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Complicating the Complicated: Southern Union and How Environmental Crime Cases Just Became More Complex

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COMPLICATING THE COMPLICATED: SOUTHERN UNION AND HOW ENVIRONMENTAL CRIME CASES JUST BECAME MORE COMPLEX

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I. INTRODUCTION

Congress has created an expansive environmental law regime that includes both civil and criminal penalties for environmental violators. The criminal portion of that regime has just become more complex. In a recent decision, *Southern Union Co. v. United States*, the Supreme Court made a significant alteration that affects, specifically, criminal fines.[1] The *Southern Union* ruling has far reaching effects in two common forms of environmental crime fines: (1) fines that involve penalties that are measured per day of violation; and (2) fines that are weighed in gain to a defendant or loss to society under the Alternative Fines Act.[2] Additionally, the Supreme Court's ruling in *Southern Union* will have significant ramifications in environmental law because it is a constitutional ruling, meaning it will affect both state and federal laws.[3] All this, coupled with the fact that increasing numbers of environmental enforcement cases are being pursued criminally by the federal govern-

1. *See* S. Union Co. v. United States, 132 S. Ct. 2344, 2357 (2012).

2. Bruce Pasfield & Elise Paeffgen, *Supreme Court's* Southern Union *Decision Helps Level the Playing Field for Corporations Subject to Criminal Fines*, 13 ENVTL. ENFORCEMENT & CRIMES COMM. NEWSL. 2, 3, 5–6 (2012), http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eecc/201208_eecc.authcheckdam.pdf.

3. *S. Union Co.*, 132 S. Ct. at 2348 (stating the ruling applies to both federal and state laws).

ment, makes *Southern Union* a particularly important alteration in environmental crime law.[4]

In effect, the *Southern Union* court added another layer of complexity to already complicated environmental crime cases, dramatically changing how certain cases will be litigated.[5] The Court held that the Sixth Amendment's notice and jury trial guarantees require all facts that increase a defendant's maximum criminal fine be proven to a jury beyond a reasonable doubt.[6] In effect, this meant that the jury in *Southern Union* had to find a violation on each and every one of 752 days where the defendant company was charged with improper storage of mercury because the charging statute had a per day fine scheme.[7] Prior to the ruling, judges were allowed to make factual determinations in sentencing that affected a criminal defendant's criminal fine, such as determining the number of days where violations had occurred.[8] In effect, *Southern Union* results in a broad expansion of the jury trial requirements in criminal fine cases.[9]

Through its expansion of jury trial requirements, *Southern Union* creates a series of new problems and challenges for the justice system. Five of these problems and challenges will be discussed in this article. The first challenge that the article will discuss is *Southern Union's* requirement that indictments and verdicts specify more facts relating to criminal fines than trial judges had previously required.[10] In a case like *Southern Union*, this could be as complicated as making a count for each day of violation, totaling 752 counts. A second challenge this article discusses is questions relating to the amount of inferences a jury can make regarding those facts.[11] This aspect of the article can be stated as a hypothetical. When *Southern Union* is remanded, will the jury have to hear evidence of a violation on each of the 752 days, or could they infer a violation took place over 752 days after seeing evidence of a violation on just a handful of days? A third challenge the article will

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4. *See* Beth S. Gotthelf & Joseph E. Richotte, *More Environmental Cases Are Going Criminal: How to Protect and Prepare-the Value of Audits and Compliance Programs*, 13 ENVTL. ENFORCEMENT & CRIMES COMM. NEWSL. 2, 9 (2012) http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eecc/201208_eecc.authcheckdam.pdf ("Those operating in industries highly regulated by federal, state, and local environmental protection agencies have seen an increase in the number of violations being escalated from administrative notices of violations and fines, or even civil penalties, to criminal prosecutions.").

5. *See* United States v. White, 766 F. Supp. 873, 882 (E.D. Wash. 1991) (quoting Don R. Clay, EPA Assistant Administrator of the EPA Office of Solid Waste and Emergency Response, as saying "RCRA is a regulatory cuckoo land of definition . . . I believe we have five people in the agency who understand what 'hazardous waste' is."); *see also* David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1224 (2009) (stating environmental laws and regulations are "often are mind-numbingly complex"); *see also* Walter D. James III, *Environmental Crimes Trials – More Complicated Now?*, ENVTL. CRIMES BLOG (June 22, 2012, 8:57 AM), http://environmentalblog.typepad.com/environmental_crimes_blog/2012/06/environmental-crimes-trials-more-complicated-now.html.

6. *S. Union Co.*, 132 S. Ct. at 2352.

7. *Id.* at 2352.

8. *E.g.*, Oregon v. Ice, 555 U.S. 160, 172 (2009).

9. Leading Cases, 126 HARV. L. REV. 256, 266 (2012) (stating that "by extending *Apprendi* to a characteristically regulatory sanction imposed against an institutional defendant, *Southern Union* suggests that if the defendant is entitled to a jury for the underlying conviction, then he should be entitled to a jury on facts that determine all accompanying penalties.").

10. *See infra* Part III.A.

11. *See infra* Part III.B.

discuss is the effect *Southern Union* has on ever complicated environmental crime trials.[12] A fourth challenge this article will discuss is a consequence of *Southern Union*. That is the case may, in effect, result in more prosecutions for individual liability that results in jail sentences because of the additional complications *Southern Union* adds to cases involving criminal fines.[13] Fifth and finally, the article will discuss whether *Southern Union* has any application to civil penalties.[14] This article will discuss these new problems and challenges in the context of environmental enforcement at both the state and federal level.

II. BACKGROUND

To understand the Supreme Court's ruling in *Southern Union*, it is necessary to examine the prior Supreme Court case law that led to *Southern Union*. Prior to *Southern Union*, the Supreme Court only required juries to determine all facts that increased a criminal defendant's term of *incarceration*—not criminal fines.[15] In fact, in a previous case the Supreme Court stated in dicta that applying such a rule to criminal fines "surely would cut the rule loose from its moorings."[16] However, in *Southern Union* the court disavowed its own dicta and applied the rule to criminal fines.[17] The ruling in *Southern Union* was not novel. In fact, it was only the extension of a ruling handed down twelve years before in *Apprendi v. New Jersey*.[18]

A. *Apprendi*

In *Apprendi*, the Supreme Court laid out its standard for judicial fact finding that leads to a determination of a criminal defendant's term of incarceration.[19] There, the Court held that the due process clauses of the Fifth and Fourteenth Amendments, along with the Sixth Amendment's notice and jury trial guarantees, require that all facts that increase a defendant's maximum term of incarceration be proved to a jury beyond a reasonable doubt.[20] The facts in *Apprendi* involved a New Jersey defendant who was accused of discharging a gun into the home of an African American family that had recently moved into his all-white neighborhood.[21] He was indicted on charges for alleged shootings and possession of various weapons.[22] Nothing in the indictment, however, referred to a hate crime or a crime

12. *See infra* Part III.C.
13. *See infra* Part III.D.
14. See infra Part III.E.
15. S. Union Co. v. United States, 132 S. Ct. 2344, 2351–52 (2012).
16. Oregon v. Ice, 555 U.S. 160, 172 (2009).
17. *S. Union Co.*, 132 S. Ct. at 2352 n.5 (stating "[w]e think the statement is at most ambiguous, and more likely refers to the routine practice of judges' imposing fines from within a range authorized by jury-found facts. Such a practice poses no problem under *Apprendi* because the penalty does not exceed what the jury's verdict permits. In any event, our statement in *Ice* was unnecessary to the judgment and is not binding.") (citations omitted).
18. Apprendi v. New Jersey, 530 U.S. 466, 553 (2000).
19. *Id.* at 552–53.
20. *Id.* at 466.
21. *Id.* at 469.
22. *Id.*

with racial prejudice.[23] Later, the defendant pled guilty to possession of a firearm for an unlawful purpose.[24] At sentencing the judge found the crime "was motivated by racial bias," and enhanced the sentence on a preponderance of the evidence standard.[25] Though the New Jersey legislature had previously made the hate crime enhancement a sentencing factor, the jury never made a factual finding that the crime was motivated by racial bias.[26] On appeal, it was held that the judge's finding of racial bias was permissible because it was within the legislature's power to make the hate crime enhancement a sentencing factor.[27] However, the Supreme Court granted certiorari and reversed the trial judge's factual determination that the crime was motivated by racial bias.[28]

The Supreme Court had multiple reasons for its reversal. First, the Supreme Court wanted to ensure that terms of incarceration were based on facts proven beyond a reasonable doubt.[29] The Court found the beyond-a-reasonable-doubt standard necessary because criminal convictions result in the most severe of legal sanctions—a loss of liberty and a criminal stigma.[30] Second, the Court wanted to preserve the jury's role in criminal convictions as reflected in the Sixth Amendment and historical practices.[31] The Court based its reasoning on the small amount of discretion that judges historically had in felony sentencing, stating "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing."[32] Thus, the Court stated the *Apprendi* rule was a reflection of the large role that juries play in criminal trials, as guaranteed by the Sixth Amendment.[33] Finally, the Court argued that the simple interests of justice mandate that a criminal defendant should not be treated differently on a matter of procedure—whether an enhancement is a sentencing factor or a trial factor.[34] Thus, the Court stated:

> Oliver Wendell Holmes, Jr., observed: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed." New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement"

23. *Id.*
24. *Apprendi*, 530 U.S. at 469.
25. *Id.* at 471.
26. *Id.* at 471.
27. State v. Apprendi, 731 A.2d 485, 492 (N.J. 1999), *rev'd*, 530 U.S. 466 (2000).
28. *Apprendi*, 530 U.S. at 474.
29. *Id.* at 477.
30. *Id.* at 484.
31. *Id.* at 476.
32. *Id.* at 479 (quoting John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, 36–37 (A. Schioppa ed. 1987)).
33. *Apprendi*, 530 U.S. at 518.
34. *Id.* at 476.

