

NOTES

A CIVIL JURY IN CRIMINAL SENTENCING: BLAKELY, FINANCIAL PENALTIES, AND THE PUBLIC RIGHTS EXCEPTION TO THE SEVENTH AMENDMENT

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In the 2004 case of Blakely v. Washington, the Supreme Court held that the Sixth Amendment's criminal jury trial right applies not only to the guilt phase of a trial, but also to the sentencing phase. Since then, criminal defendants have brought Sixth Amendment challenges to judge-imposed restitution and forfeiture, arguing that the facts underlying such financial penalties must be proven to a jury beyond a reasonable doubt. Many circuits have decided that Blakely does not apply to restitution and forfeiture because they are civil remedies, as opposed to criminal penalties, and thus do not fall within the ambit of the Sixth Amendment. This Note argues that, even if restitution and forfeiture are civil in nature, the logic of Blakely suggests that the Seventh Amendment's civil jury right nevertheless applies to such penalties. It then shows how the "public rights" doctrine—a judicial construct in administrative law used to justify exceptions to the Seventh Amendment's civil jury right—provides constitutional support for exempting certain financial penalties from the reach of Blakely.

INTRODUCTION

Was *Blakely v. Washington*¹—a Supreme Court case that dramatically expanded the scope of the jury trial right in criminal cases—a more revolutionary decision than courts and commentators have recognized?² On one hand, few have understated the case's significance. In the words of one leading observer of sentencing law, "*Blakely* is the biggest criminal justice decision not just of this past term, not just of this decade, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court."² Indeed, anyone who doubted the true import of the case when it was decided³ would have a hard time downplaying it less than a year later, when the Supreme Court in *United States v. Booker* applied *Blakely* to

1. 542 U.S. 296 (2004).

2. Douglas Berman, Supreme Court Cleanup in Aisle 4: *Blakely* Is Too Big and Messy to Ignore, *Slate*, July 16, 2004, at <http://www.slate.com/id/2104014/> (on file with the *Columbia Law Review*); see also *United States v. Penaranda*, 375 F.3d 238, 247–48 (2d Cir. 2004) (en banc) (certifying questions to Supreme Court regarding *Blakely*'s applicability to federal sentencing guidelines and warning of "an impending crisis in the administration of criminal justice in the federal courts").

3. See, e.g., *United States v. Johns*, 336 F. Supp. 2d 411, 427 (M.D. Pa. 2004) ("*Blakely* is an evolution, not a revolution."); Dahlia Lithwick, No-Good Lazy Justices: After the Supreme Court's Sentencing Case, the Sky Is Falling. Hooray!, *Slate*, July 15, 2004, at <http://www.slate.com/id/2103909/> (on file with the *Columbia Law Review*) (arguing that

the federal sentencing guidelines.⁴ *Booker* rendered the guidelines advisory rather than mandatory, thereby upending more than twenty years of sentencing procedure.⁵

Nevertheless, a growing body of lower court opinions addressing *Blakely*'s applicability to financial penalties such as restitution and forfeiture⁶ suggests that the case's holding may reach even further, affecting not only the Sixth Amendment's guarantee of a jury trial in criminal prosecutions,⁷ but also the Seventh Amendment's civil jury right.⁸ Ironically, in an effort to restrict the scope of *Blakely*'s impact on sentencing practice, some courts have raised the possibility that the logic, if not the strict letter, of *Blakely* may apply beyond the world of criminal sentencing law altogether.

This Note uses a narrow question—whether *Blakely* applies to financial penalties—to engage in a broader analysis of the modern right to a jury trial.⁹ Part I lays out the dramatic shift in the Court's sentencing jurisprudence, and then outlines how lower federal courts have responded to that shift on the specific question of financial penalties. Part II demonstrates how *Blakely* has put pressure on what may be considered a civil rather than criminal penalty, but argues that even in the case of civil penalties, *Blakely* calls for a jury trial under the Seventh Amendment. Part III claims that the civil jury requirement in turn creates an incentive to expand the realm of “public rights,” a judicial construct in administrative law used to justify exceptions to the Seventh Amendment's civil jury right. Part IV applies the Court's public rights jurisprudence to financial penalties assessed under the antitrust laws, ultimately concluding that the public rights line of cases provides constitutional support for exempting certain financial penalties from the reach of *Blakely*.

“this mess is [not] messier than the usual post-decision mess” and that lower court judges can be trusted to fashion their own solutions).

4. 543 U.S. 220 (2005).

5. The Sentencing Reform Act of 1984 created the United States Sentencing Commission as an independent agency within the judicial branch, empowered to develop guidelines and policy statements for federal sentencing courts. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2000)). For a historical overview and analysis of sentencing reform, see generally Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).

6. See *infra* Part I.B.

7. The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” U.S. Const. amend. VI.

8. The Seventh Amendment states: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved” Id. amend. VII.

9. Cf. Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 161–63 (1997) (arguing that jury right explicitly provided in Sixth and Seventh Amendments is mere “tip of the jury iceberg” and that right to jury can be located in many other constitutional provisions). But see Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 39–42 (describing widespread cynicism vis-à-vis civil jury right among lawyers and laypeople alike).

I. CONTAINING THE *BLAKELY* REVOLUTION

For federal judges, *Blakely* cut close to the bone. It cast doubt on the only sentencing system most judges had ever known,¹⁰ and potentially posed a formidable administrative burden.¹¹ This Part shows how, unsurprisingly, the judicial response has been to contain the revolution's impact on courts' day-to-day work. Part I.A provides a short overview of the Supreme Court's sentencing jurisprudence, with a particular focus on the sentencing "trilogy"¹² of *Apprendi*,¹³ *Blakely*, and *Booker*. Part I.B describes a growing consensus in lower federal courts that *Blakely* does not apply to financial penalties such as restitution and forfeiture, emphasizing an argument used by some courts that such penalties are civil rather than criminal.

A. *The Supreme Court's Sentencing Jurisprudence*

The Sixth Amendment states that "[i]n 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."¹⁴ Supported by a similar provision in Article III of the Constitution¹⁵ and considerable historical pedigree,¹⁶ the Sixth Amendment is

10. At the time of writing, 858 sitting federal judges had received their commission after October 12, 1984, the day the Sentencing Reform Act was passed, and before June 24, 2004, when *Blakely* was decided. By contrast, 365 had received their commission before the passage of the Act, only 55 of whom are still "active" rather than "senior" judges. See Fed. Judicial Ctr., The Federal Judges Biographical Database, at <http://www.fjc.gov/public/home.nsf/hisj> (last visited Aug. 8, 2006) (on file with the *Columbia Law Review*).

11. See *Apprendi v. New Jersey*, 530 U.S. 466, 556–57 (2000) (Breyer, J., dissenting) (arguing that division of factfinding between judge and jury reflects "administrative need for procedural compromise" driven by reality that "[t]here are . . . far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury" (emphasis omitted)).

12. See, e.g., Scott D. Hammond, Deputy Assistant Attorney Gen., Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants, Address Before the ABA Section of Antitrust Law (Mar. 30, 2005), at <http://www.usdoj.gov/atr/public/speeches/208354.htm> (on file with the *Columbia Law Review*).

13. 530 U.S. 466.

14. U.S. Const. amend. VI.

15. "The Trial of all Crimes, except in the Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed" Id. art. III, § 2, cl. 3.

16. Many scholars date the right to a jury trial at least as far back as the signing of the Magna Carta in 1215. See generally 1 Winston Churchill, *A History of the English-Speaking Peoples* 242–57 (1956) (discussing history and impact of Magna Carta); 1 W.S. Holdsworth, *A History of English Law* 54–63 (4th ed. 1931) (same); 1 Frederick Pollock & Frederic William Maitland, *The History of English Law* 136–73 (2d ed. 1923) (discussing history of jury right and Magna Carta); see also *Duncan v. Louisiana*, 391 U.S. 145, 151–54 (1968) (outlining history of criminal jury right in England). In colonial America, the right to a jury trial in criminal cases was "the only right that appeared in all 12 of the written constitutions predating the Declaration of Independence." Ronald Jay Allen et al., *Comprehensive Criminal Procedure* 1311 (2d ed. 2005). See generally Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.

thought to provide one of the Constitution's strongest criminal procedural protections.¹⁷ In practice, courts have construed it to require that a jury find the facts underlying the crime and apply the law (as provided by the court) to those facts.¹⁸ One question that has arisen over the past half-century is whether the jury's factfinding function extends to the sentencing phase, in addition to the guilt phase, of the trial.

1. *Sentencing Factors vs. the Elements of a Crime.* — The modern debate over Sixth Amendment rights in criminal sentencing began in 1949 with *Williams v. New York*, in which the Court held that due process does not prevent judges from finding sentencing facts.¹⁹ In doing so, it emphasized the “prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime,”²⁰ and argued that giving judges broad sentencing discretion was necessary to tailor a defendant's punishment.²¹ Underlying the Court's holding was a distinction between the “elements” of a crime, which a prosecutor must prove beyond a reasonable doubt,²² and “sentencing factors,”²³ which until recently were subject to a lower evidentiary standard.

Broadly speaking, the elements of a crime are those statutorily defined facts necessary to support a conviction,²⁴ whereas sentencing fac-

Rev. 867 (1994) (sketching history of criminal jury right in two hundred years since Bill of Rights was enacted).

17. See, e.g., Allen et al., *supra* note 16, at 1311 (“The right to a trial by jury in criminal cases . . . is one of the most revered civil liberties guaranteed by the United States Constitution.”).

18. See, e.g., *Sparf v. United States*, 156 U.S. 51, 102 (1895) (“[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.”).

19. 337 U.S. 241, 251 (1949); see also Nora V. Demleitner et al., *Sentencing Law & Policy* 109–10 (Supp. 2005–2006) (discussing *Williams* as foundational case in Supreme Court's sentencing jurisprudence).

20. *Williams*, 337 U.S. at 247.

21. *Id.* at 249–50.

22. See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

23. The phrase “sentencing factor” was coined by then-Justice Rehnquist in *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86 (1986) (“[T]he Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an *element of the crimes* enumerated in the mandatory sentencing statute . . . but instead is a *sentencing factor* that comes into play only after the defendant has been found guilty” (emphasis added)); see also *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000) (“It was in *McMillan v. Pennsylvania* that this Court, for the first time, coined the term ‘sentencing factor’ to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge.” (citation omitted)).

24. Take, for example, the crime with which Ralph Howard Blakely, Jr. was initially charged: first degree kidnapping. See *Blakely v. Washington*, 542 U.S. 296, 298 (2004). Under Washington State's criminal code, a charge of first degree kidnapping requires the prosecution to prove the following elements: (1) intentional abduction of another person (2) with intent to (a) hold him for ransom or reward, or as a shield or hostage, (b) facilitate commission of any felony or flight thereafter, (c) inflict bodily injury on him, (d) inflict extreme mental distress on him or a third person, or (e) interfere with the

tors are facts relevant to the selection of a punishment after the defendant has been duly convicted.²⁵ In the late 1990s, the Court's tendency (epitomized by *McMillan v. Pennsylvania*²⁶) to defer to legislatures on what constitutes an element or a sentencing factor shifted toward a more skeptical mood.²⁷ In *Almendarez-Torres v. United States*, the Court held that recidivism was a sentencing factor that need not be proven to a jury.²⁸ However, while *Almendarez-Torres* appeared to sustain the Court's approval of judicial factfinding at sentencing, it was immediately followed by a case—*Jones v. United States*—that characterized the recidivism issue as an exception to a general rule that provisions requiring tougher sentences must be considered elements rather than sentencing factors.²⁹ These two cases paved the way for the trilogy of *Apprendi*, *Blakely*, and *Booker*.

2. *The Sentencing Trilogy*. — The “fountainhead case”³⁰ of *Apprendi* involved a New Jersey hate crime law that provided for an extended term of imprisonment of between ten and twenty years if the judge found that the defendant committed the crime out of racial or other enumerated forms of animus.³¹ Echoing the newly skeptical mood of *Jones*,³² the Court refused to defer to the state legislature's sentencing/elements distinction as it had in *McMillan*.³³ Instead, it framed the issue as “one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty ver-

performance of any governmental function. Wash. Rev. Code Ann. § 9A.40.020(1) (West 2000).

