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THE APPLICABILITY OF MIRANDA WARNINGS TO CIVIL TAX FRAUD INVESTIGATIONS

In the case of *Hugo Romanelli*¹ the tax court held that defendant's admissions obtained during a custodial interrogation² where no *Miranda* warnings³ had been given to the taxpayer were not to be excluded in a civil fraud proceeding pursuant to § 6653(b) of the Internal Revenue Code of 1954.⁴ Romanelli, a tavern operator, was being investigated for wagering activity⁵ by special agents of the Internal Revenue Service who had placed bets with him and then obtained a warrant to search his tavern. After serving the warrant, the four agents ushered the customers out of the tavern, locked the door, and began intensive questioning without giving any *Miranda* warnings.⁶ During the interrogation Romanelli admitted he had failed to report income for fear of alerting federal authorities to his gambling activities. These admissions were subsequently used to substantiate the government's civil fraud allegations, resulting in Romanelli's liability for underpayment of tax plus an additional 50 per cent assessment of that amount.

Romanelli's objection that the admissions should be suppressed as violative of his fifth amendment privilege against self-incrimination was rejected. The court, in overruling the motion to suppress, reasoned that

1. *Hugo Romanelli*, 1970 P-H Tax Ct. Rep. ¶ 54,138 (July 10, 1970), *appeal docketed*, No. 18751, 7th Cir. Aug. 11, 1970. [Hereinafter cited as *Romanelli*.]

2. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

3. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court summarized these warnings by stating at 478-79, "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

4. A civil fraud proceeding is an action by the government to impose a 50 per cent penalty upon the amount of the underpayment of tax owed pursuant to INT. REV. CODE of 1954, § 6653(b) :

(b) Fraud—If any part of any underpayment . . . of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 per cent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

5. Romanelli was being investigated for violations of INT. REV. CODE of 1954, §§ 4412 and 4905.

6. The Tax Court admitted it could see no substantial factual distinction between this interrogation and that in *Orozco v. Texas*, 394 U.S. 324 (1969), where the Supreme Court held that interrogation in a man's bedroom by five law enforcement officers was custodial interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Romanelli* court allowed these admissions, notwithstanding custody, because the ultimate result was merely civil fraud. *Romanelli*, at 1039.

7. *Romanelli*, at 1040.

the privilege against self-incrimination is generally not applicable in civil actions, and therefore held admissions during custodial interrogation absent *Miranda* warnings are not excludable in a civil tax fraud proceeding.⁸ The dissent focused upon the possibility that by virtue of the majority's holding the purpose of the exclusionary rule would be easily circumscribed:

Under the decision of the majority, the taxpayer in this case could have been locked in the freezer until he admitted that he owed taxes to the government, and his admission used in evidence against him before this court.⁹

The IRS procedures instituted in 1967 requiring *Miranda* warnings to be given by all special agents would appear to alleviate the *Romanelli* problem.¹⁰ There is no guarantee, however, that these procedures will always be strictly followed or that a desirable result will obtain when abuses occur.¹¹ It is contended that *Miranda* warnings should be required in situations similar to *Romanelli* but justified on broader grounds. There are two basic arguments which lead to the conclusion that *Miranda* warnings should be required in custodial interrogation involving tax fraud investigations regardless of whether the ultimate penalty is civil or criminal. First, a civil fraud sanction is functionally a criminal penalty for self-incrimination purposes and is, therefore within the protection accorded by the fifth amendment. Second, since investigatory procedures of the Intelligence Division of the IRS are inequitable in practice, evidence obtained from a taxpayer in a custodial setting where he has not been advised of his rights should be excluded in civil fraud proceedings to ensure administrative fairness.