> to describe the latter surely does not provide a principled basis for treating them differently.[35]

This line of reasoning was taken up by the *Southern Union* court, which expanded the *Apprendi* rule from criminal incarcerations to both criminal incarcerations and criminal fines.[36]

B. *Southern Union*

A circuit split on whether or not to apply *Apprendi* to criminal fines was resolved in *Southern Union*.[37] Initially, the First Circuit did not apply the *Apprendi* rule to criminal fines in *Southern Union*.[38] Instead, the First Circuit relied on dicta from the Supreme Court's ruling in *Oregon v. Ice*.[39] In that case, the Supreme Court stated that applying *Apprendi* to criminal fines "surely would cut the rule loose from its moorings."[40] Following this dicta, the First Circuit asserted that "no traditional jury function had been curtailed" by allowing judges to make factual findings pertaining to fines in sentencing.[41]

The First Circuit's ruling conflicted with rulings from the Second and Seventh Circuits.[42] The Second Circuit, in *United States v. Pfaff*, held that the *Apprendi* rule did apply to criminal fines.[43] There, the Second Circuit held the *Apprendi* rule applied when a judge made pecuniary loss determinations that increased a defendant's fine, who was charged with tax evasion, from $3 million to $6 million.[44] The Second Circuit held the fine violated *Apprendi* because doubling the defendant's criminal fine based on facts that were not proven beyond a reasonable doubt to a jury "affected the appellant's substantial rights and seriously affected the fairness of the proceedings."[45] Another circuit that applied *Apprendi* to criminal fines was the Seventh Circuit.[46] The Seventh Circuit, in *United States v. LaGrou Distribution Systems Inc.*, held a district judge had "no authority to sentence" a defendant corpo-

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35. *Id.* (citations omitted) (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 40 (M. Howe ed. 1963).

36. *S. Union Co.*, 132 S. Ct. at 2352–53.

37. *Id.* at 2349.

38. United States v. S. Union Co., 630 F.3d 17, 34 (1st Cir. 2010), *rev'd and remanded*, 132 S. Ct. 2344 (2012).

39. *Id.* at 34.

40. Oregon v. Ice, 555 U.S. 160, 172 (2009).

41. *S. Union Co.*, 630 F.3d at 34.

42. *See* United States v. Pfaff, 619 F.3d 172, 175 (2d Cir. 2010); United States v. LaGrou Distrib. Sys. Inc., 466 F.3d 585, 594 (7th Cir. 2006).

43. *Pfaff*, 619 F.3d at 175.

44. *Id.* at 174–75. The judge made this determination under the Alternative Fines Act. *Id.* The Alternative Fines Act states: "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3571(d) (2006). Thus, the Alternative Fines Act allows fines above the statutory maximum in amounts equal to twice the economic gain or loss of the offense of the conviction. *Id.*

45. *Pfaff*, 619 F.3d at 175 (internal quotation marks omitted) (quoting United States v. Marcus, 130 S. Ct. 2159, 2164 (2010)).

46. United States v. LaGrou Distribution Sys. Inc., 466 F.3d 585, 594 (7th Cir. 2006).

ration to a $1 million criminal fine absent a jury finding that the crime justified a departure from the default statutory fine amount of $500,000.[47] There, the court stated:

> [T]he problem is that the district court did not give a special interrogatory with the jury instructions or verdict form asking the jury to find a loss amount. Thus, at sentencing, it was the district judge using a preponderance of the evidence standard to find the loss amount, not a jury finding loss amount beyond a reasonable doubt.[48]

These different court rulings set the stage for the Supreme Court to decide the new constitutional question presented in *Southern Union*.

The facts in *Southern Union* exemplify an old and common problem where low-income and minority communities often have a high concentration of facilities that produce hazardous chemicals.[49] The *Southern Union* case began when Rhode Island youths broke into the building and took 140 pounds of mercury, played with it, and spread it around their homes in a local apartment complex.[50] All in all, 150 residents of five apartment buildings were displaced for two months while the mercury in their building was cleaned up.[51] Although all of the residents, who were tested for mercury, did not meet the standards for hazardous exposure, some residents had elevated mercury exposure blood levels.[52]

These events precipitated from the improper storage of the mercury by a natural gas company called the Southern Union Company.[53] Southern Union was storing the mercury in a dilapidated and unguarded facility located in a residential area with a frequent history of break-ins and vandalism.[54] The actual mercury was "'stored' in doubled plastic bags placed in kiddie pools on the floor of [a] brick building."[55] Ample evidence from company letters and meetings indicated the company knew the mercury was being stored in a dangerous manner.[56] At trial, the Southern Union Company was convicted of knowingly storing hazardous mercury in violation of the Resource Conservation and Recovery Act (RCRA).[57] However, the company appealed the trial judge's determination that the violation took place over 762 days.[58] Though the trial court set a maximum fine at $38.1 million and an actual fine at $6 million, the Supreme Court reversed the fine because the district

47. *Id.*
48. *Id.*
49. *See* Dominique R. Shelton, *The Prevalent Exposure of Low Income and Minority Communities to Hazardous Materials: The Problem and How to Fix It*, 32 BEVERLY HILLS B. ASS'N J. 1, 1 (1997); Valerie J. Phillips, *Have Low Income, Minorities Been Left Out of the Environmental Cleanup?*, 38 ADVOCATE 16, 18–19 (1995) (pointing out the danger to migratory farm workers that can result from chemical exposure).
50. United States v. S. Union Co., 630 F.3d 17, 21 (1st Cir. 2010), *rev'd and remanded*, 132 S. Ct. 2344 (2012).
51. *Id.* at 24.
52. *Id.*
53. *Id.*
54. *Id.* at 22.
55. *Id.*
56. *S. Union Co.*, 630 F.3d at 23.
57. United States v. S. Union Co., 643 F. Supp. 2d 201, 205–207 (D.R.I. 2009), *aff'd*, 630 F.3d 17 (1st Cir. 2010), *rev'd and remanded*, 132 S. Ct. 2344 (2012).
58. *S. Union Co.*, 132 S. Ct. at 2349.

judge engaged in judicial fact finding that went beyond the scope of the Sixth Amendment as laid out by the *Apprendi* rule, which had previously only been applied to criminal incarcerations.[59] Thus, the Supreme Court extended the *Apprendi* rule to include criminal fines, requiring that juries make all factual findings that increase a criminal defendant's criminal fine.[60] In applying the rule, the court stated their '"core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.' That concern applies whether the sentence is a criminal fine, imprisonment, or death."[61] Thus, the court made a clear rule that all facts that affect a criminal defendant's sentence—whether a term of incarceration or a criminal fine—must be determined by the jury.[62]

In *Southern Union* the Supreme Court backed up its ruling with historical analysis "suggesting that English juries were required to find facts that determined the authorized pecuniary punishment."[63] The Court stated the rule that juries must determine facts relating to criminal fines "is an application of the 'two longstanding tenets of common-law criminal jurisprudence'" that *Apprendi* and the Sixth Amendment were based upon.[64] First, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'"[65] Second, "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason."[66] The Court's ruling followed the arguments of amicus briefs arguing that applying the *Apprendi* rule to criminal fines was a reaffirmation of the traditional role of the jury and vital to enforcing the Sixth Amendment.[67]

Thus, the Court stated the ruling preserved the historic jury function in "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt."[68] As such, the ruling followed a trend in Supreme Court cases that applied the *Apprendi* rule "to a variety of sentencing schemes that allow[ed] judges to find facts that increase[ed] a defendant's maximum authorized sentence."[69] To support the assertion that the *Southern Union* case was consistent with

