Double Jeopardy and Punishment: Why an As Applied Approach, As Applied to Separation of Powers Doctrines, Is Unconstitutional

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I. INTRODUCTION

Andre Young lives on McNeil Island, a small, mostly wooded island about four miles across Puget Sound from Tacoma, Washington. A six-time rapist,[1] Young has served time for all his crimes, but he is not free to leave McNeil Island. This is because Andre Young is a sexually violent predator, involuntarily committed pursuant to the Washington State Sexually Violent Predator Statute.[2]

Some form of sexual predator statute exists in every state; some states require notification and registration, some states allow involuntary civil commitment, and some prescribe both notification and commitment.[3] Various provenances exist behind these statutes, which

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1. Additional detail is useful for those readers unfamiliar with typical patterns of sexually violent predators. Young's first series of crimes occurred in 1962, when he broke into the respective homes of four women and raped them, two at knifepoint. One rape victim was a young mother whose five-week old baby lay nearby. In 1963, Young was convicted on four counts of first degree rape. Less than twelve months later, while out on bond, Young exposed himself to a woman and her child and threatened to rape and kill the woman. He was frightened away and was never tried for the offense because he was found to be incompetent.

Young was paroled in 1972. Five years later he was again convicted of rape after he broke into a home and raped a woman. Young was again released in 1980. Following his pattern of past offenses, in 1985, he broke into the home of a woman. With her three small children nearby, Young raped the mother, and was again convicted.

Prior to his release for this last crime, the State of Washington petitioned to have Young civilly committed pursuant to Washington's Sexually Violent Predator Statute. On March 8, 1991, following the procedural dictates of the statute, a jury unanimously found that Young was a sexually violent predator. *See In re* Young, 122 Wash. 2d 1, 13-16, 857 P.2d 989, 994-95 (1993).

2. WASH. REV. CODE § 71.09 et seq. (1994 & Supp. 1995).

3. *See generally* Tom Prettyman, Note, *Federal and State Constitutional Law Challenges to*

have been discussed in detail by other commentators.[4] These laws, regardless of the state or exact statute, are frequently challenged on double jeopardy grounds. The functional premise is simple: a person has served his sentence for his crime. This sexual predator statute, whether committing the person or requiring him to register with law enforcement, inflicts punishment for a second time. In other words, the challenge to these laws is that they inflict multiple punishments for the same crime in violation of the Double Jeopardy Clause of the United States Constitution.[5] What is not simple, however, is the way courts determine whether a statute inflicts unconstitutional punishment for a second time in violation of the Double Jeopardy Clause.

In *Hudson v. United States*,[6] the United States Supreme Court discussed the test used to determine whether a statute is criminally punitive or nonpunitive for double jeopardy purposes.[7] An in-depth analysis of the Supreme Court's logic appears later in this Comment, but what is important at this point is that the *Hudson* Court specifically overruled the Supreme Court's prior decision in *United States v. Halper*.[8] In *Halper*, the Supreme Court departed from precedent and determined the punitive/nonpunitive nature of a statute (whether it inflicts punishment or not) by examining how the statute was applied to the defendant in that case.[9] In other words, the *Halper* court held that the statute was punitive, not because of the purpose or language of the statute itself, but because of how it was specifically applied to the defendant in that case. This approach to the punitive/nonpunitive inquiry is dependent on the facts of a specific case. The facts of each case describe how a statute is being applied, and therefore, whether a

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State Sex Offender Laws, 29 RUTGERS L.J. 1075 (1998).

4. *See id.* at 1075-76; *see also* Eli M. Rollman, *"Mental Illness": A Sexually Violent Predator Is Punished Twice for One Crime*, 88 J. CRIM. L. & CRIMINOLOGY 985, 986-90 (1998) (detailing the history of Kansas' Sexually Violent Predator Statute); Adam D. Hirtz, Note, *Lock 'em Up and Throw Away the Key: Supreme Court Upholds Kansas' Sexually Violent Predator Act in* Kansas v. Hendricks, 42 ST. LOUIS U. L.J. 545, 545-52 (1998) (giving a brief description of the historical origins of sexual predator statutes); Nathaniel L. Taylor, Note, *Abuse of Judicial Review: The Unwarranted Demise of the Sexually Violent Predators Statute by* Young v. Weston, 71 WASH. L. REV. 543 (1996) (detailing the history of the Washington Sexually Violent Predator Statute and its application to Young). For a more in-depth analysis of Washington's Sexually Violent Predator Statute, including its history, *see* Symposium, *Predators and Politics: A Symposium on Washington's Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 525 (1992).