25. To continue with the *Blakely* example, the state trial judge found as a sentencing factor that the defendant acted with “deliberate cruelty,” a fact that the prosecution was not obligated to prove to a jury beyond a reasonable doubt in order to secure a conviction, but which nonetheless exposed the defendant to an increase in his sentence of more than three years. *Blakely*, 542 U.S. at 300. Other examples of sentencing factors include comprehensive background information about the offender—such as family history, employment, education, physical and mental health, and financial condition—as provided in the parole board's presentence report. Ctr. on Juvenile & Criminal Justice, *The History of the Presentence Investigation Report* (2002), at <http://www.cjcg.org/pubs/psi/psireport.html> (on file with the *Columbia Law Review*).

26. 477 U.S. at 86 (“[W]e should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.”).

27. See Demleitner et al., *supra* note 19, at 117–18 (framing *Almendarez-Torres v. United States* and *Jones v. United States* as turning point in Court's approach to distinction between sentencing factors and elements of crime).

28. 523 U.S. 224, 226–27 (1998).

29. 526 U.S. 227, 243 n.6 (1999) (“[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).

30. *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1315 (D. Utah 2004), *aff'd*, 428 F.3d 1300 (10th Cir. 2005).

31. 530 U.S. 466, 468–69 (2000).

32. See *supra* note 29 and accompanying text.

33. See *supra* note 26 and accompanying text.

dict?”³⁴ The Court then held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”³⁵

Lower federal and state courts responded to the *Apprendi* ruling by construing it narrowly.³⁶ As if to clarify its intentions,³⁷ the Supreme Court turned to the *Blakely* case, in which it rejected Washington State’s interpretation of “statutory maximum.”³⁸ According to Washington, the maximum penalty was not fifty-three months as specified in the state sentencing guidelines for the defendant’s exact offense (second degree kidnapping with a firearm); rather, it was the ten-year maximum for class B felonies, the category under which the defendant’s crime fell.³⁹ Writing for a five to four majority, Justice Scalia held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”⁴⁰ This holding significantly reduced judges’ sentencing discretion. Whereas Washington’s approach still allowed for some judicial factfinding that might increase a defendant’s sentence beyond that authorized by the jury verdict, *Blakely* now drew the line at the jury’s findings, resolving a long-running “competition . . . between judge and jury”⁴¹ in favor of the latter.

In a passionate dissent, Justice O’Connor hinted at the colossal implications of *Blakely*: namely, that it signaled the downfall of the federal sentencing guidelines because those guidelines required a much greater degree of judicial factfinding than the Sixth Amendment now permit-

34. *Apprendi*, 530 U.S. at 494. In characterizing the issue as “one not of form, but of effect,” Justice Stevens, the majority opinion’s author, implied that the sentencing/elements dichotomy was a distinction in name only. *Id.* Interestingly, Justice O’Connor in dissent lobbed the “formalist” charge back at the majority, charging that its reliance on the distinction between a penalty above or below a statutory maximum was “meaningless formalism.” *Id.* at 539 (O’Connor, J., dissenting).

35. *Id.* at 490 (majority opinion).

36. See Stephanos Bibas, *Apprendi* in the States: The Virtues of Federalism as a Structural Limit on Errors, 94 J. Crim. L. & Criminology 1, 1 (2003) (“[T]he *Apprendi* firecracker has fizzled out at the state level just as it has at the federal level.”); see also Demleitner et al., *supra* note 19, at 20 (“[M]ost lower federal and state courts interpreted *Apprendi* narrowly” (citation omitted)).

37. As Justice Breyer put it, “The Court makes clear that it means what it said in [*Apprendi*].” *Blakely v. Washington*, 542 U.S. 296, 328 (2004) (Breyer, J., dissenting) (citation omitted).

38. *Id.* at 303 (majority opinion).

39. *Id.*

40. *Id.*

41. *Apprendi v. New Jersey*, 530 U.S. 466, 548 (2000) (O’Connor, J., dissenting) (“[T]he Sixth Amendment’s guarantee was motivated by the English experience of ‘competition . . . between judge and jury over the real significance of their respective roles’” (quoting *Jones v. United States*, 526 U.S. 227, 245 (1999))).

ted.⁴² She was not alone in predicting *Blakely*'s effect on the guidelines. Literally days after the *Blakely* decision came down, U.S. District Judge Paul Cassell of the District of Utah ruled that the federal sentencing guidelines were unconstitutional as applied, noting the "potentially cataclysmic implications of such a holding."⁴³

Half a year later, Justice Stevens in *Booker* proved Justice O'Connor and Judge Cassell right. Booker was convicted of possession with intent to distribute at least fifty grams of crack cocaine, a federal offense for which the sentencing guidelines prescribed a range of 210 to 262 months.⁴⁴ The district court judge held a post-trial sentencing proceeding in which he found by a preponderance of the evidence that the defendant had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Under the guidelines, those findings increased the sentencing range to a minimum of 360 months and a maximum of life imprisonment.⁴⁵ The Seventh Circuit overturned the district court, holding that the sentence imposed on the basis of judge-found facts violated the defendant's Sixth Amendment rights after *Apprendi* and *Blakely*.⁴⁶

Writing for the majority, Justice Stevens held that "the principles we sought to vindicate [in *Apprendi*] . . . are unquestionably applicable to the Guidelines,"⁴⁷ and that because those guidelines are "mandatory and binding on all judges,"⁴⁸ they violate defendants' Sixth Amendment rights.⁴⁹ The sentencing guidelines, at least as they had been known for over twenty years, were dead.

B. Does *Blakely* Apply to Financial Penalties?

In response to the *Blakely* revolution, defense lawyers have brought novel challenges to their clients' sentences, many of which will ultimately

42. See *Blakely*, 542 U.S. at 326 (O'Connor, J., dissenting) ("What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."); cf. Editorial, A Supreme Mess, Wash. Post, July 15, 2004, at A20 (excoriating Supreme Court for failing to provide guidance to lower courts on constitutionality—or lack thereof—of federal sentencing guidelines).

43. *United States v. Croxford*, 324 F. Supp. 2d 1230, 1232 (D. Utah 2004).

44. *United States v. Booker*, 543 U.S. 220, 227 (2005).

45. *Id.*

46. *Id.* The Supreme Court in *Booker* also reviewed the sentence of another defendant, Duncan Fanfan. However, the relevant facts of his sentencing were essentially indistinguishable from Freddie Booker's, and thus do not warrant discussion here. See *id.* at 228–29.

47. *Id.* at 238.

48. *Id.* at 233.

49. The Court then launched into a protracted, and highly controversial, "remedial" opinion that, over the vigorous dissent of four of the five authors of the "substantive" opinion, "fixed" the constitutional problem by rendering the guidelines advisory rather than mandatory and subjecting sentences to "reasonableness" review. *Id.* at 244–68. However, the subsequent fate of the sentencing guidelines is beyond the scope of this Note; *Booker* is relevant only to the extent that it affirms the core holding of *Blakely*.

require attention by the Supreme Court.⁵⁰ One of the more intriguing and conceptually difficult of these challenges is the claim that juries should have to find (beyond a reasonable doubt) the facts underlying judicially imposed financial penalties such as restitution and forfeiture.⁵¹ In what is likely an effort to salvage some sphere of judicial discretion and ease the administrative burden of a reinvigorated jury process, most—though not all⁵²—courts that have addressed the issue agree that *Blakely* does not apply to restitution and forfeiture.⁵³

Judges have deployed two basic arguments in holding that *Blakely* does not apply to financial penalties. First, some courts have held that restitution and forfeiture are fundamentally civil remedies, as opposed to criminal penalties, and thus do not fall within the ambit of the Sixth

50. On his blog, Professor Douglas Berman lists the sentencing issues he thinks need to be addressed most urgently. In order of importance, he includes: (1) the validity and scope of the “prior conviction” exception; (2) the retroactive application of *Apprendi*, *Blakely*, and *Booker*; (3) *Booker* pipeline issues such as plain error; and (4) the threshold question of this Note, *Blakely*’s applicability to restitution and other nonprison sentences. Posting of Douglas A. Berman, *The Waiting Is the Hardest Part . . .*, to *Sentencing Law & Policy*, at http://sentencing.typepad.com/sentencing_law_and_policy/2005/05/the_waiting_in_.html (May 4, 2005) (on file with the *Columbia Law Review*).

51. The term “restitution” refers to, among other things, a remedy associated with the law of unjust enrichment, “in which the measure of recovery is . . . based not on the plaintiff’s loss, but on the defendant’s gain.” *Black’s Law Dictionary* 1339 (8th ed. 2004); see also *Restatement (Third) of Restitution and Unjust Enrichment* § 1 (Discussion Draft 2000) (“A person who is unjustly enriched at the expense of another is liable in restitution to the other.”). More specifically, this remedy is thought to constitute “full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.” *Black’s Law Dictionary*, *supra*, at 1339. Thus, restitution functions as a hybrid remedy combining elements of civil and criminal law. See Linda Trang, Comment, *The Taxation of Crime Victim Restitution: An Unjust Penalty on the Victim*, 35 *Loy. L.A. L. Rev.* 1319, 1337–38 (2002) (“Victim restitution is . . . a hybrid remedy—both criminal and civil.”). For an excellent analysis of the conceptual confusion that characterizes discussions of restitution, see generally Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 *SMU L. Rev.* 1577 (2002).

Civil forfeiture is another remedy that straddles the divide between civil and criminal law. See *Black’s Law Dictionary*, *supra*, at 677 (defining civil forfeiture as “[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity”).

Shortly after *Blakely* was decided, two leading commentators flagged the restitution/forfeiture issue as one that would pose Sixth Amendment problems. See Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 *Fed. Sent’g Rep.* 316, 317 (2004) (“*Blakely* has thrown into doubt those decisions authorizing judges to make findings necessary for forfeiture and restitution awards.”).

52. See *United States v. Mueffelman*, 400 F. Supp. 2d 368, 385 (D. Mass. 2005) (holding that “restitution [is] a criminal punishment fully subject to *Booker*’s constraints”).

53. See *infra* notes 54–58. In the words of an esteemed federal district judge (and sentencing expert), “The solid consensus of common-sense judges is that [*Booker* et al. do not apply to such penalties], but it isn’t clear why.” E-mail from Gerard Lynch, U.S. Dist. Judge, S. Dist. of N.Y., to author (Sept. 6, 2005) (on file with the *Columbia Law Review*).

Amendment.⁵⁴ The argument is that the Sixth Amendment only covers “criminal prosecutions,” so a civil remedy assessed in the same trial for convenience should not be subject to a criminal jury.⁵⁵ Second, and more commonly, courts have held that even if restitution and forfeiture constitute criminal punishment, such penalties are not bound by statutory maxima and thus do not trigger a *Blakely* issue.⁵⁶ By failing to specify a maximum penalty, the argument goes, statutes authorizing or requiring payment of restitution in criminal cases—for example, the Mandatory Victims Restitution Act of 1996 (MVRA)⁵⁷—do not fall under the purview of the *Apprendi* rule that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.”⁵⁸

While it is beyond the scope of this Note to address the substantive merits of these arguments, suffice it to say that both are probably wrong.⁵⁹ Nevertheless, the “civil remedy” position opens a window on a

54. See, e.g., *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (“Restitution is designed to make victims whole, not to punish perpetrators; it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” (citation omitted)); *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (holding that restitution awards are “civil” rather than “penal,” while acknowledging that such position is “a minority view”); *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1324 (D. Utah 2004) (holding that Sixth Amendment does not apply to restitution awards because “restitution has historically been understood as a ‘civil’ and not a ‘punitive’ remedy”), *aff’d*, 428 F.3d 1300 (10th Cir. 2005).

55. See *Bach*, 172 F.3d at 523 (Posner, J.) (characterizing restitution in criminal cases as “procedural innovation” that “streamline[s] . . . the cumbersome processes of our law” by obviating need for private plaintiffs to bring suit seeking civil damages on same facts).

56. See, e.g., *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006) (holding that *Apprendi* did not apply to restitution order because restitution statute lacked statutory maximum); *United States v. Reichow*, 416 F.3d 802, 807–08 (8th Cir. 2005) (concluding that restitution order under federal Mandatory Victims Restitution Act did not violate *Blakely* because statute did not specify statutory maximum); *United States v. Hall*, 411 F.3d 651, 654–55 (6th Cir. 2005) (holding that criminal forfeiture was not subject to Sixth Amendment because authorizing statute lacked statutory maximum).

57. 18 U.S.C. § 3663A (2000).

58. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added).