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59. *Id.* at 2352.
60. *Id.*
61. *Id.* at 2350 (quoting *Ice*, 555 U.S. at 170).
62. *Id.*
63. *Id.* at 2353.
64. *S. Union Co.*, 132 S. Ct. at 2354.
65. *Id.*
66. *Id.*
67. Brief of Criminal Procedure Scholars as Amicus Curiae in Support of Petitioner at 1, S. Union Co. v. United States, 132 S. Ct. 2344 (2012) (No. 11-94), 2012 WL 195309 (arguing "there is considerable evidence suggesting that the jury's role in the colonial period was similar in setting fines as for assessing the length of sentences"); Brief for the Chamber of Commerce of the United States of America and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petitioner at 2, S. Union Co. v. United States, 132 S. Ct. 2344 (2012) (No. 11-94), 2011 WL 3664464 (arguing requiring that the jury make factual determinations relating to sentencing "is critical to ensuring uniform nationwide enforcement of the Sixth Amendment.").
68. *S. Union Co.*, 132 S. Ct. at 2350 (quoting Oregon v. Ice, 555 U.S. 160, 163 (2009)).
69. *Id.*

prior decisions, the court cited a number of its previous decisions that applied the *Apprendi* rule to various sentencing schemes.[70]

The Supreme Court's ruling in *Southern Union* can be tied to the government's indictment of the Southern Union Company. Indictments serve as the initial pleading in a criminal case and, like other pleadings, they require that the government states every element of the charged crime.[71] The government's indictment was fatal because it did not specify the precise dates where the Southern Union Company committed an RCRA violation—a fact that affected the size of the company's criminal fine.[72] The indictment stated the Southern Union Company stored hazardous waste in violation of RCRA "[f]rom on or about September 19, 2002 until on or about October 19, 2004."[73] Violations involving knowing transportation of waste to an improper facility or knowing treatment, storage, or disposal of waste under RCRA are punishable by "[a] fine of not more than $50,000 for each day of violation."[74] Since, the indictment did not specify the specific dates where a violation took place, it did not contain all the facts relevant to the Southern Union Company's criminal fine.[75] This lack of specificity in the indictment led to a lack of specificity in the jury instructions in the case. The jury instructions defined "on or about" by stating:

> You will note that the Indictment charges that some of the offenses were committed "on or about" a certain date. The proof *need not establish with certainty the exact date of the alleged offense*. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.[76]

Since the jury was instructed to not establish the dates of violation with exact certainty, the dates of violation could not have been found on a beyond a reasonable doubt standard.

In effect, the lack of specificity in the date of violation opened the door for the district judge to have to determine an element of the criminal RCRA violation in sentencing—over how many days the violation occurred.[77] However, the indictment would not have violated the *Apprendi* rule if, hypothetically, the government

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70. *See* Cunningham v. California, 549 U.S. 270, 274–75 (2007) (applying the rule to an elevated "upper term" of imprisonment); United States v. Booker, 543 U.S. 220, 226–27 (2005) (imposing the rule on a scheme that increased the imprisonment range for defendant under the Federal Sentencing Guidelines that were mandatory at the time); Blakely v. Washington, 542 U.S. 296, 229–300 (2004) (applying the rule to a scheme that added imprisonment over the "standard range" defined by statute); Ring v. Arizona, 536 U.S. 584, 588–589 (2002) (applying the rule to a scheme where the death penalty was authorized upon the finding of aggravating sentencing factors); Apprendi v. New Jersey, 530 U.S. 466, 466–469 (2000) (applying the rule to an extended prison term based on defendant violating a "hate crime" statute).

71. *See* DEP'T OF JUSTICE, GRAND JURY MANUAL, at VII-4 (1991).

72. *S. Union Co.*, 132 S. Ct. at 2349.

73. Indictment, S. Union Co. v. United States, 132 S. Ct. 2344 (2012) (No. CR 07 134 T) 2007 WL 3123420.

74. 42 U.S.C.A. § 6928(d)(7)(B) (West 2013).

75. *S. Union Co.*, 132 S. Ct. at 2349.

76. Jury Instructions at 13, United States v. S. Union Co., 643 F. Supp. 2d 201 (2012) (D.R.I. 2009) (Cr. No. 07–134 S), *available at* http://www.rid.uscourts.gov/menu/judges/jurycharges/CRdocs/07-134S%20US%20v%20Southern%20Union.pdf (emphasis added).

77. *See S. Union Co.*, 132 S. Ct. at 2349.

had made a specific charge for each of the 752 days of violation.[78] Making a charge for each day of violation, however, would undoubtedly be cumbersome. Luckily, alternative ways to charge an environmental crime that has a per day fine exist and are discussed in subsequent sections of this article.[79]

The ruling in *Southern Union* had many opponents because it gave rise to many new complications in criminal fine trials. One source of opposition came from the government.[80] The government provided multiple arguments against extending *Apprendi* to criminal fines.[81] First, the government argued that requiring juries to determine facts relating to fines caused confusion, which would require additional expert testimony.[82] Second, the government argued that extending *Apprendi* might prejudice defendants because there would be situations where they would have to simultaneously argue they did not violate a statute and argue that their violations were minimal.[83] Finally, the government argued extending *Apprendi* would be impractical because fines often rely on facts that may be unknowable before a trial ends.[84] Such arguments highlight the complications that *Southern Union* created for the government in criminal fine cases.

Another example of opposition to the ruling in *Southern Union* came from the dissenters in the case.[85] Justices Breyer, Kennedy, and Alito all joined in a fifteen-page dissent to the opinion.[86] The dissenters took issue with the majority in many places.[87] Notably, the dissenters argued *Southern Union* was bad for defendants in three ways.[88] First, they argued the opinion would negatively affect defendants because in many cases they would have to make two conflicting arguments: (1) that they did not commit a crime and (2) that they only committed it for a small period of time.[89] Second, the dissenters argued the ruling would allow new evidence to come in at trial to prove daily violations that otherwise would have been prejudicial to the defendant.[90] They pointed out that the company in *Southern Union* had the court exclude prejudicial evidence of the removal of the mercury to a local apartment complex, but under the new scheme such evidence might now come into trial as it would aid the government in proving daily violations.[91] Finally, the dissenters

78. *See infra* Part III.A.
79. *See infra* Part III.A.
80. *S. Union Co.*, 132 S. Ct. at 2356.
81. *Id.*
82. *Id.*
83. *Id*.
84. *Id.*
85. S. Union Co. v. United States, 132 S. Ct. 2344, 2357 (2012) (Breyer, J., dissenting).
86. *Id.*
87. *Id.* at 2356–72 (Breyer, J., dissenting).
88. *Id.* at 2370–72 (Breyer, J., dissenting).
89. *Id.* at 2370 (Breyer, J., dissenting).
90. *Id.*
91. *Id.* Under Federal Rule of Evidence 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. This is commonly referred to as the 403 balancing test. *Id.* The dissenters were recognizing the fact that the ruling in *Southern Union* would allow the prosecutor to bring in additional evidence to prove daily violations. 132 S. Ct. 2344 at 2370–71. Such evidence could have taken the form

argued that further complicating the trial requirements in cases involving criminal fines would only create more plea deals and less actual trials.[92] They argued a justice system where "plea bargaining is not some adjunct to the criminal justice system [but] is the criminal justice system" is problematic because prosecutors are advocates and not neutral adjudicators.[93] Thus, the dissenters stated the opinion would only perpetuate a justice system where ninety-seven percent of federal convictions and ninety-four percent of state convictions are plea bargains.[94]

Despite all these increased complications in environmental crime, *Southern Union* is a correct step in guaranteeing fundamental rights to criminal defendants charged with a criminal fine. As such, *Southern Union* is a correct step towards guaranteeing fundamental jury rights in environmental cases. It is a reaffirmation of the fundamental Sixth Amendment right, and the fact that the criminal stigma should only be imposed after it has been painstakingly proven beyond a reasonable doubt. In *Southern Union*, the Supreme Court was correct in making the law reflect the fact that there is certainly a far larger stigma in a $50 million criminal fine than a $10,000 criminal fine. With an understanding of the complications, there still are many workable options to charge criminal environmental fines.

Despite all the arguments against *Southern Union*, there is merit in the argument that that the Constitution guarantees fundamental rights to criminal defendants charged with a criminal fine. *Southern Union* is a reaffirmation of the fundamental Sixth Amendment right and fact that the criminal stigma should only be imposed after it has been painstakingly proven beyond a reasonable doubt.[95] Though a term of criminal incarceration is undoubtedly different from a criminal fine, there are some similarities. The big similarity is that both criminal fines and terms of incarceration carry a criminal stigma.[96] Indeed, the larger the fine or term of incarceration, the larger the stigma.[97] Just as a one month term of incarceration has less of a stigma than a life sentence, a $50,000 fine has less of a stigma than a $7 million fine. What the Supreme Court ruled in *Southern Union* reflects this idea. Furthermore, *Southern Union* still leaves the government with many options in environmental crime cases.[98]

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of evidence showing individual children playing with the mercury on specific days—something that would have been very prejudicial to the Southern Union Company. Such hypothetical evidence would be prejudicial because some jurors might have a tendency to want to punish the company for exposing children to mercury. However, the evidence would also be very probative because it is necessary for the government to prove daily violations. Under the 403 balancing test the evidence would only not come into trial if its prejudicial effect substantially outweighed its probative value. FED. R. EVID. 403. Thus, such hypothetical evidence would probably be admissible under *Southern Union* where it may not previously been admissible.

