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Right to Jury Trial under Section 5(1) of the Federal Trade Commission Act--Building Iron Power in the Seventh Amendment

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Note: Right to Jury Trial Under Section 5(1) of the Federal Trade Commission Act—Building "Iron Power" in the Seventh Amendment

Millions of American television viewers have watched Ted Mack claim that Geritol, a high potency tonic with twice the iron in a pound of calves' liver, could cure iron deficiency anemia or tired blood and make consumers feel stronger fast. Recently, after more than ten years of administrative proceedings before the Federal Trade Commission (FTC), the Government brought suit in federal district court against J.B. Williams Company and Parkinson Advertising Agency, alleging that they had falsely represented that their products, Geritol and FemIron, could relieve tiredness and build "iron power" in ailing blood cells.¹ In United States v. J.B. Williams Co.,² the Government was awarded $812,000 in civil penalties under section 5(1) of the Federal Trade Commission Act,³ but on appeal,⁴ the Court of Appeals for the Second Circuit reversed the district court's holding that the defendants were not entitled to a jury trial under the seventh amendment. Both the majority opinion of Judge Friendly and the forceful dissent of Judge Oakes⁵ raised significant issues regarding the compatibility of jury trials with effective regulation by administrative agencies. Prior to Williams, no court had squarely faced the jury trial issue under section 5(1). In United States v. Hindman,⁶ a district court in the Third Circuit had held that the defendant had a right to a civil jury trial when there was a factual dispute over the violation of an FTC cease and desist order, but the court did not explain its departure from the long line of cases denying such a right under similar circumstances.⁷ In United States v. Vulcanized Rubber & Plastics Co.,⁸

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¹ The controversy began in 1962 with the issuance of a complaint relating to newspaper and television advertising for Geritol. See text accompanying notes 33-41 infra.
⁵ Id. at 439.
however, the Court of Appeals for the Third Circuit indicated dissatisfaction with *Hindman*, suggesting that jury trials in proceedings to enforce cease and desist orders were incompatible with effective regulation under the FTC Act.9

This Note challenges the conventional approaches used to evaluate a defendant's right to a jury trial in actions to enforce FTC administrative orders. The analysis begins with a description of the process by which regulation of an unfair or deceptive trade practice under section 5(a) of the FTC Act10 develops from exhortation to official sanction in the form of a cease and desist order, and summarizes this development in *Williams*. As a first step in striking a balance between administrative effectiveness and fairness to the defendant in an enforcement action, Part II evaluates the criminal nature of section 5(l) proceedings and the need for sixth amendment protections under the Constitution, but it concludes that the statute is only quasi-criminal and not likely to support the right to a criminal jury trial. Part III of the Note evaluates a defendant's rights under the seventh amendment by using the traditional method of determining whether jury trials were available in analogous actions under the common law. Since this approach yields no right to a civil jury trial and is incapable of reconciling effective administrative enforcement with fairness to the defendant, Part IV proposes a functional approach to seventh amendment analysis derived from a recent Supreme Court decision and suggests two standards by which to separate court from jury issues in FTC enforcement proceedings.

I. REGULATION OF UNFAIR AND DECEPTIVE PRACTICES UNDER THE FTC ACT

A. THE STATUTORY FRAMEWORK

Passage of the Federal Trade Commission Act in 1914 resulted from a widespread conviction that the growing power of giant corporations to manipulate trade was weakening competition.11 The reports of both the Senate and House committees

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9. Id. at 259 n.2.
clearly indicated that the FTC was to have broad power to regulate unfair trade practices under section 5(a), and recent decisions of the Supreme Court have reaffirmed this power to prescribe practices deceptive to consumers, regardless of their effects on competition. When the Commission has reason to believe that any person or entity is engaging in misleading or deceptive trade practices, and when the question cannot be resolved by informal, nonadjudicatory means, the Commission may issue a complaint charging a violation of section 5. At the resulting hearings, if the party charged fails to rebut the evidence supporting the complaint, the administrative law judge must state his findings in writing and issue a cease and desist order prohibiting further "violation of the law so charged in said complaint." Within 60 days after the issuance of the order, each named respondent must file with the Commission a detailed written report of his compliance and must provide any additional...
information the Commission may request.\textsuperscript{20} Section 5(c) allows those subject to cease and desist orders to obtain review of the administrative proceedings in the courts of appeals.\textsuperscript{21} The reviewing court may affirm, modify, or set aside the order,\textsuperscript{22} but to the extent that the findings of the Commission are supported by substantial evidence,\textsuperscript{23} they are conclusive and binding on the court.\textsuperscript{24}

In 1938, Congress passed the Wheeler-Lea Act,\textsuperscript{25} streamlining the process by which a cease and desist order becomes "final," or enforceable by the courts. Prior to 1938, enforcement was available only after a contempt decree was issued by the court of appeals upon proof of violation of the Commission's order. Since the assessment of penalties for contempt required evidence that new activities of the defendant had violated this decree, the respondent was given three opportunities to use deceptive trade practices before sustaining any penalty—once before a complaint and order, again before the contempt decree, and again before enforcement. The Wheeler-Lea amendment removed a step from this process by providing that a cease and desist order automatically becomes final upon judicial review or expiration of

\begin{footnotesize}
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\item\footnotesize{20} 16 C.F.R. § 3.61(a) (1974) provides in part: Where the order prohibits the use of a false advertisement of a food, drug, device, or cosmetic which may be injurious to health because of results from its use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, or where the order was issued under the Flammable Fabrics Act, or in any other case where the circumstances so warrant, the order may provide for an interim report stating whether and how respondents intend to comply.
\item\footnotesize{21} 15 U.S.C. § 45(c) (1970). Anyone subject to an order may obtain review "within any circuit where the method of competition or the act or practice in question was used or where such person . . . resides or carries on business."\textit{Id.}
\item\footnotesize{22} \textit{Id.} In addition, section 5(e) provides that the courts of appeals are to give precedence to such proceedings over other cases pending and are to expedite them in every way.
\item\footnotesize{23} Evidence is substantial if a "reasonable mind might accept [it] as adequate to support a conclusion." NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1939). In giving effect to this principle, the Court has declared that an administrative judgment is to stand if it has "warrant in the record," or if it has a "rational basis." ICC v. Jersey City, 322 U.S. 503, 513 (1944). NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944); Rochester Tel. Corp. v. United States, 307 U.S. 125, 145-46 (1939). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (substantial evidence test requires reviewing court to examine the record of the agency proceedings as a whole).
\item\footnotesize{24} 15 U.S.C. § 45(c) (1970).
\item\footnotesize{25} Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111 (codified at 15 U.S.C. § 45 (1970)).
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the time for such review. Consequently, the FTC need no longer obtain a separate contempt decree and prove its violation, but may seek enforcement immediately after its order becomes final.

In addition to streamlining the enforcement procedure, Congress enacted section 5(l), which augments the contempt procedure by permitting the FTC to bring an action in federal district court to recover civil penalties from those violating cease and desist orders. The significance of this addition is evident from the substantial penalties made available to the FTC. Section 5(l) originally provided:

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

In 1950, Congress amended section 5(l) to make it clear that each separate violation of an order may constitute a separate offense, "except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense." In 1973, Congress further augmented the enforcement powers of the FTC by increasing the maximum penalty from $5,000 to $10,000 for each violation of a cease and desist

26. See 15 U.S.C. § 45(g) (1970). Initial review is before the court of appeals, and after such review, a petition for certiorari may be filed.

27. H.R. Res. No. 580, 86th Cong., 1st Sess. (1959). Since the Commission is no longer required to prove a second violation before obtaining judicial enforcement, this prevents a respondent from "playing fast and loose with the Commission's order, neither obeying it nor asking the court to set it aside." S. Res. No. 221, 75th Cong., 1st Sess. 7 (1937).


29. Id.


The "day" concept entered only in a clause dealing with the situation where a defendant commanded to do some affirmative act has failed to do anything at all. Appellants say, with some force, that it is anomalous that a defendant who ignores a mandatory order of the Commission shall be liable for only $5,000 a day [since changed to $10,000] but one who affirmatively violates the order in 30 different places on the same day might be held for $150,000. The answer is that ... Congress relied on the good sense of the FTC in [demanding penalties] and, failing that, on the discretion of the court to prevent such an outrageous result.