59. For an excellent account of the civil/criminal debate over restitution, see generally Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *Fordham L. Rev.* 2711 (2005). As for the “statutory maximum” argument, it is likely wrong because it ignores, or at least understates, “*Blakely*’s expansive interpretation of what constitutes a statutory maximum.” *Visinaiz*, 344 F. Supp. 2d at 1326; see also King & Klein, *supra* note 51, at 317 (arguing that “*Blakely* has now undercut” statutory maximum argument, and that “because judges may not order forfeiture of defendant’s assets without specific factual findings that are not always part of the underlying conviction, these facts must be determined by a jury beyond a reasonable doubt”). For example, the MVRA requires payment of restitution to the victim “for income lost by such victim as a result of such offense.” 18 U.S.C. § 3663A(b)(2)(C). Given *Blakely*’s directive that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*,” *Blakely v. Washington*, 542 U.S. 296, 303 (2004), it seems that a judge would be constrained to apply restitution solely in the amount of lost income

much larger question—whether *Blakely* applies indirectly to the Seventh Amendment—and is thus deserving of some discussion.

1. *Blakely Meets the Seventh Amendment.* — In *United States v. Visinaiz*, a jury convicted the defendant of second degree murder, and the government sought \$473,400 in restitution (based on the victim's lost future income).⁶⁰ The defendant brought a *Blakely* challenge to the award, which the court rejected on grounds that, inter alia, "restitution is not a 'penalty' and therefore is not subject to the Sixth Amendment jury trial right."⁶¹ The court reasoned that "[r]estitution is primarily designed to compensate, not punish,"⁶² and is therefore more akin to damages in tort than a criminal fine.⁶³

Having determined that restitution was functionally a civil remedy, the court then addressed the key question of this Note: Does the Seventh Amendment apply? The Seventh Amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved."⁶⁴ While the applicability of the Seventh Amendment in some cases requires a complex "historical test,"⁶⁵ it is beyond dispute that the civil jury right would

reflected in the facts underlying conviction. See *Visinaiz*, 344 F. Supp. 2d at 1326 ("It is a difficult question whether *Blakely* changes our understanding of 'statutory maximum' in a way that might require jury fact-finding in restitution contexts.").

60. *Visinaiz*, 344 F. Supp. 2d at 1312.

61. *Id.* at 1314.

62. *Id.* at 1320.

63. In analogizing to tort law, the *Visinaiz* court argued that restitution is a compensatory remedy within the punitive context of criminal law, whereas punitive damages constitute punishment within the compensatory context of tort law. *Id.* at 1321–22. This analysis of the relationship between tort law and criminal law has an appealing symmetry, but it leads to uncomfortable consequences. For example, if restitution is free from the Sixth Amendment because it is fundamentally compensatory in nature, then it follows that punitive damages should be subject to the Sixth Amendment because they are fundamentally punitive in nature. This raises a deeper question: Should the procedural protections applied to a given penalty/remedy depend on the nature of that penalty/remedy, or rather on the nature of the proceeding in which it is assessed (that is, a civil suit or criminal prosecution)?

64. U.S. Const. amend. VII. Courts have interpreted the Framers' choice of the word "preserved" in the Seventh Amendment to guarantee the jury right as it existed in 1791, the year of its ratification by the original states. See, e.g., *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); see also Jack H. Friedenthal et al., *Civil Procedure* 499 (3d ed. 1999) (discussing how Seventh Amendment preserves, but does not create, right to trial by jury). However, the Supreme Court held as early as 1830, in an opinion by Justice Story, that the Seventh Amendment would not be limited to those common law actions that actually existed in 1791, but applied also to statutory causes of action that are analogous to those that were triable by jury in 1791. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830); see also Friedenthal et al., *supra*, at 517–23 (referencing *Parsons* in context of Seventh Amendment problems that arise when Congress creates statutory causes of action that express preference for nonjury trials).

65. For a useful overview of the Seventh Amendment historical test, see Friedenthal et al., *supra* note 64, at 502–06.

apply to a traditional tort claim such as battery,⁶⁶ including the assessment of damages. Thus, to the extent that the *Visinaiz* court characterizes restitution as functionally a remedy in tort, why would the Seventh Amendment not require a jury to determine that remedy?⁶⁷

Oddly, the court claimed that the Seventh Amendment did not apply because “court-ordered restitution . . . is a ‘constitutional extension of criminal [sic] sentencing.’”⁶⁸ In other words, the Sixth Amendment did not apply because restitution is civil, whereas the Seventh Amendment did not apply because restitution is criminal. One of these propositions may be true, but both cannot be. Indeed, it is hard to escape the conclusion that the court was trying to have it both ways.

2. *The Civil or Criminal Nature of Restitution.* — The Seventh Circuit has taken a similarly two-faced approach to the civil/criminal debate over restitution and the question of what, if any, jury trial right applies. First, in *United States v. Fountain*, Judge Richard Posner rejected a Seventh Amendment challenge to restitution ordered under the Victim and Witness Protection Act of 1982 (VWPA)⁶⁹ on grounds that it was a “traditional criminal remedy.”⁷⁰ Years later, in *United States v. Bach*, Judge Posner returned to the very same question—the civil or criminal nature of restitution—in the context of an *ex post facto*⁷¹ challenge to a restitution order under the MVRA.⁷² There, he held that restitution was a civil remedy and therefore not subject to the Ex Post Facto Clause, concluding that “[i]t is a detail from a defrauder’s standpoint whether he is ordered to make good his victims’ losses in a tort suit or in the sentencing phase of a criminal prosecution.”⁷³ Judge Posner did not refer to his *Fountain* opinion in *Bach*, which has since been used by the Seventh Circuit for purposes of exempting restitution orders from *Blakely*’s Sixth Amendment requirements.⁷⁴

For the same court to see restitution as criminal in one context and civil in another does not make sense.⁷⁵ Furthermore, is it really a mere

66. See *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (Posner, J.) (“[M]ost crimes that cause definite losses to ascertainable victims are also torts: [T]he crime of theft is the tort of conversion; the crime of assault is the tort of battery . . .”).

67. See *Visinaiz*, 344 F. Supp. 2d at 1325 (“[I]t might be argued [that] if restitution is not viewed as a penalty and therefore is not part of a criminal prosecution, it still might fall within the Seventh Amendment protections for jury trial in civil cases.”).

68. *Id.* (quoting *United States v. Watchman*, 749 F.2d 616, 617 (10th Cir. 1984)).

69. Victim and Witness Protection Act of 1982 § 5, 18 U.S.C. § 3663 (2000).

70. 768 F.2d 790, 801 (7th Cir. 1985).

71. “No Bill of Attainder or *ex post facto* Law shall be passed.” U.S. Const. art. I, § 9, cl. 3.

72. 172 F.3d 520 (7th Cir. 1999).

73. *Id.* at 522–23.

74. See *United States v. Pree*, 408 F.3d 855, 875 (7th Cir. 2005). Credit is due to Brian Kleinhaus for pointing out this discrepancy in Judge Posner’s view of restitution. See Kleinhaus, *supra* note 59, at 2750–53.

75. See Kleinhaus, *supra* note 59, at 2752 (“If restitution is a criminal penalty for one context, it seems logical and consistent that it should be for another as well.”).

“detail,” as Judge Posner puts it, whether restitution is ordered pursuant to a civil or criminal proceeding? For the Seventh, Eighth, and Tenth Circuits—each of which has held that *Blakely* does not apply to restitution because it is civil⁷⁶—the scope of a defendant’s jury trial right depends directly on this civil/criminal determination.⁷⁷ From a due process point of view, the fact that some courts have found restitution criminal for purposes of the Seventh Amendment and civil for purposes of the Sixth Amendment—with the net result that it slips away from the jury altogether—should raise eyebrows to say the least.

The above cases show us that courts can manipulate the civil or criminal nature of a given financial penalty in order to avoid the jury. Courts have a particular incentive in a post-*Blakely* world to characterize financial penalties as civil even when imposed pursuant to a criminal prosecution, thereby restricting the scope of the newly expanded Sixth Amendment and easing their own administrative concerns. Part II questions whether a civil determination really provides such respite.

II. “CIVILIZING” THE CRIMINAL LAW

Courts’ reliance on the civil/criminal distinction to exempt financial penalties from jury factfinding raises a more fundamental question: Even if a given penalty is civil in nature, does it follow that the jury has no role in determining that penalty? If the answer as a technical matter is yes, does the underlying logic of the *Blakely* revolution counsel otherwise?

Part II.A seeks to contextualize the post-*Blakely* pressure to characterize financial penalties as civil within a more general phenomenon, evident since the 1970s,⁷⁸ of what might be called “civilizing” the criminal law—that is, using civil penalties to achieve the aims of criminal punishment while avoiding criminal procedural barriers. Part II.B addresses the question of *Blakely*’s applicability to the Seventh Amendment’s civil jury right. Part II.B.1 argues that, as a matter of logic, the compensatory nature of a given penalty provides little if any support for removing that penalty from the jury. Part II.B.2 revisits a Supreme Court decision from the 1980s that held that the Seventh Amendment’s jury right does not

76. See, e.g., *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (“Restitution is designed to make victims whole, not to punish perpetrators; it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality.” (citation omitted)); *Bach*, 172 F.3d at 523 (holding that restitution awards are “civil” rather than “penal,” while acknowledging that such position is “a minority view”); *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1324 (D. Utah 2004) (holding that Sixth Amendment does not apply to restitution awards because “restitution has historically been understood as a ‘civil’ and not a ‘punitive’ remedy”), *aff’d*, 428 F.3d 1300 (10th Cir. 2005).

77. Other issues less germane to this Note are at stake in the civil/criminal determination, such as the fact that a restitution order imposed as part of a criminal sentence can be enforced along the lines of a criminal fine, including revocation of parole or resentencing of the defendant to prison. See Kleinhaus, *supra* note 59, at 2753.

78. See *infra* notes 80–83 and accompanying text.

extend to the remedy phase of a civil proceeding, and argues that, after *Blakely*, this precedent should be overturned.

A. *Civil Forfeiture and the “New Penalties”*

The post-*Blakely* use of the civil side of the ledger to avoid criminal procedure has not happened in a vacuum. With the increasing use of parallel civil and criminal proceedings over the last three or so decades, courts and commentators have struggled to sort out the procedural implications of a nebulous tort/crime distinction.⁷⁹ Nowhere is this more true than in the confused area of civil forfeiture.

1. *Civil Forfeiture and Criminal Procedure: An Uneasy Relationship.* — The use of asset forfeiture—whether civil or criminal—emerged as a tool in the government’s fight against organized crime and a growing narcotics trade.⁸⁰ Both the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Act)⁸¹ and the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),⁸² among others, included innovative forfeiture provisions. The purpose of these provisions was to enable the government to mount a multipronged attack, from both civil and criminal angles, on unlawful activity that had proven highly elusive.⁸³

Before long, however, the civil forfeiture provisions came under attack for the allegedly unfair procedural advantages they gave prosecutors.⁸⁴ For example, civil forfeiture under the Drug Act allowed prosecutors to impose a forfeiture penalty on the mere basis of probable cause, without obtaining an underlying criminal conviction, whereas formerly they had been required to afford defendants all the constitutional protections associated with criminal trials.⁸⁵ Civil forfeiture provided other ad-

79. See generally John C. Coffee, Jr., Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193 (1991). Professor Coffee’s article focuses on the problem of “criminalizing” the civil law—that is, a trend in which “the criminal law has encroached upon formerly ‘civil’ areas of the law,” particularly in the white collar environment. *Id.* at 202. This Note addresses the inverse of the problem analyzed by Professor Coffee: “civilizing” the criminal law in order to evade or mitigate procedural obstacles to enforcement.

80. See Brian Fork, The Federal Seizure of Attorneys’ Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense, 83 N.C. L. Rev. 205, 213–15 (2004).

81. 21 U.S.C. § 881 (2000).

82. 18 U.S.C. §§ 1961–1968 (2000).

83. See generally Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 Colum. L. Rev. 661 (1987) (explaining expanded use of RICO as conspiracy statute to prosecute criminals for assorted offenses).

84. See Arthur W. Leach & John G. Malcolm, Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate, 10 Ga. St. U. L. Rev. 241, 242 (1994) (“Critics of the government’s use of civil forfeiture are legion.”). Representative Henry Hyde, Chairman of the House Judiciary Committee and chief architect of the Civil Asset Forfeiture Reform Act of 2000, referred to civil forfeiture as “Kafkaesque.” See Editorial, Reining in Forfeiture Laws, *St. Petersburg Times*, June 27, 1999, at 2D.