5. U.S. CONST. amend. V.

6. Hudson v. United States 522 U.S. 93 (1997).

7. *Id.* at 99-100 (listing the seven-factor *Kennedy* "guideposts" and citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

8. *Id.* at 101 ("We believe that *Halper's* deviation from longstanding double jeopardy principles was ill considered.").

9. *See* United States v. Halper, 490 U.S. 435, 447-52 (1989).

statute is punitive. This is an "as applied" double jeopardy approach; as applied to the defendant, is this statute punitive?

Hudson specifically overruled *Halper*[10] by mandating that the punitive/nonpunitive nature of a statute be determined solely by analyzing the statute on its face,[11] and not as applied to the defendant.[12] In other words, the facts of the specific case are irrelevant to the punitive/nonpunitive inquiry, and instead the analysis focuses on the words and purposes of the statute itself. This is an "on its face" double jeopardy approach.

It is important to reemphasize what these approaches determine. They do not decide whether an act by a governmental agency or actor is punitive or nonpunitive. Rather, the two double jeopardy approaches determine the nature of the statute itself. The analysis turns on whether the *statute* is punitive, not whether certain actors carrying out the statute are *acting* punitively. If the latter were the case, a plaintiff's claim would be asserted against an actor for misusing the statute.[13] If the former, the claim would ask the court to find that the statute itself is punitive, and thus in violation of the Double Jeopardy Clause when applied to a defendant who has already been punished. It is the punitive or nonpunitive nature of a statute that both the as applied and on its face approaches determine.

Though the Court in *Hudson* attempted to settle the question regarding which of the two approaches to take, controversy remains, which leads us back to Andre Young. In 1995, Young petitioned the United States District Court for the Western District of Washington for a writ of habeas corpus.[14] His case has subsequently been heard by the Ninth Circuit twice,[15] and in a recent decision, the Ninth Circuit held that, for Double Jeopardy and Ex Post Facto purposes, an examination of "the conditions of Young's confinement" would determine the punitive/nonpunitive nature of the Washington State Sexually Violent Predator Statute.[16] The examination of the conditions of con-

10. *Hudson*, 522 U.S. at 96.

11. *Id.* at 104.

12. *Id.* at 101-02.

13. Usually, these types of claims are made under 42 U.S.C. § 1983.

14. Young v. Weston, 898 F. Supp. 744, 745 (W.D. Wash. 1995). Young challenged the Washington Sexual Predator Statute, RCW § 71.09, on the grounds that it violated his substantive due process rights, the Ex Post Facto Clause, and the Double Jeopardy Clause. *Id.* at 748. It is important to remember that Young challenged the statute itself, not certain government actors' implementation of the statute. *See id.* at 748 ("Young asserts that *the Statute* is unconstitutional on a variety of grounds.") (emphasis added).

15. Young v. Weston, 176 F.3d 1196 (9th Cir. 1999); Young v. Weston, 122 F.3d 38 (9th Cir. 1997).

16. *Young*, 176 F.3d at 1199.

finement are an expedition into the specific facts of the case, and thus the as applied approach, extinguished by *Hudson*, has been rekindled by the Ninth Circuit in the *Young* decision.

Though rekindled, the as applied fire did not spread. Soon after the *Young* decision was announced, the Washington State Supreme Court considered the same sexual predator law that was addressed by the Ninth Circuit in *Young*. In both *In re Detention of Turay*,[17] and *In re Detention of Campbell*,[18] sexual predators who were involuntarily committed brought personal restraint petitions (the Washington equivalent of a writ of habeas corpus) to the Washington State Supreme Court, claiming the Washington State Sexually Violent Predator Statute violated their individual double jeopardy rights.[19] Thus, the Washington State Supreme Court was faced with the same question the Ninth Circuit faced in *Young*: is the statute punitive or nonpunitive? The Washington State Supreme Court did not follow the *Young* court's departure from *Hudson*. Instead, the *Turay* and *Campbell* courts insisted that the on its face approach is the proper way to determine the punitive/nonpunitive nature of a statute, and thus determine if the statute violates the Double Jeopardy Clause.[20]

