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# NO LONGER IN JEOPARDY: THE IMPACT OF *HUDSON v. UNITED STATES* ON THE CONSTITUTIONAL VALIDITY OF CIVIL MONETARY PENALTIES FOR VIOLATIONS OF THE SECURITIES LAWS UNDER THE DOUBLE JEOPARDY CLAUSE

Robin W. Sardegna\* \*\*

## I. INTRODUCTION

On December 10, 1997, the United States Supreme Court held that it does not violate the Double Jeopardy Clause<sup>1</sup> to criminally prosecute people for violations of banking laws and regulations after imposing civil monetary penalties on them for the same violations.<sup>2</sup> With this decision, the Court strongly disapproved and, in effect, overruled the analysis employed in *United States v. Halper*,<sup>3</sup> a seminal double jeopardy case decided just eight years earlier.<sup>4</sup> Following the Court's decision in *Hudson*, the General Counsel to the Securities and Exchange Commission (SEC) and the Director of the SEC's Division of Enforcement publicly took the position that, although they had shied away from doing so in the past, they now had a "green light" to seek civil monetary penalties that were also the subject of criminal investigations or prosecutions.<sup>5</sup> As a result, whether *Hudson* should apply in the realm of securities law as well as banking law becomes a question of great importance. With regard to sanctions imposed under the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 [Remedies Act],<sup>6</sup> the Second Circuit

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<sup>1</sup> The Double Jeopardy Clause reads as follows: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. CONST. amend. V.

<sup>2</sup> *Hudson v. United States*, 118 S. Ct. 488 (1997).

<sup>3</sup> 490 U.S. 435 (1989).

<sup>4</sup> See Richard M. Cooper, *Separate Civil and Criminal Penalties Are Now OK*, 4 NO. 12 Bus. Crimes Bull.: Compliance & Litig. 1 (1988).

<sup>5</sup> Paul Beckett, *SEC May Seek Civil Fines in Some Cases Involving Parallel Criminal Prosecution*, WALL ST. J., Jan. 8, 1998, at B6.

<sup>6</sup> The Remedies Act, Pub. L. No. 101-429, 104 Stat. 931 (1990).

has held that the *Hudson* analysis applies to securities law as well as and banking law.<sup>7</sup>

*Hudson*, like *Halper* before it, represents a major sea change in double jeopardy law with respect to civil monetary penalties. To understand which case represents the more faithful approach to double jeopardy jurisprudence, Part II examines the purpose of the Double Jeopardy Clause, the interests it protects, and its jurisprudence. Parts III, IV, and V review the *Halper*, *Hudson*, and *Palmisano* cases. Part VI will discuss the ramifications of *Hudson* and *Palmisano* for sanctions imposed under the Insider Trading Sanctions Act of 1984 [ITSA] and the Insider Trading and Securities Fraud Enforcement Act of 1988 [ITSFEA] and will answer the three following questions: 1) whether *Hudson* was correctly decided 2) whether the Second Circuit was correct to apply *Hudson* to Remedies Act sanctions, and 3) what, if any, implications *Hudson* and the Second Circuit's decision<sup>8</sup> have on civil monetary sanctions imposed under the ITSA<sup>9</sup> and the ITSFEA.<sup>10</sup> Part VII addresses alternative bases for contesting the imposition of both civil and criminal sanctions for the same violations of the securities laws.

## II. THE PURPOSE, HISTORY, AND JURISPRUDENCE OF THE DOUBLE JEOPARDY CLAUSE

### A. *The Purpose of the Double Jeopardy Clause and the Interests It Protects*

The general function of the Double Jeopardy Clause is to assure that the prosecution and punishment of an individual have the degrees of finality and fairness essential to the administration of an efficacious justice system. The principle of fairness ensures that the defendant receives a punishment, which is set by the court, authorized by the legislature, and is commensurate with his criminal liability. The guarantee of finality ensures that a criminal defendant once convicted or acquitted, need not live in a state of anxiety of further prosecution for the same offense.<sup>11</sup> Put in other words, the state should not be able to harass a defendant through multiple criminal prosecutions for the same offense,<sup>12</sup> thereby subjecting him to embarrassment, expense and ordeal, and enhance the possibility that even though innocent, he may be found guilty because the government gets an opportunity to perfect its case against him.<sup>13</sup> The government should not be able to impose a second

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<sup>7</sup> See *SEC v. Palmisano*, 135 F.3d 860 (2nd Cir. 1998).

<sup>8</sup> *Id.*

<sup>9</sup> Pub. L. No. 98-376, 98 Stat. 1264 (1984).

<sup>10</sup> Pub. L. No. 100-704, 102 Stat. 4677 (1988).

punishment, because it is dissatisfied with a sanction obtained in the first proceeding.<sup>14</sup>

In all criminal matters,<sup>15</sup> the Double Jeopardy Clause protects against three abuses: A second prosecution for the same offense following an acquittal, a second prosecution for the same offense following a conviction, and multiple punishments for the same offense.<sup>16</sup> Moreover, the Double Jeopardy Clause protects the defendant not only from the conviction and punishment, but also from anxieties and risks accompanying the prosecution.<sup>17</sup>

The first two prohibitions against subsequent prosecutions for the same offense preserve the defendant's interest in the finality of the verdict.<sup>18</sup> The finality of the verdict is at the heart of the Double Jeopardy Clause.<sup>19</sup> It operates in a manner similar to the civil procedure doctrines of *res judicata* and collateral estoppel.<sup>20</sup>

Historically, the prohibition against multiple punishments served as a protection against unfairness in sentencing.<sup>21</sup> More specifically, the multiple punishments prohibition protected against the imposition of

<sup>11</sup> See Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 YALE L. J. 632, 634 (1981).

<sup>12</sup> See Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L. J. 1235, 1299 (1995).

<sup>13</sup> See *Green v. United States*, 355 U.S. 184, 187-88 (1957); Rebecca Frank Dallet, Comment, *Taking the Ammunition Away from the 'War on Drugs': A Double Jeopardy Bar to 21 U.S.C. 881 after Austin v. United States*, 44 CASE W. RES. L. REV. 235, 242 (1993).

<sup>14</sup> See Dallet, *supra* note 13, at 261 (citing *United States v. Halper*, 490 U.S. 435, 451, n.10 (1989)).

<sup>15</sup> While the terms of the clause explicitly prohibit only a second jeopardy of "life or limb," suggesting that its protections apply only to the most severe forms of punishment, the Supreme Court rejected such a narrow reading of the clause and held that it applies to all criminal offenses. See Note, *supra* note 11, at 641 (citing *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1874)); Lynn C. Hall, Note, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause -- United States v. Halper*, 109 S. Ct. 1892 (1989), 65 WASH. L. REV. 437, 439-40 (1990).

<sup>16</sup> *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). See also, Eric Michael Anielak, Note: *Double Jeopardy: Protections Against Multiple Prosecutions*, 61 MO. L. REV. 169, 171 (1996) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

<sup>17</sup> See Jonathan A. Blumberg, Comment, *Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy*, 64 N.C. L. REV. 117, 143 (1985).

<sup>18</sup> See, e.g., Dallet, *supra* note 13, at 241-42; Elizabeth Jahnce, Note, *United States v. Halper, Punitive Civil Fines, and the Double jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 116 (1991).

<sup>19</sup> See, e.g., Dallet, *supra* note 13, at 241-42.

<sup>20</sup> Jahnce, *supra* note 18, at 116.

<sup>21</sup> See, e.g., Dallet, *supra* note 13, at 242.

two separate penalties for an offense when the legislature has authorized only one punishment. It also prevented the imposition of one penalty more severe than what the legislature intended.<sup>22</sup> As one might suspect, multiple punishment issues arise when the government imposes two punishments in either a single prosecution or successive prosecutions.<sup>23</sup>

## B. History and Jurisprudence of the Double Jeopardy Clause

### 1. The Protection Against Multiple Punishments

The multiple punishments prohibition has its origins in the 1874 case of *Ex Parte Lange*.<sup>24</sup> Lange was convicted of stealing mailbags, an offense punishable by either one year in prison or a \$200 fine.<sup>25</sup> The trial judge, however, mistakenly sentenced Lange to one year in prison and a \$200 fine.<sup>26</sup> After Lange paid his fine, the judge realized his error, vacated the sentence, and resentenced Lange to one year in prison only.<sup>27</sup> The Supreme Court reversed Lange's second sentence, reasoning that imposition of the sentence punished him twice.<sup>28</sup> Writing for the Court, Justice Miller stated that the trial judge had no power to impose a prison sentence on Lange when he had already fully satisfied one of the maximum alternative penalties prescribed by the legislature.<sup>29</sup> The Court held that the Double Jeopardy Clause "was designed as much to prevent the criminal from being twice punished for the same offense as being twice tried for it."<sup>30</sup> After *Lange* the multiple punishments prohibition was consistently explained as a right of defendants not to be punished to any greater degree than that authorized by the legislature, until *Halper*.<sup>31</sup>

### 2. The Protection Against Successive Prosecutions

The application of the successive prosecutions arm of the Double Jeopardy Clause traditionally has focused on whether the second "prosecution" is one that punishes criminally for the same offense.<sup>32</sup> In theory, civil sanctions do not punish criminally.<sup>33</sup> The government, however, violates the Double Jeopardy Clause when it seeks to impose, in addition to a criminal sanction, a second criminally punitive sanction in the guise of a civil proceeding.<sup>34</sup> Whether a sanction is truly civil and what factors are used to make this determination, therefore, is the

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<sup>22</sup> Jahncke, *supra* note 18, at 117 (citing *Ex Parte Lange*, 85 U.S. (18 Wall.) 163; *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983); *Westen & Drubel, Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81).

<sup>23</sup> Dallet, *supra* note 13 at 242 (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *United States v. Halper*, 490 U.S. 435, 448-49(1989)).

continually vital inquiry.<sup>35</sup> In deciding if a criminal sanction is masquerading as a civil proceeding, the Court has consistently stated that the analysis is one of statutory construction, and the Court has historically given a substantial amount of deference to legislative intent.<sup>36</sup>

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<sup>24</sup> 85 U.S. (18 Wall.) 163 (1874).

<sup>25</sup> *Id.* at 175.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Ex Parte Lang*, 85 U.S. (18 Wall.) 163, 175 (1874).

<sup>30</sup> *Id.* at 173.

<sup>31</sup> Peter Michael Bryce, Note, *Second Thoughts on Punishments: Redefining the Multiple Punishments Prohibition*, 50 VAND. L. REV. 167, 168 (1997)(citing *Jones v. Thomas*, 491 U.S. 376 (1989); *United States v. DiFrancesco*, 449 U.S. 117 (1980)).

<sup>32</sup> See, e.g., Dallet, *supra* note 13, at 245.

<sup>33</sup> Anielak, *supra* note 16, at 171.

<sup>34</sup> *Id.* at 172 (citing *United States v. Halper*, 490 U.S. 435, 448 (1989); *United States v. \$485,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994); *Gainer v. United States*, 904 F. Supp. 1234 (D. Kan. 1995); *Quinones-Ruiz v. United States*, 864 F. Supp. 983 (S.D.Cal. 1994)).

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Jahncke *supra* note 18, at 122. This was not always the case. In fact, prior to *Helvering v. Mitchell*, 303 U.S. 391 (1938), there was a lack of consistency in the Supreme Court's analyses of double jeopardy successive prosecution cases. See *infra* note 37 and accompanying text. See Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 934-35 (1990). The Court seemed at times willing to apply double jeopardy protections to civil penalty proceedings. See *Id.* In *United States v. Chouteau*, 102 U.S. 603 (1881), for example, the Court held that where a criminal defendant entered into a plea agreement with the United States for removing liquor from a warehouse without paying the liquor tax, the government could not subsequently assess a double tax penalty on him because its purpose was to punish rather than to raise revenue. Moreover, in *United States v. LaFranca*, 282 U.S. 568 (1931), the Court stated that a double tax imposed for selling liquor in violation of the prohibition law following a criminal conviction for violating prohibition laws could run afoul of double jeopardy if it were punishment. But see *Waterloo Distilling Corp. v. United States*, 282 U.S. 577 (1931) (holding that an *in rem* forfeiture action seeking a distillery following a conviction of unlawfully using alcohol for beverage purposes without paying the tax for so using it was not barred by the conviction since the action was against the property itself rather than the wrongdoer, i.e., it was not punishment). Similarly, in *Coffey v. United States*, 116 U.S. 436 (1886), the Court held that an acquittal on a criminal charge of defrauding the United States by virtue of not paying a liquor tax and for selling liquor without charging the tax barred a subsequent civil forfeiture action by the United States because the action amounted to punishment. But see *Origet v. United States*, 125 U.S. 240, 8 S. Ct. 846, 31 L. Ed. 743 (1888) (holding that a civil forfeiture action was not barred by a criminal conviction); *Stone v. United States*, 167 U.S. 178 (1897) (holding that acquittal on a criminal charge of unlawfully removing timber from federal land did not bar a subsequent civil forfeiture grounds on *res judicata* or collateral estoppel grounds, recasting *Coffey* as a *res judicata/collateral estoppel* case). See *Id.* (citing Clark, *Civil and Criminal penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976)). The standards for such analyses, however, were unstated and undeveloped, as the cases appear

a) *Mitchell, Hess, and Rex Trailer Co.*: The Origin of a Statutory Construction Analysis

Beginning with the 1938 case of *Helvering v. Mitchell*,<sup>37</sup> the Court developed a statutory construction analysis, which granted considerable deference to Congress, to address successive prosecution issues. In *Mitchell*, the respondent had been tried and acquitted of tax fraud.<sup>38</sup> After the conviction, the Court assessed a deficiency of over \$700,000 to Mitchell in unpaid taxes.<sup>39</sup> In addition, Mitchell was assessed a further deficiency of over \$350,000 under section 293(b) of the Revenue Act of 1928,<sup>40</sup> which provided that “[i]f any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid.”<sup>41</sup> Mitchell claimed the assessment violated the Double Jeopardy Clause.<sup>42</sup> The Supreme Court disagreed.

The Court held that, unless the additional deficiency was so punitive as to render the proceeding essentially criminal in nature, the Double Jeopardy Clause did not apply.<sup>43</sup> The court relied on statutory construction to determine if the additional deficiency was criminal in nature.<sup>44</sup> The Court then defined two types of remedial sanctions that would not qualify as criminal in nature.<sup>45</sup> The first of these was the revocation of a privilege voluntarily granted.<sup>46</sup> The second was

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to have been decided on an *ad hoc* basis. See *Id.* (citing Levin, *OSHA and the Sixth Amendment: When is a “Civil” Penalty Criminal in Effect?*, 5 HASTINGS CONST. L. Q. 1013 (1978)). At the same time, the Court also expressed a willingness to engage in statutory construction on occasion. For example, in *Murphy v. United States*, 272 U.S. 630 (1926), the Court examined the legislative intent behind a statutory provision authorizing actions in equity for violations of the National Prohibition Act, 41 Stat. 305, 314 (1919), and concluded that its intent was to prevent future violations rather than to punish previous ones. Therefore, the Court found that double jeopardy did not prevent a court from imposing an injunction following a criminal acquittal of violating the statute.

<sup>37</sup> 303 U.S. 391 (1938).

<sup>38</sup> *Id.* at 395.

<sup>39</sup> *Id.*

<sup>40</sup> Pub. L. No. 70-562, 45 Stat. 791, 858.

<sup>41</sup> *Mitchell*, 303 U.S. at 395.

<sup>42</sup> *Id.* at 398.

<sup>43</sup> *Id.* at 398-99.

<sup>44</sup> *Id.* at 399 (citing *Murphy v. United States*, 272 U.S. 630 (1926) (holding that an injunction against occupying certain premises used in the manufacture of liquor, in violation of the prohibition law, for a year or, in the alternative, posting a bond, following an acquittal for maintaining a public nuisance based on the manufacture of the liquor was not punishment and, therefore, was not barred by the former acquittal)).

<sup>45</sup> *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

<sup>46</sup> *Id.*

forfeiture of goods or their value and the payment of fixed or variable sums of money.<sup>47</sup> Although the Court noted their comparative severity, it said these sanctions had been upheld against the claims that they were criminal in nature and, therefore, were subject to the rules of procedure governing civil cases.<sup>48</sup>

The Court found the imposition of an additional tax to be remedial, because it operated primarily as a safeguard for the protection of the revenue and to reimburse the government for the investigation expense and loss resulting from the taxpayers' fraud.<sup>49</sup> Moreover, the fact that the statute provided for the collection of the 50% addition to be executed either "by distraint" or "by a proceeding in court"<sup>50</sup> proved to the Court that Congress intended the sanction to be civil in nature.<sup>51</sup> From this, the Court concluded that civil enforcement of a remedial sanction barred any double jeopardy claim.<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *Mitchell*, 303 U.S. at 400 (citing *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1935); *Various Items v. United States*, 282 U.S. 577 (1931) (holding that an *in rem* forfeiture action is not a criminal proceeding, since it brought against the property rather than the wrongdoer); *Murphy v. United States*, 272 U.S. 630 (1926); *United States v. Regan*, 232 U.S. 37 (1914) (holding that a suit to recover a fixed penalty for unlawfully importing laborers into the United States was a civil action necessitating only proof by a preponderance of the evidence, despite the fact that the statute referred to the violation as a misdemeanor); *Grant Brothers Construction Company v. United States*, 232 U.S. 647 (1914) (holding that a suit to recover a fixed penalty for unlawfully importing laborers into the United States was a civil action, authorizing the reading of depositions of absent witnesses, despite the fact that the statute referred to the violation as a misdemeanor); *Chicago, Burlington, & Quincy Railway Co. v. United States*, 220 U.S. 559 (1911) (holding that an action to obtain a monetary penalty for operating trains without automatic couplers was a civil action); *Hepner v. United States*, 213 U.S. 103 (1909) (holding that a proceeding to obtain a monetary penalty for unlawfully bringing an alien into the United States was not criminal in nature); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (holding that an action to collect a monetary penalty for bringing an alien with a loathsome disease into the United States was not a criminal proceeding and, therefore, the right to trial by jury did not apply); *United States v. Zucker*, 161 U.S. 475, (1896) (holding that confrontation clause did not apply to an *in rem* forfeiture action, since the proceeding was not criminal in nature); *Passavant v. United States*, 148 U.S. 214 (1893).

<sup>49</sup> *Mitchell*, 303 U.S. at 401 (citing *Passavant v. United States*, 148 U.S. 214, 221 (1893); *Dorsheimer v. United States*, 74 U.S. (7 Wall.) 166 (1868); *Cliquot's Champagne*, 70 U.S. (3 Wall.) 114 (1865); *Bartlett v. Kane*, 57 U.S. (16 How.) 263 (1853); *Taylor v. United States*, 44 U.S. (3 How.) 197 (1845)).

<sup>50</sup> 26 U.S.C. §§ 276, 293 (1994).

<sup>51</sup> *Mitchell*, 303 U.S. at 401-02.

<sup>52</sup> *Id.* at 402-404 (citing *Murphy*, 272 U.S. at 630; *Various Items*, 282 U.S. at 577). To support his conclusion, Justice Brandeis relied on the fact that the Revenue Act of 1928 contained two separate and distinct provisions for sanctions which appeared in different parts of the statute. *Id.* at 404. This, Brandeis claimed, made the character of the sanction at issue clear. *Id.* The sanction at issue was titled "Additions to the Tax" and was in a portion of the



The Court's analysis in *Mitchell* gave almost complete deference to the label affixed to the statute by Congress.<sup>53</sup> Thus, while a civil action in the form of a tax could, in theory, be considered a second prosecution in violation of the Double Jeopardy Clause, the *Mitchell* Court made such a possibility remote by its high degree of deference to Congress.<sup>54</sup> Subsequent to *Mitchell*, this statutory construction approach became the standard used to resolve issues of applying double jeopardy successive prosecution protection to civil monetary penalties.<sup>55</sup>

In *United States ex rel. Marcus v. Hess*,<sup>56</sup> the Court reaffirmed its statutory construction test.<sup>57</sup> In *Hess*, local government units employed the respondents, a group of electrical contractors.<sup>58</sup> A substantial part of the respondents pay, however, came from the federal government.<sup>59</sup> A grand jury indicted the respondents for defrauding the United States, and the respondents plead no contest.<sup>60</sup> Subsequently, the petitioner sued the contractors, under 18 U.S.C. § 3490.<sup>61</sup> This statute authorized any person to bring suit on behalf of the government in a *qui tam* action, and any recovery obtained was to be evenly split between the plaintiff and the government.<sup>62</sup> Plaintiff obtained a judgment for \$315,000.

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statute entitled "Interest and Additions to the Tax." *Id.* at 405. The other sanction came under the heading "Penalties" and provided fine and imprisonment for willful attempts to evade the tax. *Id.* at 404-05. It was obvious, Justice Brandies stated, that Congress intended for the 50% addition to be a civil sanction. *Id.* For Justice Brandies and the Court, that, coupled with its remedial nature, was sufficient to defeat the double jeopardy claim.

<sup>53</sup> See Dallet, *supra* note 13, at 245.

<sup>54</sup> See Anielak, *supra* note 16, at 172.

<sup>55</sup> See, e.g., Eads, *supra* note 36, at 936, 938. *Mitchell* introduced three propositions to double jeopardy analysis of civil proceedings: 1) to resolve the issue simply by construing the relevant statute, 2) to refuse to apply the Double Jeopardy Clause to any civil penalty where the underlying statute is remedial (read civil) in nature, and 3) that a civil statute does not lose its civil nature by having a purpose other than merely compensating the government for a monetary loss. This last proposition is so because the *Mitchell* Court recognized that the statute at issue had an additional purpose of safeguarding the revenue generally in addition to compensating the government for its loss as a result of the taxpayer's fraud. See *id.* at 937-38. This third proposition was to be vastly expounded upon in subsequent cases.

<sup>56</sup> 317 U.S. 537 (1942).

<sup>57</sup> See Jahncke, *supra* note 18, at 123.

<sup>58</sup> *Hess*, 317 U.S. at 539.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 385.

<sup>61</sup> The precursor to the False Claims Act. 31 U.S.C. §§ 3729-31 (1994). Section 3490 provided for a penalty of \$2,000 plus double the damages sustained by the government.