92. *S. Union Co.*, 132 S. Ct. at 2371 (Breyer, J., dissenting).

93. *Id.* (Breyer, J., dissenting) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

94. *Id.* (Breyer, J., dissenting).

95. *S. Union Co.*, 132 S. Ct. at 2352.

96. Developments in the Law, *The Choice Between Civil and Criminal Sanctions*, 92 HARV. L. REV. 1300, 1301 (1979).

97. *Id*. at 1305.

98. *See infra* Part II.C; *see generally* Developments in the Law, *supra* note 96.

C. Overview of Criminal and Civil Enforcement of Environmental Laws

In order to understand the ruling in *Southern Union* it is important to understand what types of criminal and civil enforcement options the government can use to ensure environmental compliance. One of the principal choices the government must make, and perhaps most important, is whether it should pursue criminal or civil liability against a defendant.[99] Other choices exist for the government when a defendant is either an individual or a corporate entity.[100] It makes a substantial difference if a defendant is a corporate entity or an individual because corporate entities cannot serve jail time, whereas individuals can.[101] Though the government can pursue both criminal and civil liability against a corporation, corporate criminal enforcement is substantially different from individual enforcement.[102] However, in certain circumstances the government can make individual corporate officers liable, thus, taking advantage of a form of corporate enforcement that is similar to individual enforcement actions.[103] These types of enforcement options, as well as the advantages and disadvantages of enforcement of such options, are discussed below.

a. Corporate Defendants

One type of environmental enforcement is corporate enforcement, which involves a case brought by the government against a corporate entity. In such enforcement actions the government can bring either a civil or criminal case, or both a criminal and civil case against a corporation.[104] Such corporate enforcement is common and is the type of enforcement that was pursued in *Southern Union*. Because it is impossible to put a corporation in jail, in corporate criminal cases the government, instead, penalizes the corporation through criminal penalties and fines. Such criminal enforcement of environmental laws has real-world consequences for corporations in two ways. First, enforcement results in fines and penalties imposed by the law.[105] Second, enforcement results in "reputational penalties" that lead businesses to lose portions of their market shares.[106] These "allegations or charges that a firm violated environmental regulations correspond to economically meaningful and statistically significant losses in the firm's share values."[107] Such "repu-

99. *See* Henry Klementowicz et al., *Environmental Crimes*, 48 AM. CRIM. L. REV. 541, 545 (2011).

100. *See* EPA, CRIMINAL ENFORCEMENT PROGRAM 6 (2011), *available at* http://www2.epa.gov/sites/production/files/documents/oceft-overview-2011.pdf.

101. *See id*. at 4 (quoting James Strock, former EPA Assistant Administrator for enforcement).

102. *Id*. at 6.

103. United States v. Park, 421 U.S. 658, 673 (1975).

104. *See, e.g.*, Julie Cart, *BP Faces Civil Trial Over Gulf Oil Spill*, L.A. TIMES, Feb. 19, 2013, http://articles.latimes.com/2013/feb/19/nation/la-na-bp-trial-20130220 (stating "[h]aving just paid $4 billion to settle criminal charges, BP now risks a [civil] fine of as much as $17 billion in the trial set to begin next week.").

105. *See, e.g.*, *S. Union Co.*, 132 S. Ct. at 2352 (reversing the trial court's imposition of a 6 million dollar fine).

106. Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 666–68 (2005).

107. *Id*. at 653–55.

tational penalties" result from both civil and criminal enforcement, but criminal enforcement creates more of a stigma, tending to result in greater "reputational penalties."[108] Civil enforcement, on the other hand, causes a predictable amount of economic damage to a corporation through a fixed fine.[109] However, it lacks the stigma of a criminal conviction that can be a powerful deterrent.[110] The scope of this paper is not broad enough to fully discuss the debate that ensues regarding civil and criminal enforcement of environmental laws, but a brief overview is necessary to fully understand the ruling in *Southern Union.*[111]

To understand corporate criminal liability it is necessary to look at the legal framework that is used to hold a corporate entity criminally liable. The doctrine of corporate criminal liability is rooted in *respondeat superior*, also known as vicarious liability.[112] Through vicarious liability the acts and intent of a corporation's agents are automatically imputed to the corporation if the agent is acting in the scope of her employment for the benefit of the corporation.[113] Thus, it is possible for even the criminal acts of low-level employees to be attributable to a corporation.[114] This sort of liability may even be possible in cases where a corporation may genuinely pursue environmental compliance.[115] Such corporate criminal liability gives rise to a controversial area of law with many opponents.[116]

Opponents of corporate criminal liability offer many criticisms. They point out the inconsistencies of holding an entity vicariously responsible for acts that it may not condone.[117] Instead, opponents suggest civil penalties provide a more precise amount of economic punishment than criminal penalties.[118] The idea is that civil penalties result in a precise amount of economic loss to a corporation—the amount of the civil fine.[119] Conversely, these opponents argue criminal penalties result in unpredictable economic impacts to corporations due to loss in market share.[120]

On the other side, those in favor of corporate criminal responsibility have made many arguments. As mentioned before, proponents of corporate criminal liability argue criminal sanctions for corporations offer a stigma that is a powerful

108. *See* Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1506 (2007) (stating "the hammer of corporate criminal liability should remain in the toolkit of responses to serious corporate misconduct" and prosecutors should not have "less leverage than usual in dealing with the best educated, most sophisticated, and most well represented class of defendants.").

109. V.S. Khanna, Comment, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1532–34 (1996) (making the case that the economic effects of a criminal stigma on a corporation are unpredictable and, in contrast, civil penalties offer a more preferable way of punishing a corporation because they cause a precise amount of harm).

110. *See* Beale, *supra* note 108.

111. *See, e.g.*, Khanna, *supra* note 109, at 1533–34.

112. Klementowicz, *supra* note 99, at 548.

113. *Id*.

114. Ved P. Nanda, *Chapter 2 Corporate Criminal Liability in the United States: Is A New Approach Warranted?*, 9 IUS GENTIUM 63, 65 (2011).

115. *See id*.

116. *See generally* Khanna, *supra* note 109, at 1533–34.

117. Nanda, *supra* note 114, at 65 (stating "because corporations cannot act on their own or form criminal intent, there is no theoretical justification for the doctrine").

118. Khanna, *supra* note 109, at 1533–34.

119. Khanna, *supra* note 109.

120. Khanna, *supra* note 109.

tool for prosecutors to use to deter corporate misconduct.[121] In fact, the EPA has a policy to charge environmental violations criminally to provide maximum deterrence, pointing out the fact that criminal charges are filed against sixty-seven percent of violators.[122] Another governmental agency, the Department of Justice, provides the following rational for corporate criminal liability:

> Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.[123]

In particular, the DOJ reasons there is more reason to indict a corporation in many environmental crime cases because there is often "a substantial risk of great public harm" with environmental crimes, which are often public welfare crimes.[124] The government's emphasis on criminal environmental corporate enforcement shows such criminal enforcement will remain a fixture in environmental enforcement.[125] Governmental agencies seek corporate criminal enforcement because it results in greater protection for the public from environmental violations that can have immense public impacts.[126]

b. Individual Defendants

There are several options available to the government through individual enforcement of environmental crimes.[127] Criminal enforcement of environmental

121. Beale, *supra* note 108, at 1506.

122. EPA, *supra* note 100, at 6 (stating "corporate managers will think twice about deliberately breaking the law if they understand that they face incarceration and personal criminal fines for criminal conduct, rather than consequences that will be borne solely by the company").

123. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.200(A) (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.200.

124. *Id.* § 9-28.200(B).

125. *See, e.g.*, Office of Public Affairs, *BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident*, DEPARTMENT OF JUSTICE (Nov. 15, 2012), http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html (stating "BP Exploration and Production Inc. (BP) has agreed to plead guilty to felony manslaughter, environmental crimes, and obstruction of Congress and pay a record $4 billion in criminal fines and penalties for its conduct leading to the 2010 Deepwater Horizon disaster that killed eleven people and caused the largest environmental disaster in U.S. history").

