing violations every year, most of them heard in a special part of the criminal courts. Each of the prosecutions involves several separate counts of violation, and may involve as many as a hundred separate violations. And yet, in 1965, the average fine per case (not per violation) was under fourteen dollars. Calculated per violation, the average fine was said to be about fifty cents. Many violations so penalized have been outstanding for months, if not years, and many of them are of a hazardous nature. These inconsequential penalties are not the result of inadequate provisions of the law; on the contrary, the New York statutes allow the imposition of very heavy fines, ranging up to $1,000 per violation for repeated offenders, and provide for jail sentences of up to six months. Yet fines have remained minimal and landlords find it cheaper to pay the fine than to make the repair. Jail sentences for slum lords are practically never imposed, and hence remain an empty threat.[30]

Part of the reason criminal sanctions do not work in housing code enforcement is that housing violations do not impress the courts as true crimes—the kind that involve committing a real wrong with a guilty mind instead of merely non-compliance with a positive legal requirement.[31] Criminal courts are simply not attuned to deal with

29. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966).

30. *Id.* at 1276-77.

31. For a somewhat different categorizing of usual crime on the one hand and "administrative

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"social welfare offenses".[32] Criminal prosecution should no doubt be retained for a few exceptional cases, but because "housing violations are basically economic offenses, the way to deal with them is through the imposition of economic sanctions." The remedy used "must aim at inducing—both directly and indirectly—the future repair and rehabilitation of structures by their owners. The emphasis must be on solving the difficulties created by the problem *building*—not on the useless enterprise of punishing the troublesome *owner*."

Mr. Gribetz and Professor Grad therefore propose that a new civil penalty be created, "fixed by law at so much per violation per day," recoverable by civil action and collectible, if need be, out of the building's rents. If, for example, a housing inspection were to uncover four code violations, the owner would be notified about the violations and would be told that if they had not been removed by a stated date (perhaps two or three weeks hence), a civil penalty fixed by a law at three dollars per violation would be imposed for each day the asserted improprieties remained uncorrected. If reinspection were to show that the building's defects had been overcome, the matter would be closed, the owner being notified to that effect. But if the owner had delayed making the needed repairs, the administrative enforcement agency could sue to recover the suitable civil penalty—$3.00 multiplied by the number of violations multiplied by the number of days of inaction after the deadline. The authors add:

> The department could proceed to legal action at any time after the period for compliance has elapsed; under those circumstances, the action would not be for a fixed amount but for such amount of statutory penalties as might be shown to be due . . . The defendant could limit the amount of the penalty by making repairs during the pendency of the action, notifying the Department that he had done so . . .[33]

Some such plan of cumulative, mandatory, civil penalties seems far more likely to be administrable than the present haphazard system of criminal prosecutions. The suggested daily penalty of $3.00 per violation, as Messrs. Gribetz and Grad remark,

> . . . is less than the usual parking ticket, and the penalty would not begin

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crime" on the other, stressing the "retributive" nature of proceedings involving the former and the "deterrent" emphasis of proceedings involving the latter, *see* Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943); Note, *Administrative Penalty Regulations*, 43 COLUM. L. REV. 213 (1943).

32. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1279 (1966).

33. *Id.* at 1283.

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> to run until the offender has had an adequate time for compliance. Moreover, the offender has it within his power to reduce the amount of the penalty by making repairs promptly. Furthermore, the amount of the penalty is determinable in advance. The remedy is an economic penalty, and the offender has the opportunity to calculate how much his noncompliance will cost him; no calendar jockeying to get before an easy judge, or temporary, time-wasting pleas of 'not guilt' can affect the amount of the penalty. The fixed fine, too, removes the gambling element from housing cases; there is no chance that an owner with long-continued, serious violations will get away with an insignificant fine, nor is there a risk that the owner with few or minor violations who intended to repair promptly will unexpectedly suffer severe penalties. Finally, the remedy is less likely to encounter judicial nullification, because, unlike criminal prosecution, it does not subject the decent owner who is caught with violations on his property to the risk of a lifetime criminal record.[34]

The authors whose conclusions have been summarized propose, in the end, the creation of a "civil housing court" in which penalty proceedings would be initiated by the suitable housing agency. One may well question, however, whether either the Constitution or an unchangeable public policy would compel the creation of a new court (or the further burdening of already heavily overburdened civil courts), instead of the creation of a fair hearing procedure within the administrative agency itself to pass upon cases in which the owner denies the existence of the building defects an inspector has assertedly discovered.

In any event, the housing code enforcement problem here sketched is illustrative of the need to take an organic approach to penalty definition and imposition. Penalties are not ends in themselves, but are means to the end of achieving observance of declared social regulations. They should be analyzed contextually, not conceptually.