<sup>62</sup> See 31 U.S.C. §§ 3491, 3493 (1994).

\$203,000 of the award was for double damages, and \$112,000 was an aggregate of the \$2,000 sums for each violation.<sup>63</sup>

The Court used the statutory construction analysis from *Mitchell* to determine whether 18 U.S.C. § 3490 imposed a criminal sanction.<sup>64</sup> The Court pointed out that the statutes on which the suit rested provided for distinct civil and criminal remedies, and the civil remedy did no more than "afford the government complete indemnity for the injuries done it."<sup>65</sup>

The Court went on to state that "[i]t is, of course, well settled that for one act a person may be liable both to pay damages and to suffer a criminal penalty."<sup>66</sup> The Court then compared the government to a private party who had been defrauded. Because Congress had the power to give an individual a right to sue for damages when the individual had been defrauded, Congress could also allow the government to sue for recovery from the fraud, irrespective of any criminal penalty also imposed on the wrongdoer.<sup>67</sup>

Even though the statute authorized a recovery of more than actual damages, the Court concluded that did not render the civil remedy criminal in nature.<sup>68</sup> The Court reasoned that the provision was not criminal, because the government still did not receive more than its actual damages, in light of the *qui tam* provision.<sup>69</sup> The Court hypothesized that even treble damages, as in anti-trust actions,<sup>70</sup> might survive a double jeopardy claim because parties could collect punitive damages in private civil suits, permissible even in conjunction with criminal punishment.<sup>71</sup> The Court reasoned that law could provide the same measure of damages for the government as it could for a private person.<sup>72</sup> According to Justice Black, people were commonly punished

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<sup>63</sup> *Hess*, 317 U.S. at 540.

<sup>64</sup> *Id.* at 549.

<sup>65</sup> *Id.* (citing *Mitchell*, 303 U.S. at 401).

<sup>66</sup> *Hess*, 317 U.S. at 549.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 550.

<sup>69</sup> *Id.*

<sup>70</sup> At the time, only private anti-trust actions were authorized. Government anti-trust suits for damages were not authorized until 1955, and government anti-trust suits seeking treble damages were not authorized until 1990. See Antitrust Amendments Act of 1990, Pub. L. No. 101-588, 104 Stat. 2879.

<sup>71</sup> *Hess*, 317 U.S. at 550-51. In fact, in dicta, Justice Black surmised that even quadruple damages would not constitute criminal punishment. *Id.* at 551.

<sup>72</sup> *Id.*

through civil proceedings.<sup>73</sup> Although the Court recognized that the respondent was being punished in a certain sense by the statute, the punishment was not so severe that it would convert the statute from a civil one to a criminal one.<sup>74</sup> The Court stated that the chief purpose of the statute was to provide the government with restitution.<sup>75</sup> Moreover, allowing double damages plus a sum certain only ensured that the government would be made whole while amid the inherent difficulty in determining the proper sum that would provide full restitution.<sup>76</sup>

In 1956, the Court next addressed the double jeopardy successive prosecutions issue in *Rex Trailer Co. v. United States*.<sup>77</sup> Rex Trailer had been convicted of five counts of violating the Surplus Property Act of 1944.<sup>78</sup> Following the conviction, the government brought a civil suit under Section 26(b) of the Act. Under this Act, three remedies existed: 1) \$2,000 per acquisition plus double the damages sustained by the government, 2) twice the consideration paid for the property, as liquidated damages, or 3) the government could keep the consideration paid, as liquidated damages.<sup>79</sup> The government claimed \$2,000 each for five violations, under Section 26(b)(1), and moved for summary judgment, based upon the conviction.<sup>80</sup> The district court granted the motion, and the court of appeals affirmed. The Supreme Court granted certiorari.

Faced with Rex Trailer's claim that the imposition of the monetary sanction would violate the Double Jeopardy Clause, the Court stated that the only issue was whether Section 26(b)(1) was civil or criminal.<sup>81</sup> The Court held the recovery authorized by the statute was civil in nature.<sup>82</sup> The Court reasoned that the government could resort to the same remedies to protect its property rights available to a private party.<sup>83</sup>

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<sup>73</sup> *Id.* at 550.

<sup>74</sup> *Id.* at 551.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 350 U.S. 148 (1956).

<sup>78</sup> Pub. L. No. 78-456, 58 Stat. 765 (1944). That statute gave veterans a preference in obtaining war surplus property. Rex Trailer Company was convicted of fraudulently obtaining war surplus property. *Rex Trailer Co., Inc. v. United States*, 350 U.S. 149, 150 (1956).

<sup>79</sup> *Id.* at 148-49.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 150, 151 (citing *Mitchell*, 303 U.S. at 399).

<sup>82</sup> *Id.* at 151.

<sup>83</sup> *Id.* (citing *Cotton v. United States*, 52 U.S. (11 How.) 229 (1850)).

Moreover, liquidated damages provisions were commonplace and, when reasonable, not to be regarded as penalties.<sup>84</sup>

The Court reviewed the legislative history, which recognized the alternative remedies as civil in nature. Moreover, section 26(d) referred to each of the three remedies as civil and provided that they "shall be in addition to all other criminal penalties and civil remedies provided by law."<sup>85</sup> Noting that this statute was essentially identical to the statute in *Hess*, the Court relied on its construction of the statute in *Hess*.<sup>86</sup> Based upon these factors, the Court concluded that the statute provided a civil remedy.<sup>87</sup>

In *Mitchell, Hess, and Rex Trailer Co.*, the Court engaged in statutory construction and granted a considerable amount of deference to Congress. Yet the Court failed to articulate a specific test for determining when a civil sanction for restitution becomes so punitive that it is really a criminal fine.<sup>88</sup> The trend in these cases suggests that the government is entitled to "rough remedial justice," meaning that it may demand compensation according to imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have attempted to impose a second criminal punishment.<sup>89</sup>

b) *One Lot Emerald Cut Stones and One Ring v. United States: The Court Builds on its Foundation By Considering Government Investigative and Prosecution Expenses*

In 1972, the successive prosecutions issue came before the Court again in the form of a forfeiture statute. In *One Lot Emerald Cut Stones*

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<sup>84</sup> *Rex Trailer Co, Inc. v. United States*, 350 U.S. 149, 151 (1956).

<sup>85</sup> *Id.* at 151-52.

<sup>86</sup> *Id.* at 152.

<sup>87</sup> *Rex Trailer Co., Inc.*, 350 U.S. at 154. The Court rejected *Rex Trailer's* argument that the failure of the government to allege specific damages rendered this recovery impermissible. *Id.* at 152-53. No requirement existed, the Court said, that specific damages be shown, because the recovery was in the nature of liquidated damages. *Id.* It was obvious, the Court said, that the government had been injured through *Rex Trailer's* fraudulent purchase of war surplus trucks because it decreased the numbers available to government agencies and for sale to veterans. *Id.* at 153. Since such damages were difficult to ascertain, however, the Court said, liquidated damages were appropriate. *Id.* at 153-54. The Court found that the recovery fixed by Congress was not "so unreasonable or excessive that it transformed what was clearly intended to be a civil remedy into a criminal penalty." *Id.* at 154.

<sup>88</sup> See *Anielak*, *supra* note 16, at 173.

<sup>89</sup> See *id.* (citing *Halper*, 490 U.S. at 446).

and *One Ring v. United States*,<sup>90</sup> the defendant was acquitted on charges of smuggling certain articles into the United States without declaring them.<sup>91</sup> Following the acquittal, the government brought an *in rem* civil forfeiture action against the articles in district court.<sup>92</sup> The owner intervened and argued that his acquittal barred the forfeiture action.<sup>93</sup> The Supreme Court again disagreed.

The Court held that there was no violation of the Double Jeopardy Clause because the case involved neither two criminal trials nor two criminal punishments.<sup>94</sup> Congress could, the Court said, impose both criminal and civil sanctions for the same conduct.<sup>95</sup> It could not, however, impose or attempt to impose two criminal punishments.<sup>96</sup> After determining that the question of whether a given sanction is civil or criminal is one of statutory construction,<sup>97</sup> the Court construed the forfeiture statute to find that Congress intended it as a civil remedy. Both the criminal and civil forfeiture provisions at issue were part of the Tariff Act of 1930.<sup>98</sup> According to the Court, the forfeiture provision appeared in Title IV, Part III, of the Act.<sup>99</sup> Title IV was entitled "Administrative Provisions," and Part III was called "Ascertainment, Collection, and Recovery of Duties."<sup>100</sup> On the other hand, the Court noted that the criminal provision with which *Klementova* had been charged was part of the "Enforcement Provisions" of the Act and became part of the U.S. Criminal Code.<sup>101</sup> The Court stated that where the sanctions were separate and distinct and were contained in different parts of the U.S. Code, it was clear that Congress intended and did create a civil and a criminal remedy.<sup>102</sup> The forfeiture provisions were intended to aid in enforcement, provided reasonable liquidated damages for violations of the inspection provisions, and served to reimburse the government for costs of inspection, investigation, and enforcement

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<sup>90</sup> 409 U.S. 232 (1972).

<sup>91</sup> *Id.* at 233.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 235.

<sup>95</sup> *Id.* at 235-36.

<sup>96</sup> *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235-36 (1972).

<sup>97</sup> *Id.* at 237 (citing *Mitchell*, 303 U.S. at 397).

<sup>98</sup> Pub. L. No. 71-361, 46 Stat. 590, 729.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *One Lot Emerald Cut Stones*, 409 U.S. at 236-37 (citing *Mitchell*, 303 U.S. at 404).

expenditures.<sup>103</sup> Thus the Court concluded that these provisions were remedial sanctions.<sup>104</sup>

c) *Kennedy v. Mendoza-Martinez*: The Court Develops a Test for Determining the Effect of Nominally Civil Statutes

Outside the context of Double Jeopardy analysis, the Court interpreted a statute that divested Americans of their citizenship.<sup>105</sup> In *Kennedy v. Mendoza-Martinez*,<sup>106</sup> several people whose citizenship had been revoked claimed a violation of due process. Accordingly, the Court had to determine whether the statute was criminal or civil. In determining that the statute imposed criminal punishment without due process of law, the Court developed and utilized a seven factor test. Those factors were:

- (1) [w]hether 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 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 to it; and
- (7) whether it appears excessive in relation to the alternative purpose assigned.<sup>107</sup>

Absent conclusive evidence of congressional intent, these seven factors must be considered in relation to the statute on its face.<sup>108</sup>

Subsequently, the Court applied the *Mendoza-Martinez* test in a number of contexts to determine whether various measures were criminal or civil, punitive or remedial.<sup>109</sup> Most noteworthy, however, was the Court's use of the seven *Mendoza-Martinez* factors to develop a specific test to determine whether a civil sanction was punitive enough

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<sup>103</sup> *Id.* at 237.

<sup>104</sup> *Id.* Moreover, the Court said that the measure of recovery fixed by Congress, *i.e.* forfeiture of the undeclared articles, was not "so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 237 (citing *Rex Trailer Co.*, 350 U.S. at 154).

<sup>105</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

<sup>106</sup> *Id.*

<sup>107</sup> *Mendoza-Martinez*, 372 U.S. at 168, 169.

<sup>108</sup> *Id.* at 169.

<sup>109</sup> *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979).

to constitute in a criminal penalty. Seventeen years after instituting the seven-factor test in *Mendoza-Martinez*, the Court developed a two-part test to determine the difference between a civil and criminal penalty in *United States v. Ward*.<sup>110</sup>

d) *Ward*: The Synthesis of the Statutory Construction and the *Mendoza-Martinez* Analyses

At the time *Ward* was decided, the Federal Water Pollution Control Act [FWPCA]<sup>111</sup> required any person in charge of a vessel or onshore or offshore facility was required to report the discharge of oil or other hazardous substances into navigable waters to the appropriate agency of the United States Government.<sup>112</sup> Failure to supply such notification was criminally punishable.<sup>113</sup> The statute also specified that notification could not be used in any criminal case against the violator.<sup>114</sup> In addition to criminal penalties for violations, at the time, the FWPCA also provided for civil monetary penalties of up to \$5,000 for unlawful discharges.<sup>115</sup>

After providing the required notice of a discharge pursuant to the statute, and based upon his notice, the Coast Guard assessed Ward a \$500 civil monetary penalty.<sup>116</sup> Ward claimed the civil penalty was actually a criminal punishment and, therefore, the reporting requirement violated his right against self-incrimination.<sup>117</sup>

The Supreme Court concluded that the question of whether the statute was criminal or civil was a matter of statutory construction.<sup>118</sup> In the two-part analysis the Court utilized, it first must determine whether Congress indicated, either expressly or impliedly, a preference for one label or the other.<sup>119</sup> Second, where Congress has indicated an intention to establish a civil penalty, the Court had to determine whether the statutory scheme was so punitive in purpose or effect as to negate that

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<sup>110</sup> 448 U.S. 242 (1980).

<sup>111</sup> 33 USC §1321 (now referred to as the Clean Water Act).

<sup>112</sup> *Ward*, 448 U.S. at 244.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 245; FWPCA, § 311(b)(6). The statute was amended in 1978 to increase the penalties to a maximum of \$250,000. Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2168.

<sup>116</sup> *Ward*, 448 U.S. at 246-47. The district court subsequently reduced the penalty to \$250. *Id.* at 247.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 248 (citing *Mitchell*, 303 U.S. at 399; *One Lot Emerald Cut Stones*, 409 U.S. at 237).

<sup>119</sup> *Id.* (citing *One Lot Emerald Cut Stones*, 409 U.S. at 236-37).

intention.<sup>120</sup> With regard to the second inquiry, the Court employed the seven-factor *Mendoza-Martinez* test, mandating that "only the clearest proof" would suffice to turn what Congress intended as a civil sanction into a criminal punishment.<sup>121</sup>

Employing the two-part test, the Court determined that Congress had intended to create a civil penalty by virtue of it being labeled a "civil penalty" in the statute and its being set apart from the criminal provisions.<sup>122</sup> Employing the *Mendoza-Martinez* test for the second part, the Court found that only one factor favored Ward. The behavior to which the penalty applied was already a crime.<sup>123</sup> The Court, however, recognized that Congress could impose both criminal and civil sanctions with respect to the same conduct.<sup>124</sup> In effect, *Ward* added a second step to the statutory construction test first employed in *Mitchell*.<sup>125</sup>

e) *One Assortment of 89 Firearms*: Application of the *Ward* Analysis to Double Jeopardy Claims

Although the *Ward* analysis has implications for a number of different areas,<sup>126</sup> it has special significance in the double jeopardy arena. In *United States v. One Assortment of 89 Firearms*,<sup>127</sup> a criminal defendant was acquitted of knowingly dealing in firearms without a license.<sup>128</sup> Following the acquittal, the government brought an *in rem* civil forfeiture action against the weapons.<sup>129</sup> Mulcahey, the owner, interceded and claimed the action was barred by his acquittal.

A unanimous Court employed the *Ward* analysis and found that Congress intended the forfeiture to be a remedial civil sanction.<sup>130</sup> Because the action was *in rem*, a historically civil action, and because Congress provided for a summary administrative forfeiture proceeding for items under \$2,500, the Court felt that Congress had clearly intended a civil sanction.<sup>131</sup> Additionally, the Court relied on the fact that the

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<sup>120</sup> *Id.* at 248-49 (citing *Flemming v. Nestor*, 363 U.S. 603, 617-621 (1960) (holding that terminating social security benefits is not criminal punishment)).

<sup>121</sup> *Id.* at 249 (citing *Nestor*, 363 U.S. at 617).

<sup>122</sup> *Ward*, 448 U.S. at 249.

<sup>123</sup> *Id.* at 250.

<sup>124</sup> *Id.* (citing *Mitchell*, 303 U.S. at 399; *One Lot Emerald Cut Stones*, 409 U.S. at 235).

<sup>125</sup> See Dallet, *supra* note 13, at 246; Anielak, *supra* note 16, at 173.

<sup>126</sup> See, e.g., *Allen v. Illinois*, 478 U.S. 364 (1986).

<sup>127</sup> *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

<sup>128</sup> *Id.* at 356.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 363.

<sup>131</sup> *Id.*



scope of the forfeiture provision was broader than that of the criminal provision.<sup>132</sup> The Court also noted Congress' attempts to curb the widespread traffic in firearms. The forfeiture provision furthered Congress' "remedial aims of 'controlling the indiscriminate flow' of firearms and to 'assist States and local communities to adopt stricter gun control laws.'"<sup>133</sup> In addition, the forfeiture provision discouraged unregulated commerce in firearms and removed from circulation those firearms that had been used or were intended to be used outside regulated channels of commerce.<sup>134</sup> The court declared that keeping firearms out of the hands of unlicensed dealers was plainly more of a remedial goal than a punitive one.<sup>135</sup>

With regard to the second portion of the *Ward* analysis, the Court found that only one of the seven *Mendoza-Martinez* factors were in Mulcahey's favor: the actions giving rise to the forfeitures could also be the subject of criminal penalties.<sup>136</sup> This factor lost its strength when viewed in the context that Congress may impose both civil and criminal sanctions for the same behavior.<sup>137</sup> That factor alone was not enough to turn the forfeiture proceeding into a criminal penalty.<sup>138</sup> In addition, because the forfeiture provision applied to a broader range of conduct, it was not actually coextensive with the criminal provision.<sup>139</sup>

These successive-prosecution or punishment-prong cases held that a civil sanction would not trigger a double jeopardy prohibition unless it was actually criminal in nature.<sup>140</sup> Thus, a finding of punishment was not the critical factor. Criminal punishment only resulted from a statute that was criminal in nature.<sup>141</sup> Civil punishment did not constitute punishment or prosecution for double-jeopardy purposes.<sup>142</sup> Moreover, the multiple punishment prong of double jeopardy should only protect defendants against criminal punishment in excess of that authorized by the legislature.<sup>143</sup> Thus, at the time *Halper* was decided, the legislative

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<sup>132</sup> *Id.* at 363-64.

<sup>133</sup> *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 365.

<sup>137</sup> *Id.* at 365-66 (citing *Ward*, 448 U.S. at 250; *Mitchell*, 303 U.S. at 399).

<sup>138</sup> *Id.* at 366. In deciding that a prior acquittal on criminal charges did not foreclose a forfeiture action based on the same conduct, the Court explicitly overruled *Coffey v. United States*, 116 U.S. 436 (1886). *Id.*

<sup>139</sup> *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984).

<sup>140</sup> See *Jahncke*, *supra* note 18, at 128.

<sup>141</sup> See *Eads*, *supra* note 36, at 940.

<sup>142</sup> See *id.*

<sup>143</sup> See *supra* note 31 and accompanying text; *Hall*, *supra* note 15, at 940.

branch enjoyed a substantial amount of deference from both arms of double-jeopardy analysis.

### III. *UNITED STATES V. HALPER*

#### A. *Analysis of United States v. Halper*

Irwin Halper worked as a manager in a medical laboratory providing services for eligible Medicare patients.<sup>144</sup> As an employee, he submitted sixty-five false claims for reimbursement to Blue Cross and Blue Shield of Greater New York, an intermediary for Medicare.<sup>145</sup> Halper claimed reimbursement for each claim in the amount of \$12, nine dollars more than the \$3 authorized reimbursement.<sup>146</sup> Accordingly, Blue Cross overpaid the lab \$585, which it passed along to the federal government.<sup>147</sup>

In April 1985, a grand jury indicted Halper on sixty-five counts of criminal false claims. Halper was convicted on all counts and sentenced to two years in prison and a \$5,000 fine.<sup>148</sup> The government then brought a civil false claims action against Halper in district court under the civil False Claims Act.<sup>149</sup> At the time, this statute authorized a civil penalty of \$2,000, double the amount of damages that the government sustained because of the false claim and costs of the civil action.<sup>150</sup> Having violated the False Claims Act sixty-five times, Halper could be penalized more than \$130,000.<sup>151</sup>

A unanimous Court pointed out that the Double Jeopardy Clause protected against three distinct abuses: a second prosecution for the same offense following a conviction, a second prosecution for the same offense following an acquittal, and multiple punishments for the same offense.<sup>152</sup> The Court said that the third abuse was at issue.<sup>153</sup> The Court

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<sup>144</sup> *United States v. Halper*, 490 U.S. 435, 437 (1989).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 438.

<sup>150</sup> *United States v. Halper*, 490 U.S. 435, 438 (1989). Since the time of Halper's conduct, section 3729 was amended as part of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, to increase the penalty to "not less than \$5,000 and not more than \$10,000 plus 3 times the amount of damages which the Government sustains because of the act of that person," and "the costs of a civil action brought to recover any such penalty or damages."

<sup>151</sup> *Halper*, 490 U.S. at 438.

<sup>152</sup> *Id.* at 440 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

<sup>153</sup> *Id.*

framed the issue as whether the penalty authorized by the False Claims Act, under which Halper was subject to liability of \$130,000 for false claims amounting to \$585 constituted punishment.<sup>154</sup> The Court distinguished *Mitchell, Hess, Rex Trailer Co.* and *Ward*, because they failed to address questions arising when a remedial penalty does not remotely approximate the government's actual costs and damages.<sup>155</sup>

Finding the double jeopardy protection to be "intrinsically personal,"<sup>156</sup> the Court rejected a general examination of the nature of the proceeding. Instead, the Court assessed the character of the sanctions actually imposed on the individual.<sup>157</sup> The labels "civil" and "criminal" were "not of paramount importance" the Court said, because civil and criminal proceedings and penalties may advance punitive as well as remedial goals.<sup>158</sup> The Court instead chose to examine the penalty imposed and to assess the purposes that the penalty might serve.<sup>159</sup> In this context, a civil penalty could also enforce a minimal punishment when it served not only a remedial purpose, but also promoted retribution and deterrence, the goals behind criminal punishments.<sup>160</sup> Thus, when a civil sanction could not fairly be said solely to serve a remedial purpose, but rather could only be explained as also serving either retributive or deterrent purposes, it was punishment.<sup>161</sup> The Court held that, under the Double Jeopardy Clause, a person who has received punishment in a criminal prosecution may not be subjected to an additional civil sanction if the civil sanction can not be fairly characterized as remedial, but only as a deterrent or retribution.<sup>162</sup>

According to the Court, this rule applied to the "rare case" when a fixed-penalty provision subjects a prolific, but small-gauge, offender to a sanction overwhelmingly disproportionate to the damages he caused.<sup>163</sup> Therefore, when a person has previously been subjected to a criminal penalty, and a subsequent civil penalty "bears no rational relation to the goal of compensating the government for its loss but rather appears to qualify as punishment in the plain meaning of the word," then the

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<sup>154</sup> *Id.* at 441.