498 F.2d at 435-36.
This streamlined enforcement process coupled with potentially large liability has led one FTC Commissioner to characterize section 5(1) as a "sword of Damocles suspended above [the defendant's] head, poised to fall with devastating effect . . . ."32

B. SECTION 5(1) PROCEEDINGS IN UNITED STATES V. J. B. WILLIAMS CO.

The controversy between the FTC and the J.B. Williams Company began in 1962 when the Commission issued a complaint stating that Williams had falsely represented its iron and vitamin product, Geritol, as "an effective general remedy for tiredness, loss of strength or a run-down feeling."33 The Commission alleged that Geritol was "effective only in the small minority of cases where these conditions were caused by a deficiency in iron or in the vitamins contained in Geritol." After hearings before the FTC, the administrative law judge entered a cease and desist order prohibiting any advertisement of Geritol or of products containing "substantially similar properties . . . which represent[ed] directly or by implication that the use of such preparation will be beneficial in the treatment or relief of tiredness, loss of strength, run-down feeling or irritability . . . ."35

33. 498 F.2d at 418.
34. Id.
35. The entire paragraph containing the broadest language of the order prohibited advertisements that represented directly or by implication that the use of [Geritol or any substantially similar product] will be beneficial in the treatment or relief of tiredness, loss of strength, run-down feeling, nervousness or irritability, unless such advertisement expressly limits the claim of effectiveness of the preparation to those persons whose symptoms are due to an existing deficiency of one or more of the vitamins contained in the preparation, or to an existing deficiency of iron or to iron deficiency anemia, and further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia; and (2) for such persons the preparation will be of no benefit.
498 F.2d at 418-19 n.2.
William filed a petition for review in the Court of Appeals for the Sixth Circuit, and the court affirmed the order.\(^{36}\)

After it rejected three compliance reports submitted by Williams, the FTC submitted to the Attorney General a draft complaint alleging three types of violations of the cease and desist order. First, the complaint charged that certain commercials misrepresented that Geritol could build "power" in "iron-poor blood." Second, the complaint alleged that commercials depicting consumers as "sad" at the beginning of the commercial and "glad" at the end, "thanks to Geritol,\(^ {37}\) misrepresented that the defendant's product was a general cure for tiredness. Third, the complaint charged that commercials for FemIron, allegedly a preparation "substantially similar" to Geritol, failed to disclose that iron deficiency anemia was not present in most women and thereby implied that the product was an effective general remedy for tiredness. The Attorney General brought suit under section 5(1) in the Southern District of New York for civil penalties of $500,000 from each of two defendants, the J.B. Williams Company, manufacturer and distributor of Geritol and FemIron, and the Parkson Advertising Agency, an affiliate that marketed the products.\(^ {38}\) The district court granted the Government's motion for summary judgment and assessed penalties of $456,000 against Williams and $356,000 against Parkson.\(^ {39}\) Reversing in part, the

\(^{36}\) J.B. Williams Co. v. United States, 381 F.2d 884 (6th Cir. 1967).


\(^{38}\) The Williams majority held that since the FTC had requested only a judgment against both defendants "in the total sum of $500,000," the Attorney General was without authority to seek that amount against each under the fair implications of our decision in United States v. St. Regis Paper Co. [355 F.2d 688 (2d Cir. 1966)]." 498 F.2d at 437. The thrust of the St. Regis decision was that Congress had given the task of determining when and what penalties should be sought to the FTC and not to the Attorney General. 355 F.2d at 695-98.

\(^{39}\) The district court noted that the size of the penalty should be based on a number of factors including "financial ability to pay . . . , the degree of harm which defendants may have caused by disseminating the challenged advertisements, and their good or bad faith in disseminating these advertisements in violation of the FTC order." 354 F. Supp. at 548. See United States v. H.M. Prince Textiles, Inc., 262 F. Supp. 383, 389 (S.D.N.Y. 1966); United States v. Vitasafe Corp., 212 F. Supp. 397 (S.D.N.Y. 1962); United States v. Wilson Chem. Co., 1962 Trade Cas. ¶ 70,478 (W.D. Pa. 1962), aff'd, 319 F.2d 133 (3d Cir. 1963); United States v. Universal Wool Batting Corp., 1961 Trade Cas. ¶ 70,163 (S.D.N.Y. 1961).
court of appeals held that Williams was entitled to have a jury determine whether the word "power" and the "sad-glad" format did in fact misrepresent Geritol to be a general remedy for tiredness and anemia. The court remanded the case for a jury trial on these issues and affirmed summary judgment on the counts relating to FemIron. 41

II. SIXTH AMENDMENT RIGHTS IN THE SECTION 5(l) ENFORCEMENT ACTION

Both the sixth and seventh amendments are possible sources of a right to a jury trial in cases like Williams, but reliance on the sixth amendment would significantly increase the difficulty of enforcing cease and desist orders under section 5(l). The constitutional protections granted to defendants under the sixth amendment impose greater burdens on the prosecutor than are borne by the plaintiff in civil litigation under the seventh amendment. A criminal defendant is entitled to a more rigid, "reasonable doubt" standard of proof and is also entitled to litigate before a jury every question material to his defense. 42 These rights, if applied in an enforcement action under section 5(l), might sharply limit the power of the Commission under the FTC Act. Courts assuming that these proceedings are civil have consistently held that their own role is limited to adjudicating violations of cease and desist orders and does not include relitigating the factual foundation established in prior agency proceedings. If the proceedings were deemed criminal, however, the sixth amendment would entitle the defendant to submit to the jury

40. The court of appeals set aside the judgment against Parkson, holding that Parkson was not an independent entity and therefore could not be independently liable, and, in the alternative, that the Attorney General was not authorized to seek a penalty greater than that originally sought by the FTC. 498 F.2d at 436-39.
41. Id. at 434.
42. The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.
44. One commentator has stated:

[1] It is only in civil cases that the law confines the jury's fact-finding province solely to questions upon which "reasonable men may differ." In criminal cases, the jury is entrusted with all factual questions, whether reasonable men can differ on them or not. And even in civil cases, the necessary consequence of having the jury decide even one issue is to entrust the entire case into its hands.

the factual issues underlying an order, since the establishment of this factual foundation through administrative procedure is not compatible with the accepted rules and constitutional guarantees governing criminal trials. Thus, a sixth amendment trial might offer more comprehensive protections to the defendant, but it would severely restrict the agency's power to determine what conduct is unfair or deceptive, because its findings would be entitled to no deference in enforcement proceedings. Under the seventh amendment, the defendant may also have a right to a jury trial, but the courts would have some discretion over the factual issues submitted to the jury.

Attempting to avail themselves of the broader protections of the sixth amendment, the defendants in Williams argued that the penalties under section 5(1) constituted punishment and thus were criminal. The court of appeals affirmed the district court's rejection of this argument, holding that rights associated with criminal proceedings are to be denied when Congress has characterized a remedy as "civil" and when the only consequence of an adverse judgment is a money penalty. This rationale, however, overlooks the Supreme Court's position that courts must determine whether a statute is criminal in nature not by "the designation of the exaction, [but by] its substance and application." In discharging this responsibility, courts have tended to consider a statute criminal where the penalty is serious, where the statute operates to penalize only knowing violations and to deter the proscribed behavior, and where the sanction has a punitive purpose.

A. THE SERIOUSNESS OF THE PENALTY

One factor courts have used to determine whether a statute is criminal is the seriousness of the penalty that it imposes.
The more serious the potential loss to the defendant as a result of an adverse judgment, the more likely it is that he will be entitled to the comprehensive protections of the sixth amendment. Although the Williams majority opinion, in concluding that section 5 (l) was not criminal, assigned much weight to the monetary nature of civil penalties, the distinction between forfeiture of property and deprivation of liberty by imprisonment has not received much judicial support as the dividing line between criminal and civil statutes. The Supreme Court has held that property forfeitures are criminal proceedings, entitling defendants to fourth amendment protections and the fifth amendment protection against self-incrimination. Notwithstanding the fact that one early court had looked beyond the statutory label to hold a penalty for $300,000 punitive and therefore granted the defendant a criminal jury trial, the Williams court suggested that no such precedent existed. Generally, where penalties have been extremely large, courts have tended to look more closely at the nature of the statute than at whether its designation is "civil" or "criminal." Since potential liability under section 5 (l) is at least as large as those penalties for which courts have granted criminal jury trials, the sanction appears sufficiently "serious" to render the statute "criminal" and to warrant sixth amendment protections.