85. Fork, *supra* note 80, at 214.

vantages in addition to a lower burden of proof, such as the ability to use forfeiture as a preindictment discovery device, the benefit of collateral estoppel if the defendant is convicted of an underlying crime before the forfeiture has been adjudicated, and the right to draw adverse inferences from a defendant's assertion of his Fifth Amendment privilege against self-incrimination.⁸⁶ As Professor Kenneth Mann notes, "In many instances, the very motivation for the creation of civil punitive sanctions was to avoid criminal procedural protection."⁸⁷

Underlying the controversy over civil forfeiture is a basic separation of powers dilemma similar to that in the sentencing cases: whether, and to what extent, courts should defer to a legislature's determination that a given penalty is "civil."⁸⁸ One danger is that the courts will take what Professor Mann calls "a quintessentially positivist view of sanctions: [I]f a sanction is labeled civil, it is civil."⁸⁹ This positivist view is dangerous because it would enable legislatures to shift vast swathes of criminal prosecution onto the civil side of the ledger, thereby eviscerating criminal procedural protections with little if any judicial oversight. Still, notwithstanding the Supreme Court's recent skepticism regarding the distinction between sentencing facts and the elements of a crime, "it remains the

86. See Leach & Malcolm, *supra* note 84, at 242.

87. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *Yale L.J.* 1795, 1801 (1992). Professor Mann cites *Smith v. Department of Human Services*, which found that the purpose of the liquidated damages provision of the Age Discrimination in Employment Act was to avoid "anticipated difficulties of proof under a criminal provision, as well as impediments to investigation, conciliation, and enforcement that might arise from an employer's invocation of the [F]ifth [A]mendment." 876 F.2d 832, 836 (10th Cir. 1989). The bottom line is that when a legislature labels undesirable behavior as "criminal," that label makes it harder for government lawyers to penalize such behavior, owing to a higher standard of proof and the defendant's Fifth Amendment right against self-incrimination, among other things. Furthermore, the same incentive to "civilize" criminal prosecution obtains in the work of prosecutors and judges. For instance, in cases of remedies such as restitution and forfeiture that seem to have both punitive and compensatory purposes, a prosecutor will clearly want to characterize the remedy as civil so as to avoid the reinvigorated criminal jury right. See *supra* Part I.B. In the same case, a judge may also be motivated to see the remedy as civil, because doing so would guard some of the discretion she enjoyed before *Blakely*, and because management of a jury trial (instructing jurors on points of law, etc.) tends to draw out the proceedings. See *supra* Part I.B.

88. In *Blakely*, the crux of the dispute between the majority and dissent was how much the Court should defer to Congress's labeling a given fact a "sentencing factor" when deciding whether that fact could be exempted from a jury's oversight. Justice Scalia said that his disagreement with Justice O'Connor's dissent was "not [about] *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws." 542 U.S. 296, 302 n.6 (2004). The majority's solution was to abandon any attempt to sort out sentencing factors from elements, applying a bright-line rule instead. *Id.* at 308. Justice O'Connor argued for a "balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law." *Id.* at 321 (O'Connor, J., dissenting).

89. See Mann, *supra* note 87, at 1820.

case that few proceedings labeled civil by the legislature will be deemed criminal for the application of constitutional norms.”⁹⁰

2. *The Supreme Court Faces the Civil/Criminal Dilemma.* — This is not to say that the Court has entirely avoided the procedural difficulties surrounding the “new penalties.”⁹¹ In *United States v. Halper*, for instance, the Court addressed the question of whether the government may, consistent with the Double Jeopardy Clause,⁹² bring a civil suit against a defendant already criminally convicted for the same offense.⁹³ It held that such a civil proceeding would violate double jeopardy if “the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as ‘punishment’ in the plain meaning of the word.”⁹⁴ While hailed as a “major doctrinal breakthrough” that “render[ed] irrelevant the distinction between criminal and civil proceedings,”⁹⁵ the Court clearly indicated that the holding should be given a very narrow interpretation.⁹⁶

The Court returned to the civil/criminal dilemma in *United States v. Bajakajian*, in which it struck down a criminal forfeiture order as a violation of the Excessive Fines Clause based on a “gross disproportionality” test.⁹⁷ More important for the purposes of this Note, Justice Kennedy argued in dissent that the Court’s holding would undermine the purposes of the Excessive Fines Clause by encouraging legislators to switch from criminal to civil forfeiture provisions, resulting in a net loss in procedural protections for defendants.⁹⁸ In his words, “By invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to circumvent it.”⁹⁹

90. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *Hastings L.J.* 1325, 1368 (1991).

91. *Id.* at 1395. Professor Cheh suggests that just as the profusion of government benefits led to a recalibration of procedural due process norms, see *Goldberg v. Kelly*, 397 U.S. 254, 264–66 (1970), so too should the emergence in the 1970s of aggressive crime-fighting statutes that deliberately exploit the interplay of civil and criminal law. In other words, the “new penalties” are the enforcement flipside to the “new property.” See generally Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 733 (1964) (“The valuables dispensed by government . . . are steadily taking the place of traditional forms of wealth—forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman’s customers and goodwill.”).

92. The Double Jeopardy Clause states: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. Const. amend. V.

93. 490 U.S. 435 (1989).

94. *Id.* at 449.

95. Cheh, *supra* note 90, at 1375–76.

96. *Halper*, 490 U.S. at 449–50 (calling its holding “a rule for the rare case” and disclaiming that “[w]e do not consider our ruling far reaching”).

97. 524 U.S. 321 (1998). The Excessive Fines Clause provides: “Excessive bail shall not be required, nor excessive fines imposed” U.S. Const. amend. VIII.

98. *Bajakajian*, 524 U.S. at 354–55 (Kennedy, J., dissenting).

99. *Id.* at 355.

Justice Kennedy's "excessive zeal" argument and the debate over civil forfeiture more generally are particularly germane to the post-*Blakely* fallout.¹⁰⁰ They show that recent efforts to evade the greater procedural burdens of a reinvigorated criminal jury right can be located in a longer-running process—one in which the increasingly blurred distinctions between criminal, civil, and administrative law allow prosecutors, legislators, and judges to circumvent the procedural dictates of the Constitution. As Professor Mann explains, "[A]ny civil process is less burdensome than the criminal process, and administrative assessment is less burdensome than judicial assessment."¹⁰¹ Indeed, water follows the path of least resistance; to the extent that criminalizing behavior triggers a set of burdensome procedural protections, legislatures may find it easier to deter and punish that behavior through civil penalties that serve the same end.¹⁰²

B. *Civil Penalties and the Seventh Amendment*

The preceding discussion establishes the "motive," as it were, to characterize a financial penalty as civil in order to lessen procedural friction in criminal enforcement. Part II.B now argues that the civil determination—even if correct—does not justify removing the penalty from a jury, but rather triggers a different constitutional provision altogether: the Seventh Amendment's civil jury right.

1. *Analogizing to Compensatory Damages.* — Most of the courts that have deemed *Blakely* inapplicable to restitution and forfeiture on grounds that these are civil remedies simply do not mention the Seventh Amendment.¹⁰³ The only court that openly recognizes the issue—the *Visinaiz* court—treats it in a cursory and contradictory way.¹⁰⁴ Perhaps this blind spot is the result of bad briefing;¹⁰⁵ in order for a court to feel compelled to address the Seventh Amendment issue, defense counsel would need to bring not only a post-*Blakely* Sixth Amendment challenge to the penalty, but also a Seventh Amendment claim in the event the penalty is found to be civil. One brief to an en banc panel of the Third Circuit was careful to

100. It bears noting that Justice Kennedy dissented from the majority opinion in *Blakely*. 542 U.S. 296, 326–28 (2004).

101. Mann, *supra* note 87, at 1849.

102. See *supra* note 87.

103. See, e.g., *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) ("Restitution is designed to make victims whole, not to punish perpetrators; it is essentially a civil remedy created by Congress and incorporated into criminal proceedings for reasons of economy and practicality." (citation omitted)); *United States v. Pree*, 408 F.3d 855, 875 (7th Cir. 2005) (holding that restitution does not involve Sixth Amendment because it is civil penalty).

104. See *supra* Part I.B.1.

105. See *infra* notes 117–118 and accompanying text.

preserve the Seventh Amendment claim,¹⁰⁶ but the court did not reach the Seventh Amendment issue.¹⁰⁷

It is worth asking, as a matter of logic rather than strict precedent, why the finding that a penalty is civil should *not* trigger the Seventh Amendment.¹⁰⁸ Those courts that find restitution civil do so on grounds that it is primarily designed to compensate rather than punish.¹⁰⁹ In doing so, they implicitly (and sometimes explicitly¹¹⁰) analogize to the determination of compensatory damages in a tort suit, which is made by a jury after counsel have argued the facts surrounding the plaintiff's harm (lost future income, medical expenses, etc.). Of course, juries in tort cases assess compensatory damages under a preponderance of the evidence standard, not reasonable doubt as required by *Blakely* factfinding, so there would be a difference in applying the Seventh Amendment to a restitution or forfeiture order in a criminal case.¹¹¹ Still, the important point is that even if restitution and forfeiture are civil penalties, *some* form of jury right should apply.

2. *Extending Blakely to Civil Trials.* — The *Blakely* revolution aside, the Supreme Court has spoken to the issue of whether the Seventh Amendment applies to a restitution order. However, it has done so only in dicta, and remarkably weak dicta at that. In *Kelly v. Robinson*, the Court

106. Supplemental Brief for Appellants Before Court En Banc at 2 n.2, *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (No. 03-4490) (brief of defendant Fallon) (“If this Court . . . hold[s] that restitution is a civil penalty, appellants assert their right to a jury trial under the Seventh Amendment.”).

107. See *Leahy*, 438 F.3d at 338 (holding, in highly fractured decision, that “*Booker* does not apply to orders of restitution under the MVRA and VWPA” because “orders of restitution have little in common with . . . prison sentences”).

108. See *supra* notes 64–68 and accompanying text for a general discussion of the Seventh Amendment.

109. E.g., *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) (“Restitution is designed to make victims whole.”); *United States v. Visinaiz*, 344 F. Supp. 2d 1310, 1320 (D. Utah 2004) (holding that “the purpose of restitution ‘is not to punish defendants or to provide a windfall for crime victims, but rather to ensure that victims, to the greatest extent possible, are made whole for their losses’” (quoting *United States v. Nichols*, 169 F.3d 1255, 1279 (10th Cir. 1999))), *aff’d*, 428 F.3d 1300 (10th Cir. 2005).

110. E.g., *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (Posner, J.) (holding that when court orders restitution, “definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs”).

111. The notion of applying separate standards of proof to liability and remedy phases of a trial has an analogue in some states’ jury instructions on punitive damages. For instance, Colorado authorizes a jury to assess punitive damages only if it has found “*beyond a reasonable doubt* that the injury complained of was attended by circumstances of (fraud) (or) (malice) (or) (willful and wanton conduct).” Colorado Jury Instructions: Civil 5:3A (3d ed. 1988) (emphasis added). Other states require a “clear and convincing evidence” standard. See Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 *Psychol. Pub. Pol’y & L.* 743, 749 (2000). Thus, whereas some states apply a higher burden of proof to punitive damages on the theory that a quasi-criminal trial has been appended to a civil one, courts could similarly apply a preponderance standard to restitution or forfeiture on the theory that a quasi-civil trial has been attached to a criminal one.

considered whether a restitution order imposed by a state court as a condition of a criminal defendant's probation was dischargeable in Chapter 7 bankruptcy proceedings.¹¹² The Court held that it was not dischargeable because the restitution order was a criminal sanction with which the bankruptcy courts should not interfere.¹¹³ However, in a footnote that was tangential to the holding of the case, the Court used a single student Note¹¹⁴ to assert that "[u]nder [the Victim and Witness Protection] Act, defendants have no right to jury trial as to the amount of restitution, *even though the Seventh Amendment would require such a trial if the issue were decided in a civil case.*"¹¹⁵ It then pointed out, relying on the same Note, that "[e]very Federal Court of Appeals that has considered the question has concluded that criminal defendants contesting the assessment of restitution orders are not entitled to the protections of the Seventh Amendment."¹¹⁶

Courts have suggested that after *Blakely*, the application of the jury right to criminal restitution orders may be an open question. For instance, the Sixth Circuit cited *Kelly* (also in dicta) to the effect that "[a]lthough courts have generally recognized that Seventh Amendment jury trial rights do not apply when a criminal defendant is ordered to pay restitution, . . . there is some question as to whether *Booker* requires us to reconsider our analysis of criminal defendants' jury trial rights with respect to restitution orders."¹¹⁷ That is, the court noted the possibility that imposition of a restitution order on the basis of facts not proven at trial might amount to a violation of the defendant's rights under either the Sixth or Seventh Amendments. Acknowledging this ambiguity, the court declined to express an opinion "[b]ecause the parties did not address this important and complex question in their briefs or in oral argument."¹¹⁸

There are three reasons why *Kelly* provides weak support at best for the notion that the Seventh Amendment does not apply to restitution. First, as noted above, the Court's statement that the Seventh Amendment does not apply to restitution orders was dictum and therefore, while suggestive of a particular direction, nonbinding on subsequent decisions.¹¹⁹ Second, and more important, the actual holding of the case was that resti-

112. 479 U.S. 36 (1986).