While fifth amendment safeguards are required in cases that are clearly criminal, their use is not compelled in those cases which are civil in nature. However, limiting the classification of cases for the purpose of the privilege against self-incrimination to either criminal or civil is an oversimplification, since some cases present elements of both. Although

8. In *Mathis v. United States*, 391 U.S. 1 (1968) the Supreme Court held that evidence obtained from tax fraud suspects custodially questioned by Internal Revenue agents without prior *Miranda* warnings is excludable as evidence in criminal tax fraud trials.

9. *Romanelli*, at 1042 (Quealy, J., dissenting).

10. Int. Rev. Service News Release IR., 949 Nov. 26, 1968, 7 CCH 1968 Stand. Fed. Tax Rep. § 6946. The release requires that the special agent ". . . [I]s required to identify himself, describe his function and advise the taxpayer that anything he says may be used against him, . . . [and he must] . . . also tell the taxpayer that he cannot be compelled to incriminate himself by answering questions or producing any documents and that he has the right to seek the assistance of an attorney before responding."

11. See text accompanying note 51 *infra*.

drawing rigid, arbitrary lines of demarcation between criminal and civil sanctions arguably results in more predictability and consistency, when the danger which the constitutional safeguard seeks to eradicate is present, the basic rights of a suspect should not be compromised for the sake of institutional expediency. Mere labeling of a proceeding as criminal or civil should not necessarily be determinative of its real nature.

In rem forfeitures present an illustration of a proceeding involving both civil and criminal elements. A landmark decision in the development of the exclusionary rule was *Boyd v. United States*,¹² where the Supreme Court considered the rule's application to forfeiture proceedings. In ordering the defendant to produce his private papers in a proceeding to forfeit cases of glass imported in violation of customs duties, the Court stated:

. . . [S]uits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution and that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . .¹³

Boyd is significant because it provided the basis for the traditional classification of the in rem forfeiture proceeding as quasi-criminal.

The application of the exclusionary rule in forfeiture cases has been premised primarily upon violations of the fourth amendment's prohibition against unreasonable searches and seizures. However, in instances similar to *Boyd*, forfeiture proceedings have also been considered criminal for the purpose of the fifth amendment.¹⁴ The situation that would exist if there were no fourth or fifth amendment check on

12. 116 U.S. 626 (1886).

13. *Id.* at 634.

14. The issue of whether the fifth amendment privilege applies in forfeiture cases has been resurrected in *United States v. United States Coin and Currency in the Amount of \$8,674.00*, 393 F.2d 499 (7th Cir. 1968), *cert. granted*, 39 U.S.L.W. 3014 (1970). The question before the court is whether *Marchetti v. United States*, 390 U.S. 39 (1969), and *Grosso v. United States*, 390 U.S. 62 (1969), which prohibited criminal prosecutions of individuals who properly assert their privilege against self-incrimination when evidence of criminal activity has been uncovered as a result of their lawfully reporting activities as required by the Internal Revenue Code reporting requirements, precludes forfeiture of property in a proceeding under INT. REV. CODE of 1954, § 7302, requiring forfeiture of property used in violation of other Internal Revenue laws. Held; Forfeiture of property used to violate federal gambling tax laws is barred by Fifth Amendment privilege against self-incrimination. *United States v. United States Coin and Currency in the Amount of \$8,674.00*. 39 U.S.L.W. 4415 (April 25, 1971).

the investigative efforts of law enforcement officers in the quasi-criminal area, was aptly set forth in *United States v. Blank*:¹⁵

If there was no constitutional check on the investigative efforts of Federal administrative officials prosecuting civil claims, and there exists forfeiture and deficiency proceedings civil in form, which inflict an onerous monetary penalty upon an accused which approximates the visitations of the criminal code, there is no practical restraint upon such officials.¹⁶