126. *See id.*

127. Specific Idaho federal district court cases show the thrust of federal environmental enforcement in Idaho and the consequences federal enforcement can have on individual Idaho defendants. Idaho has multiple examples of individual defendants being convicted for criminal violations of federal environmental laws. *Moses* is an example of an Idaho case where an individual defendant was sentenced to jail time for an environmental violation. United States v. Moses, 642 F. Supp. 2d 1216, 1220 (D. Idaho 2009). There, a defendant developer was convicted of the excavation and placement of dredge and fill material in a stream in violation of the Clean Water Act and was sentenced to eighteen months in prison. *Id.* at 1218, 1220. Another example is *Vierstra*, where an Idaho dairy farmer had a misdemeanor conviction for a negli-

crimes can be used as a tool against individual defendants who act alone in their crime as well as individual defendants who are in a position in a corporation that is responsible for the crime. Individual enforcement is commonly believed to result in greater deterrence for environmental crime because it comes with the threat of jail time or loss of personal assets.[128] In fact, the EPA prefers individual enforcement because it provides greater deterrence for environmental crime.[129] A recent emphasis in individual enforcement has led to about seventy percent individual enforcement and thirty percent criminal enforcement by the EPA.[130]

One area where individual defendants may face criminal liability involves the Responsible Corporate Officers Doctrine. Through this doctrine prosecutors can hold individual corporate officers responsible for both criminal and civil violations of environmental laws.[131] Importantly, the doctrine only extends to responsible corporate officers, not mere corporate shareholders.[132] In *United States v. Park*, the Supreme Court outlined the Responsible Corporate Officers Doctrine.[133] There, the Court stated "the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct the violation complained of, and that he failed to do so."[134] Addressing concerns over the strict liability characteristics of the doctrine, the Court stated the corporate officer has a duty to exercise "the highest standard of foresight and vigilance" and that a breach of this duty has a high level of blameworthiness and culpability.[135]

Though the doctrine was originally created under the Federal Food, Drug, and Cosmetic Act, the "doctrine's most important field of application . . . has become liability under environmental statutes on both the federal and state level."[136] Under the Responsible Corporate Officers Doctrine, corporate officers have been subject

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gent discharge of dairy waste into the water of the United States in violation of the Clean Water Act. United States v. Vierstra, 803 F. Supp. 2d 1166 (D. Idaho 2011), *aff'd*, 2012 WL 3269211 (9th Cir. Aug. 13, 2012). Furthermore, another example is *King*, where an Idaho rancher was convicted of three felony violations of the Safe Drinking Water Act and one felony "materially false" statement for injecting waste water into an aquifer. United States v. King, 660 F.3d 1071, 1074 (9th Cir. 2011).

128. *See, e.g.*, EPA, *supra* note 100, at 6.

129. *Id.*

130. *Id.*

131. United States v. Park, 421 U.S. 658, 673–74 (1975). The Responsible Corporate Officers Doctrine is a way to hold corporate officers personally liable and is distinguishable from the commonly used term "piercing the corporate veil," which is a way to hold corporate shareholders personally liable. United States v. Bestfoods, 524 U.S. 51, 62 (1998) (summarizing that "the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.").

132. *See Park*, 421 U.S. at 673–74.

133. *Id.*

134. *Id*.

135. *Id*. *See also* R. Christopher Locke, *Environmental Crimes: The Absence of "Intent" and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311, 320–22 (1991). *But see* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal": Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 210–13 (1991) (raising concerns that mental states for environmental crimes come close to strict liability).

136. Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"--A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 290 (2012).

to both civil and criminal liability for environmental crimes.[137] Indeed, even Congress has embraced the doctrine by amending the Clean Air Act[138] and the Clean Water Act[139] to include "any responsible corporate officer" in the definition of "person." Critics of the doctrine have, however, argued it has "an eroding effect on the element of *mens rea*"[140] and that the doctrine "creates a rare type of strict and vicarious liability."[141]

The Responsible Corporate Officers Doctrine also applies to civil cases.[142] The rationale that a corporate officer will be deterred through monetary penalties parallels the idea that incarcerating a corporate officer will result in deterrence.[143] And while using the Responsible Corporate Officers Doctrine—which has elements of vicarious liability—may be viewed by some as questionable in the criminal context, these concerns are minimalized in the civil context.[144] One court stated "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty."[145] Critics of the civil application of the Responsible Corporate Officers Doctrine argue that the doctrine should not be applied because the very purpose of incorporating is to avoid this sort of civil liability.[146] However, proponents of civil application say individual corporate officers should be held responsible in cases involving public health and safety.[147] Additionally, proponents argue Congress worded many environmental statutes to hold individuals, "such as owners and operators of facilities," personally liable irrespective of whether or not they are corporate officers.[148]

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137. Randy J. Sutton, Annotation, *"Responsible Corporate Officer" Doctrine or "Responsible Relationship" of Corporate Officer to Corporate Violation of Law*, 119 A.L.R.5TH 205, § 1[a] (2004).

138. 42 U.S.C. § 7413(c)(6) (2012).

139. 33 U.S.C. § 1319(c)(6) (2012).

141. Petrin, *supra* note 136, at 296.

141. Petrin, *supra* note 136, at 300; *see also* Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L & POL'Y. F. 1, 8–9 (2004) (asserting that under the doctrine, corporate officers may be held criminally liable on the basis of their position in a company even though they have no actual knowledge of the conduct); David C. Fortney, *Thinking Outside the "Black Box": Tailored Enforcement in Environmental Criminal Law*, 81 TEX. L. REV. 1609, 1624–25 (2003) (arguing that "we should hesitate before applying strict liability criminal sanctions to corporate officers for the malfeasance of their employees"); Thomas Mortell & Michelle Gustavson, *The Resurgence of the Responsible Corporate Officer Doctrine*, 55 ADVOCATE 32 (2012) (arguing against the Responsible Corporate Officers Doctrine in the health care context in Idaho).

142. Petrin, *supra* note 136, at 291.

143. United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985).

144. *See id*.

145. *Id.*

146. Noël Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENVTL. L.J. 283, 292 (2002).

147. *Id.* at 292–93.

148. *Id.*

D. Environmental Laws Affected by *Southern Union*

It is important to look at the different statutes that are used in environmental crime to understand the effect *Southern Union* will have on environmental criminal enforcement. Because *Southern Union* only applies to criminal trials, this section will only mention criminal portions of environmental statutes—not including civil or administrative penalties. It is also important to point out that *Southern Union* has applications outside of environmental law in other areas of white-collar crime,[149] but the scope of this article is limited to environmental law. Further, *Southern Union's* application to environmental law is limited to certain environmental statutes. Therefore, it is important to delineate what provisions of environmental statutes *Southern Union* affects and give a brief overview of some of the large federal environmental crime laws that will be affected by *Southern Union*. Additionally, because *Southern Union* was decided on a constitutional basis, it also applies to state laws.[150] For example, there is an Idaho environmental crime law that is affected by *Southern Union.*[151]

The government normally has three options in environmental criminal fine cases.[152] It can either (1) charge under the statute of conviction which may charge on a fixed amount or charge on a per-day violation scheme; (2) charge under 18 U.S.C. § 3571(c), which has a maximum fine of $500,000 for felonies or $200,000 for misdemeanors; or (3) it can charge under Alternative Fines Act and get a fine that is twice the gain or loss resulting from the crime.[153] *Southern Union* has applications in two areas; it has applications if the government chooses to seek a per-day criminal fine or chooses to pursue a criminal restitution fine under the Alternative Fines Act.[154]

Thus, fines under both the Alternative Fines Act and various per-day violation statutes are the main types of fines that are affected by *Southern Union*.[155] It should also be noted that many of the environmental statutes explored in this article are expansive and "contain overlapping civil, criminal, and administrative penalt[ies.]"[156] The article will, however, focus exclusively on the criminal portions of these statutes to give an overview of what statutes the ruling in *Southern Union* affected.

As mentioned above, the Alternative Fines Act was affected by the ruling in *Southern Union*. The Alternative Fines Act allows criminal fines above the statutory maximum in amounts equal to twice the economic gain or loss of the offense of

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149. Kresta Daly, *Southern Union Case has Implications for White Collar Criminal and Civil Trials*, BARTH, TOZER & DALY LLP (Sept. 26, 2012), http://btdlegal.com/southern-union-case-has-implications-for-white-collar-criminal-and-civil-trials/.

150. *See* S. Union Co., 132 S. Ct. at 2348 (stating that the ruling applies to both federal and state laws).

151. *See* IDAHO CODE ANN. § 39-117 (West 2013).