113. *Id.* at 50–52.

114. Bonnie Arnett Von Roeder, Note, The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982, 63 *Tex. L. Rev.* 671 (1984).

115. *Kelly*, 479 U.S. at 53 n.14 (emphasis added); see also *supra* note 63 (discussing whether civil or criminal nature of financial penalty should be determined by nature of remedy itself or nature of proceeding in which it is imposed).

116. *Kelly*, 479 U.S. at 53 n.14.

117. *United States v. McDaniel*, 398 F.3d 540, 553 n.12 (6th Cir. 2005).

118. *Id.* at 554 n.12.

119. The question before the Court was the dischargeability in bankruptcy of a restitution order, not the Seventh Amendment's applicability to that order. The Court lacked the benefit of briefing and oral argument on the latter question.

tution was not dischargeable because it was a *criminal* penalty. Thus, for a court to cite *Kelly* for its dictum that the Seventh Amendment does not apply when that same case holds that restitution is criminal would force it to concede that the Sixth Amendment applies. Finally, in 1986 when the Court decided *Kelly*, the environment surrounding the interplay of civil and criminal jury rights was diametrically opposite to today's post-*Blakely* situation. Then, prosecutors had an incentive to characterize financial penalties as criminal because the facts underlying such penalties were mere "sentencing factors" to be ascertained by judges.¹²⁰

However, there is one Supreme Court case that may provide ballast for the argument that the Seventh Amendment should not apply to financial penalties even where a court deems them civil in nature. Roughly seventeen years before *Blakely*, the Court in *Tull v. United States* held, over the vigorous dissent of Justice Scalia (future author of *Blakely*) and Justice Stevens (future author of *Apprendi* and *Booker*), that in a civil action brought by the government against a private party, the Seventh Amendment jury right did not extend to the remedy phase of the trial, but rather was limited to the liability phase.¹²¹ This Note contends that *Blakely* counsels a rejection of *Tull*.

Tull involved a civil suit by the government against a real estate developer for dumping fill in Virginia wetlands in violation of the Clean Water Act.¹²² The government sought the maximum civil penalty authorized under the Act—\$10,000 per day, or a total of \$22,890,000.¹²³ The district court denied Tull's demand for a jury trial and found for the government, though it lowered the penalty to \$325,000 (along with injunctive relief).¹²⁴ The Fourth Circuit affirmed,¹²⁵ splitting with the Second Circuit¹²⁶ on whether the Seventh Amendment guaranteed a jury trial in such a case. Finding that a civil enforcement action under the Clean Water Act was more analogous to a "suit at common law" under the Seventh Amendment than an equitable action, the Court reversed the Fourth Circuit and found that Tull was improperly denied a jury trial to determine his liability.¹²⁷ However, it declined to extend the protection

120. Indeed, the very Note that the *Kelly* court cited suggested as much: "The seventh amendment right to a jury trial attaches to all legal issues in civil cases. The sixth amendment, on the other hand, applies only to the determination of a criminal defendant's guilt. The defendant has no constitutional right to have a jury determine his sentence." Von Roeder, *supra* note 114, at 673 n.24 (citation omitted).

121. 481 U.S. 412, 425–27 (1987).

122. *Id.* at 414.

123. *Id.* at 414–15.

124. *Id.* at 415–16.

125. 769 F.2d 182 (4th Cir. 1985).

126. *United States v. J.B. Williams Co.*, 498 F.2d 414, 422–23 (2d Cir. 1974) (holding that Seventh Amendment provides "'right of jury trial when the United States sues . . . to collect a [statutory civil] penalty, even though the statute is silent on the right of jury trial'" (quoting 5 James Wm. Moore et al., *Moore's Federal Practice* ¶ 38.81[1] (2d ed. 1971))).

127. *Tull*, 481 U.S. at 425–26.

of the Seventh Amendment to the determination of the civil penalty, which it held was “not an essential function of a jury trial.”¹²⁸

When viewed in isolation, it may appear that *Tull* settles the issue of whether the Seventh Amendment applies to a financial penalty deemed civil, answering emphatically that it does not. For instance, the Tenth Circuit in *Visinaiz*¹²⁹ could make a two-step argument: (1) that it finds restitution to be a civil remedy and therefore outside the purview of the Sixth Amendment; and (2) that the Seventh Amendment does not apply because the Supreme Court in *Tull* held that the civil jury right only covers the liability phase of an action brought by the government.¹³⁰

However, when viewed in the context of the Court’s recent sentencing cases, it becomes clear that *Tull* is at least in tension with, if not outright violation of, the *Blakely* rule. To see why this is so, one need only turn to Justice Scalia’s dissent in *Tull*, which reads like the civil counterpart of his argument for a unified jury right that ultimately prevailed in *Blakely*.¹³¹ Justice Scalia in *Tull* argued that “the right to trial by jury on whether a civil penalty of unspecified amount is assessable also involves a right to trial by jury on what the amount should be,” pointing out that “[e]ven punitive damages are assessed by the jury.”¹³² Most important, he explicitly drew an analogy to the “role of the sentencing judge in a criminal proceeding.”¹³³ Of course, *at the time*, this analogy cut the other way, in that sentencing judges were then authorized to find “sentencing factors” without the aid of a jury; hence his careful move to distinguish sentencing from imposition of a civil penalty. However, the fact that the comparison came to mind suggests the direction in which Justice Scalia’s thinking was heading.¹³⁴

128. *Id.* at 427.

129. See *supra* Part I.B.1.

130. Instead of making this semicredible argument, the Tenth Circuit rather summarily affirmed the district court opinion in *Visinaiz*, which while extremely thoughtful in many respects, left much to be desired in its Seventh Amendment analysis. See *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005).

131. See *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004) (Scalia, J.) (“The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”).

132. *Tull*, 481 U.S. at 427–28 (Scalia, J., concurring in part and dissenting in part).

133. *Id.* at 428.

134. Of course, even after *Blakely*, judges may still find facts underlying a defendant’s sentence, so long as those facts do not push the sentence beyond a statutory maximum. In theory, a judge could impose a civil penalty up to the statutory maximum without violating the Seventh Amendment. But two considerations counsel against this analogy to the criminal sentencing process. First, *Blakely* redefines the term “statutory maximum” to mean the maximum sentence that may be imposed on the basis of facts found by the jury. See *supra* note 40 and accompanying text. Thus, the maximum penalty must be determined by reference to the jury’s finding of facts. Second, as Justice Scalia persuasively argued in *Tull*, criminal trials provide greater protections by virtue of a higher standard of proof. In Scalia’s words: “Having chosen to proceed in civil fashion, with the advantages

Even before Justice Scalia was prepared to challenge the constitutional validity of judicial factfinding at sentencing, he arguably took a first step down that path in *Tull* by rejecting the notion that the Seventh Amendment jury right could be held to cover the liability phase of a civil suit (in criminal law, the “guilt” phase), but not the remedy phase (in criminal law, “sentencing”). Regardless of what one thinks about the *Blakely* revolution, it is hard to deny that Justices Scalia and Stevens won the substantive debate—through *Jones*, *Apprendi*, *Blakely*, and *Booker*¹³⁵—over the viability of the elements/sentencing divide and the need for a jury process that refuses to distinguish between facts supporting conviction and punishment. Thus, even though *Tull* is factually distinguishable from *Blakely*—the latter deals only with the Sixth Amendment, not the Seventh—it would make little sense to continue to apply an outdated, and possibly unconstitutional, liability/penalty dichotomy to the Seventh Amendment.¹³⁶

All of this suggests that *Blakely* applies, however indirectly, to the Seventh Amendment. Part III now turns to the question of whether, and if so when, there may be exceptions to this newly invigorated civil jury right.

III. THE PUBLIC RIGHTS EXCEPTION TO THE SEVENTH AMENDMENT

Notwithstanding Part II’s argument that *Blakely* indirectly expands the scope of the civil jury right, there may be an escape hatch for judges fearing an administrative nightmare.¹³⁷ That escape hatch is the public rights doctrine—a concept from administrative law that governs when Congress can delegate adjudicatory authority to administrative agencies and “legislative courts” in a manner consistent with separation of powers and due process. Part III.A describes the basic evolution of the public

which that mode entails, it seems to me the Government must take the bitter with the sweet.” *Tull*, 481 U.S. at 428. That is, the notion that a jury must find the facts underlying a given penalty applies a fortiori in the civil context.

135. See *supra* Part I.A.

136. This Note’s rejection of *Tull* is supported by the Court’s own ambivalent response to it in *Feltner v. Columbia Pictures Television, Inc.*, in which it held that the Seventh Amendment required a jury trial for the determination of statutory damages under the Copyright Act of 1976. 523 U.S. 340, 355 (1998). Though the Court distinguished *Tull* by saying that the civil penalties in that case were analogous to criminal sentencing (back when analogies to sentencing cut against a jury trial rather than in favor of one), *id.*, the distinction was not particularly convincing. One commentator writes that *Feltner* “in some respects repudiates *Tull*,” and that “[t]he Court hinted that *Tull* might have been wrongly decided.” Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 Ohio St. L.J. 1125, 1139, 1140 n.92 (2003); see also Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 777 (1993) (“The Supreme Court had never before suggested that the Seventh Amendment right to jury trial could be bifurcated in terms of liability and remedy.”).

137. See *Apprendi v. New Jersey*, 530 U.S. 466, 557 (2000) (Breyer, J., dissenting) (“There are . . . far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury.”).

rights doctrine, emphasizing how it has expanded with the increasing needs of the regulatory state. Part III.B then traces the public rights cases that have addressed whether adjudicatory delegation conflicts with litigants' Seventh Amendment rights to a civil jury trial. This Part concludes that *Blakely's* effect on the Seventh Amendment—counseling, contra *Tull*, that it should apply to the penalty phase as well as the liability phase of a civil trial¹³⁸—puts pressure on courts to further expand the realm of public rights in order to create a haven from a cumbersome jury process.

A. *Removing Adjudication from Article III Courts*

It is generally uncontested that Congress may in some circumstances delegate the judicial power vested in Article III of the Constitution to administrative agencies and “legislative courts.”¹³⁹ The Supreme Court has justified adjudicatory delegation under the public rights doctrine, which broadly speaking seeks to identify spheres of activity in which the executive branch may engage in the “application of law to fact”¹⁴⁰ in a way that resembles adjudication. The phrase “public rights” originates from *Murray's Lessee v. Hoboken Land & Improvement Co.*, a case from 1855 that identified a sphere of matters that could be entrusted either to the executive or the judicial branch, depending on the desire of Congress.¹⁴¹ Originally, three main types of cases fell under the doctrine: claims against the United States, claims involving coercive governmental conduct outside the criminal law (such as customs disputes), and immigration issues.¹⁴² Territorial and military courts were justified under the doctrine, as well as the more current examples of the Court of Federal Claims, the Tax Court, and the Court of Veterans Appeals.¹⁴³

138. See *supra* notes 121–136 and accompanying text.

139. The term “legislative courts” is credited to Chief Justice Marshall in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 921 (1988) [hereinafter Fallon, *Legislative Courts*]; Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. Rev. 1037, 1040 n.6 (1999). The view that adjudicatory delegation is *per se* unconstitutional has become sufficiently rare that Professor Fallon refers to it, somewhat dismissively, as “article III literalism.” Fallon, *Legislative Courts*, *supra*, at 916–17 (“Today, the familiar roles of legislative courts and especially of administrative agencies render a return to ‘article III literalism’ virtually unthinkable.”).

140. See Fallon, *Legislative Courts*, *supra* note 139, at 919.

141. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (“[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States . . .”).

142. Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 370 (5th ed. 2003) [hereinafter Fallon et al., *Hart & Wechsler*]; see also Fallon, *Legislative Courts*, *supra* note 139, at 919 (noting first Congress's decision to commit veterans' benefits and customs issues to nonjudicial resolution).