The majority in *Romanelli* sought to distinguish these cases on the theory that in rem forfeitures are an adjunct to criminal proceedings¹⁷ because the property forfeited is utilized in furtherance of an underlying criminal offense. It is arguable, however, that civil fraud is likewise an adjunct to a criminal offense. Conviction of civil fraud requires virtually the same elements as in criminal fraud.¹⁸ In both cases there must be an underpayment of tax with intent to defraud the government¹⁹ with only the burden of proof and the penalties differing.²⁰ In summary, just as in rem forfeiture is an adjunct to a criminal action and therefore requires the existence of an underlying criminal offense to merit constitutional protection, civil fraud is likewise an adjunct to a criminal fraud action and is merely a supplementary sanction to the underlying criminal offense.²¹ Civil fraud, like forfeiture, cannot be labeled purely civil:

15. 261 F. Supp. 180 (N.D. Ohio 1966). Federal forfeiture proceeding where the evidence had been illegally seized by federal administrative officials. *Helds* it must be excluded from evidence as violative of the fourth amendment prohibition against unreasonable search and seizure.

16. *Id.* at 184.

17. In rem forfeitures were distinguished on this basis in *John Harper*, 54 T.C. 1121 (May 26, 1970), but the *Romanelli* court, by resting its decision on the logic of *Harper*, agreed with *Harper's* conclusions. *Romanelli*, at 1039.

18. The criminal counterpart to civil fraud is INT. REV. CODE of 1954, § 7201. ATTEMPT TO EVADE OR DEFEAT TAX:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

19. Lipton, *The Relationship Between the Civil and Criminal Penalties for Tax Fraud*, 1968 U. ILL. L. F. 527, 528, citing, *Spies v. United States*, 317 U.S. 492, 499 (1943); R. SCHMIDT, LEGAL AND ACCOUNTING HANDBOOK OF FEDERAL TAX FRAUD 6 (1963).

20. Lipton, *supra* note 19, at 528. The government's burden of proof in civil fraud is clear and convincing evidence while the burden in criminal fraud is beyond a reasonable doubt. *Id.*

21. Even assuming that forfeitures are an adjunct to a criminal offense because the property involved is usually an instrumentality used in furtherance of the criminal design, *United States v. United States Coin and Currency in the Amount of \$8,674.00*, 393 F.2d 499 (7th Cir. 1968) held that forfeiture of property requires independent fifth

both are connected with an underlying criminal offense and both invoke penalties which can be exacting.

Other factual analogies between civil fraud and criminal actions suggest that civil fraud should not be classified as strictly civil for purposes of constitutional protection. First, criminal misdemeanors are entitled to all procedural safeguards, although their penalties are often less onerous than the penalties resulting in civil fraud cases.²² Second, suspects in civil fraud cases are investigated in the same manner as criminal fraud suspects, since special agents cannot possibly be certain at the time of interrogation whether the litigation will ultimately be civil or criminal.²³ Yet under *Romanelli*, the rights accorded to a suspect depend upon the nature of the action ultimately brought against him. Finally, any stigma of cheating attaching to the criminal action would also attach to the civil action although the latter might not receive as much notoriety. Civil fraud is analogous to many criminal actions, and therefore distinguishing between them merely on the basis of the sanction's nature is artificial and should only be considered as one of many factors.

The *Romanelli* majority relied primarily²⁴ upon the authority of *Helvering v. Mitchell*²⁵ in reaching its conclusion that a civil tax fraud defendant does not warrant fifth amendment protection. Mitchell had been indicted under the criminal fraud statute,²⁶ but after his acquittal on that charge the government proceeded against him under the civil fraud statute.²⁷ Mitchell argued that the civil fraud action placed him in double jeopardy on the theory that the civil sanction was also penal in nature.²⁸ The supporting argument was made that the civil fraud penalty

amendment protection, absent a further criminal prosecution. There could be no possibility of a further criminal prosecution there because *Marchetti v. United States*, 390 U.S. 39 (1969) held that evidence to convict a taxpayer of a crime must be excluded if it was obtained through the taxpayer's compliance with the Internal Revenue Code reporting provisions.