<sup>155</sup> *Id.* at 441-446.

<sup>156</sup> *Id.* at 447 (citing *Hess*, 317 U.S. at 554 (Frankfurter, J., concurring)).

<sup>157</sup> *Halper*, 490 U.S. at 447.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 448.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (citing *Mendoze-Martinez*, 372 US at 169).

<sup>162</sup> *Halper*, 490 U.S. at 441.

<sup>163</sup> *Id.* at 449.

defendant is entitled to an accounting of the government's damages and costs to determine if the penalty sought is in fact a second punishment.<sup>164</sup>

Finally, the Court emphasized that the government could still seek the full civil penalty, no matter what its purposes or effects are, against a person who has not previously been punished.<sup>165</sup> The Court also allowed the government to seek the full civil penalty, if it were sought in conjunction with a criminal sanction in the same proceeding, provided the total aggregate punishment did not exceed the maximum amount authorized by the legislature.<sup>166</sup>

### B. Outside Criticism of the Court's Analysis in Halper

This "rare case" exception spurred a considerable amount of controversy. Some commentators lauded the case<sup>167</sup> because the *Ward* test was too deferential to the legislative branch<sup>168</sup> and invited prosecutorial abuse.<sup>169</sup> Others hailed *Halper* as a major doctrinal breakthrough, because the court ignored the distinction between civil and criminal proceedings and applied the Double Jeopardy Clause as a protection of a defendant from either civil or criminal double punishment.<sup>170</sup>

The vast majority of the commentary, however, was negative. Opponents of the decision suggested that *Halper* ignored a consistent line of cases that recognized double jeopardy protection only in criminal cases.<sup>171</sup> In fact *Halper* marked the first time that double jeopardy

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 450.

<sup>166</sup> *Id.* (citing *Missouri v. Hunter*, 459 U.S. 368, 369 (1983)). Presumably, this last statement is a reference to the fact that any restitutionary sanction imposed pursuant to the criminal conviction must be credited toward the remedial civil penalty. Were it not, there could be a double assessment of a remedial sanction, and the aggregate amount the defendant would be obligated to pay might exceed the maximum amount of monetary penalties authorized. There is authority for this position. See, e.g., *Palmisano*, 135 F. 3d at 863, 864.

<sup>167</sup> See, e.g., Cox, *supra* note 12, at 1267 ("In sum, *Halper's* insight that double jeopardy protection should extend to civil proceedings which punish is sound.").

<sup>168</sup> *Id.* at 1247. See also Eads, *supra* note 36, at 966-67.

<sup>169</sup> See, e.g., Janeice T. Martin, Note, *Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game*, 46 FLA. L. REV. 661 (1994).

<sup>170</sup> See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L. J. 1325 (July, 1991).

<sup>171</sup> See, Eads, *supra* note 36, at 929. According to Eads, the *Halper* Court's efforts to distinguish the prior cases were unconvincing. *Id.* at 948. *Halper* distinguished *Mitchell* on the basis that *Mitchell* had been acquitted whereas *Halper* had been convicted of a crime. *Id.* Eads said this was irrelevant because *Mitchell's* acquittal was unimportant to the *Mitchell* Court. *Id.* at 949. *Mitchell*, she said, was premised on the fact that the sanction in that case

protections applied to a civil sanction.<sup>172</sup> Departing from precedent, the Court rejected any reliance on the civil or criminal labels.<sup>173</sup> Instead, the Court focused on whether the sanction's effect constituted punishment.<sup>174</sup> *Halper* was also criticized for, for the first time, interpreting the Double Jeopardy clause to serve as only a partial bar to a sanction.<sup>175</sup>

Critics also suggested that the Court misapplied the multiple-punishment aspect of double jeopardy. Prior to *Halper*, the prohibition against multiple punishments ensured only that multiple punishments could not be imposed for a single criminal offense, unless the legislature provided otherwise. Thus, the prohibition against multiple punishments

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was determined to be a civil one and that double jeopardy protection applied only to criminal punishments. *Id.* *Halper* distinguished *Hess* and *Rex Trailer Co.* on the ground that the sanctions there "were not exponentially greater than the amount of the fraud." *Id.* Eads said this was misleading because those cases had, in actuality not developed any severity test. *Id.* at 950. Those cases, she said, recognized that a statute may provide more than actual damages to the government and still not lose its quality as a civil action. *Id.* Eads discussed how Justice Black had said in *Hess* that treble or quadruple damages would have been acceptable as substitutes for punitive damages. *Id.* See also Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 Am. Crim. L. Rev. 1 (1993). Henning made the same criticisms of *Halper's* treatment of precedent. *Id.* at 49-50. He also pointed out how *Mitchell* had construed the same statute that was at issue in *Halper* and concluded it provided a civil remedy and how the *Halper* Court had rejected the *Ward* analysis. *Id.* See also Martin, *supra* note 169, at 671 (discussing *Halper's* rejection of the *Ward* test); Jahncke, *supra* note 18, at 133-34 (discussing *Halper's* failure to engage in any statutory construction, as the prior cases had done); Cox, *supra* note 12, at 1245 (arguing that *Halper* rendered the *Ward/Mendoza-Martinez* analysis largely irrelevant).

<sup>172</sup> See, e.g., Hall, *supra* note 15, at 437; Michael Waldman, "Damage Control": A Defendant's Approach to the Damage Penalty Provisions of the Civil False Claims Act, 21 PUB. CONT. L. J. 131, 146 (1992); Henning, *supra* note 171, at 44.

<sup>173</sup> See, e.g., Anielak, *supra* note 16, at 174; Bryce, *supra* note 31, at 178 (problem).

<sup>174</sup> See Eads, *supra* note 36, at 955. Eads argued that the Court obscured and removed the bright line distinction between civil and criminal penalties and replaced it with "a complicated philosophical inquiry into what constitutes punishment." See also, Hall, *supra* note 15, at 444 (whether a penalty is civil or criminal is no longer dispositive as the Court will, following *Halper*, look to the effect of the sanction); Robert S. Pasley, *Double Jeopardy and Civil Monetary Penalties*, 114 BANKING L. J. 4, 10-11 (1997) (The *Halper* Court made it clear that one should look to the primary purpose behind the statute as applied to determine whether it should be held to be remedial or punitive); Bryce, *supra* note 31, at 178 (under *Halper*, one must focus on the nature of the sanction rather than the nature of the proceedings as a general matter).

<sup>175</sup> Eads, *supra* note 36, at 952. According to Eads, under *Halper*, the government was precluded only from recovering the amount that exceeded rough remedial justice and constituted punishment, and it could retain any amount "on the remedy side of the line." *Id.* Eads also pointed out the unworkability of the *Halper* approach to forfeitures. *Id.* at 952, n. 86. Could a criminal defendant only have to forfeit a portion of the offending articles? *Id.* How does one forfeit, for example, part of a gem?

only limited courts and prosecutors, not legislatures.<sup>176</sup> *Halper*, however, applied multiple-punishments protection to a civil proceeding and determined the effect of the penalty on the individual instead of examining whether the legislature had authorized both sanctions.<sup>177</sup> Others noted that the Court mischaracterized the issue as multiple punishments, when really it was a multiple prosecutions issue.<sup>178</sup> Accordingly, these commentators argued that the Court defined multiple punishment in terms of proceedings rather than legislative maximums,<sup>179</sup> blurring the distinction between multiple-punishments and successive-prosecutions analyses.<sup>180</sup> Additionally, by relying on the multiple-punishment protection, a person previously convicted of a crime would be protected while a person previously acquitted received no double jeopardy protection, because the person acquitted received no punishment.<sup>181</sup>

Commentators also criticize *Halper* for refusing to recognize the role of deterrence in civil penalty schemes.<sup>182</sup> It was noted that a "host of statutory penalties [were] in jeopardy, ranging from SEC insider trading penalties to forfeiture provisions to the civil tax fraud penalty to penalties for protection of the environment and workplace."<sup>183</sup> The decision had the potential to create a cumbersome administrative burden on government enforcement efforts,<sup>184</sup> because it required the government to choose between civil and criminal remedies.<sup>185</sup> At the

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<sup>176</sup> Hall *supra* note 15, at 441.

<sup>177</sup> *Id.* at 442; Bryce, *supra* note 31, at 177 (the *Halper* Court held that punishments imposed in separate proceedings violated the multiple punishments prohibition even though the legislature had clearly authorized both punishments).

<sup>178</sup> See Hall, *supra* note 15, at 453; Henning, *supra* note 171, at 52.

<sup>179</sup> See Bryce, *supra* note 31, at 168, 169.

<sup>180</sup> See Henning, *supra* note 171, at 4. In part, as a result of the confusion caused by *Halper*, at least one commentator has argued for the elimination of multiple punishments prohibition in favor of a protection against the risk of multiple punishments. Cox, *supra* note 12, at 1262. Others, e.g., Justice Scalia (*Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798-808 (1994) (Scalia, J., dissenting)), have argued that no multiple punishments prohibition actually exists at all. See, e.g., Anielak, *supra* note 16, at 179-84.

<sup>181</sup> See Hall, *supra* note 15, at 438; Jahnce, *supra* note 18, at 139-40.

<sup>182</sup> See, e.g., Eads, *supra* note 36, at 932. Eads argues that while *Halper* states clearly that deterrence is not a legitimate, nonpunitive government objective, *Mitchell*, *Hess*, and *Rex Trailer Co.* all suggested that a deterrent purpose did not convert a civil remedy into a criminal one, because deterrence had a proper role in civil law. *Id.* at 976. (problem) See also Henning, *supra* note 171, at 51 (arguing that *Halper's* conclusion that a civil sanction rises to the level of punishment if any deterrent or retributive purpose is present is unnecessarily restrictive in its interpretation of legitimate goals of civil remedies).

<sup>183</sup> Eads, *supra* note 36, at 977.

<sup>184</sup> See, e.g., at 929; Henning, *supra* note 171, at 45.

<sup>185</sup> See Hall, *supra* note 15, at 445; Eads, *supra* note 36, at 932; Henning, *supra* note 171, at 45. See also Philip S. Khinda, *Undesired Results Under Halper and Grady: Double Jeopardy Bars on*

very least, a much greater degree of coordination between the Justice Department and the administrative agencies, as well as between the civil and criminal divisions of the United State Attorney's offices would be necessary.<sup>186</sup> Prosecutors would need to consider double jeopardy implications whenever parallel civil and criminal proceedings were contemplated.<sup>187</sup> The SEC would have been particularly vulnerable to double-jeopardy claims because of its practice to seek monetary penalties in insider-trading cases.<sup>188</sup> If deterrence could no longer be a valid nonpunitive government objective, then a number of civil penalty statutes, including the Insider Trading Sanction Act, were in jeopardy.<sup>189</sup>

The *Halper* analysis also necessitated a great deal of judicial activism at the trial level, because trial judges would have to sort through the purpose and effects of each sanction imposed on a case-by-case basis.<sup>190</sup> In this regard, the Court provided little guidance for determining when a sanction became disproportionate enough to the harm suffered by the government to become punitive.<sup>191</sup> Not only was it scant, but the guidance that the Court did proffer was criticized as being confusing.<sup>192</sup>

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*Criminal RICO Actions Against Civilly-Sanctioned Defendants*, 25 Colum. J. L. & Soc. Probs. 117, 139-40 (1991).

<sup>186</sup> See *Cheh*, *supra* note 170, at 1380. See also *Cox*, *supra* note 12, at 1237-38, 1299. One alternative, authorized in *Halper*, 490 U.S. at 452, was to seek the full bore of both civil and criminal penalties in a single proceeding. This, however, would present extremely difficult procedure issues, such as differing burdens of proof, discovery rules, and constitutional safeguards, would all have to be worked out. See *Bryce*, *supra* note 31, at 181. Many believe these issues make such joinder impossible. See *Id.* (citing Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 142 n.123 (1995)).

<sup>187</sup> See *Hall*, *supra* note 15, at 438.

<sup>188</sup> See *Cheh*, *supra* note 170, at 1380. Because of *Halper*, the practice by the SEC of seeking civil monetary penalties in cases where a criminal prosecution had occurred or was contemplated was severely reduced, until *Hudson*. See *infra* Section IV.

<sup>189</sup> See *Eads*, *supra* note 36, at 977. See also, *Jahncke*, *supra* note 18, at 114; *Cox*, *supra* note 12, at 1238.

<sup>190</sup> See *Eads*, *supra* note 36, at 932; *Henning*, *supra* note 176, at 53, 55 (arguing that the case-by-case method engenders uncertainty in an area of the law that works best with bright line rules).

<sup>191</sup> See, e.g., *Hall*, *supra* note 15, at 448.

<sup>192</sup> *Eads*, *supra* note 36, at 973, 974; *Pasley*, *supra* note 174, at 10-11. Both of these articles point out how the Court said that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment," *Halper*, 490 U.S. at 448, implying that the sanction must be solely remedial in nature, and that the Court held that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution," *Id.* at 448-49, implying that the sanction may be acceptable so long as it is not solely punitive.

Finally, the approach that the Court chose in *Halper* undermined Congress' supposedly unilateral power to determine whether or not to adopt parallel civil and criminal mechanisms to enforce the law.<sup>193</sup>

### C. Author's Criticism of the Court's Analysis in *Halper*

The analysis and holding in *Halper* resulted from the Court's obvious displeasure with the government's use of a civil remedy to extract an additional penalty from the defendant and from the Court's struggle to reach a just result for one individual without adequately considering the effect its decision would have.<sup>194</sup> The Court had three options. First, it could have followed precedent and determined whether the False Claims Act was penal or civil. This option would not have allowed the Court to find for *Halper*, because the Court had already held the same Act to be civil in nature in *Hess*. Second, it could have overruled *Hess* and held the False Claims Act to be a criminal statute. Third, it could have cast the issue differently and analyzed it from a multiple-punishment standpoint. It chose the third option as the least distasteful of the alternatives.<sup>195</sup>

The government made the correct argument in *Halper*.<sup>196</sup> The Court did not adequately recognize the proper roles of deterrence and retribution in civil law. For example, in actions between private parties, courts award punitive damages to deter and punish, yet no one argues that this makes a civil action for damages a criminal proceeding or a punitive damages award a criminal punishment. Moreover, a New York federal district court has held that the mere fact that the state is a plaintiff in an action seeking punitive damages does not render the remedy criminal.<sup>197</sup> The mere fact that the state also has the power to seek a criminal sanction as well as a civil one does not render a civil remedy otherwise.

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<sup>193</sup> See Hall, *supra* note 15, at 445; Henning, *supra* note 171, at 55. See also Bryce, *supra* note 31, at 169 (arguing that the time-honored notion that the multiple punishment prohibition guarantees that defendants will suffer no punishment further than that allowed by the legislature, which involved legislative deference, was in conflict with *Halper's* notion of multiple punishments, which focused on the proceedings instead of the legislative maximums, and undermined the authority of the legislature to prescribe punishments) (problem).

<sup>194</sup> See Henning, *supra* note 171, at 45, 49.

<sup>195</sup> See Eads, *supra* note 36, at 946-47.

<sup>196</sup> See *Halper*, 490 U.S. at 441.

<sup>197</sup> *United States v. Hooker Chemicals & Plastics Corp.*, 748 F. Supp. 67 (W.D.N.Y. 1990).



*Halper* is a prime example of the adage that "bad facts make bad law." Faced with a clear injustice, the Court seized on a footnote<sup>198</sup> and dicta<sup>199</sup> to right that injustice, at a price of confusing double-jeopardy jurisprudence and jeopardizing legitimate government enforcement activities. The Court should have either allowed the injustice to stand for the sake of preserving the clarity of double jeopardy law or decided the case on some alternative basis.<sup>200</sup>

D. *Post-Halper Supreme Court Jurisprudence: Initial Expansion and Subsequent Contraction of the Halper Analysis*

Undeterred by the criticism, the Supreme Court extended the *Halper* analysis to the realm of the Eighth Amendment's Excessive Fines Clause. In *Austin v. United States*,<sup>201</sup> the Court held that the Excessive Fines Clause applied to the forfeiture of the defendant's mobile home and auto body shop after an *in rem* civil forfeiture action that followed conviction of state drug charges, because the forfeiture constituted "punishment."<sup>202</sup>

Following *Austin*, however, the Court began to have second thoughts. In *Department of Revenue of Montana v. Kurth Ranch*,<sup>203</sup> the Court held that a tax "on the possession and storage of dangerous drugs,"<sup>204</sup> in the amount of the greater of a specified amount per drug<sup>205</sup> or 10% of the market value of the drug, payable after arrest on drug charges, was punitive where the State attempted to collect nearly \$900,000 in tax, after imposing a criminal penalty and settling a forfeiture action for \$18,000. Because the tax was punitive, the Court held that it violated the Double-Jeopardy Clause. In so doing, however, the Court refused to apply *Halper's* method for determining whether the sanction

<sup>198</sup> *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("Retribution and deterrence are not legitimate non-punitive governmental objectives.").

<sup>199</sup> *Rex Trailer Co.*, 305 U.S. at 154; *One Lot Emerald Cut Stones*, 409 U.S. at 237 ("[I]t cannot be said that the measure of recovery fixed by Congress . . . is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.").

<sup>200</sup> For example, the Court could have decided the case on due process or Eighth Amendment grounds.

<sup>201</sup> 509 U.S. 602 (1993).

<sup>202</sup> The Court found that forfeitures constituted "payment" and, therefore, could be considered as fines. *Austin*, 509 U.S. at 622.

<sup>203</sup> 511 U.S. 767 (1994).

<sup>204</sup> MONT. CODE ANN. § 15-25-111, repealed by 1995 MONT. LAWS § 74 ch. 18, § 4 ch. 446.

<sup>205</sup> E.g., \$100 per ounce for marijuana. MONT. CODE ANN. Section 15-25-111(2), repealed by 1995 Mont. Laws § 74 ch. 18, § 4 ch. 446.

was remedial or punitive.<sup>206</sup> The Court did not consider whether the sanction did more than make the government whole. Moreover, in *United States v. Ursery*,<sup>207</sup> the Court foreshadowed a major shift by applying the two-part *Ward* analysis in lieu of the *Halper* analysis to find that *in rem* civil forfeiture proceedings are not criminal proceedings for double jeopardy purposes.<sup>208</sup>

#### E. *The Effect of Halper on Lower Courts and the SEC*

Despite the apparent opening for claimants that *Halper* appeared to create, only two lower courts found statutory penalties violative of double jeopardy in reported cases.<sup>209</sup> On the other hand, many more courts found that civil penalties did not constitute punishment for

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<sup>206</sup> *Kurth Ranch*, 511 U.S. at 783. The Court found it to be inappropriate to the analysis of tax statutes. This is most likely the case because the purpose of tax statutes is to raise revenue rather than to make the government whole for an injury done to it.

<sup>207</sup> 518 U.S. 267 (1996).

<sup>208</sup> The Court cited 89 *Firearms* as its authority for employing the *Ward* test in a double jeopardy case. *Id.* at 2142.

<sup>209</sup> In *Hall*, 730 F. Supp. 646 (M. D. Pa. 1990), the court found a penalty of \$1,035,000 assessed, pursuant to 31 U.S.C. § 5321(a)(2), for failing to declare an equal amount of bonds on a customs declarations form upon entering the United States, in violation of 31 U.S.C. §§ 5316(b), 5322(b), to constitute punishment for double jeopardy purposes. The failure by the government to make any attempt at quantifying its losses, coupled with the large amount of the penalty compared to the government's apparent damages, which were minimal, brought the case squarely within the realm of *Halper*, the court said. *Hall*, 730 F. Supp. at 655. In *Quinones-Ruiz v. United States*, 864 F. Supp. 983 (S. D. Cal. 1994), the court applied *Halper* and *Austin* to a civil forfeiture of \$40,420, which the claimant had failed to declare upon entering the United States, under 31 U.S.C. § 5317(c). The court held that, since civil forfeiture was punishment for Eighth Amendment purposes, under *Austin*, 509 U.S. 602 (1993), which had employed a *Halper* analysis, it was punishment for double jeopardy purposes as well. *Quinones-Ruiz*, 864 F. Supp. at 983.

Additionally, in an unreported case, *United States v. Morse*, 1997 WL 181043 (S.D.N.Y. 1997), the Southern District of New York held that a \$100,000 penalty imposed on three violators, pursuant to the Remedies Act, was a punishment for double jeopardy purposes. The court examined the legislative history of the Act, as well as the three tiered sanction structure, and determined that the purpose and nature of the Act were deterrent and, therefore, punitive, in nature. *Morse*, 1997 WL 181043 at \*3. The court also found the sanction not to be reasonably related to government expenses because, while the government alleged approximately \$100,000 in investigative costs, it sought to impose that amount on each of the three respondents. *Id.* at \*4.