50. Id. at 502.
51. Boyd v. United States, 116 U.S. 616, 634 (1886). See Hepner v. United States, 213 U.S. 103, 111 (1909). The Supreme Court has left open the question of the right to counsel in such actions. Justice Powell, concurring in Argersinger v. Hamlin, 407 U.S. 25, 51 (1972), where the Court held that a defendant had a right to counsel if he faced incarceration, stated: It would be illogical—and without discernible support in the Constitution—to hold that no discretion may ever be exercised [in according a defendant criminal protections]... in "non-jail" petty-offense cases which may result in far more serious consequences than a few hours or days of incarceration.
52. United States v. Shapleigh, 54 F. 126 (8th Cir. 1893). The court asked: Now, if the government enacts a statute which provides that a case in its nature criminal, whose purpose is punishment, whose prosecutor is the state, and whose successful prosecution disgraces the defendant, and forfeits his property to the state as punishment for crime, may be brought in the form of a civil suit, does that change the rule of evidence that ought to be applied to it?
Id. at 129-30.
53. 498 F.2d at 421.
B. THE OPERATION OF THE STATUTE

1. Scienter

Some courts, consistently with the traditional treatment of the criminal law, have held that a statute is criminal if it requires scienter for conviction. Statutory crimes, however, include crimes imposing liability without fault and crimes requiring only objective fault, such as negligence, as well as crimes requiring subjective fault, such as knowledge or willfulness. Courts evaluating the punitive nature of a statute in modern actions, therefore, have not given conclusive weight to the requirement of a "knowing violation"; the presence of scienter is only one factor that may indicate the need to grant a defendant criminal rights. The Supreme Court has held that scienter is not a necessary element of liability under section 5 (l), but lower courts have nevertheless mitigated the penalties under that section to reflect the "good faith" of the defendant. Mistake, inadvertence, and ordinary negligence have not usually triggered substantial liability, but where willfulness is proved, courts have levied maximum penalties. Thus, although a knowing violation, or scienter, is not required on the face of section 5 (l), a willful violation is frequently a factor in determining the amount of the penalty when the statute is actually applied. In this respect, section 5 (l), in its operation, has some criminal characteristics.

2. Deterrence

Another factor courts have considered in evaluating the operation of a statute is its capacity to deter the penalized behavior. An important purpose of criminal sanctions is to prevent certain undesirable conduct by making the commission of proscribed acts unattractive. Punishment may have a "special" deterrent ef-

55. W. LaFave & A. Scott, Criminal Law 218 (1972).
56. Charney, supra note 48, at 495.
57. W. LaFave & A. Scott, supra note 55, at 191-93.
fect on the criminal by giving him an unpleasant experience he will not want to endure again or a "general" deterrent effect by discouraging the public from committing such crimes. Both civil and criminal sanctions have a deterrent effect since the penalty discourages a defendant from behaving in a manner that causes injury to others, but this effect in civil cases is usually subordinate to the redress of an individual claimant. Congress, in its recent action to double the penalties under section 5(1) from $5,000 to $10,000, stated that its purpose was to prevent all deceptive acts and practices in commerce, as well as to deter violations by those already subject to FTC orders. Like a criminal statute, then, section 5(1) appears to have a general as well as a specific deterrent effect.

C. THE PURPOSE OF THE SANCTION

Courts evaluating the criminal nature of a statute have also considered the extent to which it serves a punitive purpose. Whereas a punitive statute seeks retribution for wrongs without need for quantifying the loss to the plaintiff or another person, a remedial statute requires measurement of the damages that may accrue to an individual or class of individuals and provides compensation for those injured by the proscribed conduct. Although section 5(1) is variable in that civil penalties of "up to 10,000 dollars" may be assessed for one violation, thereby suggesting remuneration commensurate with the plaintiff's injury, the size of the penalty need not correspond to the loss to the Government. Courts weigh the probable injury to competitors and consumers, but the Government need not prove actual injury to collect civil penalties. The purpose of section 5(1), therefore, is at best partly remedial and partly punitive.

63. Id. at 22-23.
64. Congress stated in its recent amendment of section 5(1) that its purpose was to ensure the "enforcement of the laws the Commission administers." Act of Nov. 16, 1973, Pub. L. No. 93-153, § 408(b), 87 Stat. 576.
66. See Charney, supra note 48, at 508.
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Judge Friendly, writing for the majority in Williams, evaluated the criminal nature of section 5(l) without considering the seriousness of its penalty, its operation, or the purpose of its sanction. Citing Hepner v. United States69 and Helvering v. Mitchell,70 he stated that appellants had not “directed our attention to any civil penalty provision that [had] been held sufficiently ‘criminal’ in nature to invoke the protections of the Sixth Amendment.”71 Those cases, however, evaluated a defendant's rights under statutes with language and purposes different from those of section 5(l). In Hepner the Government was suing for a fixed penalty of only $1000, the maximum amount recoverable under the Alien Immigration Act;72 in Mitchell, involving a civil penalty for tax evasion, the statute limited recovery to an amount proportionate to the costs incurred by the Government in establishing its case against the defendant.73 As illustrated by the district court's judgment in Williams, however, liability under section 5(l) can total millions of dollars. By permitting cases evaluating statutes with penalties substantially smaller than section 5(l) to determine the right to a criminal jury trial in all civil penalty actions, Judge Friendly not only avoided a constitutional analysis of the substance and application of section 5(l), but implied that Congress could undermine sixth amendment rights by simply labeling an otherwise criminal sanction a “civil penalty.” A civil designation of a monetary penalty, however, does not justify denial of a criminal jury trial where a defendant is in fact punished for his conduct;74 only application of the factors traditionally used by courts to evaluate a defendant's sixth amendment rights is sufficient to measure the punitive effect of section 5(l).

The court's reliance in Williams upon the civil designation of section 5(l) may in part be justified by the fact that analysis of these factors is inconclusive. Nevertheless, the Williams approach does not account for the statute's criminal characteristics. Where such characteristics predominate in a statutory action,

69. 213 U.S. 103 (1909).
70. 303 U.S. 391 (1938).
71. 498 F.2d at 421.
73. The Supreme Court held that because Congress provided a distinctly civil procedure for the collection of an additional 50 percent penalty for fraudulently filing an income tax return, it intended the action to be civil rather than criminal. 303 U.S. at 402.
74. Charney, supra note 48, at 482.
courts have held that the rules governing criminal actions prevail. A section 5(l) proceeding, however, appears to fall within that category of actions labeled "quasi-criminal," for which courts have granted fourth and fifth amendment rights and have suggested that the right to counsel under the sixth amendment may be available.\textsuperscript{75} Thus the seriousness of the penalty, the importance of scienter and deterrence, and the punitive purpose of section 5(l) all suggest the criminal character of the statute, but whether they require a sixth amendment jury trial has not been established. Since the right to a jury trial is available under the seventh amendment in quasi-criminal actions, courts have not felt compelled to determine whether the same right is also guaranteed by the sixth amendment.\textsuperscript{76} In proceedings to enforce administrative orders, like those under section 5(l), this approach is especially convenient: a jury trial under the seventh amendment does not require relitigation of the factual foundation of cease and desist orders, the determination of which is vested by Congress exclusively in the agency.\textsuperscript{77} Nevertheless, where penalties have some criminal characteristics, abandoning all the protections and attendant rights of a criminal jury trial might violate the sixth amendment, especially since only a very fine and technical distinction often separates criminal from civil penalties. In such quasi-criminal cases, the strict right accorded a criminal defendant to litigate every material issue could combine with the flexibility given courts under the seventh amendment to control the issues that go to the jury, thereby permitting a defendant to relitigate all issues material to his defense, including those tried by the agency, except in those cases where the regulatory power of the agency would be impaired.\textsuperscript{78} This approach avoids abandoning all the protections of the sixth amendment once a statute is found to be civil as it permits some traditionally criminal rights to attach to jury trials under the seventh amendment.

\textsuperscript{75} Boyd v. United States, 116 U.S. 616, 634 (1886) (penalties were quasi-criminal for purposes of the fourth amendment and that part of the fifth amendment which declares that no person shall be a witness against himself).