152. Pasfield, *supra* note 2, at 4–5.

153. Pasfield, *supra* note 2, at 4–5.

154. Pasfield, *supra* note 2, at 5.

155. Pasfield, *supra* note 2, at 5.

156. Klementowicz, *supra* note 99, at 544; *see, e.g.*, 42 U.S.C. § 7413(b)–(d) (2006) (including both civil and administrative penalties in the Clean Air Act for violations of implementation plans and criminal penalties for "knowing" violations of implementation plans).

the conviction.[157] The Alternative Fines Act states: "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process."[158] Under the Alternative Fines Act it is possible to have a fine in the millions, if not billions, of dollars when a statutory maximum may only be a $500,000.[159] As a result of *Southern Union*, a defendant who is convicted under a per-day violation scheme under the Alternative Fines Act will have far more reason to challenge each day of the government's fine demand.[160] This will make the imposition of criminal fines increasingly difficult and expensive for the government.[161] However, it is also possible that evidence used to show fines on each day could be prejudicial for a defendant as explored earlier in this article.[162]

The Resource Conservation and Recovery Act (RCRA) is another statute with a criminal environmental provision that was affected by *Southern Union*. In fact, RCRA is the environmental statute that was at issue in *Southern Union*.[163] Under RCRA, violations involving knowing transportation of waste to an improper facility or knowing treatment, storage, or disposal of waste under RCRA are punishable by "a fine of not more than $50,000 for each day of violation."[164] This is the quintessential sort of per-day criminal statutory fine provision that *Southern Union* affects.

The Clean Water Act also has per-day criminal fine statutory provisions that will be impacted by *Southern Union*. The Clean Water Act has per day criminal fines for both negligent violations and knowing violations.[165] Negligent violations are punishable by "not less than $2,500 [or] more than $25,000 per day of violation."[166] Knowing violations are punishable by fines "of not less than $5,000 nor more than $50,000 per day of violation."[167] The Alternative Fines Act also may apply to any provision of the Clean Water Act and can create higher fines.[168] Thus, the Clean Water Act will be impacted by *Southern Union* in its per-day fine provisions and its use of the Alternative Fines Act.

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157. *See* 18 U.S.C. § 3571(d) (2006).
158. 18 U.S.C. § 3571(d) (2006).
159. *See* 18 U.S.C. § 3571(d) (2006).
160. Pasfield, *supra* note 2, at 5–6.
161. Pasfield, *supra* note 2, at 5–6.
162. *See supra* text accompanying note 91.
163. United States v. S. Union Co., 643 F. Supp. 2d 201, 206 (D.R.I. 2009), *aff'd*, 630 F.3d 17 (1st Cir. 2010), *rev'd and remanded*, 132 S. Ct. 2344 (U.S. 2012).
164. 42 U.S.C. § 6928(d) (2011).
165. 33 U.S.C. § 1319(c) (2006).
166. 33 U.S.C. § 1319(c)(1)(B) (2006).
167. 33 U.S.C. § 1319(c)(2)(B) (2006).
168. *See* United States v. Ming Hong, 242 F.3d 528, 532–34 (4th Cir. 2001) (interpreting the Clean Water Act to include the Alternative Fines Act, which subjected the defendant to a Class A misdemeanor fine of $100,000 per violation instead of the Clean Water Act's maximum fine of $25,000 per day of violation).

Another federal statute that will be impacted by *Southern Union* is the Toxic Substance Control Act. Under the Toxic Substance Control Act, a criminal fine for a knowing or willful violation involves "a fine of not more than $25,000 for each day of violation."[169] This is yet another per-day environmental criminal fine that *Southern Union* will impact.

It is also important to note the ruling in *Southern Union* applies to both federal and state rulings.[170] The Court, in *Southern Union*, held that the due process clauses of the Fifth and Fourteenth Amendments along with the Sixth Amendment's notice and jury trial guarantees require that all facts that increase a defendant's maximum criminal fine be proven to a jury beyond a reasonable doubt.[171] This constitutional holding applies to both federal and state laws.[172] For example, Idaho also has a state per-day statutory provision that will be impacted by *Southern Union* in its environmental quality statute.[173] In the criminal violations section of Idaho's environmental quality statute, Idaho provides multiple per-day fines.[174] These include $1,000 per day for continuing negligence violations; $10,000 per day for a violation of "the provisions of the air quality public health or environmental protection laws" and a $250,000 per day fine for a crime that "places another person in imminent danger of death or serious bodily injury."[175] These Idaho per-day fines are the types of fines that *Southern Union* impacts.

III. PREDICTION ON HOW THESE CASES WILL PROCEED

Southern Union will undoubtedly change environmental enforcement, and, as a result, components of the environmental justice system will have to make adjustments. In particular, *Southern Union* will change environmental enforcement in five areas discussed and analyzed below. These five areas of changes will result in new choices for both defendants and the government. The first area of adjustment will involve the changes prosecutors will have to make in indictment and verdicts as a result of *Southern Union*.[176] Next, the second area of change will involve the sort of inferences a jury can make in criminal fine cases.[177] After that there will be a third change resulting from the complications *Southern Union* creates in environmental crime trials, which may tend to encourage more guilty pleas and fewer trials.[178] After that there will be a fourth adjustment because prosecutors should now, more than ever, seek individual sentences involving incarceration in criminal environmental cases.[179] Finally, a fifth legal change could result from the possible expansion of the *Apprendi* rule into civil cases.[180] All these changes, resulting from

169. 15 U.S.C. § 2615(b) (2006).
170. *See* S. Union Co. v. United States, 132 S. Ct. 2344, 2352 (2012).
171. *Id.* at 2350–51.
172. *Id.* at 2348.
173. IDAHO CODE ANN. § 39-117 (West 2013).
174. *Id.*
175. *Id.*
176. *See infra* Part III.A.
177. *See infra* Part III.B.
178. *See infra* Part III.C.
179. *See infra* Part III.D.
180. *See infra* Part III.E.

Southern Union, will result in new challenges and complications in environmental crime cases.

A. Indictment and Verdict Complications

As previously discussed, the Supreme Court's ruling in *Southern Union* was tied to the government's indictment of the Southern Union Company. Indictments serve as the initial pleading in a criminal case and, like other pleadings, they require that the government state every element of the charged crime.[181] The government's indictment in *Southern Union* was fatal because it did not specify the precise dates when the Southern Union Company committed a RCRA violation—a fact that affected the size of the company's criminal fine.[182] Since the indictment did not specify the dates when a violation took place, it did not contain all the facts relevant to the Southern Union Company's criminal fine.[183] In effect, the lack of specificity in the dates of violation in the indictment opened the door to a district judge having to determine how many days the RCRA violation occurred in sentencing.[184] However, the indictment would not have violated the *Apprendi* rule if, hypothetically, the government had made a specific charge for each of the 752 days of violation.[185] Making a charge for each day of violation, however, would undoubtedly be cumbersome.

In most environmental crime cases the government has two options with such fines.[186] It can either (1) charge on a per-day violation scheme to get a fine that is cumulatively large or (2) it can charge under the Alternative Fines Act and get a fine that is twice the gain or loss resulting from the crime.[187]

Under the first option, the per-day violation scheme, the government still has many choices.[188] The government could have an indictment that has a count for each day of violation or it could charge during a specific time span and include a special verdict form on which the jury could specify its findings as to which dates the violation occurred over.[189] It is likely that the government will use the special verdict form option in most cases because having a count for each day of violation would be too cumbersome.[190] Such special verdict forms have been recognized as an excellent way to have juries deliberate on complex cases.[191] Thus, "[w]hen multiple offenses are submitted to a jury, special verdicts are often helpful to an orderly

181. DEP'T OF JUSTICE, GRAND JURY MANUAL, at VII-4 (1991).
182. S. Union Co. v. United States, 132 S. Ct. 2344, 2349 (2012).
183. *Id.*
184. *Id.*
185. Pasfield, *supra* note 2, at 5.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 288–89 (2003).

deliberative process."[192] These verdict forms provide a mechanism for prosecutors to get "per-day" convictions and comply with the Sixth Amendment.

Under the second option, the Alternative Fines Act, the government will be at a disadvantage because of *Southern Union*.[193] The government would be at a disadvantage because it would have to face more scrutiny from the defense in its calculation to prove gain or loss resulting from the crime.[194] Defendants will have far more reason to challenge the government's calculation of gain or loss before the jury.[195]

Under either option, in cases where the government is not certain it can prove exact dates of violation or gain or loss resulting from the crime because of limitations in witnesses or reporting, it is likely that *Southern Union* will place the government at a disadvantage.[196] In those cases, the government may be better off following some alternative form of liability, such as civil penalties where *Southern Union* doesn't apply. However, many options still exist and *Southern Union* will not greatly reduce convictions in criminal environmental cases. Indeed, the Antitrust Division of the Department of Justice has been treating the Sixth Amendment as though it is applicable to criminal fines in anticipation of a case like *Southern Union* and four of its five top antitrust fines imposed in the last quarter century have been obtained under the more rigorous standard.[197]

B. Jury Inferences

Another area where issues arise under *Southern Union* involves the types of inferences a jury is allowed to make. This issue can be stated as a hypothetical. When *Southern Union* is remanded,[198] will the jury have to see evidence of a violation on all 752 days charged, or will the jury be allowed to infer a 752-day violation after seeing evidence establishing a violation on a certain number of days? If so, how many days are needed to allow the jury to make permissible inferences regarding the number of days where a violation took place?