A number of other lower courts had also ruled against the government on double jeopardy claims following *Halper*, but they were overruled, vacated, or modified by higher courts. See *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *overruled sub nom.* *Ursery v. United States*, 511 U.S. 767 (1996); *S.A. Healy Co. v. Occupational Safety and Health Review Commission*, 96 F.3d 906 (1996), *vacated*, 118 S. Ct. 623 (1997); *Gainer v. United States*, 904 F. Supp. 1234 (D. Kan. 1995), *rev'd*, 89 F.3d 851 (10th Cir. 1996).

double jeopardy purposes.<sup>210</sup> The case law of the lower courts demonstrated that the lower courts were generally unwilling to find penalties so severe as to amount to punishment.<sup>211</sup>

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<sup>210</sup> In *Karpa v. Commissioner of Internal Revenue*, 909 F.2d 784 (4th Cir. 1990), the court ruled that a 25% penalty on overdue taxes was not punishment because it was not disproportionate to damages caused to the government by taxpayers who do not pay their taxes in a timely fashion. In *Bernstein v. Sullivan*, 914 F.2d 1395 (10th Cir. 1990), the court ruled that an assessment of approximately \$52,000 under the Civil Monetary Penalties Law (CMPL), 42 U.S.C. § 1320a-7a, for 210 false items submitted to Medicare, totalling \$3,150, was not punishment for double jeopardy purposes, in large part because the statutory maximum penalty was much greater. The CMPL authorizes the Secretary of Health and Human Services to assess a penalty of up to \$2,000 plus twice the amount claimed for each false item submitted to Medicare. In *U.S. v. Bizzell*, 921 F.2d 263 (10th Cir. 1990), the court found a \$30,000 penalty for supplying false statements to, and violating other regulations of, HUD was in the nature of reimbursement for damages caused by *Bizzell* to the government and was not overwhelmingly disproportionate to those damages. Accordingly, the court held that the assessment was not punishment for double jeopardy purposes. *Bizzell*, 921 F.2d at 264-65. In *United States v. Walker*, 940 F.2d 442 (9th Cir. 1991), the court found a civil penalty of \$500 imposed pursuant to 19 U.S.C. § 1459 for failing to declare approximately one gram of marijuana on a customs declaration form was not punishment for double jeopardy purposes, in light of government expenses associated with maintaining and administering customs checkpoints. Similarly, in *United States v. McClinton*, 98 F.3d 1199 (9th Cir. 1996), the court upheld penalties of \$500 and \$1,000 for similar violations as not constituting punishment for double jeopardy purposes. In *United States v. Barnette*, 10 F.3d 1553 (11th Cir. 1994), *cert. denied*, 513 U.S. 816 (1994), the court held that treble damages imposed under the Civil RICO statute (18 U.S.C. § 1964), where the United States is the plaintiff, did not constitute punishment for double jeopardy purposes, because a recovery of three to one did not approach the shocking 222 to one ratio in *Halper*. In *United States v. United States Fishing Vessel Maylin*, 725 F. Supp. 1222 (S. D. Fla. 1989), the court found the forfeiture of a fishing vessel for fishing and game violations, pursuant to 16 U.S.C. § 3374(a)(2), to bear a rational relation to compensating the government for investigative expenses and the damage to wildlife. Therefore, the forfeiture was held not to be punishment for double jeopardy purposes. *Maylin*, 725 F. Supp. at 1222.

Interestingly, after *Halper*, several courts also found monetary penalties assessed under the False Claims Act not to be punishment. In the form of the Act as it existed at the time of *Halper*, the Southern District of New York upheld penalties assessed for three claims. See *supra* text accompanying note 154. *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989). Three claims, the court said, did not give rise to the "rare case" contemplated by *Halper*. *Pani*, 717 F. Supp. at 1019. In the Act's subsequent form, *i.e.*, \$5,000 to \$10,000 plus treble damages for each violation (See, note 154), the Eighth Circuit ruled that an assessment totalling over \$480,000 for four false claims was not punishment for double jeopardy purposes. *United States v. Peters*, 110 F.3d 616 (8th Cir. 1997), *cert. Denied*, 118 S. Ct. 162 (1997). The court held that the treble monetary penalty was "in the nature of rough remedial justice," *Peters*, 110 F. 3d at 617 (citing *United States v. Brekke*, 97 F. 3d 1043, 1048 (8th Cir. 1996), and that the \$5,000 per violation was not punitive in light of the small number of violations. 110 F. 3d at 617, 618. In *United States v. Fliegler*, 756 F. Supp. 688 (E. D. N.Y. 1990), the court found a penalty of \$115,000 not to constitute punishment where the government's costs were in excess of \$110,000. In *United States v.*

*Halper* also had a considerable effect on the SEC's enforcement program. In a number of securities fraud cases where the respondents had already been subject to criminal penalties, the SEC did not seek civil monetary penalties, for fear of a double jeopardy claim.<sup>212</sup> The government recognized the *Halper* Court's admonishment that the government could still obtain both civil and criminal penalties as long as the proceedings were not successive.<sup>213</sup> Thus, the SEC continued to seek monetary penalties in cases where parallel proceedings occurred simultaneously.<sup>214</sup> Additionally, the SEC also responded to the threat *Halper* presented by demanding a waiver of any double jeopardy claim in all settlement offers.<sup>215</sup>

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*Boutte*, 907 F. Supp. 239 (E. D. Tex. 1995), the court found a penalty equal to 3.38 times the amount of damages to the government was not punishment for double jeopardy purposes.

Several post-*Halper* cases addressed the double jeopardy issue presented by sanctions imposed under the Commodities Exchange Act (CEA), a statute very similar in subject matter to the securities laws. After 1974, the Act provided for civil monetary penalties in the amount of \$100,000 per violation for commodities fraud or manipulation, as well as a trading bar and/or a suspension or revocation of registration. 7 U.S.C. § 9; Pub. L. No. 93-463, 88 Stat. 1389 (1974) (this provision has since been amended as part of the Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590. See *infra* notes 420-22 and accompanying text). In *In the Matter of Incomco, Inc., and Philip M. Smith*, 1991 WL 281626 (C.F.T.C. 1991), the CFTC ruled that the imposition of a trading bar was a remedial prophylactic sanction to which double jeopardy did not apply. *Incomco*, 1991 WL 281626, \*11 (C.F.T.C.). The CFTC went on to find that a civil monetary penalty of \$5,000 bore a rational relationship to the remedial goal of the proceeding, deterring similar violations in the future. *Id.* at 12. In *United States v. Furllett*, 974 F.2d 839 (7th Cir. 1992), employing a *Halper* analysis, the court found that a trading bar and a \$75,000 civil monetary penalty did not constitute punishment for double jeopardy purposes. The court found the penalty to be remedial when compared with government costs. *Furllett*, 974 F.2d at 843-44. In light of *Furllett's* "pernicious, widespread, and institutionalized" fraud, the court found the trading bar a valid remedial measure to ensure the integrity of the market and to protect it from him. *Id.* at 844.

<sup>211</sup> Nelson T. Abbott, *United States v. Halper: Making Double Jeopardy Available in Civil Actions*, 6 BYU J. Pub. L. 551, 568 (1992).

<sup>212</sup> See, e.g., S.E.C. v. Langheinrich, SEC Litigation Release No. 13924, SEC Docket, Vol. 55, No. 17, at 2341 (Jan. 7, 1994); S.E.C. v. Lloyd Securities, SEC Litigation Release No. 13841, SEC Docket, Vol. 55, No. 5, at 713 (Oct. 21, 1993). See also Arthur B. Labby & W. Hardy Callcott, *Patterns of SEC Enforcement under the 1990 Remedies Act: Civil Monetary Penalties*, 58 ALB. L. REV. 5, 35 (1994).

<sup>213</sup> *Halper*, 490 U.S. at 450.

<sup>214</sup> See, e.g., S.E.C. v. Arnold, SEC Litigation Release No. 13356, SEC Docket, Vol. 52, No. 6, at 1327 (Aug. 31, 1992); S.E.C. v. Cohen, SEC Litigation Release No. 13800, SEC Docket, Vol. 55, No. 2, at 301 (Sept. 24, 1993); S.E.C. v. Weiss, SEC Litigation Release No. 13811, SEC Docket, Vol. 55, No. 2, at 306 (Sept. 29, 1993). See also Labby & Callcott, *supra* note 212, at 35. Apparently, the SEC hoped that separate proceedings occurring simultaneously would not be considered as successive proceedings.

<sup>215</sup> See Richard J. Morvillo, *Caught in a Double Bind: In a Cunning Dodge Around the Constitution, the Government Voids the Guarantees of Protection Against Double Jeopardy for*

HUDSON V. UNITED STATES

A. Analysis of Hudson

Hudson was the chairman and controlling shareholder of two failed banks.<sup>216</sup> Rackley presided over one bank and held office on the board of directors of the other; and Baresel was a board member of both banks.<sup>217</sup> An examination of the two banks led the Office of the Comptroller of the Currency (OCC) to conclude that Hudson, Rackley, and Baresel had used the banks to arrange a series of loans to third parties which violated banking statutes. In reality, the banks had loaned money to Hudson so that he could redeem bank stock that he had pledged as collateral on defaulted loans.<sup>218</sup>

On February 13, 1989, the OCC issued a "Notice of Assessment of Civil Monetary Penalty" which alleged that the three men had violated banking laws by causing their banks to unlawfully allow Hudson to receive the benefit of the loans. The notice also alleged that the illegal loans resulted in nearly \$900,000 in losses to the banks and contributed to their failures. The notice did not allege any harm to the government. Based upon the allegations, the OCC assessed penalties of \$100,000 against Hudson and \$50,000 each against Rackley and Baresel. The notice also informed all three that the OCC intended to bar them from further participation in the conduct of "any insured depository institution."<sup>219</sup>

In October 1989, Hudson, Rackley, and Baresel resolved the OCC proceedings by entering into a "Stipulation and Consent Order" wherein Hudson, Baresel, and Rackley agreed to pay \$16,500, \$15,000, and

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*Defendants in Cases that Involve the SEC*, NATL. L. J., June 3, 1991, at 13 (1). The language chosen by the SEC, however, does not unambiguously reflect an intention to waive constitutional defenses. *Id.* The language the SEC requires is as follows: "[The settlement] does not resolve, extend to, affect, or preclude any other proceeding which may be brought against [the respondent]." *Id.* It could be argued that this language is not sufficiently clear to compel the conclusion that a defendant waived his or her double jeopardy protections. *Id.* Waivers of constitutional rights in any context must, at the very least, be clear. *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)). While some courts have ruled that this language precludes a defendant from making a double jeopardy claim, in the author's opinion, they are not correct. See *infra* note 343 and accompanying text. The C.F.T.C. routinely requires such a waiver as well. See, e.g., *In the Matter of William Koerner, IV Great River Corp.*, 1998 WL 27558, \*2 (C.F.T.C.).

<sup>216</sup> *Hudson v. United States*, 118 S. Ct. 488, 491-92 (1997).

<sup>217</sup> *Id.* at 492.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

\$12,500, respectively. Additionally, each agreed not to "participate in any manner" in the affairs of any banking institution without written authorization from the OCC and all other relevant regulatory agencies. The consent orders also contained language providing that the orders did not constitute "a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate."<sup>220</sup>

In August 1992, all three were indicted in the federal district court in Oklahoma for conspiracy, misapplication of bank funds, and making false entries in violation of 18 U.S.C. §§ 371, 656, and 1005.<sup>221</sup> The grounds of the indictments were the same transactions that formed the basis for the prior administrative actions.<sup>222</sup> The three men moved to dismiss the indictment on double jeopardy grounds.<sup>223</sup> The district court denied the motion, and the court of appeals affirmed on the nonparticipation sanction issue but vacated and remanded on the monetary sanctions issue.<sup>224</sup> On remand, the district court granted the motion to dismiss the indictments.<sup>225</sup> The government appealed, and the court of appeals reversed.<sup>226</sup> The Supreme Court granted certiorari<sup>227</sup> and affirmed the reversal of the appellate court.<sup>228</sup>

The Supreme Court again noted that the Double Jeopardy Clause protects against multiple punishments for the same offense.<sup>229</sup> The Court applied the *Ward* test to determine whether this statute indicated that the particular punishment was criminal or civil.<sup>230</sup> First, the Court needed to determine whether the legislature indicated, either expressly or impliedly, a preference for a civil label or a criminal one.<sup>231</sup> Second, where the legislature indicated an intention to establish a civil penalty, the Court needed to determine whether the statutory scheme was so punitive in purpose or effect that it transformed an intended civil penalty into a criminal one.<sup>232</sup> To make this second determination, the

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Hudson v. United States*, 118 S. Ct. 488, 492 (1997).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 493.

<sup>228</sup> *Hudson v. United States*, 118 S. Ct. 488, 493 (1997).

<sup>229</sup> *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359 (1983); *Breed v. Jones*, 421 U.S. 519 (1975); *Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938)).

<sup>230</sup> *Hudson*, 118 S.Ct. at 493. (citing *Mitchell*, 303 U.S. at 399).

<sup>231</sup> *Hudson*, 118 S. Ct. at 493. (citing *Ward*, 448 U.S. at 248).

<sup>232</sup> *Hudson*, 118 S. Ct. at 493. (citing *Ward*, 448 U.S. at 248-49; *Rex Trailer Co.*, 350 U.S. at 154).

Court used the seven factors listed in *Kennedy v. Mendoza-Martinez*<sup>233</sup> as "guideposts."<sup>234</sup> These seven factors had to be considered in relation to the statute on its face.<sup>235</sup> In employing the second part of the two-part test, "'only the clearest proof' will suffice to override legislative intent and transform what has been demonstrated a civil remedy into a criminal penalty."<sup>236</sup>

Applying this test, the Court held that the criminal prosecutions of Hudson, Baresel, and Rackley did not violate the Double Jeopardy Clause. Congress had intended the OCC monetary penalties and debarment sanctions to be civil in nature.<sup>237</sup> The statutes authorizing the imposition of the monetary penalties expressly provided that such penalties are civil in nature.<sup>238</sup> Moreover, the Court noted that the fact that the authority to issue sanctions was conferred to an administrative agency was further evidence that Congress intended to provide for a civil sanction.<sup>239</sup>

Turning to the second prong of the *Ward* test, the Court found "little evidence, much less than the clearest proof [required]," suggesting that neither the OCC monetary penalties nor the debarment was so punitive as to render them criminal, despite Congress' intent to the contrary.<sup>240</sup> In the context of the second factor of the *Mendoza-Martinez* test, the Court stated that neither monetary penalties nor debarment have historically been viewed as punishment.<sup>241</sup> Revocation of a privilege voluntarily granted, such as a debarment, "is characteristically free of the punitive criminal element."<sup>242</sup> Similarly, the Court said, "the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforceable by civil proceedings since the original revenue law of 1789."<sup>243</sup>

Addressing the first factor of the *Mendoza-Martinez* test, the Court noted that the sanctions imposed did not involve an affirmative

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<sup>233</sup> 372 U.S. 144 (1963).

<sup>234</sup> *Hudson*, 118 S. Ct. at 493.

<sup>235</sup> *Id.* (citing *Mendoza-Martinez*, 372 U.S. at 169). See *supra* note 108 and accompanying text.

<sup>236</sup> *Hudson*, 118 S. Ct. at 493. (quoting *Ward*, 448 U.S. at 249)

<sup>237</sup> *Id.* at 495.

<sup>238</sup> 12 U.S.C. §§ 93 (b)(1), 504 (a) (1994).

<sup>239</sup> *Hudson*, 118 S. Ct. at 495. (citing *Helvering v. Mitchell*, 303 U.S. 391, 402; *United States v. Spector*, 343 U.S. 169, 178 (1952) (Jackson, J., dissenting); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 495-96 (quoting *Mitchell*, 303 U.S. at 399 n.2).

<sup>243</sup> *Hudson*, 118 S. Ct. at 496 (quoting *Mitchell*, 303 U.S. at 400).

disability or restraint, because they did not approach imprisonment.<sup>244</sup> Also, neither sanction in this case was imposed upon a finding of scienter.<sup>245</sup> The statutes in question allowed for the assessment of penalties irrespective of the violator's state of mind.<sup>246</sup> That the amount of the penalty assessed under the statutes in question was affected by the good faith of Hudson and his associates was unimportant to the Court; the analysis of the nature of the statutory scheme was conducted "on its face."<sup>247</sup> Similarly, under 12 U.S.C. § 1818(e)(1)(c)(ii), one could be debarred for willful disregard for the safety of an institution. Willfulness, however, was not a necessary condition for debarment.<sup>248</sup> The disregard for safety of institution needs only to be continuing.<sup>249</sup> Therefore, the Court maintained that scienter was not an issue.

Furthermore, while the Court recognized that the conduct deserving the OCC sanctions was also criminal, this was insufficient to render the sanctions criminally punitive.<sup>250</sup> Although, the Court recognized that deterrence is a traditional goal of criminal punishment, the Court held that the presence of a deterrent purpose was insufficient to render a sanction criminal. Deterrence "may serve civil as well as criminal goals."<sup>251</sup> The Court did not address the sixth and seventh factor of the *Mendoza-Martinez* test.<sup>252</sup>

Thus, criminal prosecutions in the wake of the civil penalties did not violate the Double Jeopardy Clause. More importantly, the Court strongly disapproved and, in effect, overruled the analysis employed in *Halper*. The Court noted that the *Halper* analysis deviated from the Court's traditional double jeopardy doctrine in two ways: first, it bypassed the threshold question of whether or not the successive punishment at issue was a *criminal* punishment; second, it assessed the character of the actual sanctions imposed rather than evaluating the statute on its face to determine whether it provided for what amounted to a criminal sanction.<sup>253</sup> By focusing solely on whether the sanction was so grossly disproportionate to the harm as to constitute punishment, the seventh factor of the *Mendoza-Martinez* test had been elevated to

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<sup>244</sup> *Hudson*, 118 S. Ct. at 496 (citing *Nestor*, 363 U.S. at 617).

<sup>245</sup> *Hudson*, 118 S. Ct. at 496.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* (citing *Mendoza-Martinez*, 372 U.S. at 169).

<sup>248</sup> *Hudson*, 118 S. Ct. at 496.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* (citing *United States v. Dixon*, 509 U.S. 688, 704 (1993)).

<sup>251</sup> *Id.* (quoting *Hudson*, 118 S. Ct. at 488, 496).

<sup>252</sup> See *Cooper*, *supra* note 4, at 3.

<sup>253</sup> *Hudson*, 118 S. Ct. at 494.



dispositive status. When no one factor of that test was meant to be controlling.<sup>254</sup>

The Court characterized the *Halper* analysis as unworkable, because all civil penalties have some deterrent effect.<sup>255</sup> If a sanction must be solely remedial or completely nondeterring to avoid implicating the Double Jeopardy Clause, then no civil penalty is beyond the scope of the Clause.<sup>256</sup> Accordingly, a double jeopardy analysis determination would be necessary in every case where a civil penalty is sought.<sup>257</sup> Further, such a determination could not be made before a sum certain is obtained.<sup>258</sup> Finally, the Court pointed out that the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment adequately provided enough protection against the evils that occurred in *Halper*.<sup>259</sup>

### B. Comments on Hudson

The Court's criticisms of the *Halper* analysis in *Hudson* are justified. The *Halper* decision was a major departure from double jeopardy precedent,<sup>260</sup> and *Hudson* represents a return to the traditional double jeopardy analyses of successive prosecutions and deference to the legislature. Unlike the *Halper* analysis, the *Hudson* approach is both reliable and efficient.<sup>261</sup>

The Court correctly employed the *Ward* analysis. First, Congress clearly intended for 12 U.S.C. §§ 93(b),<sup>262</sup> 504(a),<sup>263</sup> the statutory provisions under which the monetary penalties were assessed, to be civil remedies. The drafters refer to the titles of Section 93 and Section 504 as the "Civil Monetary Penalty" and "Civil Penalty." Both sections 93 and 504 authorize the penalties under those statutes to be assessed by an

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<sup>254</sup> *Id.* (citing *Mendoza-Martinez*, 372 U.S. at 169).

<sup>255</sup> *Hudson*, 118 S.Ct. at 494-95 (citing *Kurth Ranch*, 511 U.S. at 776-77 n.14; *Ursery*, 116 S. Ct. at 2145 n.2).

<sup>256</sup> *Hudson*, 118 S. Ct. at 495.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993)).

<sup>260</sup> *Hudson*, 118 S.Ct. at 494.

<sup>261</sup> See Eads, *supra* note 36, at 967. It is not, however, without its drawbacks. See *infra* note 268.

<sup>262</sup> See Financial Institutions Regulatory and Interest Rate Control Act of 1978, Title I, § 103, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

<sup>263</sup> See Financial Institutions Regulatory and Interest Rate Control Act of 1978, Title I, § 103, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

administrative agency rather than by judicial determination. The legislative history echoes the statutory language.<sup>264</sup>

Second, employing the *Mendoza-Martinez* factors, it is clear that Sections 93(b) and 504(a) are not so punitive in effect as to render them criminal statutes. (1) The civil monetary penalties assessed do not constitute affirmative disabilities or restraints. (2) The case law suggests that civil monetary penalties historically do not constitute punishment. (3) The imposition of these penalties does not require scienter.<sup>265</sup> The factors considered under Section 504(b), including the violator's good faith, are relevant only to determining the amount of the penalty not its imposition. (4) Clearly the imposition of monetary penalties under these provisions furthered the goal of deterrence and retribution. In fact, the legislative history makes clear that Congress intended these sanctions to promote deterrence.<sup>266</sup> Because deterrence is an appropriate effect of civil sanctions, deterrence does not dispositively make the statute criminal.<sup>267</sup> (5) In this case, the Court imposed monetary penalties for criminal behavior, a factor operating in favor of finding a criminal sanction.<sup>268</sup> This factor is also not dispositive, however, because Congress has the latitude to proscribe both criminal and civil sanctions for the same conduct.<sup>269</sup> (6) The banking penalties are remedial. Sanctions imposed under Sections 93(b) and 504(a) account for the financial resources of the bank or person charged,<sup>270</sup> indicating a remedial purpose. Additionally, the imposition of civil monetary fines extended to a far broader range of conduct than the criminal penalties, further indicating a remedial purpose.<sup>271</sup> The legislative history suggests that the policy of authorizing monetary penalties was to give agencies flexibility to secure compliance.<sup>272</sup> Finally, the statutes and regulations at issue supported the clearly remedial purpose of the stability of the banking industry. (7) Yet, the maximum penalties that could be imposed

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<sup>264</sup> See H.R. REP. NO. 95-1383, at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9289 (referring to the authorization of "civil monetary penalties." ).

<sup>265</sup> See *Cache Nat'l Bank v. Hinman*, 626 F. Supp. 1341 (D. Colo. 1986).

<sup>266</sup> See H.R. REP. NO. 95-1383, at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9289 ("Daily money penalties [referring to Section 504] should serve as deterrents to violations of laws, rules, regulations, and orders of the agencies.").

<sup>267</sup> See *Ursery*, 116 S. Ct. at 2149.

<sup>268</sup> See, e.g., *89 Firearms*, 465 U.S. at 365.

<sup>269</sup> See *Ward*, 448 U.S. at 250; *89 Firearms*, 465 U.S. at 365-66.

<sup>270</sup> This requirement, in fact all factors other than the seriousness of the violation, were eliminated from consideration of the amounts of penalties under both sections in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 471 (1989).