\textsuperscript{76} See, e.g., Hepner v. United States, 213 U.S. 103 (1909).


\textsuperscript{78} Charney, supra note 48, at 483. Other criminal rights that may offer added protection to a defendant in a section 5(l) civil penalty action include the right of confrontation, the right of compulsory process for obtaining witnesses in one's favor, and the right to a speedy trial. Id. at 478-79.
III. SEVENTH AMENDMENT RIGHTS IN THE SECTION 5(l) ENFORCEMENT ACTION

Recent declarations by the United States Supreme Court have favored seventh amendment jury trials in modern statutory actions. This support for civil juries may indicate a tension between a recognition that fairness requires the submission of important issues for jury decision and a reluctance to restrict judicial discretion to limit the issues triable before a lay panel. In section 5(l) enforcement proceedings, this discretion is reflected in the courts' ability to direct a verdict where jury determination of an issue would risk nullification of congressional intent to regulate trade effectively, i.e., where the Commission's cease and desist order clearly indicates that the defendant's conduct was prohibited. Commentators disagree on the standards that define the scope of the seventh amendment right generally, but they agree that the pro-jury bias reflected in recent decisions is consistent with the pro-jury bias of the Constitution. Nevertheless, deciding what conduct violates a final cease and desist order is tantamount to measuring the effective scope of the order, and a lay determination of this issue, without deference to the agency's findings, may usurp the broad discretionary power vested in the FTC by Congress. An analysis of civil jury rights under section 5(l), therefore, must attempt to reconcile a defendant's seventh amendment right to a jury trial on disputed factual issues with the preservation of agency effectiveness. This Part attempts the reconciliation in three steps: first, it considers the perspectives from which judges have viewed the compatibility of juries with administrative regulation; second, it challenges the traditional approaches to the evaluation of a defendant's rights under the seventh amendment; and third, it examines the recent shift by the Supreme Court toward a "functional" ap-

proach to the seventh amendment, evaluating the impact of this shift on traditional analysis and the role of this approach as a source of civil jury rights independent of those provided under the common law. Analysis of the functional approach is continued in Part IV with an evaluation of its capacity to separate court from jury issues. Part IV also proposes two standards by which courts can reconcile the agency's power to regulate with the defendant's interest in litigating issues of fact before a jury.

A. TWO PERSPECTIVES ON SEVENTH AMENDMENT RIGHTS

Congressional silence regarding the right to jury trial under section 5(1) has allowed much room for dispute over the respective roles of the court, agency, and jury in the enforcement proceeding. If Congress had indicated in the language of the FTC Act or in legislative history what deference courts enforcing Commission orders were to give to administrative findings, as it had for courts reviewing them, it might have avoided the conflict between the tradition of permitting jury trials in civil actions and the tradition of barring civil juries from administrative proceedings. In the absence of such guidance, however, section 5(1) caused a sharp division between the majority and the dissenting judge in Williams. Writing from one perspective, the Williams majority held that juries were compatible with the administrative process, reasoning that civil penalty proceedings were like other civil actions in which the court's adjudicative power is "plenary." The majority held that where such a clear right to jury trial was applicable, an equally clear congressional statement was necessary to revoke the right. Congress, however, has the power to expressly provide for civil juries in any statutory action, and, assuming it was aware of this when enacting the Wheeler-Lea Act, its silence with respect to the jury trial right could imply a negative as well as positive intention. Moreover, the applicability of the seventh amendment is not universally recognized in civil penalty suits. Some courts have held

83. Judge Oakes, dissenting in Williams, said: "[I]t is conceded by all that neither the statute itself nor the legislative history make any direct reference to the jury trial question." 498 F.2d at 446. See also United States v. St. Regis Paper Co., 355 F.2d 688, 692 (2d Cir. 1966).
84. See notes 22-24 supra and accompanying text.
86. 498 F.2d at 425.
87. See 5 J. Moore, FEDERAL PRACTICE ¶ 38.12, at 128.24 (2d ed. 1948).
that such actions are equitable rather than legal\textsuperscript{88} and have
denied jury trials on this basis. Consequently, no clear intention
to grant a right to a jury trial may be inferred from congress-
sional silence.

Writing from the opposite perspective, the dissenting opinion
in \textit{Williams} by Judge Oakes argued that section 5(I) was intended
to broaden administrative powers rather than to grant plenary
power to the court.\textsuperscript{89} He criticized the majority opinion for at-
temptsing to interpret section 5(I) as if it existed "in a statutory
vacuum," and argued that the court's "task in interpreting sep-
parate provisions of a single Act is to give the Act 'the most har-
monious, comprehensive meaning possible' in light of the legisla-
tive policy and purpose."\textsuperscript{90} Such an approach, according to
Judge Oakes, recognizes the need to preserve an active adminis-
trative role in determining what conduct violates the agency's
own orders.

As the dissenting opinion suggests, permitting a jury to de-
side whether a defendant has violated a final cease and desist or-
der appears to infringe on the power exclusively vested by Con-
gress in the Commission to interpret what trade practices are un-
fair or deceptive under the FTC Act. Until recently, such con-
siderations would have had little bearing on the right to a civil
jury, which courts have traditionally determined according to the
chance resemblance of an \textit{action} to an historical common-law an-
tecedent.\textsuperscript{91} But the test for this seventh amendment right has be-
come more sensitive to the nature of issues and the context in
which they arise, permitting a court to vary and condition consti-
tutional protections to suit the issues, rather than the character of
the overall action. Depending upon its perspective of seventh
amendment rights and congressional intent, therefore, a court
may squarely face or completely avoid the unique considerations

\textsuperscript{88} United States v. Shaughnessy, 86 F. Supp. 175 (D. Mass. 1949);

\textsuperscript{89} Judge Oakes stated:
\[\text{[T]}\text{he FTC plays the key role in determining whether its own order has been violated and in seeking sanctions for such viola-
tion . . . . Even given some unasserted right of appellants to secure a narrow review by way of a declaratory judgment as to whether a specific commercial is in compliance with . . . [its own] order, it seems beyond dispute that the FTC is to use its expertise in construing the order and applying it to "new" advertising.}\]

\textsuperscript{90} \textit{Id.} at 411, quoting Weinberger v. Hunson, Westcott & Dunning,

\textsuperscript{91} \textit{See} text accompanying notes 92-96 \textit{infra}. 
necessary to balance effective regulation with fairness to the defendant. The Williams majority chose the traditional approach and thus failed to address the peculiar relationships between court, agency, and jury in the enforcement of administrative orders in civil penalty actions.

B. THE TRADITIONAL APPROACH TO SEVENTH AMENDMENT RIGHTS: THE HISTORICAL TEST

The test traditionally applied to resolve the seventh amendment question is historical: "If a jury would have been impaneled in this kind of case in 1791 English practice, then generally a jury is required by the seventh amendment." The historical test is suggested by the language of the seventh amendment itself:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Under the common law, civil actions were either legal, with an attendant right to jury trial, or equitable, in which case the court would try the proceeding itself. Consistently with the formal

92. Wolfram, supra note 81, at 640. See Dimick v. Schiedt, 293 U.S. 474, 476 (1935), where the Court stated: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Baltimore & Carolina Line, Inc. v. Redman, 235 U.S. 654, 657 (1914); Patton v. United States, 281 U.S. 276, 283 (1938); United States v. Wonson, 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812).


The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. By common law [the framers of the amendment] 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. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.

94. With respect to the law and equity distinction, Professor Wolf-

ram stated:

The exception of "equitable" cases from the seventh amendment is insupportable on any principle that readily distinguishes between "law" cases and "equity" cases. It is doubtful, at
rules for distinguishing legal from equitable suits, more frequently resulting from the political struggle between the King and Parliament than from any analysis of the merits of a jury trial in a particular proceeding, courts applying the historical test have categorized statutory actions by searching for common-law counterparts, focusing on the designation of the action rather than on its substance and application.