Generally, a jury is allowed to "infer, on the basis of [their] reason, experience and common sense, from one or more established facts, [or] the existence of some other fact."[199] A jury may base such inferences on their common sense.[200] However, because juries make these determinations on a different burden of proof standard than judges, *Southern Union* effectively changed the burden of proof that is used in such inferences to a higher standard as discussed below.

Thus, what *Southern Union* changed is the burden of proof that is, effectively, used in inferences and factual findings involving criminal fines. The Sentencing Guidelines do not state which standard of proof is applicable when judges make

192. *Id.* (quoting State v. Diaz, 677 A.2d 1120, 1127–28 (N.J. 1996)).
193. Pasfield, *supra* note 2, at 5.
194. *Id.*
195. *Id.*
196. *Id.*
197. Brief for the Chamber of Commerce of the United States of America and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petitioner at 16, S. Union Co. v. United States, 132 S. Ct. 2344 (2012) (No. 11-94), 2011 WL 3664464.
198. S. Union Co. v. United States, 132 S. Ct. 2344, 2357 (2012) (remanding to the United States District Court for the District of Rhode Island).
199. 1 MODERN FED. JURY INSTRUCTIONS (CRIMINAL VOLUMES) § 6.01 (Sand et al. 2013).
200. *Id.*

factual findings during sentencing.[201] Prior to the *Southern Union* holding, judges were making factual findings in sentencing that increased a criminal defendant's fines on a preponderance of the evidence standard[202] rather than the beyond a reasonable doubt standard[203] employed by juries.[204] In fact, most circuits used the preponderance standard.[205] However, this changed with the ruling in *Southern Union*.[206] In effect, *Southern Union* raised the government's burden of proof.[207] *Southern Union* holds that any fact that increases a defendant's sentence, including fines, must be submitted to a jury and proved beyond a reasonable doubt.[208] Thus, *Southern Union* raised the government's burden of proof in many instances. This is an affirmation of a defendant's Sixth Amendment right to proof beyond a reasonable doubt in criminal matters.

C. Complicated Trials

Another area that *Southern Union* will change will be the overall complication of jury trials in criminal environmental cases involving fines.[209] Additional evidence and time will have to be put into such cases. As Justice Breyer pointed out in his fifteen-page dissent, further complicating the trial requirements in cases involving criminal fines would only create more plea deals and less actual trials.[210] He argued that a justice system where "plea bargaining is 'not some adjunct to the criminal justice system [but] is the criminal justice system'" is problematic because prosecutors are advocates and not neutral adjudicators.[211] Thus, he stated the opinion would only perpetuate a justice system where 97% of federal convictions and 94% of state convictions are plea bargains.[212]

This prediction mirrors statistics and comments made about plea bargaining and the justice system in other areas. In some federal districts, the plea rate in crim-

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201. Pasfield, *supra* note 2, at 3.

202. "The preponderance-of-the-evidence standard of proof requires that the factfinder determine whether a fact sought to be proved is more probable than not, and essentially allocates the risk of error equally among the parties involved." 32A C.J.S. *Evidence* § 1627 (2013).

203. The beyond a reasonable doubt standard means "[t]he evidence is sufficient to support a conviction whenever, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Parker v. Matthews, 132 S. Ct. 2148, 2152 (2012) (quoting Jackson v. Virginia, 443 U.S. 307 (1979)).

204. United States v. S. Union Co., 630 F.3d 17, 34 n.14 (1st Cir. 2010) (stating a judge may make factual findings relating to restitution that increase fines in sentencing by a preponderance standard because the juries guilty verdict "automatically authorizes restitution in the full amount of the victim's losses"), *rev'd and remanded*, 132 S. Ct. 2344 (2012).

205. Pasfield, *supra* note 2, at 3.

206. S. Union Co. v. United States, 132 S. Ct. 2344, 2346 (2012).

207. *Id.*

208. *Id.*

209. *See* James, *supra* note 5. Such complicated trials are in addition to environmental crime statutory schemes that have been characterized by some commentators as "mind-numbingly complex." Uhlmann, *supra* note 5, at 1224.

210. *S. Union Co.*, 132 S. Ct. at 2357, 2371 (Breyer, J., dissenting).

211. *Id.* at 2371 (Breyer, J., dissenting) (quoting Robert E. Scott & William J. Stuntz, Symposium, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (1992).

212. *Id.* (Breyer, J., dissenting).

inal convictions has been cited as over 99%.[213] Thus, some commentators have suggested in many cases a prosecutor plays a role as both the prosecutor and final adjudicator of a defendant's case.[214] Conversely, other commentators have argued plea bargaining results in greater trial efficiency and effectively saves the public money.[215] Either way, plea bargaining has taken hold of the criminal justice system and is now the most common form of criminal case resolution.[216] Thus, the concern is that *Southern Union* will serve as yet another incentive to strike a plea bargain because of the increased complications of environmental crime cases.

D. Individual Liability

Additionally, under *Southern Union* prosecutors have increased incentives to pursue individual liability that results in jail sentences because of the additional complications *Southern Union* adds to cases involving criminal fines.[217] This is a positive result of the ruling because individual enforcement is commonly believed to result in greater deterrence for environmental crime since it comes with the threat of jail time.[218] Prosecutors should now, more than ever, pursue individual corporate officer responsibility in environmental cases to provide strong disincentives to environmental crimes, which can result in serious risks to the public at large.[219]

Such an emphasis on individual enforcement already exists in some government agencies and *Southern Union* simply gives another argument to perpetuate this emphasis. For example, the EPA prefers individual enforcement because it provides greater deterrence for environmental crime.[220] A recent emphasis in individual enforcement has led to about 70% individual enforcement and 30% criminal enforcement by the EPA.[221] The EPA's emphasis in individual enforcement shows the government can go one step further and achieve greater environmental crime deterrence by taking *Southern Union* as an indication that it should pursue even more individual enforcement in such cases.

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213. Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

214. *Id.* at 1409 (stating "[A]merican criminal justice systems have become administrative systems run by executive-branch officials (namely, prosecutors)"); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2548 (2004) (arguing "[l]aw's shadow disappears" as defendant's "[b]argain in the shadow of prosecutors' preferences, budget constraints, and political trends").

215. Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 601 (2005) (claiming "[T]hat plea bargaining is justified because it largely mirrors the results that would have occurred after a highly regulated trial process, discounted to reflect uncertainty and adjudication costs").

216. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (stating "[P]lea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

217. *See* Pasfield, *supra* note 2, at 4–5 (stating the government may be at a disadvantage in proving some per-day fines and Alternative Fines Act fines under *Southern Union*).

218. *See, e.g.*, EPA, supra note 100 (stating "corporate managers will think twice about deliberately breaking the law if they understand that they face incarceration and personal criminal fines for criminal conduct, rather than consequences that will be borne solely by the company").

219. *See* DEP'T OF JUSTICE, *supra* note 123 (stating there is often "a substantial risk of great public harm" with environmental crimes, which are often public welfare crimes).

220. EPA, *supra* note 100, at 6.

221. *Id.*

E. Application to Civil Cases

As a consequence of *Southern Union*, the government now has more reason than ever to seek civil penalties, instead of criminal penalties, because fewer facts will have to be found by the jury in civil cases.[222] In response, it is likely some defendants will argue the *Apprendi* rule should apply to the determination of facts that affect civil fines under various environmental statutes.[223] Even before *Southern Union* was decided there was argument for applying the *Apprendi* rule to civil cases.[224] One area where these arguments have come up is in the context of Securities and Exchange Commission civil penalties.[225] In those cases, defendants are arguing Congress's "civil" label is not determinative and certain "civil" statutes that are punitive in nature should be considered criminal for the purpose of constitutional protections provided to the defendant.[226]

This argument follows the Supreme Court's analysis, which can be seen in *United States v. Ward*.[227] Under this analysis, a civil statute's label is not determinative because constitutional protections reserved for criminal cases have been applied to statutes that Congress has labeled "civil."[228] The question of whether a statute is criminal or civil is a question of statutory construction that is based on a two-part analysis.[229] First, courts look at whether Congress expressly or impliedly labeled a statute as criminal or civil.[230] Second, if Congress has labeled a provision as a civil penalty, courts inquire, "further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."[231] In *Kennedy v. Mendoza-Martinez* the Court listed seven factors that may be examined to determine if a civil statute is so punitive it is criminal in nature.[232] These factors include:

> [1] whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation

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222. Dorothy Heyl, *United States: Be Careful What You Wish For – SEC Penalties Act and 'Southern Union,'* MONDAQ (Jan. 3, 2013), http://www.mondaq.com/unitedstates/x/213716/Securities/Be+Careful+What+You+Wish+For+SEC+Penalties+Act+And+Southern+Union.

223. *See id*.

224. *See* W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In Re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 178 (2011) (arguing the *Apprendi* rule should be applied to civil commitments of sexual predators).