22. See, e.g., IND. ANN. STAT. §§ 10-2301-03 (Burns 1956 Repl.), prohibiting raffling, lotteries, or advertising for lotteries all resulting in penalties of \$10.00 to \$500.00. The penalties in civil fraud can often be quite onerous; for example, in *Helvering v. Mitchell*, 303 U.S. 391 (1938), Mitchell was subject to a civil fraud penalty assessment of \$364,354.92.

23. E. Mortenson & P. Mortenson, *The Investigatory and Administrative Processes*, 1968 U. ILL. L. F., 443, 445.

24. The *Romanelli* majority also relied upon John Harper, 54 T.C. 1121 (May 26, 1970), a recent variation of the *Mitchell* theme, but the *Harper* case is distinguishable on its facts, as there was no custodial interrogation.

25. 303 U.S. 391 (1938).

26. At that time the criminal fraud statute which corresponded with INT. REV. CODE of 1954, § 7201, was REVENUE ACT OF 1928, § 146(a).

27. The corresponding 1928 civil fraud statute was REVENUE ACT OF 1928, § 293(b).

28. U.S. CONST. amend. V, ". . . [N]or shall any person be subject for the same offence to be twice in jeopardy of life or limb. . . ."

was meant primarily to suppress certain conduct rather than to supply revenue, as indicated by the fact the addition was far out of proportion to the ordinary tax.²⁹ The Court in *Mitchell* found that the remedial character of the sanction made it a civil assessment rather than a criminal penalty, while pointing to revenue protection, recouping of heavy investigation expenses, and Congressional intent as the basis for its conclusion.³⁰ By allowing Congressional intent to sweep all other considerations aside, the Court's analysis begs the essential question of whether a particular sanction is, for constitutional purposes, civil or criminal.³¹ Under the Court's analysis, if Congress clearly states that a sanction is to be remedial, a monetary penalty could be unlimited and nevertheless be considered civil for all constitutional purposes.

It is proposed that the appropriate analysis of this issue should follow the one advocated by Justice Frankfurter in *United States ex rel. Marcus v. Hess*,³² to the effect that the focus should shift from the nature of the sanction to the purpose of the particular constitutional safeguard when a clear classification of either civil or criminal is difficult. Frankfurter characterized the distinctions between civil-remedial and criminal-penal sanctions as "dialectical subtleties" and proposed that they are "too subtle when the problem is one of safeguarding the humane

29. *Brief for Respondent*, at 7, *Helvering v. Mitchell*, 303 U.S. 391 (1938); *citing*, *United States v. La Franca*, 282 U.S. 568 (1931); *Regal Drug v. Wardell*, 260 U.S. 386 (1922); *Child Labor Tax Case*, 259 U.S. 20 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Helwig v. United States*, 188 U.S. 605 (1903); *Passavant v. United States*, 148 U.S. 214 (1893); *Wright v. Blakeslee*, 101 U.S. 174 (1880); *Bartlett v. Kane*, 57 U.S. (16 How.) 263 (1853).

30. *Helvering v. Mitchell*, 303 U.S. 391, 399-406 (1938). The *Mitchell* Court found congressional intent that this was a civil sanction in the presence of two separate and distinct provisions that appear in different parts of the statute and the heading of the section reading "Additions to the Tax."

31. It must be conceded that the Supreme Court has consistently upheld statutory provisions which provide for so-called civil sanctions in addition to criminal penalties in situations analogous to civil fraud by relying primarily on the nature of the sanction. *See, e.g.*, *Hepner v. United States*, 213 U.S. 103 (1909), where the Alien Immigration Act of 1903, ch. 1012, 32 Stat. 1213, provided for a forfeiture of \$1,000.00 by a violator upon suit by the United States for a violation of its provisions. Action by the United States against a violator resulted in a directed verdict for the United States. The Supreme Court found that the statute was for a civil action to recover a penalty rather than for a criminal proceeding and therefore a directed verdict did not violate petitioner's sixth amendment right to a jury trial; *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) involving double damages to the government for violations of the Surplus Property Act of 1944, ch. 479, 58 Stat. 765. The Court held that the double measure of recovery fixed by Congress was not so unreasonable and excessive as to transform a civil remedy into a criminal penalty, and thus a second criminal prosecution was not in violation of the double jeopardy clause; *accord*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), as to similar statutory double damage action subsequent to a criminal prosecution.

32. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 553 (1943), (Frankfurter, J., *concurring*).

interest for the protection of which the double jeopardy clause was written into the Fifth Amendment."³³ The constitutional protection against self-incrimination, coupled with the exclusionary rule, is designed to deter governmental coercion.³⁴ Coercing self-incriminating statements from taxpayers during custodial interrogations is just as reprehensible whether used in a civil or criminal action. The best insurance against coercive measures is a clear warning of a taxpayer's rights at the outset of any custodial interrogation. The fifth amendment guarantee should not be avoided merely by labeling the proceeding civil.³⁵

Although the fifth amendment privilege would seem limited by its own terms to criminal cases,³⁶ it has been consistently held that the privilege reaches to the possibility of criminal action, regardless of whether one is actually brought.³⁷ This right would apply to any dis-

33. 317 U.S. 537, 554 (1943).

34. B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 93-114 (1969) ; 8 WIGMORE, EVIDENCE, § 2251 (McNaughton rev. 1961).

35. This issue was raised in *Boyd v. United States*, 116 U.S. 616 (1886), as follows: If the government prosecutor elects to waive an indictment, and to file a civil information against the claimant—that is civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens and extort from them a production of their private papers, or as an alternative a confession of their guilt? This cannot be. *Id.* at 634.

36. U.S. CONST. amend. V, "... [N]or shall be compelled in any criminal case to be a witness against himself."

37. *United States v. Burr*, 25 F. Cas. 38 (No. 14, 692e) (C.C.D. Va. 1807). Cited in *Piccirillo v. New York*, 39 U.S.L.W. 4162, 4166 (Jan. 25, 1971), (Brennan, J., *dissenting*). However, *Donaldson v. United States*, 39 U.S.L.W. 4139 (Jan. 25, 1971), casts doubt upon the premise that the mere possibility of a criminal prosecution will sustain an invocation of the privilege. Donaldson sought to intervene in an enforcement proceeding to require his past employer to produce certain records and documents relating to transactions with Donaldson. The court mentioned two instances where intervention is appropriate: (1) Where material is sought for the improper use of obtaining evidence for use in a criminal prosecution, or (2) where such materials are protected by the attorney-client privilege. The Court rejected Donaldson's contention that intervention in enforcement proceedings of a summons is appropriate where the summons is utilized in aid of an investigation which has the potentiality of resulting in a recommendation that a criminal prosecution be instituted against the taxpayer. The court relied on cases which found intervention appropriate only when a recommendation of criminal prosecution existed or an indictment had been returned. That Donaldson might be indicted and prosecuted was only a possibility, and this, according to the Court, would not be sufficient grounds for intervention. The Court could see no statutory suggestion for any meaningful line of distinction for civil as compared with criminal purposes at the point of a special agent's appearance. In rejecting any significance to the presence of a special agent, the Court may be indicating a reluctance to follow *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), which held that the presence of a special agent shifts the investigation from civil to criminal. In *Romanelli*, however, there was much more than the mere possibility that he would be prosecuted. The search warrant from which the special agents had authority to search Romanelli's tavern for gambling paraphernalia was issued pursuant to INT. REV. CODE of 1954, § 7302 which can only be issued in accordance with FED. R. CRIM. P. 41 which provides that a search warrant may only be issued on the finding of probable cause that the property was stolen, embezzled, designed or intended for use as a means of committing a criminal offense.

closures that could be used in a criminal action,³⁸ and can be claimed in "any proceeding, be it criminal or civil, administrative or judicial, investigative or adjudicatory."³⁹ Therefore, Romanelli had a right to invoke his constitutional privilege against self-incrimination at the time of his interrogation since there was a strong probability that a criminal action might obtain.⁴⁰ This right, coupled with the inherent unfairness of an IRS fraud investigation,⁴¹ should give rise to an obligation on the part of special agents to advise all suspected taxpayers of their privilege at the time of custodial interrogation. Omitting *Miranda* warnings should taint any oral evidence obtained in the manner employed by the IRS in *Romanelli*, even though it was ultimately used in a civil fraud proceeding.