A majority of decisions have held that a civil penalty action is equivalent to the common-law action for debt, in which there was a constitutional right to jury trial, while a minority have likened such a proceeding to an action in equity, triable to the court without a jury. Debt lies when a defendant allegedly owes the plaintiff a sum certain, an amount established either by agreement between the parties or by operation of law; prior to 1791, such actions were typically brought by creditors for the collection of loans. Courts have, however, held that a section 5(l) proceeding more closely resembles an action for liquidated damages to compensate the Government for the cost of enforcement efforts and for injury to its economic policies than it does an action for debt. Since in a section 5(l) action the Government need not prove an actual debt, but only a breach of the obligation to compete fairly which is implied from the decision to trade in interstate commerce, the statute appears to provide a range of

least today, that "equity" invokes the use of any greater discretion than do many of the "legal" remedies that nonetheless are tried to a jury. An assertion that "law" cases tend to be less complicated and thus less likely to require the specialized abilities of a judge trained by experience in the skills of fact finding would seem, in 1791 and today, both to be highly conjectural and to overlook some of the immensely complicated cases that juries determine daily.

Wolfram, supra note 81, at 731.

95. F. JAMES, CIVIL PROCEDURE § 8.2, at 346 (1965). James concluded that "the line dividing equity from law [was never] . . . the product of a rational choice between issues which were suited to court or to jury trial." Id. § 8.1, at 344.

96. See, e.g., cases cited in note 92 supra.


100. D. HENDERSON, COURTS FOR A NEW NATION 72-89 (1971).

liquidated damages for the use of the courts. Cases of such statutory forfeitures and penalties were historically tried by courts of equity sitting without juries.\textsuperscript{102}

Attempting to analogize a section 5(l) proceeding to the common-law action for debt, the Williams court rejected the Government's argument that the variable nature of section 5(l), allowing penalties of "up to $5,000 per violation," meant that it was not an action for a sum certain. The court stated that "[t]he legislative background... demonstrates that Congress replaced the proposed fixed penalty with a variable one in order to give the penalty provision more flexibility, not to avoid the requirement of a jury trial."\textsuperscript{103} The reasons for making a penalty variable, however, are not relevant to the question whether the penalty resembles a common-law action for debt; if the penalty is variable, the sum is not certain, and no action for debt lies in the common-law sense.

The Williams majority opinion, however, also relied on American common-law precedent to support its decision to recognize seventh amendment rights under section 5(l).\textsuperscript{104} Although this approach, because of its reliance on developments since 1791, varies the test traditionally used by the courts, such a "modified" historical test conforms to the trend away from strict reference to English common law in the determination of a defendant's right to a civil jury trial in modern statutory actions.\textsuperscript{105} Since most American courts have characterized civil penalties as actions for debt, the Williams court was arguably correct in holding that a right to a jury trial existed in corresponding actions under the common law, though not under the common law prior to 1791. In fact, however, only the broadest classification of section 5(l) as a "civil penalty" justifies this result. Within this broad classification fall variable and invariable penalties, only the latter of which

\begin{itemize}
\item \textsuperscript{102} A. Corbin, Contracts § 1054 et seq. (1964).
\item \textsuperscript{103} 498 F.2d at 427 n.15. Cf. Hepner v. United States, 213 U.S. 103, 106 (1909), in which the Court stated: "It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The act of 1823 fixes the amount of liability at double the value of the goods received, concealed, or purchased ..." Section 5(l) does not fix the penalty according to an invariable formula, but allows the district court to determine the amount due.
\item \textsuperscript{104} 498 F.2d at 423.
\item \textsuperscript{105} Professors Wright and Miller state that most modern courts refer to common law as it existed before the merger of law and equity in 1938, rather than prior to 1791. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2302, at 14-15 (1971).
\end{itemize}
are properly designated actions for debt. Even under the modified historical test, the Williams majority could justify the right to a jury trial only by focusing on the "civil penalty" designation and ignoring the variable nature of the penalty. If the penalty is variable, a defendant is not entitled to a jury trial under the seventh amendment.

Although the modified historical test may appear to give greater flexibility to courts searching for common-law actions to justify seventh amendment rights, this approach still focuses on categorical counterparts to historical actions and encourages courts to avoid the substance and application of statutes. Moreover, courts have in fact shaped the right to jury trial under American common law by referring to pre-1791 practice, so that even a correct application of the modified historical test is likely to recur to English law and may not significantly expand the seventh amendment right to accommodate the pro-jury bias of the Constitution and recent Supreme Court decisions.\(^{106}\) If the right to a jury trial is to depend upon the merits of seventh amendment protection rather than upon formal distinctions between law and equity no longer relevant to modern statutory actions, courts must break free of traditional classifications under a historical or "modified" historical test and must adopt a "functional" analysis that examines, for example, the compatibility of a jury with effective regulation.

C. THE MODERN APPROACH TO SEVENTH AMENDMENT RIGHTS: ISSUE ANALYSIS

In 1970, the Supreme Court departed from traditional seventh amendment analysis in granting a jury trial in a shareholders' derivative action. Historically, a derivative action brought by a shareholder as a nominal plaintiff on behalf of a corporation could only be brought in a court of equity, regardless of whether the corporate cause of action was at law.\(^{107}\) Although these actions proceeded as if the corporation itself were the plaintiff, thus permitting all corporate rights and defenses, there was no right to a jury trial because the suit was in equity.\(^{108}\) The Supreme

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106. Those courts looking to pre-1938, rather than pre-1791 law may, therefore, be using the historical test in a derivative sense. If a strict view of the historical test were taken, decisions from years before or after 1791 presumably would be authoritative only to the extent that they themselves accurately reflect the English state of practice in 1791. Wolfram, supra note 81, at 642 n.8.


108. Id. at 415.
Court held in Ross v. Bernhard, however, that the right to a jury trial was guaranteed by the seventh amendment to the extent that a jury would have been available if the corporation had brought the action itself. In a dissenting opinion, Justice Stewart indicated the significance of this holding:

Today the Court tosses aside history, logic and over 100 years of firm precedent to hold that the plaintiff in a shareholder's derivative suit does indeed have a constitutional right to a trial by jury. This holding has a questionable basis in policy and no basis whatsoever in the Constitution. What appeared to alarm Justice Stewart particularly was that the Supreme Court had departed from the historical test, which stressed the overall nature of statutory actions and sought common-law counterparts of modern actions, and, instead, had focused on the "issues" in determining seventh amendment rights in a shareholder's derivative suit. The majority in Ross reasoned that the merger of law and equity produced by the adoption of the Federal Rules of Civil Procedure removed any procedural obstacle to the assertion of legal rights before juries. Footnoting its emphasis on "issues," the court stated: "[T]he 'legal' nature of an issue is determined by considering, first, the premerger custom . . . ; second, the remedy sought; and, third, the practical abilities and limitations of juries."

The first two factors set forth by the Supreme Court in Ross, the premerger custom and the remedy sought, stem from the modified historical test under which courts look to American common law for analogous legal and equitable actions to establish or deny the right to a civil jury trial. Whereas under the traditional approach the character of an action, if designated equitable, could have justified denial of seventh amendment rights entirely, the Ross approach encourages isolation of underlying legal issues for a civil jury trial. Although application of the first two Ross factors does not constitute a "functional" analysis, the emphasis on issues rather than on the character of the overall action avoids the formalistic classifications that bound courts applying the modified historical test and that encouraged them to reclassify statutes to suit their own concepts of fairness.

The Williams majority correctly referred to the premerger custom of common-law courts by evaluating the right to a jury

110. Id. at 542-43.
111. Id. at 544-45.
112. Id. at 538.
113. Id. at 538 n.10.
trial under analogous statutes, but it relied on the congressional label of the statutory sanctions as civil penalties to resolve the seventh amendment question,\textsuperscript{114} overlooking other substantive differences in similarly worded provisions enacted prior to the merger of law and equity. Since these differences could generate issues unlike those generated by a statute embedded in a complex regulatory scheme,\textsuperscript{116} such as section 5(l), the substance of the statutes as well as their "civil penalty" designation must be examined.