143. Fallon et al., *Hart & Wechsler*, *supra* note 142, at 377–79.

1. *An Article III Challenge to Bankruptcy Courts.* — Surprisingly, it was not until 1982 that Congress's well-worn habit of assigning adjudicatory power to the executive branch hit a snag in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹⁴⁴ There, a constitutional challenge was brought to the Bankruptcy Act of 1978 on grounds that it empowered Article I bankruptcy courts to resolve both "traditional matters of bankruptcy" (that is, debtor-creditor disputes) and all legal controversies arising in or related to bankruptcy proceedings, including state law claims.¹⁴⁵ A plurality opinion authored by Justice Brennan argued that the power to adjudicate a state law dispute between two private parties could not be delegated to a non-Article III court under the public rights doctrine because "a matter of public rights must at a minimum arise 'between the government and others.'"¹⁴⁶ Conversely, the plurality stated, "'[T]he liability of one individual to another under the law as defined,' is a matter of private rights,"¹⁴⁷ and thus unsusceptible of administrative resolution.

2. *Administrative Adjudication Under a "Public Regulatory Scheme."* — However, what at first appeared to be a significant setback to administrative adjudication quickly turned out to be a mere bump in the road leading to an even more expansive public rights doctrine. First, in the 1985 case of *Thomas v. Union Carbide Agricultural Products Co.*, a pesticide manufacturer challenged the constitutionality of the binding arbitration provision of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁴⁸ It argued that FIFRA created a "private right" to compensation from so-called "follow-on registrants" (that is, later registrants of the same or a similar product who enjoy the benefit of the data submitted by the first registrant).¹⁴⁹ In rejecting the Article III claim, Justice O'Connor announced a bold new definition of public rights that openly embraced suits between private parties: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."¹⁵⁰ Thus, unlike in *Northern Pipeline*, the issue was no longer whether the government was a party, but rather whether the right in question was "closely integrated into a public regulatory scheme."

A year later, in *Commodity Futures Trading Commission v. Schor*, the Court introduced a balancing test that would weigh Article III values against Congress's reasons for assigning adjudicatory power to a non-Arti-

144. 458 U.S. 50 (1982) (plurality opinion).

145. *Id.* at 54, 85.

146. *Id.* at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

147. *Id.* at 69–70 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

148. 473 U.S. 568, 585 (1985).

149. *Id.*

150. *Id.* at 593–94.

cle III body.¹⁵¹ Congress had authorized the Commodity Futures Trading Commission (CFTC), an administrative agency, to hear claims arising under the Commodity Exchange Act. The CFTC then promulgated a rule¹⁵² allowing it to hear counterclaims arising out of the same transaction or occurrence that originally brought the case to the agency, meaning all manner of common law claims could fall under its purview.¹⁵³ Justice O'Connor, again writing for the majority, upheld the CFTC's rule even though she admitted that the counterclaim in question was a private right deriving from the common law.¹⁵⁴ Echoing the pragmatic tone in *Union Carbide*, she explained that resolution of the Article III challenge would depend on:

the extent to which the “essential attributes of judicial power” are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.¹⁵⁵

Thus, with the one-two punch of *Union Carbide* and *Schor*, the Court effectively overruled *Northern Pipeline*, replacing its formalistic public rights framework with an ad hoc balancing test that raised as many questions as it answered.¹⁵⁶ One of those questions was how an expansive public rights doctrine would interact with the Seventh Amendment right to a jury trial.

B. *The Civil Jury Right and Adjudicatory Delegation*

As the public rights doctrine has expanded to accommodate a growing administrative state, a Seventh Amendment problem has emerged: Even if adjudicatory delegation is permissible under separation of powers and the nondelegation doctrine, does it nevertheless violate litigants' rights to a civil jury trial?

1. *The Civil Jury Right and “Statutory Proceedings.”* — The Supreme Court first addressed this question in *NLRB v. Jones & Laughlin Steel Corp.*,

151. 478 U.S. 833, 851 (1986).

152. 17 C.F.R. § 12.23(b)(2) (1983), reprinted as amended in 17 C.F.R. § 12.19 (2006).

153. See *Schor*, 478 U.S. at 836–41.

154. *Id.* at 853 (“The counterclaim asserted in this litigation is a ‘private’ right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the ‘core’ of matters normally reserved to Article III courts.” (citation omitted)).

155. *Id.* at 851 (citing *Union Carbide*, 473 U.S. at 587, 589–93; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84–86 (1982) (plurality opinion)).

156. As Professor Sward points out, one question is whether the *Schor* balancing test replaces the public rights doctrine as described in *Union Carbide*, or simply kicks in when nonpublic rights are at issue. See Sward, *supra* note 139, at 1071–72; see also Fallon, *Legislative Courts*, *supra* note 139, at 917 (“The chief attraction of the Court’s form of balancing seems to be that it avoids almost all of the most basic questions, or at least appears to do so. Uncertainty continues rife. Prediction is often impossible.”).

in which it held that the Seventh Amendment did not apply to the NLRB's order of payment of lost wages because the dispute was not a "suit at common law."¹⁵⁷ Rather, the Court determined that "[t]he proceeding is one unknown to the common law. It is a statutory proceeding."¹⁵⁸ Years later, in *Curtis v. Loether*, the Court tried to rein in its apparent holding that any statutory right would be unbound by the Seventh Amendment, asking instead whether the statutory right in question was "of the sort typically enforced in an action at law."¹⁵⁹ However, notwithstanding this substantial calibration, the Court upheld *Jones & Laughlin's* liberal interpretation of adjudicatory delegation: "*Jones & Laughlin* . . . stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme."¹⁶⁰

Implicit in *Curtis's* repackaging of the *Jones & Laughlin* position on delegation was the idea that the Seventh Amendment issue could be subordinated to the larger Article III question: If the dispute had been appropriately delegated to an agency, then the Seventh Amendment did not apply. Thus, the question of whether or not there was a civil jury right depended not on the nature of the claim, but rather on the tribunal to which Congress had assigned it, a position the Court would state explicitly in 1977 in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*.¹⁶¹

2. *Adjudicatory Delegation Reaches Its High-Water Mark.* — *Atlas Roofing* represents the high-water mark of the Court's acquiescence to congressional dilution of the civil jury right through adjudicatory delegation. The case involved a Seventh Amendment challenge to civil penalties imposed by the Occupational Safety and Health Review Commission.¹⁶² Showing extreme deference to Congress, the Court brought the jury question "under the rubric of the public rights doctrine,"¹⁶³ holding that if the right in question was a public right susceptible of administrative

157. 301 U.S. 1, 48 (1937). The Seventh Amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved." U.S. Const. amend. VII. Much of what makes it "one of the most difficult constitutional provisions to apply," Friedenthal et al., *supra* note 64, at 499, is the vexed question of what constitutes a suit at common law.

158. *Jones & Laughlin*, 301 U.S. at 48.

159. 415 U.S. 189, 195 (1974); see also *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J.) ("By common law, [the Framers] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered" (emphasis omitted)).

160. *Curtis*, 415 U.S. at 194 (footnote omitted).

161. 430 U.S. 442, 460-61 (1977).

162. *Id.* at 447-49.

163. Sward, *supra* note 139, at 1092.

adjudication, then the Seventh Amendment need not come into play.¹⁶⁴ The Court further clarified that “[t]his is the case *even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.*”¹⁶⁵ Thus, the exact same claim may or may not require a jury trial depending on where Congress assigned it.

Atlas Roofing seemed to put the matter to rest. Indeed, nearly ten years after the decision, one commentator in a comprehensive historical overview of the public rights doctrine ventured that *Atlas Roofing* “settled definitively the question of the application of the seventh amendment’s jury trial provisions to administrative actions.”¹⁶⁶ However, there was an inherent circularity in the case: If the jury right depends on the forum, but the forum depends on the nature of the claim (that is, whether it is a public right), then does not the jury right in fact boil down to the nature of the claim? It was likely this confusion that prompted the Court to take another bite at the apple in 1989 in *Granfinanciera v. Nordberg*.¹⁶⁷

3. *The Bankruptcy Question Returns.* — *Granfinanciera* is notable not only because it is the latest Supreme Court case on the Seventh Amendment’s applicability to administrative adjudication, but also because it is the only case in which the Court found such adjudication to have violated the Seventh Amendment.¹⁶⁸ The issue was whether a person being sued by a bankruptcy trustee for an alleged fraudulent money transfer was entitled to a jury trial.¹⁶⁹ Congress, in the 1984 Amendments to the Bankruptcy Act, had reclassified fraudulent conveyance actions as “core proceedings” of the Act,¹⁷⁰ which would seem to place them in the category of public rights.¹⁷¹ However, notwithstanding this reclassification, the Court held that it was a “purely taxonomic change” that “simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations.”¹⁷² In other words, the fraudulent conveyance action was a common law “private right”—such as an action for breach of contract or trespass—the adjudi-

164. *Atlas Roofing*, 430 U.S. at 455.

165. *Id.* (emphasis added).

166. Gordon G. Young, Public Rights and the Federal Judicial Power: From *Murray’s Lessee* Through *Crowell* to *Schor*, 35 *Buff. L. Rev.* 765, 845 (1986).

167. 492 U.S. 33 (1989).

168. See Friedenthal et al., *supra* note 64, at 518 (noting that Court has spoken on four occasions as to whether adjudicatory delegation violated Seventh Amendment, and upheld statutory enactment against Seventh Amendment challenge in three of those cases).

169. *Granfinanciera*, 492 U.S. at 36.

170. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 340 (codified as amended at 28 U.S.C. § 157(b)(2)(H) (2000)).

171. Recall the Court’s definition in *Union Carbide* of a public right as one that is “closely integrated into a public regulatory scheme.” 473 U.S. 568, 594 (1985). A “core proceeding” of the federal bankruptcy system would seem, at least superficially, to satisfy that criterion.

172. *Granfinanciera*, 492 U.S. at 60–61.

cation of which could not be removed from Article III or state courts solely on Congress's say-so.¹⁷³ Thus, the bankruptcy court's denial of a jury trial on the fraudulent conveyance claim violated the Seventh Amendment.¹⁷⁴

Granfinanciera achieved two things. First, it changed the analysis from *Atlas Roofing's* "location of the claim" template to one more oriented toward the substance of the claim. That is, it reduced the Seventh Amendment question to a public rights formula: If the claim is legal and a public right, there is no jury right; but if it is legal and a private right, there is.¹⁷⁵ Second, it reflected a new skepticism toward Congress's ability to transform a common law cause of action into a public right simply by formalistically integrating it into a federal regulatory scheme.¹⁷⁶ In doing so, it expressed a serious concern about administrative impingement on the Seventh Amendment, a concern that was basically absent from *Jones & Laughlin*, *Curtis*, and *Atlas Roofing*.¹⁷⁷

The Court's move in *Granfinanciera* may well have been salutary, but when read in light of the public rights jurisprudence, it creates a muddle. As shown in Part III.A, shortly before its decision to reject the "core proceeding" label, the Court had moved in the opposite direction, significantly expanding its definition of what constitutes a public right. While it is beyond the scope of this Note to resolve the numerous conceptual difficulties underlying the Court's public rights doctrine,¹⁷⁸ this one problem

173. See *id.* at 60 ("The decisive point is that in neither the 1978 [Bankruptcy] Act nor the 1984 Amendments did Congress 'creat[e] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem." (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461 (1977))).

174. Oddly, the Court "le[ft] open the question whether the jury trial may be conducted in a bankruptcy court before a non-Article III bankruptcy judge," or whether the finding of a Seventh Amendment violation meant that the claim could only be adjudicated by an Article III court. See Fallon et al., *Hart & Wechsler*, *supra* note 142, at 399. Fallon et al. point out that, for five years following *Granfinanciera*, "the lower courts struggled inconclusively with both statutory and constitutional questions concerning the authority of bankruptcy courts to conduct jury trials." *Id.* at 399 n.6. Congress eventually resolved the issue with the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 112, 108 Stat. 4106, 4117 (codified at 28 U.S.C. § 157(e)), which provides: "If the right to a jury trial applies in a proceeding that may be heard . . . by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties."

175. *Granfinanciera*, 492 U.S. at 42 n.4.

176. Sward, *supra* note 139, at 1095 (noting that *Granfinanciera* Court found fraudulent conveyance claim to be private right in part because it "had passed into the bankruptcy context virtually unaltered from its common law roots").

177. *Granfinanciera*, 492 U.S. at 52 (declaring that to allow Congress's attempted reclassification would "permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies . . . all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears" (citing *Atlas Roofing*, 430 U.S. at 457-58)).