IRS procedure renders it unlikely that a pure civil fraud investigation is ever conducted.⁴² Once the Intelligence Division assigns a special agent to determine whether fraud has been committed, his primary objective is to acquire evidence for criminal prosecution.⁴³ Since the elements of civil and criminal fraud are identical,⁴⁴ a taxpayer's own admissions will be the primary source of evidence for either civil or criminal fraud, and special agents will use the same methods to obtain proof regardless of which action ultimately results.⁴⁵

There is a growing number of cases which recognize a fairness concept in administrative agency action that requires adherence to their own procedural rules.⁴⁶ In *United States v. Heffner*⁴⁷ an administra-

38. *Mason v. United States*, 244 U.S. 362, 363 (1917); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

39. *Murphy v. Waterfront Comm'rs.* 378 U.S. 52, 94 (1964), (White, J., concurring).

40. See note 37 *supra*.

41. See text accompanying notes 57-65 *infra*.

42. IRS News Release IR., 897 Oct. 3, 1967, 7 CCH 1967 Stand. Fed. Tax Rep. § 6832. Investigation of suspected criminal tax fraud is conducted by special agents of the IRS Intelligence Division. When a taxpayer's return is checked by the Audit Division, the purpose is simply to determine if the taxpayer has reported his correct tax liability, and at the first indication of fraud the case is transferred to the Intelligence Division for a determination of that issue.

43. Internal Revenue Service Organization and Functions ¶ 1118.6, 35 Fed. Reg. 2454 (Feb. 1970). "Intelligence Division enforces the criminal statutes applicable to income. . ." See also, Andrews, *Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage"*, 53 IOWA L. REV. 1074, 1111 (1968).

44. See notes 19, 20 *supra*.

45. Boughner, *Wilful Failure to File*, 1968 U. ILL. L. F. 460, 468.

46. See Popkin, *A Critique of the Rule-Making Process in Federal Income Tax Law with Special Reference to Conglomerate Acquisitions*, 45 IND. L.J. 453, 501 (1970).

47. 420 F.2d 809 (4th Cir. 1969). *Heffner* was a situation where the taxpayer had willfully furnished to his employer fraudulent withholding statements. The criminal conviction was sustained in part by statements obtained from Heffner by special agents in a non-custodial interrogation, and the court concluded that even though there had been no

tive fairness rationale was applied where a special agent failed to follow an IRS directive requiring *Miranda* warnings at the first contact.⁴⁸ In the ensuing criminal action, the court excluded the taxpayer's admissions, holding that a government agency must scrupulously observe its own rules and a failure to do so is a violation of due process.⁴⁹ Romanelli's dilemma arose prior to the issuance of the directive at issue in *Heffner*, and it is therefore arguable that the problem in *Romanelli* no longer exists if the *Heffner* rationale is applied to civil fraud cases.⁵⁰ However, reliance on *Heffner* may be tenuous. Several courts have already rejected the *Heffner* rationale,⁵¹ and others may draw distinctions between civil and criminal cases in an attempt to limit its application.