The first statute Judge Friendly considered in Williams, the Packers and Stockyards Act of 1921,\textsuperscript{117} was referred to frequently in the legislative history of section 5(l) as a model for that section.\textsuperscript{118} The Packers and Stockyards Act, however, is clearly criminal in nature, since it provides monetary penalties as an alternative to imprisonment and refers to violations as "convictions."\textsuperscript{119} It is not useful, therefore, as a premerger analogue by which seventh amendment rights for a quasi-criminal penalty may be established. Judge Friendly also referred to section 32 of the Securities Exchange Act.\textsuperscript{120} The usefulness of this reference is weakened both by the absence of any authority recognizing a right to jury trial under that provision and by the dissimilarity of the provision to section 5(l). Section 32 penalizes the failure by issuers of stock to file with the SEC the information required by section 15(d) of the Act,\textsuperscript{121} and thus sanctions direct violations of

\begin{itemize}
  \item \textsuperscript{114} 498 F.2d at 426-28.
  \item \textsuperscript{115} 498 F.2d at 451 (Oakes, J., dissenting).
  \item \textsuperscript{116} 7 U.S.C. § 195 (1970).
  \item \textsuperscript{118} Any packer . . . who fails to obey any order . . . (3) After such order, or such order as modified, has been sustained by the courts as provided in section 194 of this title, shall on conviction be fined not less than $500 nor more than $10,000, or imprisoned for not less than six months nor more than five years, or both. Each day during which such failure continues shall be deemed a separate offense.
  \item \textsuperscript{119} 7 U.S.C. § 195 (1970).
  \item \textsuperscript{119} Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.
  \item \textsuperscript{120} 15 U.S.C. § 78ff(b) (1970).
  \item \textsuperscript{121} 15 U.S.C. § 15(a) (1970).
\end{itemize}
a statute rather than violations of administrative orders. The substance of an action under section 32, therefore, is not similar to that of a section 5(l) proceeding.\textsuperscript{121}

Under the Ross approach to premerger tradition, a court may ignore the designation of the overall action as a "civil penalty" and seek analogous rights and claims in various common-law actions.\textsuperscript{122} Because section 5(l) is part of a complex statutory scheme to enforce administrative orders regulating fraudulent commercial practices, several aspects of this provision suggest that it has no premerger analogue. First, the statute authorizes the Government to bring an action on behalf of the public but does not authorize suits by private individuals;\textsuperscript{123} second, the statute intends that these actions restrain corporations from misusing their power to defeat public policy;\textsuperscript{124} and third, the statute enforces orders prohibiting fraudulent practices by granting pecuniary relief.\textsuperscript{125} Each of these characteristics of section 5(l) would have rendered an action equitable under premerger custom, and therefore, under the first inquiry of Ross, would have denied a defendant the right to a civil jury trial.

\begin{itemize}
\item \textsuperscript{121} Section 16(8) of the Hepburn Act of 1906, 49 U.S.C. § 16(8) (1970), discussed by the Williams court, is similar to section 5(l) and, as part of a regulatory statute, this civil penalty action may generate issues similar to those arising under section 5(l). No premerger tradition exists, however, since the seventh amendment question has not been resolved under this provision.
\item \textsuperscript{122} "Right," "claim," and "issue" were used interchangeably in Ross. 396 U.S. at 537-41. Conceptually, an alleged "right" is the basis for a "claim" that raises factual "issues." Note, Congressional Provision for Nonjury Trial, 83 Yale L.J. 401, 410 n.68 (1973).
\item \textsuperscript{123} See, e.g., Wirtz v. Jones, 340 F.2d 901, 903-04 (5th Cir. 1965) (Jury trial not available in action by Secretary of Labor to require employer to pay back wages owed to employees, because purpose of the action is "to correct a continuing offense against the public interest." Id. at 904.); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1239-43 (N.D. Ga. 1969), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970) ("Under the reasoning of Wirtz v. Jones . . . and under the cases emphasizing the public nature of this remedy, the Court must conclude that the claims herein involved are purely equitable in nature and the demand for a jury trial must be denied." Id. at 1242.); cf. McGraw v. Local 43, Plumbers & Pipefitters, 341 F.2d 705, 709 (6th Cir. 1965).
\item \textsuperscript{124} J. POMEROY, EQUITY JURISPRUDENCE: EQUITABLE REMEDIES § 302, at 538-39 (3d ed. 1905).
\item \textsuperscript{125} J. POMEROY, 1 EQUITY JURISPRUDENCE § 188 (4th ed. 1918), quoting Meek v. Spracher, 87 Va. 162, 169, 12 S.E. 397, 399 (1896): Fraud and misrepresentation are among the elementary grounds of equitable jurisdiction and relief. Where they exist, the question of an adequate remedy at law is generally a sufficient ground of equitable jurisdiction; but it is equally true that the existence of a remedy at law cannot deprive courts of equity of jurisdiction in a matter that comes within the scope of their elementary jurisdiction.
\end{itemize}
The remedy sought under section 5(l) also appears to lack a legal common-law counterpart and therefore, under the second Ross test, a jury trial would not be required. Since section 5(l) is intended primarily to enforce obedience to orders rather than to provide adequate compensation for past acts, the remedy is partially injunctive and equitable under the common law. Moreover, despite the "civil penalty" designation emphasized under the modified historical test, the actual application of section 5(l) reveals the variability of the penalty in contrast to those fixed by statute allowing seventh amendment rights under the common law. If the issue approach is used to analyze the substance and application of this statute, then, the remedy sought under section 5(l) does not have a legal common-law counterpart, contrary to the opinion of the majority in Williams.

By encouraging a court to dissect an action for statutory penalties and probe beneath the classification of the statute to its substance and application, Ross can check the tendency of legislatures to disguise legal issues with equitable nomenclature. But a court relying on premerger custom and the remedy sought cannot actually expand the right to a jury trial beyond that provided under the common law, regardless of the punitive nature of an action. Under traditional classification approaches, the court may expand the right only by manipulating the designation of a penalty to correspond with a common-law analogue. Although this approach does not appear harmful when courts harbor a pro-jury bias, the power to so manipulate constitutional results could jeopardize a defendant's right under the seventh amendment if exercised by a court skeptical of juries. By applying the third Ross factor—the practical abilities and limitations of juries—to expand rather than qualify the rights recognized in the application of the first two factors, courts can escape the restrictions inherited from common-law judges. But since the "practical

126. The dissenting opinion agreed with this interpretation of the injunctive powers under section 5(l):

There is some indication that Congress viewed § 45(l) proceedings as essentially equitable by importing into those proceedings the power to issue mandatory injunctive relief "and further equitable relief," this power to be exercised by the district courts. Of course, such relief could previously be granted by the court of appeals granting enforcement of the cease and desist order, . . . so we must assume that Congress had some reason to lodge this same power in the district courts in § 45(l) proceedings.

498 F.2d at 440 n.1. Judge Oakes appears to have overlooked the possibility that the same statute might provide both legal and equitable relief.

127. See text accompanying notes 104-06 supra.

128. See note 103 supra.
abilities and limitations of juries" are criteria also susceptible to manipulation, the following section evaluates this third Ross factor not only as a possible source of seventh amendment rights, but also as a source of objective standards to ensure uniform application of the right to a jury trial.

IV. THE PRACTICAL ABILITIES AND LIMITATIONS OF JURIES: A FUNCTIONAL APPROACH

The issue approach of Ross not only provides courts with the power to evaluate the resemblance of legal rights and remedies raised by a statutory action to those existing under the common law, regardless of the congressional designation of the overall action, but also appears to allow courts to recognize seventh amendment rights without finding a legal common-law counterpart if a jury is capable of resolving issues that would arise in such an action. This expansion of the right to a civil jury trial beyond the limits of the common law was recently affirmed in Curtis v. Loether,129 where the Supreme Court insisted that courts give broad scope to the seventh amendment in modern statutory actions.130 Emphasis by the Court on "issues" rather than on the overall action also indicates that the "practical abilities and limitations of juries" may be a useful means to decide, assuming a right to jury trial, which issues should go to the jury and which should be preserved for the court. Consequently, the third factor set forth by the Supreme Court in Ross has two potential functions: as an independent constitutional "source" of seventh amendment rights, and as a means to limit the use of juries once this right is recognized. In fulfilling the latter function, the factor provides the flexibility courts need to reconcile effective enforcement with fairness to the defendant, regardless of whether the seventh amendment rights are recognized under the traditional test or only under the broad mandate announced by the Curtis Court.