<sup>271</sup> See *89 Firearms*, 465 U.S. at 363.

<sup>272</sup> H.R. REP. NO. 95-1383, at 17.

under either section may be excessive in relation to the remedial purposes of the sections. \$1,000 per day for each violation for as long as the violation continues could be potentially result in a tremendous penalty. Sections 504(b) and 93(b)(2), however, require the OCC to consider the financial resources of the violator in assessing the amount of the penalty, minimizing the chance of excessiveness. With only two of the seven factors in Hudson's favor, the Court did not have the "clearest proof" required to convert Congress' civil remedy into a criminal one. The Court chose and employed the correct analysis, making *Hudson* a sound decision.<sup>273</sup>

#### IV. PALMISANO

The soundness of *Hudson* has implications on the validity of sanctions imposed under ITSA, ITSFEA, or the Remedies Act, in the face of a double jeopardy claim. The Second Circuit held that civil monetary

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<sup>273</sup> The majority opinion in *Hudson*, however, is not without its flaws. First, Chief Justice Rehnquist criticized *Halper* for creating a regime where it would not be possible to determine whether double jeopardy was violated until a judgment was obtained while the aim of the Double Jeopardy Clause is to prevent such an action at its inception. *Hudson*, 118 S. Ct. at 495. While the Court's other criticisms of *Halper* are apt, this one is disingenuous. The Chief Justice's argument is correct where the amount of the penalty is within the discretion of the administrative agency or judge imposing it. Where the amount of the penalty is mandatory, however, the argument is not correct. In such a case, one need not wait until a judgment is obtained to determine whether the Double Jeopardy Clause prohibits the action. If the second action is an administrative one, a respondent could contest the validity of the initial assessment or make a motion to dismiss the action at its inception based upon the relief sought on the face of the initiating instrument. If the second action is a civil action in district court, one can make a motion to dismiss based upon the relief sought in the complaint. Finally, if the second action is a criminal proceeding, one can move to dismiss the indictment or information.

Second, in applying the second prong of the *Ward* test, the Court's opinion said that the OCC sanctions were not "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* [emphasis added]. In *Ward*, however, the test was disjunctive, not conjunctive: "Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Ward*, 448 U.S. at 248-49. The disjunctive form was used in *89 Firearms* as well. See *89 Firearms*, 465 U.S. at 362-63 (quoting *Ward*, 448 U.S. at 248). If this distinction was intentional, it was unfounded in the case law. The conjunctive form of the test would, however, be more difficult for a claimant to meet. This appears to be an unfortunately, inadvertent error, because *Hudson* cited *Ursery* in support of its construction of the *Ward* test. *Hudson*, 118 S. Ct. at 495. *Ursery*, in fact, however, employed the disjunctive form. *Ursery*, 116 S. Ct. at 2142. Ironically Chief Justice Rehnquist seems to misstate a test he created himself. On the facts of *Hudson*, however, the error was not dispositive. Finally, the *Hudson* court did not explicitly address *Halper's* confusing expansion of the multiple punishment doctrine. Flaws of the opinion aside, it is apparent that the *Hudson* analysis is the correct one.

penalties imposed pursuant to the Remedies Act following a criminal proceeding do not violate the Double Jeopardy Clause.<sup>274</sup>

A. *Analysis of Palmisano*

In *Palmisano*,<sup>275</sup> a bankruptcy attorney induced over ninety people to invest a total of approximately \$7.9 million in a Ponzi scheme.<sup>276</sup> In July 1994, Palmisano was indicted for a variety of criminal conduct in connection with the scheme.<sup>277</sup> On the same day, the SEC commenced a civil enforcement action alleging the sale of unregistered securities, in violation of Section 5(a) and (c) of the Securities Act of 1933 and the sale of securities through fraud and misrepresentation, in violation of Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5.<sup>278</sup> The SEC requested disgorgement and the imposition of a monetary penalty.<sup>279</sup> In September 1995, Palmisano pleaded guilty to mail fraud, wire fraud, money laundering, and securities fraud.<sup>280</sup> He was sentenced to 188 months in prison and ordered to make restitution of approximately \$3.8 million.<sup>281</sup> Additionally, Palmisano forfeited \$700,000.<sup>282</sup>

In the civil action, the SEC moved for summary judgment, based on the guilty pleas.<sup>283</sup> The court granted the motion and ordered Palmisano to disgorge approximately \$9.2 million and ordered him to pay a \$500,000 civil penalty.<sup>284</sup> Palmisano appealed, claiming the disgorgement and monetary penalty violated the Double Jeopardy Clause.<sup>285</sup>

The Second Circuit rejected Palmisano's claim. Using the *Hudson/Ward* analysis, the Court held that Palmisano's claim was

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<sup>274</sup> SEC v. Palmisano, 135 F. 3d 860 (2d Cir. 1998).

<sup>275</sup> *Id.* at 864.

<sup>276</sup> *Id.* at 862.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Specifically, the request for monetary penalties was made under Sections 101 and 201 of the Remedies Act, which appear as Sections 20(d) of the Securities Act, and 21(d)(3) of the Exchange Act, 15 U.S.C. §§ 77t(d), 78u(d)(3), respectively. *Id.* at 862-63.

<sup>280</sup> *Palmisano*, 135 F.3d at 863.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

"plainly meritless."<sup>286</sup> Under the *Ward* test, the Court first found that Congress' intent clearly favored classifying disgorgement and the penalties at issue as civil.<sup>287</sup> The statutory provisions of the Remedies Act relied on by the SEC were entitled, "[M]oney penalties in civil actions."<sup>288</sup> Moreover, the drafters of the statute referred to the penalties as "civil penalties" within the text of the statute.<sup>289</sup> Although the statute failed to provide a remedy of disgorgement, the Court said that Congress had explicitly endorsed the disgorgement remedy.<sup>290</sup> Additionally, precedent suggested that the district courts had an equitable power to impose disgorgement,<sup>291</sup> and that the courts had historically considered disgorgement as a civil sanction, not a criminal one.<sup>292</sup>

Under the second prong of the *Ward* test, the court found that neither disgorgement nor the monetary penalties authorized by the Remedies Act were so punitive in purpose or effect as to override Congress' intent to provide for a civil remedy.<sup>293</sup> The court conceded that the sanctions could not be imposed without a finding of scienter, that the sanctions applied to conduct that was criminal as well as civil, and that the sanctions possessed a deterrent character.<sup>294</sup>

On the other hand, the court noted that historically disgorgement and monetary penalties were civil sanctions, neither imposing an affirmative disability nor an imprisonment-like restraint.<sup>295</sup> Additionally, the sanctions had remedial, non-punitive purposes. Disgorgement, the Court said, is akin to the forfeitures upheld in *Ursery*, because it ensured that the wrongdoer did not profit from his illegal acts.<sup>296</sup> Detering securities fraud also served the remedial goals of

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<sup>286</sup> SEC v. Palmisano, 135 F.3d 860, 864 (2d Cir. 1998).

<sup>287</sup> *Id.* at 865.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Palmisano*, 135 F.3d at 865-66 (citing SEC v. Wang, 944 F.2d 80 (2d Cir. 1991); SEC v. Manor Nursing Ctrs., 458 F.2d 1082 (2d Cir. 1972)).

<sup>292</sup> *Palmisano*, 135 F.3d at 866 (citing SEC v. Commonwealth Chem. Sec., 574 F.2d 90 (2d Cir. 1978)). In this, the Court was undoubtedly correct. There is a great deal of caselaw holding that disgorgement is a remedial, non-punitive remedy. See, e.g., *United States v. Teyibo*, 877 F. Supp. 846, 863 (S.D.N.Y. 1995); SEC v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994); SEC v. Blatt, 583 F.2d 1325 (5th Cir. 1978); SEC v. Shapiro, 404 F.2d 1301 (2d Cir. 1974); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971).

<sup>293</sup> *Palmisano*, 135 F.3d at 866.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* (citing *Hudson*, 118 S. Ct. at 496).

<sup>296</sup> *Palmisano*, 135 F.3d at 866.

encouraging investor confidence, increasing the efficiency of markets, and promoting the stability of the securities industry.<sup>297</sup> The court reasoned that monetary penalties imposed under the Remedies Act furthered these remedial goals.<sup>298</sup>

According to the court, the statute's three-tiered system of monetary penalties minimized the possibility of a penalty being excessive in relation to the statute's remedial goals by linking the size of the penalty to the level of the violator's scienter, the risk of loss to others, and the amount of the violator's wrongful profits.<sup>299</sup> Thus, the court held it had "little indication," much less the "clearest proof," to find either disgorgement or the penalties provided under the Remedies Act to be criminal punishments.<sup>300</sup>

#### B. *The Second Circuit Properly Decided Palmisano*

The Second Circuit's decision on *Palmisano* appears the correct one. Congress intended for the Remedies Act sanctions in Sections 77(t) and 78(u) to be civil in nature, given the nomenclature for the sanctions and the legislative history of the Act. Both the House and the Senate Report described the sanctions repeatedly as "civil money penalties."<sup>301</sup> The House Report also stated that the legislation authorizes the SEC to seek penalties in *civil* actions.<sup>302</sup> Both sections 77(t) and 78(u) state that the remedies provided are not exclusive.<sup>303</sup> The government may bring other actions authorized by law.<sup>304</sup> This strongly implies that Congress intended the remedies to be distinguished from the criminal remedies existing elsewhere. That the 1933 and 1934 Acts and the United States Code refer to criminal penalties for the same behavior elsewhere

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* Both Sections 20(d) of the Securities Act, and 21(d)(3) of the Exchange Act, 15 U.S.C. §§ 77t(d), 78u(d)(3), as well as 21B of the Exchange Act, 15 U.S.C. § 78u-2 (dealing with administrative proceedings), provide for a three-tiered penalty system which works as follows: first-tier, for any violation, the greater of (i) \$5,000 for any natural person or \$50,000 for any other person or (ii) the gross amount of pecuniary gain to the violator; second-tier, for any violation with scienter, the greater of (i) \$50,000 for any natural person or \$250,000 for any other person or (ii) the gross amount of pecuniary gain to the violator; third-tier, for any violation with scienter which resulted, or could have resulted, in substantial losses for others, the greater of (i) \$100,000 for any natural person or \$500,000 for any other person or (ii) the gross amount of pecuniary gain to the violator.

<sup>300</sup> *Palmisano*, 135 F. 3d at 866.

<sup>301</sup> H.R. REP. NO. 101-616, at 15, 18, 22, reprinted in 1990 U.S.C.C.A.N. 1379, 1382, 1385, 1389; S. REP. NO. 101-337, at 2, 8, 9, 10, 11, 15 (1990).

<sup>302</sup> *Id.* at 30 [emphasis added].

<sup>303</sup> 15 U.S.C. §§ 77t(d)(3)(C), 78u(d)(3)(C)(iii)(1994).

<sup>304</sup> *Id.*

demonstrates Congress' intent to create a civil remedy in Sections 78(t)(d) and 789(u)(d)(3).<sup>305</sup>

The Remedies Act sanctions fail to be so punitive as to override Congress' intent to create civil remedies, even though three of the seven *Mendoza-Martinez* factors fell in Palmisano's favor. The House and the Senate Report discuss the necessity for increased deterrence of securities laws violations, and the intent to solve these violations through this new statute.<sup>306</sup> Case law, however, suggests that deterrence is a legitimate goal of civil law.<sup>307</sup> Palmisano's conduct was already punishable criminally. Congress, however, may lawfully prescribe both civil and criminal remedies for the same conduct.<sup>308</sup> Thus, the force of two of these three factors in Palmisano's double jeopardy claim was eviscerated.

As a further evisceration of Palmisano's claim, these sanctions fail to impose an affirmative disability or restraint and are not generally viewed as punishment.<sup>309</sup> In fact, the sanctions have a remedial purpose. The case law is replete with references to the remedial purposes of the securities laws.<sup>310</sup> The legislative history of the Remedies Act also contains numerous references to the Act's remedial purpose. For example, the House Report states that the principal purpose of [the Act] is to provide the [SEC] with new remedial authority that will enable the agency to operate its enforcement program in a more flexible manner.<sup>311</sup> This enforcement program, the report says, "is necessary to maintain investor confidence in the integrity, fairness, and efficiency of our securities markets."<sup>312</sup> Because the penalties are payable directly into the United States Treasury, as opposed to some investor protection fund or the like, and are enforceable by the United States Attorney General,<sup>313</sup> they may seem more like a criminal fine. This, however, does not detract from the remedial purposes of the Act sufficiently to recharacterize the sanctions as criminal punishment.

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<sup>305</sup> See *Mitchell*, 303 U.S. at 404; *One Lot Emerald Cut Stones*, 407 U.S. at 236-37; *Ward*, 448 U.S. at 249.

<sup>306</sup> H.R. REP. NO. 101-616, at 17, reprinted in 1990 U.S.C.C.A.N. 1379, 1382, 1385, 1389; S. REP. NO. 101-337, at 8-11 (1990).

<sup>307</sup> See, e.g., *Ursery*, 116 S. Ct. at 2149; *Hudson*, 118 S. Ct. at 496.

<sup>308</sup> See, e.g., *Ward*, 448 U.S. at 250; *89 Firearms*, 465 U.S. at 365-66.

<sup>309</sup> See, e.g., *Hudson*, 118 S. Ct. at 496.

<sup>310</sup> See, e.g., *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

<sup>311</sup> H.R. REP. NO. 101-616, at 13. See also *id.* at 18; S. REP. NO. 101-337, at 11.

<sup>312</sup> H.R. REP. NO. 101-616, at 14.

<sup>313</sup> 15 U.S.C. §§ 77t(d)(3), 78u(d)(3)(C) (1994).

The three-tiered penalty system minimizes the possibility of any excessiveness and furthers the remedial purpose of the Act. Under the Act, the courts have discretion to determine whether to impose a penalty and the amount to impose.<sup>314</sup> Taken together, the possibility of excessiveness of a sanction in relation to the Act's remedial goals is minimal. The clearest proof required to override Congress' intent does not exist, as the Second Circuit correctly noted.

C. *Additional Factors Not at Issue in Palmisano That Support the Remedial Nature of the Remedies Act Sanctions*

The Court did not discuss first-tier sanctions. The third-tier sanctions at issue in *Palmisano* and second-tier sanctions require a showing of scienter before their imposition indicate a criminal provision. While the third- and second-tier sanctions require a showing of scienter and are thus indicative of a criminal provision, the scienter requirement was the only meaningful indication of a criminal purpose or effect in the statutory scheme and was not enough to override Congress' intent. For the imposition of a first-tier sanction, scienter is not necessary.<sup>315</sup> Thus, first-tier sanctions are clearly not subject to double jeopardy claims.

A second factor not at issue in *Palmisano* is that the Remedies Act authorized ancillary relief in the form of officer/director bars in civil actions in federal district court.<sup>316</sup> The court could impose this sanction in conjunction with civil monetary penalties.<sup>317</sup> Such barments are affirmative disabilities or restraints under the first factor of the *Mendoza-Martinez* test, but they fail to constitute punishment under the second factor of the test.<sup>318</sup>

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<sup>314</sup> H.R. REP. NO. 101-616, at 22 (1990).

<sup>315</sup> See 15 U.S.C. §§ 77t(d)(2)(A), 78u(d)(3)(B)(i) (1994). See also *supra* note 294.

<sup>316</sup> 15 U.S.C. §§ 77t(e), 78u(d)(2) (1994); Sections 20(e) of the 1933 Act and 21(d)(2) of the 1934 Act.

<sup>317</sup> H.R. REP. NO. 101-616, at 22 (1990).

<sup>318</sup> See *Hudson*, 118 S. Ct. at 495. Moreover, while *Johnson v. S.E.C.*, 87 F. 3d 484 (D.C. Cir. 1996), held that a six month supervisory suspension (and, therefore, presumably, a barment) was penal in nature for purposes of determining which statute of limitation applied, the court specifically stated that the suspension could still be remedial and not punishment in other contexts, such as double jeopardy. *Johnson*, 87 F. 3d at 256, 257. Additionally, the SEC found, employing a *Hudson* analysis, that a barment from associating with a broker-dealer or from any penny stock offering was not punishment for double jeopardy purposes. In the Matter of William F. Lincoln, Release No. 34-39629; Administrative Proceeding File No. 3-8998, Vol. 66, No. 10, CCH SEC Docket, at 972 (Feb. 9, 1998), in part because barments had not historically been viewed as punishment. Vol. 66, No. 10, CCH SEC Docket, at 976.



Finally, in addition to authorizing civil monetary penalties in civil district court actions, the Remedies Act authorizes the imposition of monetary penalties in SEC administrative actions under the same three-tiered scheme.<sup>319</sup> Instead of leaving the assessment and its amount completely up to the discretion of the administrative law judge and the SEC, as done with district court judges,<sup>320</sup> the Act prescribes six factors which the SEC may consider before imposing a civil monetary penalty.<sup>321</sup> These factors help to ensure that the SEC does not convert what Congress intended as a civil penalty into a criminal one.<sup>322</sup> In addition, the fact that the sanction is imposed by an administrative agency is even stronger evidence of Congress' intent to create a civil remedy.<sup>323</sup> Thus, the Second Circuit correctly decided that the imposition of monetary penalties under the Remedies Act does not constitute criminal punishment for purposes of the Double Jeopardy Clause.<sup>324</sup> The monetary sanctions under the Remedies Act are civil in intent and effect, precluding the application of the Double Jeopardy Clause.

#### V. THE RAMIFICATIONS OF HUDSON AND PALMISANO FOR SANCTIONS IMPOSED UNDER THE ITSA AND THE ITSFEA

Having discussed the implications of *Hudson* on the Remedies Act, the application of the current Double Jeopardy Clause analysis to ITSA or ITSFEA sanctions is uncertain. ITSA provides for the imposition of civil monetary penalties of up to three times the profit gained or loss avoided in insider trading transactions in civil actions against those who traded and their tipplers.<sup>325</sup> ITSFEA provides for liability of a person controlling someone who engages in insider trading in an amount equal to the greater of \$1,000,000 or three times the profit gained or loss avoided by the controlled person engaging in insider trading.<sup>326</sup> No court has addressed the issue of whether civil monetary penalties

<sup>319</sup> 15 U.S.C. § 78u-2 (1994).

<sup>320</sup> 15 U.S.C. §§ 77t(d), 78u(d). See also H.R. REP. NO. 101-616, at 22 (1990)

<sup>321</sup> 15 U.S.C. §78u-2(c)(1)-(6). These factors include such equitable matters as unjust enrichment and the extent of any restitution made to the victims, if any, and "such other matters as justice may require." According to the legislative history, "such other matters" may include the violator's ability to pay. H.R. REP. NO. 101-616, at 21 (1990).

<sup>322</sup> See H.R. REP. NO. 101-616, at 21 (1990).

<sup>323</sup> See *Hudson*, 118 S. Ct. at 495.

<sup>324</sup> If the imposition of the penalties were criminal punishment, then the proceedings in which they were sought would be criminal prosecutions for purposes of the successive punishment analysis.

<sup>325</sup> Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, amended by, Insider Trading and Securities Fraud Enforcement Act of 1988, § 3, Pub. L. No. 100-704, 102 Stat. 4677 (1988). Currently this session law appears as 15 U.S.C. § 78u-1(a)(1),(2).

<sup>326</sup> *Id.*

assessed under either of these statutes are criminal punishments for purposes of the Double Jeopardy Clause, under the traditional *Ward* analysis revised by *Hudson*.

The southern district of New York has interpreted the validity of the ITSA monetary penalties only under the *Halper* regime. In *United States v. Marcus Schloss & Co.*,<sup>327</sup> a brokerage firm settled an SEC civil enforcement action for insider trading.<sup>328</sup> Pursuant to the settlement, the firm disgorged \$136,000 in illegal profits and paid double damages amounting to \$273,000.<sup>329</sup> Subsequently, the brokerage firm was indicted for the same conduct.<sup>330</sup> The brokerage firm protested, claiming a violation of double jeopardy because the double-damages monetary penalty constituted punishment under *Halper*.<sup>331</sup>

The district court held that the consent order that the firm entered with SEC barred their claim, because it acknowledged the possibility of further actions.<sup>332</sup> The court also ruled that the claim failed on its merits as well.<sup>333</sup> The court acknowledged that deterrence was a significant goal of the ITSA, but found that Congress intended the proceedings to be civil in nature.<sup>334</sup> The court examined the nature of the sanctions actually imposed on the firm and concluded that the amount of the penalty corresponded to the government's expenses of investigation and prosecution. Thus, the penalty was not a punishment like the one imposed in *Halper*.<sup>335</sup> Moreover, the court held that the penalty was "only a small part of an otherwise clearly remedial settlement[.]"<sup>336</sup> Because the court employed a *Halper* analysis, however, the holding no longer has any validity.

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<sup>327</sup> 724 F. Supp. 1123 (S.D.N.Y. 1989).

<sup>328</sup> *Id.* at 1124.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 1125.

<sup>332</sup> *Id.* at 1126-27. The Court's position in this regard is not without support. See, e.g., *Berstein v. Sullivan*, 914 F.2d 1395 (10<sup>th</sup> 1990). A settlement on the civil penalties, however, was unimportant to the Supreme Court in *Halper* and *Hudson*. Intuitively, this is the correct view. Whether a sanction is imposed with or without consent matters not as to the question of its being a sanction. For example, the fact that a criminal defendant enters into a plea agreement whereby he consents to the imposition of an agreed upon punishment does not render the sentence something other than criminal punishment.

<sup>333</sup> *Marcus Schloss & Co.*, 724 F. Supp. at 1127.

<sup>334</sup> *Id.* at 1127-28.

<sup>335</sup> *Id.* at 1128. The notion of including the government's costs and expenses of investigation and prosecution for determining whether a sanction was merely making the government whole and, therefore, remedial rather than punitive had its origin in *One Lot Emerald Cut Stones*, 409 U.S. at 237.