A broader application of administrative fairness appears to underlie the Seventh Circuit Court of Appeals' reasoning in *United States v. Dickerson*,⁵² where the issue was at what point in time must *Miranda* warnings be given in a criminal tax fraud investigation. The court held that warnings be given by special agents prior to actual custody, specifically when the investigation's focus on the taxpayer turns from civil to criminal.⁵³ Implicit in the *Dickerson* holding is the concept of fairness: the *Miranda* warnings were deemed a necessary response to the inherent coercion in tax investigations and the methods used by special agents to elicit information. The *Heffner* case also alludes to this broader concept of fairness by recognizing that the purpose of the particular IRS directive involved is both necessary and laudable.⁵⁴

custody the admissions were to be excluded; *accord*, *United States v. Leahy*, 8 Crim. L. Rptr. 2038 (1st Cir. 1970).

48. 7 CCH 1967 Stand. Fed. Tax Rep. § 6832.

49. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles*, 354 U.S. 363 (1959); *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

50. The due process clause makes no distinction between civil and criminal actions. U.S. CONST. amend. V, ". . . [N]or be deprived of life, liberty, or property without due process of law."

51. Two federal district court cases have not followed *Heffner*. *United States v. Luna*, 70-2 USTC ¶ 9498 (W.D. Tex. May 7, 1970), refused to follow *Heffner*, stating that the cases *Heffner* relied on were distinguishable from a case involving the exclusion of evidence. *United States v. Middleton*, 70-2 USTC ¶ 9498 (D. Minn. June 5, 1970), found *Heffner* factually distinguishable, in that *Heffner* involved an uneducated and emotionally disturbed individual, who was not instructed that he was a criminal suspect, while *Middleton* involved a well-educated professional who at all times was aware that criminal prosecution was a possibility.

52. 413 F.2d 1111 (7th Cir. 1969).

53. *Dickerson* held that the warnings must be given when the investigation's focus turns from civil to criminal, that is, when special agents enter the case. The majority of circuits continue to rely on the pre-*Miranda* voluntariness test for non-custodial interrogations. *See, e.g.*, *Cohen v. United States*, 405 F.2d 34 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969); *United States v. Mackiewicz*, 401 F.2d 219 (2d Cir. 1968); *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967); *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. denied*, 389 U.S. 920 (1967).

54. *United States v. Heffner*, 420 F.2d 809, 813 (4th Cir. 1969). The court stated

In other contexts, courts, after discovering inequities, have felt free to analyze entire administrative systems with a view toward fairness. An analogous use of this logic led to the Supreme Court's decision in *In Re Gault*.⁵⁵ After examining the juvenile offender system as a whole, the Court concluded that the system was dysfunctional and, as a result, was inherently unfair. To remedy the unfairness of the system, juvenile offenders were granted certain constitutional safeguards afforded to all adults. A more recent illustration is *Goldberg v. Kelly*,⁵⁶ which concerned state procedures for the termination of welfare payments. The Court found that the entire termination process lacked fundamental fairness and its holding imposed appropriate due process standards to prevent further inequities.

Likewise, investigatory procedures used by the Intelligence Division operate upon a suspected tax evader with sufficient unfairness that an application of strict due process standards is required. First, at the time of interrogation the taxpayer is often unaware that the investigation is anything more than a routine audit.⁵⁷ Although IRS regulations require special agents to identify themselves,⁵⁸ the term "special agent" usually means nothing to the average taxpayer.⁵⁹ It follows that any tax interrogation without *Miranda* warnings can be more treacherous than custodial questioning of a suspect at the police station: the ordinary suspect at least knows that his interrogators are seeking evidence to

that their holding would "assist the IRS in fulfilling its own important stated purpose in requiring that the warnings be given." The purpose of the particular directive was to ensure uniformity in the protection of constitutional rights of suspected taxpayers.

55. 387 U.S. 1 (1967). In *Gault* the Court, after reviewing the process of the juvenile offender system, decided that the procedures were fundamentally unfair and that, therefore, the juvenile needed the basic constitutional criminal safeguards. The significant point is that once the court uncovered these specific problems they felt themselves free to analyze the system beyond the specific problems at hand and to conclude on the basis of the total system that the procedures were unfair. *Id.* at 1331.