A. A FUNCTIONAL ANALYSIS OF THE RIGHT TO JURY TRIAL UNDER SECTION 5 (I)

In Curtis, the Court favored broad recognition of seventh amendment rights generally, but affirmed the denial of a civil jury in administrative proceedings for an NLRB backpay award.131 The Court stated that there was a "functional justifi-

130. Id. at 193.
131. Id. See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S.
cation" for denying seventh amendment rights in cases where a jury would substantially interfere with the agency's role in a statutory scheme. The Williams majority distinguished proceedings for NLRB awards, holding that there was no "functional justification" for denial of jury rights in a section 5(l) action when the district court rather than the agency is assigned adjudicative responsibility. Citing the district court opinion in United States v. Hindman, Judge Friendly held that juries in such cases were compatible with the agency's power to regulate. Judge Oakes cited the contrary authority of the Hindman court's own court of appeals. In a footnote to United States v. Vulcanized Rubber & Plastics Co., the Court of Appeals for the Third Circuit criticized leaving the question of violation of an FTC order to the jury:

[C]reating an issue of fact as the court did in Hindman, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public.

1 (1937). Responding to the defendant's objection to nonjury proceedings, the Court in Jones & Laughlin said:

The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings of the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies.

Id. at 47. The proceeding for review, unlike the enforcement action, is not a civil action but is comparable to that offered the defendant under 15 U.S.C. § 5(c) (1970) prior to finalization of an order.

132. 415 U.S. at 195. 133. 498 F.2d at 424. Judge Friendly, for the majority, stated:

What is decisive is that, with that avenue [granting plenary authority to the agency] known to be open, and with the Supreme Court having just sustained the provision in the National Labor Relations Act of 1935 authorizing the NLRB to award back pay, Congress in enacting Section 5(l) took a course that had been uniformly held to entail a right to jury trial.


Although Judge Friendly agreed that this criticism was "against" the Hindman court's holding that a defendant in a section 5(l) proceeding was entitled to a jury trial,\textsuperscript{138} the statement actually went no further than to question whether the particular issues before the Hindman court were appropriate for jury decision, assuming a seventh amendment right. The Vulcanized court was only apprehensive that a jury might disturb the factual findings of the FTC that supported the order; it did not appear to deny the right to jury trial altogether. Since the Vulcanized court sustained a lower court's summary judgment,\textsuperscript{139} there was no further indication that this criticism was intended to deny a defendant's right to a jury trial on all disputed questions of fact.

The Williams majority also read Vulcanized as suggesting that the FTC had exclusive authority to adjudicate violations or to finally determine what conduct was prohibited by the order. Denying this proposition, Judge Friendly clearly indicated that the agency's role in enforcement actions was prosecutorial rather than adjudicative.\textsuperscript{140} The Vulcanized court, however, seems not to have been concerned with expanding the Commission's role in enforcement proceedings, but only with preserving the Commission's freedom to determine, on the basis of administrative proceedings, what conduct it should proscribe to prevent injury to consumers and competitors from unfair and deceptive trade practices. According to this view, a jury might restrict the scope of the original FTC order, thereby retroactively interfering with the Commission's administrative decision, since juries are not required to apply orders in light of the intent and purpose of the agency as the court must if it retains the question of violation as a matter of "law."\textsuperscript{141} Consequently, a jury trial, as Vul-
canized and the Williams dissenting opinion suggested, might be functionally incompatible with effective regulation where the jury is asked to decide questions of violation, or to apply law to fact. Such "mixed" questions, however, if they have not arisen in prior agency proceedings, are not always inappropriate for lay determination. Moreover, questions of "pure" fact, such as whether an event did or did not occur, will never have been previously decided by the agency in enforcement actions under section 5(l), since such actions are brought for acts allegedly occurring after the agency's cease and desist order is issued. Application of the functional approach, therefore—measuring the compatibility of juries with the statutory purpose—yields a conditional seventh amendment right for defendants in section 5(l) actions, with the applicability of the right dependent upon the type of issue before the court.

B. A FUNCTIONAL ANALYSIS OF ISSUES APPROPRIATE FOR JURY RESOLUTION

Once it is determined that the jury, although limited in some respects with regard to prior agency findings, is capable of trying issues that arise in a section 5(l) action, the "practical abilities and limitations of juries" factor may again be applied to decide on an issue-by-issue basis which questions the defendant has a right to submit to a lay panel. This approach contains the flexibility necessary to balance the criminal nature of section 5(l) and the criminal defendant's right to try all issues before a jury against the need for effective enforcement of cease and desist orders, the foundation for which may be undermined by relitigating FTC findings. It also contains, however, in the form of the "fact-law" distinction, the potential for de facto denial of seventh amendment rights. Although courts have traditionally exercised with impunity the power to distinguish "factual" from "legal" issues, the functional approach elevates this distinction to constitutional significance and thus requires standards to assure its before it the entire record, including all evidence taken, whereas the court enforcing the order does not, the findings supporting an order affirmed by the former court are binding on the latter. Although the Court has held that this comports with due process, Yakus v. United States, 321 U.S. 414 (1944), an enforcing court sensing that the defendant has been disadvantaged in prior proceedings may want to review facts on the original Commission record. With the potentially large liability under section 5(l), res judicata may be a barrier to a fair enforcement action for the respondent. See Schwartz, Administrative Law and the Sixth Amendment: "Malaise in the Administrative Scheme," 40 A.B.A.J. 107 (1954).
uniform application. Without standards to distinguish "legal" from "factual" issues, courts will retain the power to manipulate a defendant's constitutional rights by simply relabeling issues "legal," similar to the manner in which courts could deny seventh amendment rights by relabeling actions as "equitable" under the modified historical test.

1. The Need to Protect the Scope of the Original Order

Allowing a lay panel to determine without deference to the agency whether the defendant has violated a cease and desist order shifts the responsibility for interpreting the dimensions of the order from the FTC to the jury, thereby reducing the scope of conduct within the Commission's effective power of regulation. Deciding which issues are "factual," therefore, necessarily involves a determination of the scope of the order, measured by the relationship of the conduct under scrutiny to that originally addressed by the Commission's decree. Recognizing that broad regulatory discretion is necessary to regulate trade effectively, the Supreme Court in FTC v. Ruberoid Co.\textsuperscript{142} affirmed a broadly worded cease and desist order, but also held that the defendant should be permitted in an enforcement action to raise all statutory issues, such as the deceptiveness of its trade practices, especially where conduct allegedly in violation of the order is not specifically proscribed. The Court reasoned that when the facts change substantially after the issuance of the original order, so that the general language of the order is the sole basis for establishing liability, the enforcing court must perform the agency function of interpreting what acts Congress intended to prohibit as "deceptive."\textsuperscript{143} In the enforcement proceeding, therefore, where the court is called upon to make these "first instance" determinations, the agency merely argues for its own interpretation of the FTC Act.\textsuperscript{144} In such cases, a jury does not interfere with

\textsuperscript{142} 343 U.S. 470 (1952).
\textsuperscript{143} Id. at 475-76.
\textsuperscript{144} In NLRB v. Express Publishing Co., 312 U.S. 426 (1941), the Supreme Court held that the Board's order, like the injunction of a court, must state with reasonable specificity the acts which the respondent may or may not do:

It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

Id. at 433.
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the agency's adjudicative function, since the court is performing that function. A jury trial would duplicate agency deliberations or impair the scope of an agency order only when the specific language of the order clearly prohibits acts and practices previously determined to be unfair by the Commission. In such cases, the court may grant summary judgment as a matter of "law." Courts should leave questions of violations to the jury, therefore, whenever the facts change substantially after the original proceedings before the FTC, and liability under section 5(1) thus depends upon proscription of the defendant's conduct under the general, rather than specific, language of the order. This standard permits maximum litigation of factual issues consistent with the sixth amendment without usurping the agency's power to proscribe conduct found in administrative proceedings to be harmful.145

2. The Need to Defer to Agency Expertise

Even if the conduct falls within the general rather than the specific prohibitions of the order, a court applying the Ross analysis must consider a second factor in evaluating the practical abilities and limitations of the jury: the need for special expertise to resolve questions of violation. If an issue is too complex for jury determination, or if its resolution requires application of the experience accumulated by the Commission in regulating an industry, a court should preserve the matter for its own judgment in light of the intent and purposes of the agency.