<sup>336</sup> *Id.*

A. *Under the Ward Analysis, ITSA and ITSFEA Sanctions Are Not Criminal in Nature*

1. ITSA and ITSFEA sanctions were intended to be civil in nature

Employing the *Ward* analysis ITSA and ITSFEA do not impose criminal penalties for purposes of double jeopardy. The statutes, as well as their legislative history, suggest that Congress intended ITSA and ITSFEA sanctions to be civil in nature. The title of the statute, "Civil penalties for insider trading," reference to the sanctions as "civil penalties,"<sup>337</sup> and Congressional designation of the civil nature of the penalties suggest the overall intent by Congress that the courts construe these penalties as civil in nature.<sup>338</sup> Additionally, section 78u-1(a)(1)(A) & (B) authorize the SEC to "bring an action in a United States District Court," which implies a civil proceeding.<sup>339</sup>

A closer look at the legislative history of these statutes also implies the civil nature of the ITSA and ITSFEA. The House Report on ITSA describes the penalty as a "civil money penalty"<sup>340</sup> and imposes this "civil penalty" on those who trade while in possession of material non-public information.<sup>341</sup> The House Report authorizes the SEC to seek a "civil penalty" in district court.<sup>342</sup> The House Report also notes that the purpose of the Act is to expand the scope of "civil penalties."<sup>343</sup> Finally, two subtitles in the House Report, "Civil Penalties for Violating Persons and Persons 'Controlling' those Violators,"<sup>344</sup> and "Authority To Impose Civil Penalties"<sup>345</sup> suggest the civil nature of the Act.

Like the Remedies Act, the civil penalty provisions of ITSA and ITSFEA are separate and distinct from the criminal sanction provision of the 1934 Act.<sup>346</sup> The separate designations for criminal and civil penalties in the Acts demonstrates Congress' intent to keep each separate and distinct from the other, and their intent for the ITSA and ITSFEA

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<sup>337</sup> 15 U.S.C. § 78u-1(a), (a)(1)(A),(B); Section 21A(a), (a)(1)(A) & (B) of the 1934 Act.

<sup>338</sup> See, e.g., *Ward*, 448 U.S. at 249.

<sup>339</sup> See, *Mitchell*, 303 U.S. at 401-02.

<sup>340</sup> H.R. REP. NO. 98-355, at 1 (1984), reprinted in 1984 U.S.C.C.A.N. 2274. This reference is part of the "Purpose and Summary" Section.

<sup>341</sup> *Id.* at 9. This reference is part of the "Scope of Liability" Section.

<sup>342</sup> *Id.* at 16. This reference is part of Section 2 of ITSA.

<sup>343</sup> H.R. REP. NO. 100-910, at 7 (1988), reprinted in 1988 U.S.C.C.A.N. 6043. This reference is part of the "Purpose and Summary" Section.

<sup>344</sup> *Id.* at 16. This reference is part of the "Summary of Legislation" Section.

<sup>345</sup> *Id.* at 35. This reference is part of Section 3 of the Act.

<sup>346</sup> 15 U.S.C. § 78ff (1994)

penalties to be civil in nature.<sup>347</sup> Moreover, the fact that Congress chose to place the civil monetary penalties of ITSA in Section 21 of the 1934 Act<sup>348</sup> demonstrated an intent to create a civil provision, because Section 21 deals exclusively with the SEC's authority.<sup>349</sup> The SEC does not have the authority to prosecute criminal cases. If Congress had intended to create a criminal sanction in the ITSA, placing that sanction in Section 21 would have been inappropriate.<sup>350</sup> Further, creating a criminal remedy would not accomplish Congress' goal of broadening the SEC's enforcement powers.<sup>351</sup> The legislative history of the ITSA also discusses changes to criminal and civil sanctions separately.<sup>352</sup> Preponderance of evidence standard and declines to mention any right to a jury trial.<sup>353</sup> The use of civil standard for the burden of proof, the lack of the right to a jury trial, and the suggestion that the government may seek other courses of action all demonstrate the civil nature of the penalty.<sup>354</sup>

Some parts of these Acts, however, suggest that these sanctions may be criminal. The penalties under these Acts apply to a much more narrow scope of conduct than does the criminal sanction. While Section 32 of the 1934 Act provides for criminal punishment for the violation of all but one provision of the 1934 Act, the ITSA and ITSFEA penalties apply only to a small subset of violations of a single provision of the Act, Section 10(b). Perhaps Congress was dissatisfied with the possible punishments one could receive for engaging in insider trading and increased the penalty, making the provision appear penal in nature. Additionally, one may be sanctioned as an aider and abettor as well as a primary violator under ITSA, or as a controlling person, under ITSFEA, which makes the statute appear more criminal than civil in nature. Finally, one representative's reference to insider trading as "thievery"<sup>355</sup>

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<sup>347</sup> See *Mitchell*, 303 U.S. at 404; *One Lot Emerald Cut Stones*, 407 U.S. at 236-37; *Ward*, 448 U.S. at 249.

<sup>348</sup> 15 U.S.C. § 15 U.S.C. § 78u-2 (1994).

<sup>349</sup> See Carole B. Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 Duke L. J. 960, 972 (1985). The same argument may be made for the ITSFEA.

<sup>350</sup> See Silver, *supra* note 349, at 972.

<sup>351</sup> See *id.* at 972-73.

<sup>352</sup> H.R. REP. NO. 98-355, at 12; H.R. REP. NO. 100-910 at 23.

<sup>353</sup> H.R. REP. NO. 98-355, at 15, 16 (1983).

<sup>354</sup> H.R. REP. NO. 98-355, at 15, 16 (1983). 15 U.S.C. §78u-1(d)(3) explicitly provides that the actions authorized in the statute do not preclude any other actions, including, presumably, criminal ones, that the government may have. See *Mitchell*, 303 U.S. at 401-02.

<sup>355</sup> *Insider Trading Sanctions and SEC Enforcement Legislation: Hearings on H.R. 559 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 67 (1983)(statement of Rep. Wirth).

and a senator's reference to insider traders as "thieves"<sup>356</sup> indicates intent to punish criminally rather than civilly.<sup>357</sup> While these facts cast some doubt as to whether the Supreme Court would consider the penalties under the ITSA and ITSFEA civil or criminal, they are not sufficient to change Congress' explicitly stated intent to create civil penalties rather than criminal ones.<sup>358</sup>

2. ITSA and ITSFEA Sanctions Are Not So Punitive as to Override Congress' Intent: Analysis of ITSA and ITSFEA Under the *Mendoza-Martinez* Factors

Applying the *Mendoza-Martinez* analysis also reveals that these sanctions are not so punitive in purpose or effect as to override Congress' intent and convert them into criminal sanctions. First, the monetary penalties imposed under the ITSA and ITSFEA do not constitute affirmative disabilities or restraints. Second, the caselaw does not historically regard these sanctions as punishment. Third, under insider trading law, a finding of scienter is necessary to impose these sanctions.<sup>359</sup> Fourth, the sanctions definitely promote deterrence.<sup>360</sup> Fifth, the conduct for which the sanctions may be applied is also criminal.<sup>361</sup> Sixth, the statutes serve remedial purposes. Seventh, the penalties may or may not be excessive in relation to those remedial purposes. A closer examination of the third through the seventh factors reveals that although certain factors in the *Mendoza-Martinez* test weigh toward finding a criminal sanction, these factors do not remove the sanctions under the ITSA and ITSFEA from civil remedy status.

a) The imposition of ITSA and ITSFEA sanctions require a finding of scienter

Unlike other schemes the Court addressed in such cases as *Ward* and *Hudson*, the violation under this statutory scheme requires scienter.<sup>362</sup> Because *mens rea* is most often required in criminal statutes, the existence

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<sup>356</sup> 130 Cong. Rec. pt 15 (June 29, 1984) (remarks of Sen. D'Amato).

<sup>357</sup> See *Silver*, *supra* note 349, at 1004.

<sup>358</sup> One commentator has argued that Congress did not actually decide to enact civil remedies, rather they merely assumed that their remedies under the statutes were civil. *Silver*, *supra* note 349, at 1013. Accordingly, *Silver* argues, we should not defer to Congress' intent. *Id.*

<sup>359</sup> See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1977).

<sup>360</sup> See H.R. REP. NO. 98-355, *reprinted in* 1984 U.S.C.C.A.N. 2274; H.R. REP. NO. 100-910, *reprinted in* 1988 U.S.C.C.A.N. 6043.

<sup>361</sup> 15 U.S.C. § 78ff (1994).

<sup>362</sup> See *Ernst & Ernst*, 425 U.S. at 185.

of a scienter requirement for a person to be subject to an ITSA or ITSFEA penalty tends to indicate a criminal nature.<sup>363</sup>

b) Insider trading may also be punished criminally

In addition to subjecting the violator to penalties under ITSA or ITSFEA, insider trading may be punished criminally. Moreover, the conduct punishable under ITSA and ITSFEA is coextensive with the conduct punishable criminally under Section 32 of the 1934 Act. In other words, if a person is sanctioned under ITSA or ITSFEA, she will also be subject to a criminal prosecution under Section 32. Although this scenario tends to indicate a violation of double jeopardy, Congress may provide for both criminal and civil sanctions for the same conduct without violating the Double Jeopardy Clause *per se*.

c) ITSA and ITSFEA sanctions serve deterrent and retributive aims

The sanction of the ITSA and ITSFEA serve the punitive aim of deterrence.<sup>364</sup> Like the legislative history of the Remedies Act, the legislative history of ITSA and ITSFEA clearly indicates that the legislation should have a deterrent effect. The House Report for ITSA stated the legislation "provides increased sanctions against insider trading in order to increase deterrence of violations."<sup>365</sup> The House report also repeatedly refers to the inadequacy of the existing remedies to deter violations,<sup>366</sup> and how the treble monetary penalty will facilitate deterrence.<sup>367</sup> The House Report states, "existing remedies have proved inadequate to deter violations."<sup>368</sup> The House report also states, "[T]he Committee believes the new penalty provided by the legislation will serve as a powerful deterrent to insider trading."<sup>369</sup> It continues, "[T]he Committee believes that providing the [SEC] with the power to seek a civil penalty for violations is the best way to accomplish the goal of deterring insider trading."<sup>370</sup> The House Report for the ITSFEA states that the Act would "augment enforcement of the securities laws,

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<sup>363</sup> See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997)(citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144,168 (1963).

<sup>364</sup> See Michael J. Metzger, *Treble Damages, Deterrence, and Their Relation to Substantive Law: Ramifications of the Insider Trading Sanctions Act of 1984*, 20 VAL. U. L. REV., 575, 594 (1986).

<sup>365</sup> H.R. REP. NO. 98-355, at 2 (1984).

<sup>366</sup> *Id.* at 6, 7, 8, 24.

<sup>367</sup> *Id.* at 8, 13, 24, 25, 26.

<sup>368</sup> *Id.* at 6.

<sup>369</sup> *Id.* at 8.

<sup>370</sup> *Id.* at 13.

particularly in the area of insider trading, through a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading.<sup>371</sup> Plus, in both the House and Senate Reports, where they discuss increasing the criminal sanctions for violating the 1934 Act, they state it is being done to preserve the deterrent effect of the fine.<sup>372</sup> Thus, the civil monetary penalties are supposed to have the same effect as increased criminal sanctions: deterrence. The intended identical effect makes civil penalties appear to be criminal in nature. Precedent suggests, though, that deterrence has a legitimate role to play in civil law and will not necessarily implicate a double jeopardy claim.<sup>373</sup> Additionally the fact that the sanction operates to punish the violator does not alter the statute's civil character.<sup>374</sup>

d) ITSA and ITSFEA sanctions serve remedial ends

Even though the ITSA and ITSFEA exhibit some characteristics of a criminal statute, the Acts have remedial features as well. The legislative history demonstrates that Congress was acting with the remedial purpose of safeguarding the public's expectation of fairness and honesty in the market. The House report for ITSA states that, "[i]nsider trading threatens [the] markets by undermining the public's expectations of honest and fair securities markets where all participants play by the same rules."<sup>375</sup> The ITSA was meant to "help to insure that insider trading does not diminish public confidence in the fairness and integrity of our securities markets,"<sup>376</sup> and "reaffirm[s] that fairness and honesty are the guiding principles of [the] securities markets."<sup>377</sup> Similarly, the House Report for ITSFEA declares that the "[c]ommittee views [the legislation] as an essential ingredient in a program to restore the confidence of the public in the fairness and integrity of our securities markets."<sup>378</sup> These are remedial purposes. In addition, a plethora of case law indicates that the securities laws are remedial in nature.

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<sup>371</sup> H.R. REP. NO. 100-910, at 7, *reprinted in* 1988 U.S.C.C.A.N. 6043.

<sup>372</sup> H.R. REP. NO. 98-355, at 12, 22, 26; H.R. REP. NO. 100-910, at 23.

<sup>373</sup> See *Ursery*, 116 S. Ct. at 2149; *Hudson*, 118 S. Ct. at 496.

<sup>374</sup> *Hess*, 317 U.S. at 551. At least one commentator, however, argued that because the sanctions' aims were deterrent and retributive, the sanctions should be found to be criminal in nature. See, *Blumberg*, *supra* note 17, at 150-52.

<sup>375</sup> H.R. REP. NO. 98-355, at 2, *reprinted in* 1984 U.S.C.C.A.N. 2274.

<sup>376</sup> H.R. REP. NO. 98-355, at 23 (1983).

<sup>377</sup> *Id.* at 25.

<sup>378</sup> H.R. REP. NO. 100-910, at 7, *reprinted in* 1988 U.S.C.C.A.N. 6043.

Because the United States Treasury collects the penalties, the statutes again seem less remedial.<sup>379</sup> The statutes would seem more remedial if the penalties were payable to a compensation fund for the victims of the violator's fraud or even to a fund for SEC enforcement.<sup>380</sup> Several remarks made during the hearings for the Acts also suggest that the penalties are not remedial:

John Fedders, former head of SEC enforcement, described the treble penalty as 'an extraordinary burden.' One participant stated that 'since the penalty may exceed the inside trader's actual or theoretical gain (or avoidance of loss), the penalty takes on significance as a quasi-criminal punishment.' Representative Rinaldo asked whether 'a higher burden of proof, such as proof by clear and convincing evidence, [should] be applied in the special circumstances of treble damages actions under [ITSA] in light of the potentially severe penalties.' Furthermore, in discussing whether a definition of 'insider trading' should accompany ITSA, Rinaldo stated that 'when you go from the remedial stage to the punitive stage, . . . there should be a definition, but that definition should apply only to . . . the [treble penalty].'<sup>381</sup>

Paying the penalty to the treasury and the remarks of senators is not, however, enough to prevent the statute from being characterized as remedial in nature.<sup>382</sup>

One commentator criticizes the remedial labeling of these penalties because they do not indemnify the government.<sup>383</sup> This critic suggests that these penalties are not like tax or contract action where the government seeks indemnity.<sup>384</sup> With these SEC violations the government suffers no loss as a result of the violator's actions.<sup>385</sup> These

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<sup>379</sup> 15 U.S.C. § 78u-1(d)(1) (1994).

<sup>380</sup> See Metzger, *supra* note 364, at 607.

<sup>381</sup> Blumberg, *supra* note 17, at 151, 152 [footnotes omitted].

<sup>382</sup> The severity of a penalty is of little relevance in determining whether it is civil or criminal in nature. See *Mitchell*, 303 U.S. at 400.

<sup>383</sup> See Blumberg, *supra* note 17, at 150.

<sup>384</sup> *Id.*

<sup>385</sup> See *id.* Blumberg also argues that, especially when compared to a truly remedial sanction such as an injunction, a treble damages provision simply cannot be characterized as remedial. *Id.* at 150-51. In light of Justice Black's discussion in *Hess*, 317 U.S. at 550 this argument is simply not a valid one.



arguments, however, fail to account for the government's investigative and enforcement expenses. To the extent that the government incurs costs in investigating and prosecuting a violation of the prohibition against insider trading, the government is being indemnified by the monetary penalty.<sup>386</sup> The notion that a statute must serve the goal of making the government whole in order to be remedial is incorrect.<sup>387</sup>

- e) ITSA and ITSFEA sanctions are not likely to be found excessive in relation to their remedial goals

In addition to disgorging the trader's profits and being barred from serving as an officer or director in a publicly-held company, an inside trader, or the controlling person, may be forced to pay a treble monetary penalty.<sup>388</sup> Whether this penalty is excessive in relation to the remedial goals announced in the legislative history is a difficult question to answer.

In deciding to grant the SEC the authority to seek treble monetary damages, Congress noted the opportunity presented by insider trading to reap huge profits with little risk.<sup>389</sup> Congress also noted the public perception that the risk of detection was slight.<sup>390</sup> This volatile combination required a tough sanction to deter insider trading and implement the remedial goal of insuring the integrity, honesty, and fairness of the securities markets. In light of the number of insider trading investigations conducted by the SEC,<sup>391</sup> even the treble monetary penalty sanction may not be tough enough. Moreover, the Supreme Court has hypothesized that even a quadruple damages monetary penalty regime might still fall within the civil realm.<sup>392</sup>

On its face, however, a treble monetary penalty seems too excessive to be characterized as remedial. Other treble monetary penalty provisions provide a measuring stick to determine when treble damages

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<sup>386</sup> See *One Lot Emerald Cut Stones*, 409 U.S. at 237.

<sup>387</sup> See *89 Firearms*, 465 U.S. at 364; *Hudson*, 118 S. Ct. at 496.

<sup>388</sup> See *supra* notes 319-23 and accompanying text.

<sup>389</sup> H.R. REP. NO. 98-355, at 6, 21, 23, *reprinted in* 1984 U.S.C.C.A.N. 2274.. See *supra* note 368.

<sup>390</sup> *Id.*

<sup>391</sup> According to the Chairman of the SEC, more insider trading cases were filed by the SEC in fiscal year 1997 than in any previous fiscal year, and a record number of insider trading investigations are currently underway. Michael Schroeder, *Nine Charged in a Trading Case Tied to Merck's Purchase of Medco*, WALL ST. J., March 12, 1998, at B10.

<sup>392</sup> See *Hess*, 317 U.S. at 551. Of course *Hess* dealt with a statute which authorized an action by the government for injuries suffered by it due to the defendant's conduct. This is not the use with insider trading.

become excessive. Section 4A of the Clayton Act,<sup>393</sup> enacted in 1990, authorizes the United States to sue in federal district court for treble damages plus the cost of the suit when it has been injured by a violation of the anti-trust laws.<sup>394</sup> No one has challenged this provision of the Act on grounds of double jeopardy. A district court, however, employed a *Halper* analysis and held that the civil recovery by a State of treble damages plus costs, following a defendant's acquittal on criminal Sherman Act charges, failed to constitute punishment for double jeopardy purposes.<sup>395</sup> Because the *Halper* approach has been discredited, this case provides little guidance post-*Hudson*. Additionally, the Supreme Court has held that the treble damages provision of the Clayton Act for parties other than the United States, 15 U.S.C. § 15, is remedial in nature.<sup>396</sup>

The False Claims Act also provides for treble damages.<sup>397</sup> In 1986,<sup>398</sup> Congress amended the Act to provide for a civil penalty of between \$5,000 and \$10,000, plus treble damages, for any violation. Courts have addressed whether sanctions imposed under the False Claims Act<sup>399</sup> constitute punishment for double jeopardy purposes on several occasions under the *Halper* analysis. A New York district court found that a penalty of \$115,000 failed to constitute punishment where the government mounted costs in excess of \$110,000.<sup>400</sup> A Texas district court held that a penalty equal to 3.38<sup>401</sup> times the government's damages also failed to constitute punishment for purposes of the Double Jeopardy Clause.<sup>402</sup> The Eighth Circuit held that the treble damages provision of the False Claims Act was "in the nature of rough remedial justice," not punishment.<sup>403</sup> Because the courts employed a *Halper* analysis, the utility of their decisions is minimal.

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<sup>393</sup> Section 5 of the Antitrust Amendments Act of 1990, Pub.L.No. 101-588, 104 Stat. 2879 (1990).

<sup>394</sup> 15 U.S.C. §15a (1994). Prior to this statute's enactment, the United States was only authorized to seek actual damages plus the cost of the suit.

<sup>395</sup> *Connecticut v. Tobacco Valley Sanitation Co.*, 818 F. Supp. 504 (D. Conn. 1993). This action was brought under the provision of parties other than the United States, 15 U.S.C. §15.

<sup>396</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

<sup>397</sup> See 31 U.S.C. § 3729 (1994).

<sup>398</sup> False Claims Amendments Act of 1986, §2, Pub.L.No. 99-562, 100 Stat. 3153 (1986).

<sup>399</sup> Pub.L.No. 99-562, 100 Stat. 3153 (1986).

<sup>400</sup> *United States v. Fliegler*, 756 F. Supp. 688 (E.D. N.Y. 1990).

<sup>401</sup> Without factoring in the government's costs in prosecuting the case and in investigating both the civil and the criminal case. *Infra* note 390, at 243. Had those costs been accounted for, the court stated that the ratio would have been lower. *Id.*

<sup>402</sup> *United States v. Boutte*, 907 F. Supp. 239 (E.D. Tex. 1995).

<sup>403</sup> *United States v. Peters*, 110 F.3d 616 (8th Cir.), *cert. denied*, 118 S. Ct. 162 (1997).

A third statutory civil monetary penalty scheme that grants potentially large penalties to the government is the Commodities Exchange Act. As part of the Commodities Futures Trading Commission Act of 1974 (CFTCA),<sup>404</sup> Congress provided for civil monetary penalties in the amount of \$100,000 per violation for commodities fraud or manipulation.<sup>405</sup> The statute also authorized a trading bar and suspension or revocation of registration.<sup>406</sup> In determining the amount of the monetary penalty to be assessed, the Commodities Futures Trading Commission (CFTC) needed to review a number of factors, including the size of the violator's business and the violator's ability to pay.<sup>407</sup> As an amendment to the CFTCA, the Futures Trading Practices Act (FTP) of 1992,<sup>408</sup> provided for a civil monetary penalty equal to the higher of \$100,000 or triple the monetary gain for each violation. The amended statute also provided a restitution remedy to the victims of the fraud and eliminated all considerations except the severity of the offense in determining the amount of the monetary penalty.<sup>409</sup>

Employing a *Hudson* analysis, the Eleventh Circuit addressed the double jeopardy claim concerning the CFTCA.<sup>410</sup> Grossfeld had been assessed a \$1.8 million monetary penalty for engaging in various fraudulent activities and for violating a cease and desist order.<sup>411</sup> When Grossfeld claimed the penalty violated the Double Jeopardy Clause, the court held that Congress intended the monetary sanction to be civil in nature, because the statute was designated as a civil penalty, and because an administrative agency imposed the penalty.<sup>412</sup> While Grossfeld's conduct could also be punished criminally, and the statute promoted deterrence, the court responded that it did not impose an affirmative restraint.<sup>413</sup> The court further reasoned that monetary

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<sup>404</sup> Pub.L.No. 93-463, 88 Stat. 1389 (1974).