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17. *In re* Detention of Turay, 139 Wash. 2d 379, 986 P.2d 790 (1999). Richard Turay, like Andre Young, has been an active litigant. He brought a 42 U.S.C. § 1983 claim against the officials who run Washington State's Special Commitment Center (SCC), which houses those committed under Washington's Sexually Violent Predator Statute. The SCC was previously located in Monroe, Washington, but has since been moved to McNeil Island, where there is also a Washington State Prison. In fact, the SCC is physically incorporated within the prison, though the SCC block and committees are kept separate from the prisoners. This physical link with the prison is clearly one of the main reasons that, at least on the level of perception, people view the SCC as a penal facility, not a treatment facility.

In fact, the poor quality of treatment gives rise to much of the criticism against the SCC; so much so that Turay's federal suit succeeded, and an injunction was issued against the SCC mandating that adequate treatment be provided. *See* Turay v. Weston, No. C91-664WD (W.D. Wash. 1994). As will be discussed in section III of this Comment, injunctive relief against an official for a constitutional violation is much more compatible with separation of powers principles than a declaration by a court that a law itself is unconstitutionally punitive and thus cannot be applied to an individual at all.

18. *In re* Detention of Campbell, 139 Wash. 2d 341, 986 P.2d 771 (1999).

19. *Turay*, 139 Wash. 2d at 384, 986 P.2d at 793; *Campbell*, 139 Wash. 2d at 345-46, 986 P.2d at 772-73.

20. *See Turay*, 139 Wash. 2d at 418-19, 986 P.2d at 811; *Campbell*, 139 Wash. 2d at 348, 986 P.2d at 775. Although both decisions held that the on its face approach was the proper analysis to use, both decisions also did an as applied analysis of the statute in question. *See Turay*, 139 Wash. 2d at 421, 986 P.2d at 812 ("Assuming arguendo, however, that the Ninth Circuit is correct that a person committed as an SVP under RCW 71.09 may challenge that statute as violative of double jeopardy 'as applied to them,' rather than facially, Turay's claim would still be unsuccessful."); *Campbell*, 139 Wash. 2d at 348-49, 986 P.2d at 775 ("Even assuming Campbell may properly challenge the validity of his order of commitment based upon the conditions of confinement at the SCC, . . . Campbell has failed to prove the conditions of confinement are punitive, so as to render the statute unconstitutional as applied to him."). The motives

The *Turay* court (on which *Campbell* relied for its analysis[21]) noted the *Young* court's decision to use an as applied approach, but expressly declined to follow the Ninth Circuit on this issue.[22]

Campbell and *Turay*'s refusal to follow *Young* created a conflict between the Washington State Supreme Court and the Ninth Circuit. With this conflict looming, the United States Supreme Court granted certiorari to Washington State's appeal of the *Young* decision.[23] The case will be heard in the 2000–2001 term, and it presents a prime opportunity for the United States Supreme Court to specifically articulate why an as applied approach is impermissible.

This Comment will argue that an as applied approach allows the executive branch, whether at the state or federal level, to encroach into the legislative realm by rendering a statute unconstitutional as a result of the way the statute is administered. An as applied approach allows an otherwise constitutional statute to be robbed of its constitutionality solely by the dictates of the executive branch. This kind of as applied veto violates the separation of powers principles that underpin the federal, and many state, constitutions. In other words, an as applied approach allows the executive branch to undermine the constitutionality of a law by administering it in an unconstitutional way. Instead of holding the executive branch responsible for its actions, an as applied approach shifts the blame to the statute itself and holds that the statute is unconstitutionally punitive. Thus, an as applied approach extends the executive power to invalidate laws beyond its normal veto power. The United States Supreme Court should therefore use *Young* to reject as applied approaches in the double jeopardy context.