178. For a rather withering critique of the Court's public rights jurisprudence, see Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-*

is especially nagging: How could the Court, after allowing administrative adjudication of a “seemingly” private right claim in *Union Carbide* and a concededly private right claim in *Schor*, nevertheless refuse to allow Article I adjudication of the private right claim in *Granfinanciera*? The most compelling explanation is that there is something unique about bankruptcy that ignited the Court’s fears. After all, *Granfinanciera* and *Northern Pipeline* are the two exceptions in a long body of opinions reaching back to *Murray’s Lessee* that are consistently—indeed increasingly—solicitous of adjudicatory delegation, and both of these exceptions dealt with common law claims arising out of bankruptcy proceedings.¹⁷⁹

Still, regardless of these local inconsistencies, the black letter law that emerges from the Court’s public rights jurisprudence is surprisingly clear (if difficult to apply). First, *Granfinanciera* holds that if a dispute concerns a legal claim and involves public rights, then the Seventh Amendment does not require a jury trial. Second, *Union Carbide* and *Schor* hold that a dispute involves public rights if (1) it is “closely integrated into a public regulatory scheme,”¹⁸⁰ or (2) Congress’s reasons for assigning the issue to a non-Article III body outweigh any harm to Article III values.

The public rights doctrine is a potentially powerful antidote to *Blakely*’s effect on the judicial imposition of financial penalties. As we saw in Part I, the sentencing cases create an incentive for prosecutors and judges to characterize such financial penalties as civil, given that those cases explicitly apply only to the Sixth Amendment’s criminal jury right. Part II then argued that, even if penalties such as restitution and forfeiture are civil, the Seventh Amendment nevertheless requires that the facts underlying them be proven to a jury. Thus, *Blakely* has in turn put pressure on courts to expand the public rights doctrine elaborated in Part III, because a flexible application of that doctrine would empower judges to rein in the expansive role of the jury in a post-*Blakely* world. Part IV now puts this highly abstract line of jurisprudence into effect. It shows how, in the antitrust field, the Court’s modern public rights doctrine can be used to exempt financial penalties from the Seventh Amendment, even though, as this Note concluded in Part II, *Blakely* counsels otherwise.

Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407, 410 (1995) (charging that public rights exception to Seventh Amendment is premised on “convoluted, unpredictable, and virtually Byzantine doctrinal contortions”). For a discussion of Redish & La Fave’s critique, as well as others’ Seventh Amendment concerns, see *infra* Part IV.B.

179. Professor Sward also notes that a fear of delegating too much judicial power to bankruptcy courts may explain the result in *Granfinanciera* and *Northern Pipeline*, but adds two more hypotheses: (1) that the Seventh Amendment and Article III issues are different, and the Court is more solicitous of the former; and (2) that the objecting party was a voluntary party before the non-Article III court in *Schor*, but not in *Granfinanciera* and *Northern Pipeline*. See Sward, *supra* note 139, at 1096–97.

180. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

IV. A PUBLIC RIGHTS RESTRICTION ON *BLAKELY*

How might the public rights exception to the Seventh Amendment work in practice to justify judicial factfinding for financial penalties in a post-*Blakely* environment? Part IV uses the framework established by Parts II and III to show how the Seventh Amendment requires a jury on the question of financial penalties, and how the public rights doctrine then supports an exception to that requirement. Part IV.A.1 analyzes the regulatory scheme underlying the antitrust laws as particularly suitable to public rights analysis under the Supreme Court's precedents and on policy grounds. Part IV.A.2 asks whether an Article III court can apply the public rights doctrine to itself, as it were, rather than using it to justify congressional delegation of adjudicatory power to an agency or legislative court. Finally, Part IV.B addresses the case against an expansive public rights doctrine, highlighting some of its dangers while ultimately concluding that they are containable.

A. *Statutory Rights or Common Law Rights in Statutory Disguise?*

1. *The Regulatory Scheme of Antitrust Law.* — Suppose the Justice Department brings parallel civil and criminal charges against a powerful insurance corporation and its top executives, alleging a bid rigging scheme in violation of section 1 of the Sherman Act, plus assorted collateral offenses, such as mail fraud, wire fraud, and obstruction of justice.¹⁸¹ The executives are convicted, sentenced to a year in prison,¹⁸² and slapped with substantial fines.¹⁸³ The corporation is fined \$126 million,¹⁸⁴ significantly above the statutory maximum of \$100 million authorized by the Sherman Act,¹⁸⁵ but nonetheless justified by the “alternative fine” provision, which allows for fines of “the greater of twice the gross gain or twice the gross loss”¹⁸⁶ even when that number exceeds the \$100 million maximum.

181. Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. [Violators] . . . shall be deemed guilty of a felony [punishable by fine and/or imprisonment].” 15 U.S.C. § 1 (2000).

182. In April 2002, A. Alfred Taubman, the 78-year-old ex-chairman of the prestigious auction house Sotheby's, was sentenced to a year and a day in prison for a price-fixing scheme with its rival Christie's. See Carol Vogel & Ralph Blumenthal, *Ex-Chairman of Sotheby's Gets Jail Time*, N.Y. Times, Apr. 23, 2002, at B1.

183. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 raised the maximum individual fine from \$350,000 to \$1 million, and the maximum corporate fine from \$10 million to \$100 million. Pub. L. No. 108-237, § 215(a), 118 Stat. 661, 668 (to be codified at 15 U.S.C. § 1).

184. In November 2004, the insurance giant AIG paid the SEC and DOJ a total of \$126 million in fines and restitution to settle an investigation into alleged bid rigging practices. Lynnley Browning & Joseph B. Treaster, *A.I.G. and U.S. Complete Big Settlement Agreement*, N.Y. Times, Dec. 1, 2004, at C2.

185. Antitrust Criminal Penalty Enhancement and Reform Act § 215(a).

186. 18 U.S.C. § 3571(d) (2000).

In such a case, prosecutors will have an incentive to characterize the “alternative fine” penalty as civil, designed primarily to compensate “victims” (however loosely defined) for their losses, so as to avoid a Sixth Amendment jury on the factually complex question of the gain/loss associated with the bid rigging scheme.¹⁸⁷ Suppose they succeed in doing so; or alternatively, suppose the court imposes restitution in a jurisdiction that considers restitution civil. Would the defendant corporation have the right to a jury trial on the financial penalty under the Seventh Amendment?

Though it is a close call,¹⁸⁸ this Note argues yes. As we saw in Part II, the best way to assert that the Seventh Amendment does not apply to civil penalties is to rely on *United States v. Tull*, which held that the jury right in a civil suit by the government against a private party extends only to the liability phase of the trial, not the penalty phase.¹⁸⁹ However, as this Note argued above, the *Tull* rule, already shaky before the sentencing revolution, makes no sense after *Blakely* rejected a bifurcated jury process on the criminal side.¹⁹⁰ Thus, so far, our prosecutors have succeeded only in showing that the jury may apply a preponderance standard to the facts underlying the financial penalty,¹⁹¹ not that it should be taken from a jury altogether.

But the inquiry does not stop there; the public rights doctrine may provide support for withdrawing the financial penalty from the jury entirely. *Union Carbide* defines a public right as one “closely integrated into a public regulatory scheme.”¹⁹² The antitrust laws promulgated under the Sherman Act, Clayton Act, and Federal Trade Commission Act arguably constitute such a scheme, because the purpose of these statutes was the “regulation of ordinary business corporations . . . in an area of perva-

187. For a discussion of why prosecutors have an incentive to avoid a criminal jury, see *supra* note 87.

188. Indeed, there are other regulatory regimes to which it is much easier to apply the public rights exception to the Seventh Amendment. For instance, the federal securities laws, much like the FIFRA regime at issue in *Union Carbide*, impose extensive filing requirements as a condition of participation in the public securities markets. See, e.g., SEC Regulation 14A, 17 C.F.R. §§ 240.14a-1 to 14a-15 (2006) (mandating disclosure obligations of securities registrants under proxy system pursuant to section 14(a) of Securities Exchange Act of 1934). Moreover, the courts have explicitly discussed the securities laws and the SEC’s role in enforcing them as a matter of public rights. See, e.g., *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (“When the Commission sues to enforce the securities laws, it vindicates public rights and furthers the public interest.”). By contrast, the courts do not seem to have addressed the issue of whether the public rights doctrine applies to the antitrust laws.

189. See *supra* notes 121–130 and accompanying text.

190. See *supra* notes 131–136 and accompanying text.

191. Cf. *United States v. Tull*, 481 U.S. 412, 428 (1987) (Scalia, J., dissenting) (arguing that “the proper analogue to a civil-fine action is the common-law action for debt,” and that therefore “the Government need only prove liability by a preponderance of the evidence”).

192. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

sive and intense public interest: fair competition.”¹⁹³ Even a private treble damages claim under section 15 of the Sherman Act¹⁹⁴ could be conceived, much like the claim for compensation from a follow-on registrant under FIFRA in *Union Carbide*, as one closely integrated into the regulatory scheme: “Even early in this century, . . . private rights of action against private parties were conferred legislatively, largely for public purposes.”¹⁹⁵ Given that the Court found the public rights doctrine applies to such a private suit, it should apply a fortiori where, as in our hypothetical, the government is a party.¹⁹⁶

The notion of allowing the judge to determine the antitrust penalty makes further sense on policy grounds, given the complexity of the determination. Courts have taken a skeptical approach to a complexity exception to the Seventh Amendment,¹⁹⁷ but have acknowledged that “there may be some instances in which a case is so complex that the use of a jury would violate Fifth Amendment Due Process rights.”¹⁹⁸ At least one court has so held, in an antitrust case at that.¹⁹⁹ Regardless, the point is not to justify a broad complexity exception to the civil jury right, but simply to point out that complexity considerations provide some of the underlying rationale for application of the public rights exception.

Nevertheless, the defendant, unhappy that the prosecutor will only have to prove “the greater of twice the gross gain or twice the gross loss”²⁰⁰ to a “lone employee of the state” rather than “twelve of his equals and neighbors,”²⁰¹ might bring an objection based on *Granfinanciera v. Nordberg*.²⁰² There, the Court held that a fraudulent conveyance claim could not be adjudicated by a bankruptcy court on public rights grounds because Congress had made a mere “taxonomic change” by reclassifying

193. Young, *supra* note 166, at 821.

194. Sherman Act of 1890, 15 U.S.C. § 15(a) (2000) (providing that treble actual damages may be awarded to successful private plaintiff); see also Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (permitting either issuer or holder of security to sue to recover short-swing profits).

195. Young, *supra* note 166, at 864.

196. To be clear, the public rights doctrine would *not* apply to a criminal prosecution. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.24 (1982) (“[T]he public-rights doctrine does not extend to any criminal matters, although the government is a proper party.” (citation omitted)). Rather, it would apply to an allegedly civil penalty being assessed pursuant to a criminal case.

197. See Friedenthal et al., *supra* note 64, at 516 (discussing Supreme Court’s broad interpretation of Seventh Amendment and its narrow complexity exception).

198. *Id.*

199. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1088–90 (3d Cir. 1980), *rev’d on other grounds*, 475 U.S. 574 (1986); cf. Sward, *supra* note 139, at 1109 (arguing virtues of juries are less significant when courts or agencies adjudicate complex regulatory matters).

200. 18 U.S.C. § 3571(d) (2000).

201. *Blakely v. Washington*, 542 U.S. 296, 313–14 (2004) (quoting 4 William Blackstone, *Commentaries* *350).

202. 492 U.S. 33 (1989).

it as a “core proceeding.”²⁰³ Superficially at least, this precedent seems to carry some weight in the antitrust environment. After all, for many proponents of the Sherman Act, its purpose was not to create an unprecedented statutory right, but rather “to ‘federalize’ the common law of trade restraints.”²⁰⁴ Indeed, Senator Sherman himself stated during congressional debate that the Act “does not announce a new principle of law, but applies old and well recognized principles of the common law.”²⁰⁵

On the other hand, notwithstanding Senator Sherman’s assurances to his colleagues,²⁰⁶ the Sherman Act was passed in large part to deal with “the *inadequacy* of th[e] common law safeguard,”²⁰⁷ not merely to codify it. Conversely, the *Granfinanciera* Court found the fraudulent conveyance claim to be a private right in part because it “had passed into the bankruptcy context virtually unaltered from its common law roots.”²⁰⁸ Despite the Sherman Act’s historical origins in the common law, it would be hard to make the case that the antitrust regime we know today—including an extensive administrative apparatus centered at the Federal Trade Commission and an entire division of the Justice Department empowered to bring civil and criminal suits²⁰⁹—is “virtually unaltered from its common law roots.”