4. Remission, Mitigation, and Compromise of Penalties

Suppose that a statute, instead of allowing an administrator to impose a penalty, were to allow him to abate a penalty that might otherwise be indisputably collectible. Suppose, for example, that a state cigarette tax law were to provide that for non-affixation of required revenue stamps "there is imposed a civil penalty of $1,000 to be recovered by proceedings in a proper court. Upon application therefore the tax commission may remit or mitigate such penalty." The Tax Commission concludes that a cigarette vendor has failed to affix the required stamps.

34. *Id.* at 1285.

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The Commission notifies the vendor that it is referring the case to the district attorney for recovery of the $1000 penalty, and encloses a form of application for remission of the penalty, which the vendor may return to the Commission if he does not contest his liability to pay $1,000. As is well known in the trade, the Commission's policy is to mitigate the $1000 penalty to about $200.

Or suppose that the statute had provided that vendors of tobacco must be licensed and had authorized the commission "to revoke, or suspend for a period up to one year, the license of any vendor who fails to purchase and affix tax stamps as provided herein. In those cases where the commission shall suspend a license, the commission may accept from the licensee an offer in compromise as a penalty in lieu of such suspension and shall thereupon rescind its order of suspension. The offer in compromise shall be at the rate of one dollar ($1.00) for each day of suspension." After notice and hearing, the commission suspends vendor's license for 200 days.

In both of these instances the vendor will be under nearly irresistible pressures to apply for mitigation or compromise. If he fails to seek mitigation in the first case, he runs the risk of paying not $200 but $1000 plus court expenses and attorney's fees. In the second, if his tobacco business is at all significant, he can better afford to pay $1 a day than to have the license suspended. Of course, by applying for mitigation or compromise, the vendor will lose his chance to litigate the merits of the commission's charges. The mitigation or compromise device "thus becomes a kind of administrative blackmail."[35] Moreover, the possibility of discriminatory exercises of the discretionary power to be lenient cannot be overlooked when the standards that guide judgment are unformulated; judicial review will not be readily available to one who has, in essence, "thrown himself upon the mercy of the court."[36]

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35. Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 WEST. POL.Q. 610, 620 (1951).

36. *Compare* MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, DEPARTMENT OF COMMERCE, BUREAU OF MARINE INSPECTION AND NAVIGATION, Sen. Doc. No. 186, Part 10, 76th Cong., 3d Sess. 26-27 (1940):

> The power is one which because of its very nature is likely to be exercised with some degree of arbitrariness. . . . One who is content to submit a written application for mitigation or remission is likely to pay a much larger fine than the individual or corporation which sends a representative to Washington to address argument to the officials. It is undeniable that pressures substantially affect the ultimate conclusion. . . . Partly because pressure from organized labor was sufficiently strong, not a single fine imposed upon owners in connection with a recent tanker strike was mitigated.

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Yet mitigation and compromise provisions are common in both federal and state statutes,[37] and

> . . . [t]he arguments in favor of the device . . . are sound. A multitude of small cases are settled without resort to the courts. Certainly in many of these cases formal adjudication would be an altogether meaningless and needless step. The device offers a lever to secure compliance with the law which the more ponderous instrument of court action could not afford. It has also been suggested that the administrator can more exactly measure the degree of culpability of an offender than can a court, and can prevent hardship to the unintentional offender. And, finally, there is the usual argument in favor of administrative action: the expertness of administrators in dealing with a specialized subject.[38]

The problem is to devise a procedure that will retain these advantages and at the same time eliminate or reduce the potentiality of abuse. The Attorney General's Committee on Administrative Procedure recommended a hearing before hearing commissioners to determine de novo whether offenses have been committed and to fix the amount of the penalties. The Committee also suggested that "in order to resolve any doubts about the constitutionality of the procedure, . . . the aggrieved person be permitted review de novo by a Federal district court. . . ."[39]

The Task Force on Legal Service and Procedure of the Second Hoover Commission urged that

> Judicial functions, such as the imposition of money penalties, the remission or compromise of money penalties, the award of reparations or damages, and the issuance of injunctive orders, should be transferred to the courts wherever possible. . . . Where a money penalty is imposed by a court, no agency should have authority to mitigate or remit. . . . Power

37. J. CHAMBERLAIN, N. DOWLING, & P. HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES 100-02 (1942), and Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 WEST. POL. Q. 610 (1951), give examples. *See also* R. CHILDS, MAKING REPEAL WORK 168-69 (1947), for a listing of compromise provisions in state liquor control statutes.

38. Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 WEST POL. Q. 610, 619 (1951).

39. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, SEN. DOC. No. 8, 77th Cong., 1st Sess. 147 (1941). The Committee did not spell out the exact nature of the "doubts about constitutionality" which led it to leave open the possibility of de novo judicial proceedings. Perhaps the answer lies in the Committee's monograph concerning the Bureau of Marine Inspection and Navigation, cited in note 36 *supra*, at 29n: "Such doubts might arise from the circumstance that money penalties have traditionally been imposed by courts, so that such imposition might be regarded as a 'judicial function' which could not validly be transferred to an administrative agency." This is an example of what Justice Holmes had in mind when he remarked that sometimes a page of history is worth more than a volume of logic.

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> of remission of judicially imposed fines should be exercised only by the court which possesses the penalty power in the first instance. Where both the power to impose and to remit monetary penalties are left with an agency, special procedural safeguards should be provided. Agency hearing should be held in connection with remissions and mitigation.[40]

Congress has not, however, followed the advice thus given—probably for the purely pragmatic reason that a prudent division of law administration labor precludes having everything done personally by a few hundred lifetime judges instead of by many lesser (possibly even less wise or less sensitive or less scrupulous) officials. The Federal Aviation Act of 1958 is an example.[41] It provides penalties at the rate of $1000 for numerous types of violation, including violation of administrative regulations. As a matter of practice the aviation agency, when it believes a violation has occurred, sends to the alleged violator a "civil penalty letter" with a "suggested compromise figure" that may range from $25 to $900. Few of these "suggestions" are rejected.[42]

Somewhat similarly, the Federal Communications Commission has been empowered to remit or mitigate penalties (denominated "forfeitures") ranging as high as $1000 per day or an aggregate of $10,000 for certain types of misconduct by licensees. The Commission in the first instance gives the licensee a notice of "apparent liability." The licensee may then set forth its position, in writing. Although a contested "forfeiture" can be collected only by a civil suit if the licensee chooses to fight to the last ditch, the Commission may settle the matter before litigation for whatever fraction seems to it to be suitable, all things considered—and it may exercise its discretionary judgment with or without procedural formalities, as it may prefer.[43] Technically, the Commission does not determine the licensee's liability or the amount of the forfeiture; the former is triable in court, and the latter is fixed by statute. But in reality, as is plain enough, the Commission can pretty well call the tune.

This is not to say that the Commission's power is oppressively exercised. During the calendar year 1969, for instance, 932 Notices of Apparent Liability were issued; the Commission mitigated the amount

40. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 242, 244 (1955).

41. 49 U.S.C. § 1301 (1963).

42. *See* Murphy, *Money Penalties—An Administrative Sword of Damocles*, 2 SANTA CLARA LAW. 113, 114-115 (1962).

43. 47 U.S.C. § 504 (1962).

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of forfeiture originally proposed in 426 of these 932 cases and remitted forfeiture altogether in 220 of the remainder. These figures show considerable readiness to be attentive to licensees' comments and to weigh additional information that might justify mitigating or remitting liability. In all the years that the Commission has possessed authority to proceed in court to collect penalties assessed against alleged violators, however, it has had to resort to court enforcement only five times. In two of those five cases which had not been finally disposed of by purely administrative processes, the defendants finally prevailed; the other three defendants paid up when litigation was initiated.[44]

5. Detention of the Person

The expansion of administrative powers to impose "civil" or "remedial" fines raises the further question whether authority to imprison may be delegated to administrative officials.

The power to detain the person as an incident of administering health laws is of course widely exercised. Quarantining sick persons to prevent spreading the infection among the well has long been regarded as permissible.[45] The courts have upheld, for example, the validity of laws involving institutional detention of venereal disease carriers, without resort to judicial proceedings.[46]

But detention of this sort is so clearly preventive rather than punitive in purpose and in a sense so impersonal that it may have little bearing on power to penalize by imprisoning the person. True penalization was invalidated in *Wong Wing v. United States*,[47] "one of the bulwarks of the Constitution."[48] An act of Congress provided that a Chinese person who had been found by a court commissioner to be in the country unlawfully "shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." Pursuant to

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44 Letter to the author from Henry Geller, F.C.C. General Counsel, Feb. 5, 1970, on file at *Washington University Law Quarterly*.

45. *See* Compagnie Francaise v. Board of Health, 186 U.S. 380 (1902).

46. *See Ex Parte* Lewis, 328 Mo. 843, 42 S.W.2d 21 (1931), which upheld an ordinance providing for a compulsory physical examination of every person "arrested for being a prostitute. . . ;" if the examination revealed that the person was suffering from venereal disease in an infectious stage, "such person shall be quarantined and detained in a hospital . . . until such time as such person is no longer capable of conveying the disease to others." *Accord*, Brown v. Manning, 103 Neb. 540, 172 N W. 522 (1919); *contra*, Wragg v. Griffin, 185 Iowa 243, 170 N.W. 400 (1919), 28 YALE L.J. 703 (1919).

47. 163 U.S. 228 (1896).

48. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953).