225. Daly, *supra* note 149 (stating "[i]n addition [*Southern Union*] may be extremely important to defendants in civil enforcement actions. In an SEC enforcement case the Ninth Circuit is presently considering whether a jury must decide that facts that enhance penalties where a defendant is being punished by the imposition of significant monetary penalties. Under this new decision a civil defendant facing such penalties may not be in a substantially different position than a criminal defendant for the purposes of a Sixth Amendment analysis.").

226. Heyl, *supra* note 222.

227. United States v. Ward, 448 U.S. 242, 248 (1980).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 248–249.

232. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

> will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.[233]

Arguably, many of these factors apply to large civil fines assessed against corporations. The first two factors—whether a penalty is a disability or restrain and has historically been regarded as punishment—were answered affirmatively by the justices in *Southern Union*.[234] The fourth and fifth elements—whether a sentence accomplishes deterrence and whether a sentence has criminal overlap—arguably also apply to multi-million dollar fines assessed against corporations.[235] If a civil environmental statutory scheme has any kind of scienter requirements, all of the *Kennedy* factors would arguably apply to it.[236]

However, the Supreme Court in *Ward* determined civil fines under the Clean Water Act are not criminal in nature.[237] The ruling in *Ward* demonstrates environmental defendants will be unsuccessful in arguing the *Apprendi* rule should apply to civil fines unless there is some sort of scienter requirement.[238]The general lack of the scienter element in civil actions under federal environmental statutes[239] should prevent the *Apprendi* rule from being applied to civil environmental cases. This is encouraging because any kind of widespread application of the *Apprendi* rule in civil environmental cases would unnecessarily burden environmental enforcement with increased cost and complications.[240]

IV. CONCLUSION

Southern Union added a new layer of complexity to environmental crime cases dramatically changing how certain cases will be litigated. These complications are particularly important because they have impacts for both federal and state environmental laws.[241] As outlined previously, in environmental law these complications will be seen in five areas.

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233. *Id*.

234. S. Union Co. v. United States, 132 S. Ct. 2344, 2353–2357 (2012); Heyl, *supra* note 222.

235. Heyl, *supra* note 222 (arguing all the *Kennedy* factors apply to huge fines assessed against companies).

236. *See id*.

237. *United States v. Ward*, 448 U.S. 242, 250–51 (ruling on the Clean Water Act which is also known as the Federal Water Pollution Control Act).

238. *See, e.g.*, Cal. Sportfishing Prot. Alliance v. Callaway, No. S–10–1801, 2012 WL 947483, at *6 (E.D. Cal. Mar. 20, 2012) (rejecting the argument that civil penalties under the Clean Water Act should be considered criminal).

239. *See, e.g.*, EPA, ENFORCEMENT OF HAZARDOUS WASTE REGULATIONS, III-217, http://www.epa.gov/osw/inforesources/pubs/orientat/rom310.pdf (showing intent is not an element of any RCRA civil enforcement action).

240. *Contra* Ball, *supra* note 224, at 175 (arguing for the application of the *Apprendi* rule to certain civil situations by stating "*Apprendi*, ultimately, is not an entirely new doctrine whose application to novel situations should be avoided for fear of unintended consequences. It's a collection of older doctrines. The Court already knows how to deal with due process--it should not shy away from due process analysis with an *Apprendi* label slapped on it.").

241. *S. Union Co.*, 132 S. Ct. at 2348 (stating the ruling applies to both federal and state laws). Environmental law has many applications in Idaho industries, such as agriculture and resource extraction. *See, e.g.*, *United States. v. Elias*, 269 F.3d 1003, 1007–09 (9th Cir. 2001), *supplemented*, 27 F. App'x 750

First, indictments and verdicts now will require greater specificity in particular facts relating to a criminal fine.[242] Prosecutors will now have to consider using special verdict forms in per day fines, and defendants will have increasing reason to challenge every fact under an Alternative Fines Act fine.[243]

Second, juries will make factual inferences at trial on the beyond a reasonable doubt standard, rather than the lower preponderance standard that was previously used by judges in sentencing.[244] This will make it more difficult for the government to prove facts relating to elements of an environmental crime.[245] Along with complications in indictments and verdicts, this heightened burden of proof will probably make it far more complicated and difficult for prosecutors to get as large of criminal environmental fines.[246] However, the government still has a veritable plethora of options in punishing defendants for environmental misconduct.[247] As demonstrated previously in this article, in many cases the government can pursue either criminal or civil liability as well as corporate or individual liability.[248] Smart prosecutors will always weigh these options to try and create maximum judicial efficiency and deterrence in environmental misconduct. Federal prosecutors have a high rate of conviction in environmental cases,[249] and *Southern Union* should not greatly alter prosecutors' conviction rates if prosecutors effectively use the other options that are available to them.

Third, *Southern Union* will further complicate criminal trials that result in environmental fines, most likely resulting in more plea bargains.[250] In this way, *Southern Union* is part of a larger trend favoring plea bargains in resolving criminal cases.[251] This is also a bit of a double-edged sword for the criminal justice system. On one hand, it may result in greater judicial efficiency and smooth out some of the random effects that juries perpetuate.[252] However, it also means defendants spend

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(9th Cir. 2001) (sentencing a defendant fertilizer company owner to a restitution fine of 6.3 million dollars for knowingly exposing his employees to a tank of cyanide). *Elias* is an example of the repercussions some of these federal criminal statutes can have on Idaho defendants. *Id.* In *Elias*, an Idaho fertilizer company owner was sentenced to seventeen years in prison for knowingly exposing his employees to a tank of cyanide. *Id.* Additionally, the defendant in *Elias* received a criminal restitution fine of 6.3 million dollars. *Id.* at 1009 (this fine was later overturned by the Ninth Circuit because Congress had not authorized restitution fines for knowingly exposing someone to hazardous waste under RCRA; however, the overturning of the fine had nothing to do with the *Aprendi* rule). Though the fine was later overturned on different grounds, such restitution fines involve facts that could have been determined in sentencing and, thus, may be subject to the ruling in *Southern Union*. *Id.* at 1021–22; Ellis Paeffgen & Bruce Pasfield, *Supreme Court Opinion in Southern Union Changes Burden of Proof for Imposition of Criminal Fines*, ALSTON AND BIRD LLP (June 26, 2012), http://www.alston.com/environmentalandlandblog/blog.aspx?entry=4609.

242. *See supra* Part III.A.

243. *See supra* Part III.A.

244. *See supra* Part III.B.

245. *See supra* Part III.B.

246. *See supra* Part III.B.

247. *See supra* Part II.C; *see generally The Choice Between Civil and Criminal Sanctions*, 92 HARV. L. REV. 1300 (1979).

248. *See supra* Part II.C.

249. *See* EPA, *supra* note 100 at 5.

250. *See supra* Part III.C.

251. Wright & Miller, *supra* note 213, at 1415.

252. Howe, *supra* note 215, at 601.

less time in front of a neutral judge in favor of having a larger proportion of their cases being determined by what bargain the prosecutor is willing to strike.[253] As the dissenters in *Southern Union* pointed out, this is a fundamental change in the American system of criminal justice.[254] *Southern Union* just shows the perpetuation of this trend in the area of criminal fines.[255]

Fourth, prosecutors have increased incentives to pursue individual liability, which can lead to personal fines or jail sentences, because of the additional complications *Southern Union* adds to cases involving criminal fines.[256] These incentives will result in more effective environmental enforcement because individual enforcement results in more deterrence than corporate enforcement.[257]

Finally, courts might have to address whether the doctrine has any application to environmental civil penalties.[258] Any expansion of the *Apprendi* rule into the civil arena would be a large expansion of the doctrine.[259] However, it seems unlikely that an argument for such an expansion could occur, unless the argument was based on a civil environmental statute with a scienter requirement.[260]

Despite all these increased complications in environmental crime, *Southern Union* is a means of guaranteeing fundamental rights to criminal defendants faced with a criminal fine. As such, *Southern Union* is a logical step towards guaranteeing fundamental jury rights in environmental cases. It is a reaffirmation of the fundamental Sixth Amendment right and the fact that the criminal stigma should only be imposed after it has been painstakingly proven beyond a reasonable doubt. In *Southern Union*, the Supreme Court was correct in making the law reflect the fact that there is certainly a far larger stigma in a $50,000,000 criminal fine than a $10,000 criminal fine. Even though *Southern Union* leads to a whole series of complications, the government still has many ways to prosecute environmental violations. One thing is certain. In the wake of *Southern Union*, both defendants and the government will have many new arguments and strategies to use in environmental crime cases.

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253. S. Union Co. v. United States, 132 S. Ct. 2344, 2371 (Breyer, J., dissenting).
254. *Id.*
255. *See supra* Part III.C.
256. *See supra* Part III.D.
257. *See* EPA, *supra* note 100.
258. *See supra* Part III.E.
259. *See* Heyl, *supra* note 222.
260. *Id.*

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