This Note now turns to the question of whether, even if the antitrust regime is susceptible of public rights analysis, it would make sense to apply the exception *within* an Article III court, rather than applying it to adjudication in a non-Article III body.

2. *Can the Public Rights Doctrine Apply Within Article III?* — In one specific sense, this Note’s application of the public rights doctrine marks a departure from traditional practice. Traditionally, courts have used the doctrine to evaluate the appropriateness of a congressional decision to delegate adjudication to an agency or legislative court and in the process deny litigants the protection of the Seventh Amendment. As applied to post-*Blakely* financial penalties, however, the doctrine is being asked to justify an exception to the Seventh Amendment *within* an Article III court; there is no delegation at all.²¹⁰ As one critic of the public rights

203. See *supra* notes 169–174 and accompanying text.

204. Ernest Gellhorn et al., *Antitrust Law and Economics* 1 (5th ed. 2004).

205. 21 Cong. Rec. 2456, 2456 (1890).

206. See Gellhorn et al., *supra* note 204, at 23 (suggesting that Senator Sherman wanted to assure other Senators that Act would not announce radical break with common law prohibition against restraints on trade).

207. *Id.* at 17 (emphasis added).

208. Sward, *supra* note 139, at 1095 (citation omitted).

209. See generally Gellhorn et al., *supra* note 204, at 17–56 (outlining general provisions of Sherman Act and its subsequent enforcement by Justice Department and interpretation by courts).

210. As a corollary, a judge, rather than Congress, would make the decision to deny the litigant a right to a jury trial on the penalties question. Conversely, in both *Atlas Roofing* and *Granfinanciera*, the Seventh Amendment decision followed from the act of delegation, which of course was a congressional act.

doctrine puts it, "Given that the Court in both *Atlas Roofing* and *Jones & Laughlin* emphasized the administrative nature of the forum, application of the public rights analysis to determine the scope of the Seventh Amendment right in Article III courts would represent a substantial extension."²¹¹

Less turns on this distinction than meets the eye. First, as a matter of logic, denial of the jury right within an Article III court is less prejudicial to a litigant than delegation of the issue to an Article I tribunal with which a jury trial is incompatible. After all, if the claim in question is "so closely integrated into a public regulatory scheme"²¹² as to be susceptible of adjudication by a non-Article III judge (who lacks the constitutional independence and, in many cases, the legal acumen associated with federal judges), then it seems a decidedly lesser step to curtail the operation of the Seventh Amendment while still providing the protections of a highly qualified, professionally independent judge.

Second, and perhaps more important, the Supreme Court has implicitly sanctioned this type of restriction. In 1996 in *Markman v. Westview Instruments, Inc.*, the Court affirmed an en banc decision by the Federal Circuit holding that interpretation of the terms of a patent claim was a matter exclusively for the court, and that this conclusion did not violate the Seventh Amendment.²¹³ One commentator has argued that the Court's decision was essentially based on an (unspoken) public rights rationale: "The Court's lack of concern for preserving the jury trial right in *Markman* . . . may be related to the fact that the patent law area appears to share certain characteristics with some of Congress's other statutory schemes involving public rights."²¹⁴ Thus, one reading of the *Markman* decision is that it sanctioned use of the public rights theory to justify a

211. Redish & La Fave, *supra* note 178, at 440. For further discussion of Redish and La Fave's concerns, see *infra* Part IV.B, and also compare Friedenthal et al., *supra* note 64, at 520–21, who note that the Court has not faced a situation in which "Congress expresses a preference for nonjury trial but provides for the remedies to be enforced under the normal Article III jurisdiction of the federal district courts," but suggest that "the cases do not foreclose the possibility that Congress" can do so. Of course, Friedenthal et al.'s hypothetical involves a *congressional* preference for a nonjury trial, not a *judicial* one. See *supra* note 210.

212. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

213. 517 U.S. 370, 372, 384 (1996).

214. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 *Geo. Wash. L. Rev.* 183, 231 (2000); see also *In re Lockwood*, 50 F.3d 966, 981, 983 (Fed. Cir. 1995) (Nies, J., dissenting) (asserting that patent rights are public rights and that "[a] constitutional jury right to determine validity of a patent does not attach to this public grant"). But see Moses, *supra*, at 233 n.347 (arguing that patent rights are probably not public rights because "the rights granted in the patent are to a private patent holder" and because "the jury trial right in a patent case derives from common law").

restriction on the Seventh Amendment within an Article III court, rather than as a means of delegation to a legislative one.²¹⁵

Finally, in *Crowell v. Benson*, the Court's lead case on agency factfinding, the Court upheld the constitutionality of such factfinding on grounds that the agency functioned, much like a jury, as an adjunct of the Article III court.²¹⁶ Under that theory, the Court implicitly approved of a restriction on the jury process that nonetheless takes place under the purview of Article III.²¹⁷ Thus, both logic and the Court's precedents suggest that the notion of applying the public rights doctrine to Article III courts is constitutionally sound. Part IV.B now asks whether this application, even if constitutional, is desirable as a matter of policy.

B. *The Case Against Public Rights*

A reasonable argument can be made that the *Union Carbide/Schor* line of public rights jurisprudence has simply gone too far, threatening to become, in the Seventh Amendment sphere in particular, the "exception that . . . threatens to swallow the rule."²¹⁸ Indeed, for critics of the doctrine, this Note's claim that it could invade the Article III courts might serve as a case in point of its dangerous malleability.

Martin Redish and Daniel La Fave argue that the Court's "cryptic and often confusing" public rights jurisprudence rests on little more than "the theoretically illegitimate principle of unadorned functionalism."²¹⁹ The authors raise numerous objections to the doctrine's effect on the Seventh Amendment, but one is particularly relevant to the antitrust hypothetical in Part IV.A: that the public rights doctrine should apply, if ever, only where the government is providing a benefit, not imposing a burden.²²⁰ The idea is that the public rights exception to the Seventh

215. In fact, one commentator reads *Granfinanciera*, *Crowell*, and *Murray's Lessee* to support such a restriction within an Article III court. See Carrington, *supra* note 9, at 78 ("Congress also has constitutional power to authorize the Executive to bring a civil action *in a federal court* to enforce a statutory right *without trial by jury* where the right can be characterized as a 'public right.'" (emphasis added) (citations omitted)).

216. 285 U.S. 22, 51–53 (1932).

217. See Fallon et al., Hart & Wechsler, *supra* note 142, at 379–80 ("[A]t least since *Crowell v. Benson*, agency adjudication has frequently been justified *under* Article III on the theory that judicial review of the agency's decisionmaking retains 'the essential elements' of the judicial power in an Article III court."). But see Young, *supra* note 166, at 780 (arguing that fact that Seventh Amendment "rules out a conclusion that article III judges must find all facts in all federal adjudications" does not "compel[] the inference that other institutions not expressly recognized by the Constitution are to have power resembling that of juries").

218. Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 *Hastings Const. L.Q.* 1013, 1014 (1994) ("Under [the public rights] doctrine, a potentially huge body of civil disputes, including virtually all administrative law cases, are exempt from the Seventh Amendment.").

219. Redish & La Fave, *supra* note 178, at 411.

220. *Id.* at 437–42.

Amendment is premised on a “greater-includes-the-lesser” rule: Since the government did not have to supply the benefit in question in the first place, it can take the lesser step of conditioning that benefit on waiver of the civil jury right. They conclude that “the rule is referred to as the public ‘rights’ doctrine, rather than the public ‘obligations’ doctrine”²²¹ because it is intended to refer only to the provision of public benefits—say, food stamps or federal employment.

While the argument may have some validity, it likely takes too cramped a view of regulation in the public interest. As Professor Young points out in his historical study of the public rights doctrine, “Congressional approval of agency fact-finding expanded along with its view of the public interest.”²²² The very creation of the Federal Trade Commission was motivated by a desire to regulate “an area of pervasive and intense public interest: fair competition.”²²³ Of course, the nation’s antitrust laws do not provide a “benefit” to individual parties in the sense that Redish and La Fave seem to require; instead, they provide the generally enjoyed benefit of a right to a competitive marketplace. Thus, even though enforcement of the antitrust laws (or the securities laws, or environmental laws, etc.) may in an individual case involve the imposition of an obligation (not to engage in price fixing or bid rigging), the overall regime operates to provide the benefit of competition. As Justice Scalia notes in the context of federal takings law, “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”²²⁴

Another objection to the public rights doctrine is that it has encouraged “continued growth in the use of administrative agencies as part of the law enforcement establishment.”²²⁵ Indeed, this danger is implicit in the very argument of this Note: namely, that the pressure to characterize a financial penalty as civil rather than criminal in turn creates pressure to expand what is deemed a public rather than private right. As Professor Mann points out, “By facilitating the use of civil money sanctions, [the public rights doctrine] further legitimate[s] the shift of sanctions from the criminal into the civil paradigm, a setting which permit[s] the imposition of a penalty with an efficiency not attainable in the thickets of criminal procedure.”²²⁶ The counterargument to this objection is that a requirement of criminal-type procedure in every vaguely punitive action by the government would result in “ossification”: Much unlawful activity such as organized crime or sophisticated securities fraud would go

221. *Id.* at 438.

222. Young, *supra* note 166, at 821.

223. *Id.*

224. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992).

225. Mann, *supra* note 87, at 1836.

226. *Id.*

unchecked if the government's only means of recourse were the criminal system.²²⁷

Finally, one might think that it is precisely in public rights cases—at least where the government is a plaintiff in a civil suit—that a jury right would be most appropriate. As Professor Sward notes, “When the government sues a private citizen, there is already considerable inequality between the parties, just as there is in a criminal case.”²²⁸ This inequality is more of a concern in cases of true delegation to agencies, where “the litigation is conducted in a court whose judges are potentially under the control of the very governmental body that created the rights and duties.”²²⁹ Still, even in an Article III setting, the public rights doctrine could leave the defendant boxed in by two branches of the government—the judge and the prosecutor—with no recourse to “the unanimous suffrage of twelve of his equals and neighbors.”²³⁰

It is not the aim of this Note to resolve any and all objections to the Court's public rights jurisprudence. It may even be true that the edifice rests on “unadorned functionalism,” as Redish and La Fave contend;²³¹ indeed, some commentators continue to argue that the entire administrative state is unconstitutional.²³² Nevertheless, the law as it stands does seem to justify exempting certain financial penalties from the civil jury right, a right that, ironically, has been expanded by *Blakely*. Whether *Blakely* counsels a narrowing of the public rights doctrine itself is a question for another Note; this one has been content merely to show that it applies.

CONCLUSION

This Note offers a constitutionally rigorous approach to the complex interplay between the Sixth and Seventh Amendments in a post-*Blakely* world. Taking as its starting point the often conclusory assertion that *Blakely* does not apply to financial penalties such as restitution or forfeiture because they are civil in nature, the Note argues that the Seventh Amendment's civil jury right nevertheless applies to such penalties. It then goes on to show that many penalties assessed in both criminal and civil circumstances may be subject to the public rights exception to the Seventh Amendment, thus providing a constitutionally sound basis for imposition of such penalties by a judge, not a jury.

227. For a study of rulemaking ossification as a consequence of increased procedural burdens in administrative law, see, e.g., Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59 (1995).

228. Sward, *supra* note 139, at 1076.

229. *Id.*

230. 4 William Blackstone, Commentaries *350.

231. Redish & La Fave, *supra* note 178, at 411.

232. See, e.g., Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1249 (1994) (“The actual structure and operation of the national government today has virtually nothing to do with the Constitution.”).

This two-step civil jury theory may strike some readers as schizophrenic: On one hand, the civil jury right expands; on the other, it contracts. However, this bifurcation reflects, in Justice Breyer's words, an "administrative need for procedural compromise,"²³³ rather than sheer conceptual confusion. While the compromise is unlikely to please either side in the debate over the scope of the jury right, it comes closest to meeting the requirements of the Constitution as interpreted in the recent sentencing cases, as well as the massive administrative task posed by the modern regulatory state.

233. *Apprendi v. New Jersey*, 530 U.S. 466, 556–57 (2000) (Breyer, J., dissenting) (emphasis omitted); see also Benjamin N. Cardozo, *The Paradoxes of Legal Science* 61–63 (1928) (endorsing view that in reconciling legal doctrine with changing circumstances, appropriate response is not logical synthesis, but compromise).