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this statute, Wong Wing was arrested and brought before a commissioner of the federal circuit court in Michigan, who found that Wong Wing was unlawfully within the country and adjudged that he should be imprisoned at hard labor for a period of 60 days. Wong Wing sought a writ of habeas corpus.

The Supreme Court thought it perfectly "clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid"; for Congress may forbid the entry or order the expulsion of aliens and "can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials."[49]

Nevertheless, "when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused . . ." The statute, by providing for imprisonment, in effect declared unlawful residence to be an "infamous crime"—and the Fifth and Sixth Amendments declare that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

Is this not the answer to the problem? Imprisonment as a deterrent of anti-social behavior is traditionally the earmark of the criminal law. The processes of the criminal law, fortified by explicit federal and state constitutional provisions, are calculated to furnish safeguards against arbitrary deprivations of liberty of the person. So long as imprisonment is the sanctions, should the law not insist that, however the statute may denominate the proceeding, it is in fact and in custom a criminal proceeding, to be disposed of in accordance with the practice developed in that branch of jurisprudence?[50]

49. This dictum has been strengthened by Abel v. United States, 362 U.S. 217 (1960), involving arrest by immigration authorities of an alien who was illegally in the United States—but whose *real* illegality was his being a Soviet spy.

50. Some historical exceptions must of course be noted, such as the vestigial remnants of imprisonment for debt as well as civil contempts of courts or legislatures. And *see also* Note, *Constitutionality of Nonjudicial Confinement*, STAN. L. REV. 109 (1950). For a discussion of many

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Conclusion

(1) The arguments against administrative imposition of money penalties are not very strong;

(2) Courts have occasionally been hostile to statutes giving administrative officers large discretion in the severity of the penalty to be imposed, because they fear that inequality in application of the sanction will result; therefore, to the extent practicable, the statutes should contain guides to the considerations that should weigh with the delegate;

(3) Notice and hearing should typically precede administrative penalizing, lest the existence of the power be denied because of the impropriety of the procedure employed;

(4) The use of administrative sanctions is justifiable mainly in respect of matters already or typically committed to administrative supervision and control (*e.g.*, workmen's compensation, taxation, public utility regulation). Even if possibly valid, the power to impose penalties for anti-social behavior not directly related to an extensive regulatory scheme (*e.g.*, disorderly conduct, sedition, counterfeiting) should not be committed to administrative hands. In short, the administrative power to penalize should be an incident of other functions, rather than an activity standing alone;

(5) In the present state of the law, confusion will probably be avoided if conduct which is to be subject to administrative penalties is not also denounced as criminal and subject to the sanctions of the criminal law, but no really persuasive reason argues against legislative prescription of a whole arsenal of sanctions, to be used cumulatively or alternatively as the case may be; many decided cases, such as those involving income tax fraud, show that an act otherwise criminal may also be subjected to an administrative penalty;

(6) The policy arguments against permitting administrative officers to incarcerate individuals by a procedure free from the protective restraints of criminal trials, are overpoweringly strong.[51] Since doctrinal support for the policy arguments is readily available, the courts are

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aspects of detention of the person because of mental illness, *see* Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945 (1959); Kadish, *A Case Study in the Signfication of Procedural Due Process—Institutionalizing the Mental Ill*, 9 WEST. POL. Q. 93 (1956). For a highly readable account of a related problem, see Fahr, *Iowa's New Sexual Psychopath Law—An Experiment Noble in Purpose?*, 41 IOWA L. REV. 523 (1956).

51 For effective discussion of the potentiality of danger in the power to make "administrative arrests", *see* I B. SCHWARTZ, RIGHTS OF THE PERSON 54-62 (1968); and *compare* McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441, 464-67 (1964).

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unlikely to uphold an attempted authorization of administrative prison sentences; but, even here, the Supreme Court has expressed tolerance of temporary incarceration without judicial order, where necessarily incident to the effective execution of administrative duties;[52]

(7) One implication of the conclusion that administrative agencies may not imprison is that collection of administratively imposed money penalties must be by civil action or by direct administrative action, as by distraint. In criminal proceedings, refusal to pay a fine imposed by a judge results customarily in imprisonment; but the courts are not likely to uphold an administrative equivalent of "Ten dollars fine—or ten days in jail";

(8) Collection of true penalties by summary devices such as distraint will probably be frowned upon, except when supported by a strong tradition such as that encountered in the revenue field, where penalties related to non-payment or under-payment of tax will be collectible accordingly. Payment of other money penalties will have to be enforced through civil suits, except where pressure can be exerted through administrative withholding of a desired status or advantage until the penalty has been paid.[53]

52. Wong Wing v. United States, 163 U.S. 228 (1896), discussed in the preceding text.

53. *See also* Parker, *The Execution of Administrative Acts*, 24 U. CHI. L. REV. 292 (1957).

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