<sup>405</sup> 7 U.S.C. § 9 (1994).

<sup>406</sup> *Id.*

<sup>407</sup> 7 U.S.C. § 9a (1994).

<sup>408</sup> Pub.L.No. 102-546, 106 Stat. 3590 (1992).

<sup>409</sup> *Id.*

<sup>410</sup> *Grossfeld v. CFTC*, 137 F.3d 1300 (11th Cir. 1998).

<sup>411</sup> *Id.* at 1302.

<sup>412</sup> *Id.* at 1303.

<sup>413</sup> *Id.* at 1303-04. The CFTC had relied on *United States v. Furllett*, 974 F.2d 839 (7th Cir. 1992) (holding, employing a *Halper* analysis, that a trading bar and a \$75,000 civil monetary penalty was remedial when compared with government costs and did not constitute punishment for double jeopardy purposes), as well as an earlier decision in the same case (In the Matter of Kenneth Grossfeld & Murray L. Stein, 1993 WL 169894 (C.F.T.C.) [Grossfeld I] (finding a \$5,000 monetary penalty for violating the cease and desist order to be remedial because, interestingly enough, its purpose was deterrence, and, utilizing a *Halper* analysis, ruled that the penalty was remedial in nature). The CFTC's reasoning in

penalties had not historically been viewed as punishment, and the penalty served the remedial goal of ensuring the integrity of the commodities markets.<sup>414</sup> Finally, the Court held that the penalty was not excessive in relation to that purpose.<sup>415</sup>

The Seventh Circuit also employed a *Hudson* analysis and held that a trading ban imposed under the CFTCA was not a criminal sanction.<sup>416</sup> In a subsequent case,<sup>417</sup> the Seventh Circuit again employed a *Hudson* analysis to hold that a post FTPA registration revocation was remedial.<sup>418</sup> No reported case, however, addresses the treble monetary penalty issue under the FTPA amendment to the 1974 regime.<sup>419</sup>

The Supreme Court has held a treble damages provision to be remedial in the context of a private action for damages.<sup>420</sup> Thus, the present Supreme Court may find that if treble damages are remedial and

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Grossfeld I aside, there is authority for the position that contempt sanctions, which are analogous to penalties for violating a cease and desist order, are remedial in nature. See *In the Matter of Kenneth Grossfeld & Murray L. Stein*, 1996 WL 709219, \*10, 11 (C.F.T.C.) [Grossfeld II].

The CFTC also found that the NFA's sanction was not punishment for double jeopardy purposes because the NFA was not a government agency. *Id.* Presumably, the same would be true of the NASD or any of the other self regulatory organizations.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *LaCrosse v. CFTC*, 137 F.3d 925 (7th Cir. 1998).

<sup>417</sup> *Cox v. CFTC*, 138 F.3d 268 (7th Cir. 1998).

<sup>418</sup> The court relied upon *LaCrosse* and engaged in an identical *Hudson/Ward* analysis, with one exception. The court noted that not all the violations for which the sanctions could be imposed, under the new statute, required a finding of scienter. *Cox*, 138 F.3d at 272. *Id.* Additionally, the court noted that CFTC Rule 3.60(e)(1), 17 C.F.R. § 3.60(e)(1), allowed the violator to demonstrate that his continued registration would not pose a substantial risk to the markets, thus rendering the sanction more remedial than punitive. *Id.* at 273. The court again found that clear proof did not exist to override Congress' intent to create a civil remedy. *Id.*

<sup>419</sup> In an unreported case, however, the Northern District of Illinois has ruled that a penalty imposed under the 1992 version, authorizing treble penalties, was not criminal punishment for double jeopardy purposes. *United States v. Serfling*, 1998 WL 142453 (N.D. Ill.). The court employed a *Ward/Hudson* analysis and found that the penalty was intended to be civil in nature and was not so punitive in form or effect as to negate that intent. 1998 WL 142453, \*3-5. The penalty actually imposed in the case, though, was not a treble penalty. In fact, the amount of the penalty was \$250,000, when Serfling, a commodities broker, had defrauded his clients of over \$425,000. *Id.* at \*1.

<sup>420</sup> *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1914) (holding that a statute of limitations barring punitive actions did not apply to an action for treble damages under anti-trust laws, because the anti-trust laws were remedial). This case was actually cited by the Court in *Hess* in support of the dicta that the government could have provided for treble damages under the False Claims Act instead of double damages, *Hess*, 317 U.S. at 550, which the government eventually did, when it amended the Act in 1986. See notes 408-09 and accompanying text. See also *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. at 477.

not excessive when asserted by a private party, then they are remedial and not excessive when asserted by the government.<sup>421</sup> Overall, little case law exists on the issue of whether treble monetary penalties are excessive to the remedial goal of safeguarding public confidence in the integrity and fairness of the securities markets. Congress has determined that they were not excessive. In light of the Court's repeatedly reiterated policy of deferring to congressional intent on double jeopardy issues, the Court may once again defer to Congress and find that a penalty is not excessive with relation to its remedial goals.

With regard to the excessiveness of the penalties, key distinctions exist between ITSA, ITSFEA, and the Remedies Act. Unlike the Remedies Act, the ITSA and ITSFEA do not have a tiered system limiting the amount of the penalty dependent upon the seriousness of the violation. The tiered system of the Remedies Act was an important factor to the Second Circuit in determining that the sanctions imposed under that statute were not excessive in relation to its remedial goals.<sup>422</sup> While a first-tier penalty under the Remedies Act would not apply to insider trading because of the scienter requirement, some insider trading violations are undoubtedly more serious than others. The ITSA and ITSFEA accommodate for varying degrees of seriousness by giving the court discretion to grant or deny, and to set the amount of, the penalty.<sup>423</sup> In granting complete discretion to the trial judge, ITSA and ITSFEA are similar to the Remedies Act. Thus, a court could likely find that the treble monetary penalty is not excessive with relation to the remedial purposes of ITSA and ITSFEA.

Looking at the seven factors of the *Mendoza-Martinez* test, a person claiming that the imposition of a treble monetary penalty under the ITSA or the ITSFEA was punishment for purposes of the Double Jeopardy Clause would have three or four factors in their favor: the scienter requirement, the deterrent and retributive purpose of the statutes, the conduct for allowing imposition of the penalty also criminally punishable, and, possibly, that the treble penalty is excessive with relation to its remedial purposes. Of these factors, the courts have consistently downgraded the importance of the deterrent purpose<sup>424</sup> and the criminal punishment for the same conduct.<sup>425</sup> Whether the factors

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<sup>421</sup> This is an adaptation of the Court's reasoning in *Hess*. See *Hess*, 317 U.S. at 550.

<sup>422</sup> See *Palmisano*, 135 F.3d at 866.

<sup>423</sup> See 15 U.S.C. § 78u-1(a)(2) (1994), Section 21A(a)(2) of the '34 Act; H.R. REP. NO. 98-355, at 8 (1983), reprinted in 1984 U.S.C.C.A.N. 2274.

<sup>424</sup> See, e.g., *Ursery*, 518 U.S. at 292; *Hudson*, 118 S. Ct. at 496.

<sup>425</sup> See, e.g., *Ward*, 448 U.S. at 250; *89 Firearms*, 465 U.S. at 365-66.

that remain in the person's favor would be enough to convert the treble monetary penalty into a criminal sanction depends on what the "clearest proof" standard requires.

### 3. The Clearest Proof Requirement: An Assessment

What the "clearest proof" standard requires is uncertain because it has never been defined or met in the United States Supreme Court.<sup>426</sup> Moreover, it has been met only once at the United States Court of Appeals and, as yet, remains undefined there as well. The Third Circuit applied the *Mendoza-Martinez* test to a regulation issued by the Director of the Selective Service System.<sup>427</sup> The regulation reclassified anyone who destroyed or abandoned their draft card as delinquent and ordered them to report for immediate induction. Because surrendering a draft card was already a crime, unable to find a remedial purpose,<sup>428</sup> the court held that the regulation was criminal in nature.<sup>429</sup>

As mentioned earlier, a person claiming a violation of double jeopardy with regard to the ITSA or ITSFEA penalty would have three or four factors in his or her favor. In *Hudson*, the person bringing the double jeopardy claim had only the following two factors in his or her favor: the conduct was also punishable criminally and the banking statute that allowed imposition of the monetary penalty had the purpose and effect of deterrence. The difference in the number of factors might influence the outcome, but it is unlikely in light of the following cases.

Two other cases where at least three of the seven *Mendoza-Martinez* factors were in the claimant's favor show no violation of the Double Jeopardy Clause. The Sixth Circuit held that the reclassifying of one's selective-service status to require immediate induction for destroying

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<sup>426</sup> *Cheh*, *supra* note 170, at 1358.

<sup>427</sup> *Bucher v. Selective Service System, Local Boards Nos. 2*, 421 F.2d 24 (3d Cir. 1970).

<sup>428</sup> The government claimed that the regulation's remedial purpose was to prevent people from evading military service. *Id.* at 32. The court rejected this argument on the ground that the registrant at issue was exempt from service, as he was in category I-A. *Id.* In this regard, the court misapplied the test in that it examined the facts of the case rather than looking at the regulation on its face. See *Mendoza-Martinez*, 372 U.S. at 169.

<sup>429</sup> *Bucher*, 421 F.2d at 34. But see *Anderson v. Hershey*, 410 F.2d 492 (6th Cir. 1969), *vacated on other grounds*, 397 U.S. 47 (1970). Additionally, the Tenth Circuit found that the civil sanction imposed under the Federal Water Pollution Control Act in *Ward* was criminal in nature but was overruled by the Supreme Court. *Ward v. Coleman*, 598 F.2d 1187 (10th Cir. 1979), *overruled sub nom.*, *United States v. Ward*, 448 U.S. 240 (1980). A district court found an earlier version of the FWPCA to be criminal in nature as well. *United States v. LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E. D.La. 1974). This earlier version, 33 U.S.C. § 1161(b)(5), had a scienter requirement in order for a civil penalty to be imposed, which was deleted when the statute was recodified as 33 U.S.C. § 1321 in 1972.

one's draft card was not a criminal sanction.<sup>430</sup> While the reclassification for induction did impose an affirmative restraint, was imposed for conduct which was already criminal, and did have elements of deterrence and retribution, the court found that it was nevertheless remedial in nature and not excessive with relation to those goals.<sup>431</sup> With those factors in mind, the court determined that the plaintiff had not shown the "clearest proof" required to overcome the government's intention to create a civil or remedial sanction.<sup>432</sup>

Returning to the realm of commodities regulation, the Seventh Circuit held that a statutory provision authorizing a trading ban imposed no affirmative disability or restraint and did not constitute punishment.<sup>433</sup> The court further reasoned revocation of a privilege voluntarily granted is not punishment.<sup>434</sup> The court recognized that a finding of scienter was necessary to impose the sanction and that the sanction promoted deterrence, but it found that the sanction served the remedial goals of ensuring market integrity and protecting the public interest.<sup>435</sup> The criminality of the conduct that allowed the imposition of the sanction alone was not enough to change the character of the remedy.<sup>436</sup> Finally, the court held that the trading ban had a remedial purpose of protecting the public interest and was not excessive with relation to that purpose.<sup>437</sup> Accordingly, the court found that the defendant had not demonstrated the "clearest proof necessary" to alter the character of the remedy to a criminal one when Congress explicitly intended to create a civil remedy.<sup>438</sup>

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<sup>430</sup> *Anderson v. Hershey*, 410 F. 2d 492 (6th Cir. 1969), vacated on other grounds, 397 U.S. 47 (1970).

<sup>431</sup> *Id.* at 498, 499.

<sup>432</sup> *Id.* at 499. *But see* *Bucher v. Selective Service System*, 421 F. 2d 24 (3d Cir. 1970).

<sup>433</sup> *LaCrosse v. Commodity Futures Trading Comm'n*, 137 F.3d 925 (7th Cir. 1998).

<sup>434</sup> *Id.* at 931(citing *Hudson*, 118 S. Ct. at 496).

<sup>435</sup> *LaCrosse*, 137 F.3d at 931-32.

<sup>436</sup> *Id.* at 932.

<sup>437</sup> *Id.*

<sup>438</sup> *LaCrosse v. Commodity Futures Trading Comm'n*, 137 F.3d at 932. Two district courts also ruled against claimants after finding three of the seven *Mendoza-Martinez* factors in their favor. *Duncan v. Norton*, 974 F. Supp. 1328 (D. Colo. 1997); *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W. Va. 1975). These cases are not of much persuasive authority, however, as they misapplied the test when they stated that monetary penalties imposed an affirmative disability or restraint, contrary to Supreme Court guidance. *See, e.g., Hudson*, 118 S. Ct. at 496 (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). The cases ruling against claimants where the court found fewer than three factors in their favor are legion. *See, e.g., Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *United States v. Ursery*, 518 U.S. 267 (1996); *United States v. Ward*, 448 U.S. 242 (1980); *Cole v. USDA*, 133 F.3d 803 (11th Cir. 1998)(statutory penalty imposing penalty equal to 75% of market value of tobacco

Most notably the Supreme Court held that the Sexually Violent Predator Act, which civilly confines persons who are likely to engage in "predatory acts of sexual violence," because of a "mental abnormality" or "personality disorder," was not a criminal sanction.<sup>439</sup> The Court held that confinement, while being an obvious restraint, does not necessarily equal punishment and a criminal sanction.<sup>440</sup> In the context of violations of prison rules, the Eleventh Circuit found administrative punishment to be civil in nature despite the fact that five of the seven *Martinez-Mendoza* factors were in the claimants' favor.<sup>441</sup> The Court conceded the first five factors and relied solely on the sanctions' remedial purposes and found them to be excessive with relation to those purposes.<sup>442</sup> With holding such as these, one wonders if any nominally civil sanction could ever be found criminal in nature. Accordingly, a person claiming that ITSA or ITSFEA imposes criminal sanctions, for purposes of the Double Jeopardy Clause, will not likely be able to meet the "clearest proof" standard.

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marketed in excess of set quota not a criminal penalty); *Roach v. NTSB*, 804 F.2d 1147 (10th Cir. 1986), cert. denied, 486 U.S. 1006 (1988)(suspension of pilot's license for 60 days was not punitive); *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975)(\$600 penalty imposed for "serious" OSHA safety violations not criminal in nature); *Frank Irey, Jr. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1975)(\$5,000 penalty imposed for willful OSHA safety violations were not punitive or criminal in nature); *Williams v. Leybold Techs.*, 784 F. Supp. 765 (N.D. Cal. 1992)(\$10,000 penalty per day for noncompliance with reporting requirements of the Emergency Planning and Community Right-to-Know Act civil, not criminal in nature); *United States v. Charles George Trucking Co.*, 642 F. Supp. 329 (D. Mass. 1986)(\$25,000 penalty per day for noncompliance with request for information by EPA under the Resource Conservation and Recovery Act not criminal in nature); *United States v. General Motors Corp.*, 403 F. Supp. 1151 (D. Conn. 1975)(\$1,200 penalty imposed for violation of FWPCA not a criminal penalty); *United States v. J. B. Williams Co.*, 354 F. Supp. 521 (S.D.N.Y. 1973)(\$1 million in penalties assessed by Federal Trade Commission under statute authorizing \$5,000 per violation of a cease and desist order was civil in nature); *United States v. Dunkel*, 1998 WL 83086 (N.D. Ill. 1998)(interest and penalties for deficiencies in tax paid are not criminal in nature); *Lanni v. Engler*, 994 F. Supp. 849, (E.D. Mich. 1998)(Michigan's version of "Megan's Law," whereby sex offenders must register with the police, and neighbors are informed of the offender's presence, is not criminal in nature); *Towers v. City of Chicago*, 979 F. Supp. 708 (N.D. Ill. 1997)(vehicle forfeitures for nuisance violations civil in nature); *O'Neill v. City of Philadelphia*, 817 F. Supp. 558 (E.D. Pa. 1993), vacated on other other grounds, 32 F.3d 785 (3d Cir. 1994), cert. denied, 514 U.S. 1014 (1995) (penalties for parking violations civil in nature); *Unites States v. Lippert*, 14 F.3d 974 (2d Cir. 1998) (The Anti-kickback Statute, 41 U.S.C. §54, authorizing a penalty of "not more than \$10,000 for each occurrence" is civil in nature).

<sup>439</sup> *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

<sup>440</sup> *Id.* at 2083.

<sup>441</sup> *United States v. Mayes* 1998 U.S. App Lexis 27939 (October 29, 1998).

<sup>442</sup> *Id.* at \*22-31.



B. *Problems with Finding the ITSA and ITSFEA Sanctions Civil in Nature*

If a court held that ITSA and ITSFEA sanctions are civil in nature, it would be technically correct, but this outcome can also cause problems. For example, a doctor, unsophisticated and inexperienced in financial matters, joins a publicly-traded biomedical company to do research and signs a confidentiality agreement. During the course of his employment, the doctor discovers facts that would adversely affect the price of the stock if they were made public. Not owning any stock in the company himself and not realizing the importance of the information, but knowing that several of his wife's friends do own stock in the company, the doctor casually mentions to his wife what he discovered. The doctor's wife then repeats the information to her friends, who sell their stock in the company immediately. The wife's friends tell everyone they know to sell their stock as well. When the information subsequently becomes public, the price of the stock drops 30%. Assume that the price of the stock was \$50 per share prior to the drop, and that the doctor's wife's friends and the people they told to sell owned an aggregate total of 200,000 shares.

Under current insider trading laws, both the doctor and his wife can be labeled tippers, in violation of Section 10(b) of the 1934 Act and Rule 10b-5. Under Section 32 of the 1934 Act, the doctor and his wife could each be criminally punished for their actions by up to \$1,000,000 in fines plus ten years in prison. In addition they could both be forced to pay civil monetary penalties of \$9,000,000 under the ITSA.<sup>443</sup> The biomedical company could be penalized under the ITSFEA in an amount up to triple the losses avoided by the persons that the doctor's wife told directly.<sup>444</sup> All these penalties potentially could apply when neither the doctor nor his wife profited at all from their actions.<sup>445</sup>

Under the *Ward/Hudson* analysis, the doctor's claim that the civil monetary penalty constitutes a second criminal sanction in violation of the Double Jeopardy Clause would likely fail. The SEC would be free to proceed against him following his criminal conviction. Alternatively, the United States Attorney could prosecute following the SEC enforcement

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<sup>443</sup> This amount is computed by tripling the loss avoided (\$15/share) multiplied by the aggregate number of shares traded (200,000).

<sup>444</sup> This assumes that the company qualifies as a controlling person and either had reason to know that the doctor would engage in insider trading and did nothing to stop it or had no regulations in place to prevent such conduct. 15 U.S.C. § 78u-1(b) (1994). The limitation of the controlling person's liability to responsibility only for the first level of persons who trade is set by 15 U.S.C. § 78u-1(a)(3) (1994).

<sup>445</sup> See *Dirks v. SEC*, 463 US 646 (1983); *SEC v. Wade*, 151 F 3d 42 (1998).

action. The facts and result presented in the hypothetical are patently unjust. Additionally, it is at least troubling to characterize a statute as civil when it sanctions conduct narrower in scope than the relevant criminal provision, provides for the sanctioning of an aider and abettor, has a scienter requirement for the imposition of its penalties, has the purpose of deterrence and retribution, and prohibits conduct referred to by Congress as "thievery."<sup>446</sup> Thus, even the *Ward/Hudson* analysis could yield unjust results when dealing with the ITSA and ITFSEA.

## VI. ALTERNATIVE APPROACHES TO DETERMINE THE VALIDITY OF CIVIL MONETARY PENALTIES

While the *Ward/Hudson* approach is more appropriate than the Halper analysis, the *Ward/Hudson* approach nevertheless has its shortcomings with regard to the Double Jeopardy Clause. First, it is doubtful whether the Court will ever employ the test seriously.<sup>447</sup> Using the *Ward* analysis,<sup>448</sup> the Supreme Court, has even held civil confinement statutes for those likely to commit sexual crimes to be civil in nature.<sup>449</sup> These decisions make clear that the Court will determine any congressional attempt to control anti-social behavior through monetary penalties to be a civil proceeding, regardless of the penalties' severity, unless Congress either designates the proceeding criminal or provides for the procedures or safeguards of a criminal proceedings.<sup>450</sup> The danger is that such conclusive deference to congressional labeling could easily lead to legislative abuses.<sup>451</sup> Under the *Ward* Analysis, Courts have abdicated their job of deciding whether statutes violate the Constitution,<sup>452</sup> deferring too much to congressional intent by concentrating on the purpose of a statutory penalty instead of its effects.<sup>453</sup> Because the *Ward/Hudson* approach only concentrates on the

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<sup>446</sup> See notes 348-50 and accompanying text.

<sup>447</sup> See Cheh, *supra* note 170, at 1358.

<sup>448</sup> *Hendricks*, 117 S. Ct. at 2072; *Allen v. Illinois*, 478 U.S. 364 (1986).

<sup>449</sup> See Cheh, *supra* note 170, at 1362-63.

<sup>450</sup> See *id.* at 1364. See also, Cooper, *supra* note 4, 1-2 ("If the legislature denominated the sanction 'civil,' then it will be virtually impossible to find that it did not intend it to be treated as civil rather than criminal."); Martin, *supra* note 174, at 666 (Congress' statutory labeling of a . . . proceeding as 'civil' [is] practically unassailable).

<sup>451</sup> See *id.* at 1354.

<sup>452</sup> See Eads, *supra* note 36, at 966-67.

<sup>453</sup> See *id.* One commentator has advocated simply assessing the sanction's severity. Blumberg, *supra* note 17, at 156. If the sanction is sufficiently severe, Blumberg argues, it will be considered criminal punishment. *Id.* Under such an analysis, Blumberg asserts that the ITSA sanctions are criminal. This approach, however, directly contradicts long-standing Supreme Court precedent. Moreover, Blumberg offers no guideposts for determining when a sanction becomes too severe to be characterized as civil.

statutory provision on its face, it fails to account for the rare case when the rubric of the statute creates a patent injustice.