56. 397 U.S. 254 (1970). In *Goldberg* the Court rejected the contention that the procedural due process afforded an aggrieved welfare recipient should turn on the rubric of whether the welfare assistance is a privilege or a right. The standard for due process applicable to termination of welfare payments is assessed by the extent to which the recipient may be condemned to suffer grievous loss. The extent of the loss must be measured by balancing the government's interest which must begin with a determination of the precise nature of the government function involved. *Id.* at 262-63. *Goldberg*, like *Gault*, followed the approach urged in this note, that is, they viewed the process as a whole considering both the extent of the harm to the individual and the needs of the government in utilizing their particular methods and from this they would ascertain the standards of due process applicable.

57. Comment, *Fifth Amendment Right to Counsel in Federal Income Tax Investigations*, 19 STAN. L. REV. 1014, 1019-21 (1967).

58. INT. REV. SERVICE News Release IR. 949 Nov. 26, 1968, 7 CCH 1968 Stand. Fed. Tax Rep. § 6946.

59. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 36 (1966).

convict him of a crime, but the taxpayer is "permitted and even encouraged to believe that no criminal prosecution is in contemplation."⁶⁰ Second, considerable pressure to cooperate arises from the well-founded fear that non-cooperation may result in inquiries by special agents to clients, customers, or other associates of the taxpayer which would be harmful to his reputation.⁶¹ Moreover, the taxpayer may believe that the government prosecutes only the recalcitrant.⁶² Third, the special agent adds to these pressures because he is instructed to obtain admissions before the taxpayer has had an opportunity to consider his dilemma⁶³ or consult with counsel.⁶⁴ The questions asked by a special agent will be designed to elicit incriminating responses,⁶⁵ since the government will usually prove its case with these statements.⁶⁶

In practice a civil tax fraud investigation exists only as a concomitance of the criminal fraud investigation. It is administratively unfair to permit the IRS to use this dual investigatory procedure to its own advantage by relying on evidence which would clearly be excludable in a criminal action⁶⁷ to support a civil fraud suit.

Under the holding in *Romanelli*, evidence is admitted by focusing upon the label attached to the ultimate cause of action and ignoring the

60. *United States v. Turzynski*, 268 F. Supp. 847, 851 (N.D. Ill. 1967), where investigation of taxpayer's business affairs by IRS shifted from civil investigation to criminal without the taxpayer's knowledge, the district court held it was incumbent on special agents to advise the taxpayer of his constitutional rights prior to non-custodial interrogation.

61. *See Duke*, *supra* note 59, at 35.

62. Lipton, *Constitutional Rights in Criminal Tax Investigations*, 45 F.R.D. 323, 336 (1968).

63. The court in *Dickerson v. United States*, 413 F.2d 1111 (7th Cir. 1969) summed the problem up, stating:

It is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agent, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe.

Id. at 1116.

64. *See Lipton*, *supra* note 62, at 337.

65. E. Mortenson & P. Mortenson, *The Investigatory and Administrative Processes*, 1968 U. ILL. L. F. 443-44. An example of the results of such pressure can be found in *Hugo Romanelli* T.R. 69-70 where the testimony of Romanelli was as follows:

Q. And you were trying to be cooperative?

A. I was scared and . . .

The Court: Mr. Romanelli, if they asked you a question and you knew the answer was "no", do you mean to tell the Court that you were answering that yes?

A. I would have then, yes, sir.

The Court: In other words even if they asked you "Did you commit murder," you would have said yes?

A. I would have said that at that time, yes sir.

66. *See* note 45 *supra*.

67. *Mathis v. United States*, 391 U.S. 1 (1968).

coercive aspects of the interrogation. The purpose behind the constitutional protection against self-incrimination is thereby thwarted, and doubt is cast upon the integrity of the judicial process which admits such evidence in the face of administrative unfairness.

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