In Hindman, the district court faced the question whether a representation that the defendant's uniforms were "custom-tailored" fell within the prohibitions of an order forbidding "custom-made" labels. The court ruled that the issue was one for jury determination:

We must bear in mind the principle that the meaning to be given such representations as these is not the meaning which would be attached to them by experts, but by the average man who

145. An additional advantage of limiting the scope of agency authority to the specific language of the order is that it will encourage the Commission to specify more carefully what conduct it intends to regulate. The Supreme Court, concerned with the power of the FTC to arbitrarily regulate beyond the original decree, stated:

The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

would be likely to purchase the articles in question and to whom these representations are made.\footnote{146}

Professor Jaffe concurred:

The jury was to decide whether in the opinion of purchasers the questioned phrase meant the same thing as the proscribed one. Who better than a lay customer to decide?\footnote{147}

Jaffe's characterization of a juror as a "lay customer," however, is inaccurate. A juror does not reassume the role of an ignorant consumer once he has heard evidence regarding the actual capability of the product, but decides, in light of all the testimony, whether the defendant's representations are deceptive. The relevant inquiry, therefore, is whether a jury, set apart from "the American gullible public"\footnote{148} can evaluate the evidence placed before it. Presumably, simple fact questions such as whether a defendant did or did not commit certain acts can be decided by the jury, but questions of violation that may require interpretation of subtle shades of deceptiveness and frequent reliance on "inference and pragmatic judgment"\footnote{149} are more difficult and may be beyond lay competence. Yet the strong mandate for a civil jury trial, even where the factual issues are complex, suggests that few questions should be retained by the court for its own decision. Only when factual issues arise that require evaluation of voluminous or technical evidence should the court apply prior agency findings and conclusions to the conduct in alleged violation of a general cease and desist order.\footnote{150} Where the jury is incapable of understanding and drawing conclusions from a wide range of statistical and technical data, deference should be paid to agency findings.\footnote{151}

\footnote{146} 179 F. Supp. at 927-28.
\footnote{147} L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 319 n.237 (1965). The simplicity of this logic is alluring, but since not all products are for general consumption, this restricts rather than enlarges the lay jury's role. In Hindman, the army was the only purchaser of the uniforms whose labels were allegedly deceptive. To be consistent with Jaffe's rationale for jury trial, the court should have tried the question of violation, since the representations were not designed to influence the general public. Only the army as "lay customers" would be capable of evaluating the label's deceptiveness.
\footnote{149} 498 F.2d at 446 (Oakes, J., dissenting), quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).
\footnote{150} Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). The Supreme Court in Dairy Queen stated that few matters would be beyond jury competence, but suggested that the courts, if necessary, could appoint masters to assist the jury "in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone ...." \textit{Id.} at 478.
\footnote{151} Another example of superior agency expertise occurs where in-
C. Application of the Proposed Standards to Williams

A functional analysis thus suggests two standards to guide courts in reconciling effective regulation with fairness to the defendant in the selection of jury issues. Under these standards,\(^{152}\)

1. if the conduct is not specifically proscribed by the original order but falls only within general prohibitions, and
2. if the question is not so technical as to require resolution in light of the intent and purpose of the agency, then the jury must decide the question.

In Williams, the first issue—whether the defendants misrepresented Geritol's ability to build "iron power" in "iron poor blood"—was correctly remanded for jury trial, since the representations were not alleged to state directly, but only "by implication that [this preparation could relieve] tiredness, loss of strength, run-down feeling, nervousness or irritability . . . ."\(^{153}\)

The phrase "by implication" in the cease and desist order is a general prohibition, and no special expertise is required to decide whether building "iron power" exaggerates Geritol's limited ability to remedy iron deficiency or iron deficiency anemia.\(^{154}\)

The court was also correct in remanding for jury trial the issue whether the "sad-glad" commercials violated the cease and desist order. This format, depicting a consumer at the beginning of the commercial as generally unhappy and at the end of the commercial as in higher spirits,\(^{155}\) is widely used by the advertisement.
ing industry\textsuperscript{156} to convey the impression that a consumer's life will be improved by the use of a product. The sad-glad format represented only by implication that Geritol was "beneficial in the treatment or relief of tiredness,"\textsuperscript{157} and consequently these commercials did not fall within the specific prohibitions of the order. Nevertheless, the \textit{Williams} majority may have overlooked the complexity of this question of violation by suggesting that "tiredness" was a word of common meaning and that a jury could decide better than a court whether a commercial conveyed the proscribed impression. The word "tiredness" as originally applied in the 1965 cease and desist order was intended to prohibit representations that Geritol was an effective remedy for "tiredness, loss of strength, [or a] run-down feeling."\textsuperscript{158} Arguably, the sad-glad format, which suggests that consumption of a product yields emotional dividends, does not cause the same harm that the original order, applied to "tired blood" commercials, sought to prevent. Merely because the product advertised is a vitamin supplement consumed to improve physical health, it does not follow that a format suggesting an improved outlook from use of the product should be penalized. Though tiredness was, to the \textit{Williams} court, a word with a static meaning, the alteration of the factual context to which the order applied may have substantially changed its effect. Methods of competition that would be unfair under certain circumstances may be entirely unobjectionable under different circumstances.\textsuperscript{159} Discernment of the subtle shadings and nuances that the order may have acquired over the course of negotiations between the agency and the respondent may indeed require expertise. When such expertise is required to make a fair determination of a factual issue, however, the court should not be limited to allowing a common definition to control the jury's decision, nor should it necessarily remove the question from the jury altogether. By alerting the jury to possible shades of meaning that may have evolved during the course of pre-enforcement proceedings, the court may preserve the scope of the original order without denying the defendant the right to jury trial. Only when the term is incapable

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\textsuperscript{156} feeling run-down as a result of that fact. Now she is smiling not simply because she has iron rich blood, but because she feels better as a consequence. Thanks to Geritol.

\textit{Id.} at 540.

\textsuperscript{157} \textit{See} note 35 \textsuperscript{supra}.

\textsuperscript{158} \textit{See} note 35 \textsuperscript{supra} and accompanying text.

of further clarification should the court allow the common definition to control the jury determination.160

The court was incorrect, however, in failing to remand the issue of whether the FemIron commercials violated the cease and desist order. The Williams majority held that this product was included in the order, and that the commercials failed to disclose adequately that iron deficiency anemia was not present in most women.161 FemIron, however, was not specifically prescribed by the original order. The defendants argued that this product was of only "supplemental" value while Geritol was "therapeutic," and that since FemIron was not intended to treat the syndrome for which Geritol was formulated, the products were not "substantially similar."162 Moreover, the commercials only suggested "by implication" that FemIron was a general remedy for tiredness. With a claim that "some women risk becoming anemic and tired"163 because of insufficient iron reserves, followed by a suggestion to take FemIron to prevent iron shortages, the commercials only implied that this product relieved tiredness. These two factual issues—whether the commercials represented that FemIron was an effective general remedy for iron deficiency anemia, and, if so, whether the commercials adequately disclosed that most women do not suffer from this disease—required only that the jury evaluate the meaning of the commercials, and not FemIron's remedial potential. Neither question, therefore, required expert judgment and, under the proposed standards, should have been remanded to the district court for a jury trial.

V. CONCLUSION

The Supreme Court's shift in Ross v. Bernhard from the traditional historical and modified historical tests to an "issue" approach may provide an important source of seventh amendment rights for defendants in statutory proceedings that have no resemblance to "legal" actions under the common law. Even under the issue approach that permits courts to dissect statutory schemes into their component rights and remedies, however, some modern statutory actions may not have common-law counterparts, thus forcing courts disposed toward granting civil jury rights either to artificially manipulate the classification of an ac-

161. See note 35 supra and accompanying text. See also text accompanying note 38 supra.
162. 498 F.2d at 431.
163. Id. at 434.
tion or to pursue the functional approach embodied in the third Ross factor, the practical abilities and limitations of juries. The advantage of adopting this approach is that courts may avoid the search for legal common-law counterparts supporting a right to jury trial, and follow the pro-jury mandate of Curtis to expand civil jury rights if a jury is functionally compatible with the purposes of the statute. The functional analysis also appears to work well as a means of separating court from jury issues to check arbitrary de facto denials of seventh amendment rights. By elevating the fact-law distinction to constitutional importance, preservation of the civil jury right assumes a significance comparable to the agency's interest in deciding what conduct violates the FTC Act. An important byproduct of the functional analysis is its ability to accommodate the sixth amendment policy favoring the litigation of all material issues before laymen, while maintaining the power of courts to withdraw issues previously decided by the agency. Uniform adherence to the standards inspired by the Ross analysis will promote liberal recognition of the right to a civil jury trial without invasion of the Commission's regulatory authority.