A. *Modification of the Ward/Hudson Analysis*

The framework of the *Ward/Hudson* analysis offers two possible solutions to the injustice it could cause. The first alternative is to modify the "clearest proof" standard in favor of some lesser burden. While the "clearest proof" standard should not be watered down to create an easy way to overturn the expressed intent of Congress, the "clearest proof" standard should also not operate as a guarantee that a finding in favor of a party seeking to overturn Congress "is likely to be as rare in the future as it has been in the past."<sup>454</sup> Accordingly, courts could be less deferential to Congress' intent and give more weight to the countervailing indications of criminal nature.

Alternatively, as Justice Breyer suggests, the "clearest proof" standard could be relegated to "the same legal limbo where *Halper* now rests."<sup>455</sup> Instead of applying the heavy standard, courts could merely apply the seven *Mendoza-Martinez* factors and decide whether the measure is criminal in nature based upon an even-handed analysis of those factors. Such a change would not have made a difference in the outcome of *Hudson* or *Palmisano*, but it might result in a finding that the ITSA and ITSFEA sanctions are criminal in nature. At a minimum, double jeopardy protection against multiple criminal punishments masquerading in the form of civil penalties would exist in actuality instead of in name only. The "clearest proof" standard offers this "name only" protection.

The second possibility is to eliminate the requirement that the *Mendoza-Martinez* factors be employed with regard to the statute on its face rather than assessing the character of the sanctions actually imposed.<sup>456</sup> Justice Breyer suggested this avenue in *Hudson*, recognizing that looking only at the statute on its face fails to address injustices that occurred in a situation like *Halper*.<sup>457</sup> Justice Breyer noted that a statute that provides for a punishment that normally is civil in nature could

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<sup>454</sup> 118 S.Ct. at 501 (Souter, J., concurring).

<sup>455</sup> *Id.* (Breyer, J., concurring).

<sup>456</sup> *Id.* at 501-02.

<sup>457</sup> *Id.* at 502.

nonetheless amount to a criminal punishment as applied in special circumstances.<sup>458</sup>

The Sixth Circuit utilized this synthesis of the *Ward* and *Halper* analyses in an attempt to reconcile the two cases.<sup>459</sup> The court employed the first prong of the *Ward* test and found that Congress intended the penalties assessed under the Federal Mine Safety and Health Act<sup>460</sup> to be civil in nature.<sup>461</sup> The court then applied the seven *Mendoza-Martinez* factors and determined that the sanctions were civil in nature.<sup>462</sup> When the court considered the seventh factor, whether the sanction was excessive with relation to its remedial purpose, it viewed the amount of the sanction actually imposed. Because the sanction only made the government whole, the court did not find it excessive.<sup>463</sup>

While the Sixth Circuit focused on making the government whole, two other decisions utilized a similar approach where the sanction imposed did not compensate the government for damages. The Third Circuit needed to decide whether the sanction imposed, immediate induction, was excessive with relation to its remedial purpose.<sup>464</sup> The court looked more to the facts of the case than the statute on its face. Finding that the person sanctioned was ineligible for military service, the Court held that, on those facts, the sanction was excessive with relation to its remedial purposes, constituting criminal punishment.<sup>465</sup> A West Virginia district court addressed whether a sanction under the FWPCA was civil or criminal.<sup>466</sup> The court considered the amounts of the sanctions actually imposed. The assessed penalty was \$521 per violation, instead of the \$5,000 statutory maximum, and therefore not excessive under the seventh *Mendoza-Martinez* factor.<sup>467</sup>

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<sup>458</sup> *Id.*

<sup>459</sup> *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993)

<sup>460</sup> 30 U.S.C. § 820(a) (1994).

<sup>461</sup> *United States v. WRW Corp.*, 986 F.2d at 141.

<sup>462</sup> *Id.* at 141-42.

<sup>463</sup> *Id.* at 142. See also, *United States v. J & T Coal, Inc.*, 818 F. Supp. 925, 927-29 (W. D. Va. 1993). Why the court looked at the sanction actually imposed and the facts and circumstances of the case when the pre-*Halper* caselaw at the time called for merely examining the provision on its face is unclear.

<sup>464</sup> *Bucher v. Selective Service System*, 421 F.2d 24 (3d Cir. 1970).

<sup>465</sup> *Id.* at 32. This case was the only occasion where a circuit court held an ostensibly civil sanction to be criminal in nature. Again, why court looked at the sanction actually imposed and the facts and circumstances of the case when the pre-*Halper* caselaw called for merely examining the provision on its face is unclear.

<sup>466</sup> *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W. Va. 1975).

<sup>467</sup> *Id.* at 940-41. Again, why the court did so, in light of the precedent to the contrary, is unclear.

This approach has an advantage over a facial examination of the statute, because it can accommodate the possibility of injustice that could easily occur under the ITSA and ITSFEA. Unfortunately, such an approach would result in an analysis of whether each sanction imposed is civil or criminal for double jeopardy purposes on a case-by-case basis. This approach would also inevitably result in a double jeopardy claim in nearly every case involving both civil monetary penalties and a criminal prosecution, thus slowing down the judicial process. Such an approach injects a degree of uncertainty in the law because, even though a statutory provision could be a civil one, a penalty imposed under it in any given case could be found to be criminal.<sup>468</sup>

*B. Possible Constitutional Arguments Other than Double Jeopardy: Excessive Fines and Substantive Due Process*

Additionally, in *Hudson*, the Court proposed two other alternatives to the Double Jeopardy Clause, namely the Eighth Amendment's Excessive Fines Clause or the Due Process Clause.<sup>469</sup> Analyses of the Excessive Fines and Due Process Clause jurisprudence reveal that the availability of relief to a defendant/respondent under either of those clauses is uncertain.

1. The Excessive Fines Clause

The Eighth Amendment is perhaps the more appropriate vehicle for correcting constitutional violations of civil monetary penalties that are too severe.<sup>470</sup> It is more suited to a case-by-case analysis than is the Double Jeopardy Clause. An Excessive Fines Clause analysis could address the concerns raised by civil monetary penalties without triggering the problems created by the *Halper* analysis.<sup>471</sup> While a number of commentators have also suggested the Eighth Amendment's Excessive Fines Clause as an alternative to claiming a double jeopardy violation,<sup>472</sup> any claim made by a person subjected to civil monetary penalties is likely to fail.

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<sup>468</sup> See *supra* note 198 and accompanying text.

<sup>469</sup> *Hudson*, 118 S. Ct. at 495 (1997). The Chief Justice also suggests the equal protection clause as a possible alternative (presumably only in cases where a State imposes the sanctions as opposed to the federal government). However, the applicability of that clause remains uncertain.

<sup>470</sup> See Henning, *supra* note 167, at 6.

<sup>471</sup> See *id.* at 56.

<sup>472</sup> See, e.g., Eads, *supra* note 36, at 992; Jahncke, *supra* note 18, at 114-15; Henning, *supra* note 167, at 6; Cox, *supra* note 12, at 1269; King, *supra* note 182, at 146.

As long ago as 1833, the Supreme Court held the Excessive Fines Clause applied only to criminal cases.<sup>473</sup> More recently, the Supreme Court held that the Excessive Fines Clause was not applicable to a private civil punitive damages award.<sup>474</sup> According to the Court, the term "fine" was understood at the time of the adoption of the Eighth Amendment to mean "a payment to a sovereign as punishment for some offense."<sup>475</sup> The Court further noted that, fines were assessed in criminal, rather than in private civil, actions.<sup>476</sup>

In 1993, the Court abandoned the traditional civil/criminal distinction and instead followed *Halper*, examining whether or not the provision at issue constituted punishment.<sup>477</sup> With *Halper* having been discredited, however, the Court is likely to resurrect the civil/criminal distinction in Excessive Fines jurisprudence. The analysis, then, would once again become whether a particular statute imposes a criminal sanction or a civil one. In making this determination, the Court would probably follow precedent and employ the *Ward* test. If the Supreme Court decided differently, it would create the anomalous situation of a sanction constituting punishment for Excessive Fines Clause purposes, but not for double jeopardy purposes.<sup>478</sup> Accordingly, the Excessive

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<sup>473</sup> *Ex Parte Watkins*, 32 U.S. (7 Pet.) 786, 789 (1833).

<sup>474</sup> *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. at 257.

<sup>475</sup> *Id.* at 265.

<sup>476</sup> *Id.*

<sup>477</sup> See *Austin*, 509 U.S. at 602. See, e.g., *Dallet*, *supra* note 13 at 240-48; *Martin*, *supra* note 165, at 663-64, 672-73.

<sup>478</sup> See *Austin*, 509 U.S. at 602 (holding that civil forfeitures are punishment and, therefore, are subject to the Excessive Fines Clause); *Ursery*, 116 S. Ct. at 2135 (holding that civil forfeitures are not punishment for double jeopardy purposes). Accordingly, the dicta in *Hudson* stating that "[t]he Eighth Amendment protects against excessive civil fines . . ." *Hudson*, 118 S. Ct. at 495 (citing *Alexander*, 509 US at 544), is not likely to be of much assistance to future litigants.

The recent Supreme Court case of *Bajakajian v. United States*, 118 S. Ct. 2028 (1998), did not alter this analysis. In *Bajakajian*, the Court found an *in personam* criminal forfeiture imposed under 18 U.S.C. § 982(a)(1) to be violative of the Excessive Fines Clause. The Court distinguished this provision from an *in rem* civil forfeiture provision. *Id.* The Court, thus, did not have to address the issue of whether a nominally civil forfeiture was tantamount to criminal punishment for Excessive Fines Clause purposes. Since the securities fraud penalties under ITSA, ITSFEA, and the Remedies Act are civil in nature, the issue remains whether or not they would be treated as such. From the Court's opinion, one can surmise, as the dissent does, that the forfeiture would have been upheld had it been sought in a civil as opposed to a criminal forfeiture proceeding. *Id.* at 2041, 2047.

In *Bajakajian*, the Court also adopted a proportionality test from the Cruel and Unusual Punishment Clause and applied it to the Excessive Fines Clause. *Id.* at 2029, 2033-36. Even if the monetary penalties under the securities laws were found to be punishment within the Eighth Amendment, a proportionality review could well be of no avail to a defendant because there is ample precedent for treble damages provisions, *i.e.*, treble

Fines Clause of the Eighth Amendment is not likely to assist a person who could not make a case for a violation of the Double Jeopardy Clause.

## 2. The Due Process Clause

The Due Process Clause is more promising for the defendant. The imposition of a penalty without a rational relation to the defendant's culpability violates due process.<sup>479</sup> Because the sanctions imposed under the ITSA and ITSFEA are discretionary, a possible violation of due process is more likely than if the statutes had mandatory amounts.<sup>480</sup> Demonstrating that a penalty bears no rational relation to the nature of the offense or the claimant's culpability, however, could be difficult. Historically, courts have been hostile to these types of claims. For example, a North Carolina district court found that the imposition of \$577.84 and \$2,000 penalties for failures to itemize a fee for \$4.00 and \$17.75 bordered on the unconscionable but was insufficient to invoke substantive due process.<sup>481</sup> Additionally, the *Halper* analysis utilized the same standard as does substantive due process, and during the *Halper* era the claimants still had difficulty meeting this standard.<sup>482</sup> Moreover,

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monetary penalties could very well be constitutional anyway. See Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1273 (1987).

<sup>479</sup> See, e.g., *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993)(citing *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915); *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286 (1912); 78 (*Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909)); *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907). See also, e.g., *TXO Production Corp.*, 509 U.S. at 458 (a general concern of reasonableness properly enters into the constitutional calculus)(citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

<sup>480</sup> See *Reese v. Railroad Retirement Board*, 906 F.2d 355 (8th Cir. 1990)(holding, *inter alia*, that penalties imposed for failure to report the receipt of excess retirement benefits was not a violation of due process because the amount of the penalties imposed under the Railroad Retirement Act, 45 U.S.C. § 231 et. seq., were mandatory under the statute).

<sup>481</sup> *Dalton v. Bob Neill Pontiac*, 476 F. Supp. 789, 797 n.13 (M.D. N.C. 1979). See also, *Waters-Pierce Oil Co.*, 212 U.S. at 96 (holding that penalties of \$1,500/day for violating Texas anti-trust laws did not violate due process); *St. Louis, I. M. & S. Ry. Co.*, 251 U.S. at 63 (holding that a penalty of up to \$300 for each instance of overcharging a customer did not violate due process). But see *Danaher*, 238 U.S. at 482 (holding that penalties of \$100/day, aggregating \$6,300, for overcharging a customer 50 cents/month was so arbitrary and oppressive as to violate due process).

<sup>482</sup> See *supra* Section IV. The author is aware of only two reported cases (aside from the *Halper* case itself) where a statutory penalty was struck down under the *Halper* analysis. A number of lower courts had done so, but they were overruled, vacated, or modified by the Supreme Court. See *Kurth Ranch*, 511 U.S. at 767 (where the Bankruptcy and District Courts struck down the tax using a *Halper* analysis, but the Supreme Court disavowed the use of

feelings regarding the availability of this alternative are not uniform. Justice Scalia, for example, has argued that the Due Process Clause contains absolutely no limit on penalties at all.<sup>483</sup> It has also been held that, for due process purposes, no inherent unfairness exists in parallel civil and criminal proceedings.<sup>484</sup> It is worth noting that the facts of the cases with this holding dealt with parallel Department of Justice and SEC investigations. Apparently, then, the only grounds for a due process claim will be the severity of the sanction itself. All in all, the parameters of this possible protection seem murky at best.<sup>485</sup>

## VII. CONCLUSION

Under the analysis employed in *Halper*, the SEC was quite correct to be leery of seeking criminal monetary penalties in cases where a criminal prosecution had occurred or was likely to occur. Had it done so, it could have faced a ruling by a court that the penalty constituted punishment and precluded a subsequent criminal prosecution.<sup>486</sup> *Hudson* all but eliminated that concern. The Seventh Circuit offered a prime example of the difference between the two analyses when it examined the validity of an OSHA penalty imposed under the Occupational Health and Safety Act.<sup>487</sup> S.A. Healy was convicted and civilly sanctioned for the same

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the *Halper* analysis in deciding tax cases); *Ursery*, 116 S. Ct. at 2149 (where the Supreme Court reversed the Ninth Circuit's ruling that the forfeiture at issue was invalid under *Halper*); 118 S. Ct. at 623 (where the Supreme Court vacated the Seventh Circuit's invalidation of a sanction imposed by OSHA under 29 U.S.C. § 666(a), utilizing a *Halper* analysis, and remanded for reconsideration in light of *Hudson*); *Hendricks*, 117 S. Ct. at 2073 (where the Supreme Court reversed the Kansas Supreme Court's determination that the Sexually Violent Predator Act violated substantive due process). *Austin*, it will be recalled, did not invalidate any sanction imposed, but rather it merely held that the Excessive Fines Clause was applicable and remanded for a determination of excessiveness.

<sup>483</sup> See *Albright v. Oliver*, 510 U.S. 266, 275-276 (1994) (Scalia, J., concurring).

<sup>484</sup> *United States v. Bloom*, 450 F. Supp. 323 (E.D. Pa. 1978).

<sup>485</sup> See *King*, *supra* note 182, at 112-13.

<sup>486</sup> See *Eads*, *supra* note 36, at 963-64 (stating, "[i]f the Commission seeks [treble monetary penalties] after a successful prosecution, a defendant will rely on *Halper*, arguing: (1) that a treble monetary penalty bears no rational relationship to the government's compensation for its loss in this particular case and (2) that the trial court, under the holding of *Halper*, is not free to consider any government costs that do not apply to this particular defendant. . . [D]epending on the quickness, ease of the government's investigation, and other criteria that are case-specific, this argument may prevail. . . . An appellate court could find [an award of treble monetary penalties] to be an abuse of discretion under the guidelines of *Halper* . . . [E]specially if the defendant has already disgorged profits and has been punished criminally."). Similarly, a prior criminal prosecution could have precluded the seeking of civil monetary penalties in an SEC civil or administrative action. See *Labby & Callcott*, *supra* note 212, at 35 (citing H.R. REP. NO. 101-616, at 19).

<sup>487</sup> 29 U.S.C. §§ 651-678. The civil monetary penalty was imposed under Section 666(a).



violations and claimed a double jeopardy violation.<sup>488</sup> The court examined the sanction imposed, using a *Halper* analysis. The statute required that the court consider the size of the employer, the gravity of the violation, the good faith of the employers, and the prior history of the employer in determining the penalty amount.<sup>489</sup> Moreover, the court noted that the penalty per violation was higher than that authorized in the False Claims Act, that the United States was not a victim, and that the secretary of Labor had issued a directive which stated that the purpose of the civil penalties was deterrence.<sup>490</sup> Because the government was not a victim, the statute prohibited considering whether the government was made whole by the sanction, and because the purpose of the statute was deterrence, the court concluded the sanction imposed was not remedial and constituted punishment for double jeopardy purposes.<sup>491</sup> Following the government's petition for certiorari, the Supreme Court vacated the Seventh Circuit's decision and remanded for reconsideration in light of *Hudson*, which the Supreme Court had decided in the interim.<sup>492</sup> On remand, the Seventh Circuit applied the *Ward/Hudson* analysis and concluded that the sanctions did not violate the Double Jeopardy Clause.<sup>493</sup> The statute at issue was explicitly labeled a "civil penalty."<sup>494</sup> The court then looked to earlier cases, which had employed the *Mendoza-Martinez* and found that the statute was civil.<sup>495</sup> Accordingly, the court rejected Healy's claim.<sup>496</sup>

While the return to traditional double jeopardy analysis, which *Hudson* represents, has eased government enforcement efforts, that return comes at a possibly unfair price. At present, violations of statutes commonly expose wrongdoers to a range of sanctions in addition to criminal punishment.<sup>497</sup> The distinction between criminal and civil law

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<sup>488</sup> S.A. *Healy Co.*, 96 F. 3d at 907-08.

<sup>489</sup> *Id.* at 909.

<sup>490</sup> *Id.* at 909-911.

<sup>491</sup> *Id.*

<sup>492</sup> S.A. *Healy Co. v. OSHRC*, 118 S. Ct. 623, 139 (1997).

<sup>493</sup> S.A. *Healy Co.*, 138 F.3d. at 687.

<sup>494</sup> *Id.*

<sup>495</sup> *Id.* Those cases included *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990 (5th Cir. 1975) and *Frank Irey Jr., Inc. v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974). See *supra* note 450.

<sup>496</sup> S.A. *Healy Co.*, 138 F.3d. at 687.

<sup>497</sup> See Cooper, *supra* note 4, at 3. The importance of this issue is clear and will likely continue to grow in importance. Already, parallel civil and criminal actions are becoming more the rule than the exception in prosecutions for economic crimes. Henning, *supra* note 171, at 4. In *Atlas Roofing Co.*, 518 F.2d at 990, the court compiled a list of statutory provisions authorizing the imposition of civil monetary penalties. That list covered six pages in the Federal Reporter. *Id.* at 1003-09. In 1975, when *Atlas Roofing* was decided, the

is collapsing.<sup>498</sup> Civil remedies supplement criminal sanctions.<sup>499</sup> While this practice does not always constitute a technical violation of the Double Jeopardy Clause, it negates one of the main purposes of the Double Jeopardy Clause: to prevent the government from seeking additional punishment when it is dissatisfied with the results of a criminal proceeding.

Moreover, the practice of pursuing parallel civil and criminal actions can frequently operate to prejudice the subject of those actions.<sup>500</sup> For example, in order to defend against potentially huge civil monetary penalties in an SEC insider trading enforcement action, a respondent may be forced to relinquish his privilege against self-incrimination, to his detriment in the criminal proceeding.<sup>501</sup> On the other hand, if a respondent remains silent to preserve his privilege in the criminal action, he has impaired his ability to defend the civil action because the civil tribunal may draw an adverse inference from his silence.<sup>502</sup> At the same time, the government can also use the generous discovery opportunities in the civil proceeding to obtain information for the criminal prosecution that would otherwise not be available.<sup>503</sup>

The widespread practice by Congress of granting these additional civil remedies is understandable. Civil remedies are easier to use, more efficient, and less costly than criminal prosecutions.<sup>504</sup> The likelihood that offenders will be punished is greater.<sup>505</sup> Additionally, the case law seems to indicate that most, if not all, statutory civil monetary penalties

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court noted nearly 100 such statutory provisions in the U.S. Code. *Id.* That number has grown substantially since that time, and it is likely to continue to grow.

<sup>498</sup> See Cheh, *supra* note 170, at 1325.

<sup>499</sup> *Id.*

<sup>500</sup> *Id.* at 1331.

<sup>501</sup> *Id.*

<sup>502</sup> *Id.* at 1390.

<sup>503</sup> Cheh, *supra* note 170, at 1325. In this regard, the government is assisted tremendously by the courts. The government is far more likely to be able to secure a stay of civil proceedings pending the outcome of the criminal prosecution than is the defendant. A defendant's motion to stay the civil proceedings will fail if the government can show a legitimate reason for bringing the civil case. As long as the government is not found to be acting in bad faith, a court is unlikely to grant a defense requested stay. To demonstrate bad faith, a defendant usually must prove that the government purposely brought the civil case to bypass the more limited criminal discovery rules. The government, on the other hand, is much more successful because it claims that a defendant's civil discovery might jeopardize ongoing criminal investigations or prosecutions. Courts are also amenable to the government argument that the defendant is seeking to circumvent criminal discovery rules by availing himself of the more liberal civil discovery procedures. *Id.* at 1393.

<sup>504</sup> *Id.* at 1345.

<sup>505</sup> See *id.*

are not violative of the Double Jeopardy, Excessive Fines Clause, or the Due Process Clause.

The SEC's ability to seek and obtain civil monetary penalties is "no longer in jeopardy." Violators of the securities laws can no longer make meritorious claims that those penalties violate the Double Jeopardy Clause. Moreover, any possibility of relief from reliance on some other constitutional provision is uncertain at best. For better or worse, in *Hudson*, the Supreme Court placed the fates of alleged wrongdoers squarely in the hands of Congress.