Reaching this conclusion, however, will require several analytical steps. Section II of this Comment will begin by examining the history of the as applied and on its face double jeopardy approaches during the last 20 years. After a close examination of the decisions in *Halper* and *Hudson* in sections II.B and II.C, this Comment will explain why the holding of *Hudson*, though correct in its result, was not based on sound reasoning. In section II.D, this Comment will examine the *Young* decision and its departure from the mandates of *Hudson*. With

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behind these technically unnecessary analyses seem fairly obvious. The Washington State Supreme Court wanted to ensure that its holdings would survive an affirmance of the *Young* decision by the United States Supreme Court.

21. *See Campbell*, 139 Wash. 2d at 348-49, 986 P.2d at 775.

22. *See Turay*, 139 Wash. 2d at 419, 986 P.2d at 811-12. The *Turay* court not only relied on *Hudson* for the proposition that a statute needs to be analyzed on its face for double jeopardy purposes, but also cited its prior decision in Winchester v. Stein, 135 Wash. 2d 835, 959 P.2d 1077 (1998). *Turay*, 139 Wash. 2d at 417, 986 P.2d at 810.

23. Seling v. Young, 120 S. Ct. 1416 (2000).

the Ninth Circuit's holding in *Young* in direct conflict with the Washington State Supreme Court's holdings in *Cambpell* and *Turay*, section III will argue that the United States Supreme Court should overturn *Young* on separation of powers grounds. Finally, section III will also address the differences between an as applied challenge in the double jeopardy context and an as applied challenge in other constitutional contexts.

II. WHAT IS PUNISHMENT FOR DOUBLE JEOPARDY PURPOSES?—RECENT HISTORY

A. *Pre* Halper *Formulations*

The Double Jeopardy Clause states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[24] The United States Supreme Court has held that this clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[25] In the first two instances, it is assumed that the "prosecution" in a criminal context is the pursuit of a criminal sanction (punishment). However, for purposes of this Comment, it is the third type of abuse, multiple punishments, that is of import, for this last abuse is where the question of *what is punishment* becomes dispositive. The United States Supreme Court has also limited the Double Jeopardy Clause's protections against multiple punishments to criminal, rather than civil, punishments.[26]

The first major case of the last 20 years affecting double jeopardy jurisprudence is *United States v. Ward*,[27] which yielded what has come to be known as the "*Ward* test."[28] This test determines whether a statute imposes a civil (nonpunitive) or criminal (punitive) penalty. The first part of the *Ward* test examines if the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label [civil or criminal] or the other."[29] If the legislature intended to establish a civil penalty,[30] the second part of the

24. U.S. CONST. amend. V.

25. *Halper*, 490 U.S. at 440 (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

26. *See* Helvering v. Mitchell, 303 U.S. 391 (1938).

27. United States v. Ward, 448 U.S. 242 (1980). The significance of *Ward* is not that it was a double jeopardy case because, in fact, it was not, but rather that *Ward* lays out the foundations for distinguishing a civil and criminal penalty. *See Ward*, 448 U.S. at 248-49.

28. *See Hudson*, 522 U.S. at 104.

29. *Ward*, 448 U.S. at 248.

30. Obviously, if the legislature intended a criminal penalty, then the statute is punitive for

test determines "whether the statutory scheme [is] so punitive either in purpose or effect" as to render the statute a criminal penalty regardless of the legislative label.[31] In regard to the second step of the inquiry, the statute can only be ruled a criminal penalty if the "clearest proof" exists that the statute is criminally punitive.[32]

Though the phrase "purpose or effect" seems to indicate that the actual "effects" of a statute on a particular individual may be analyzed and, thus, an as applied approach may be permissible, the history of that language reveals it is firmly and *exclusively* rooted in an on its face approach. The phrase, purpose or effect, is a paraphrase[33] of the United States Supreme Court's prior analysis in *Flemming v. Nestor*.[34] In *Flemming*, the Court examined whether a statute's purpose was civil or criminal, and the analysis only considered the implications (i.e., purposes and effects) of the statute on its face.[35] Nowhere in *Flemming's* analysis regarding the criminal or civil nature of the statute in question did the Court address the actual consequences that flowed from the application of the statute to the plaintiff in that case.[36] The purposes and effects of the statute were strictly examined on the face of the statute.[37] This approach was carried forward in the *Ward* decision.

In *Ward*, the Court specified how to determine the purposes and effects of a statute. The *Ward* Court noted that, while not dispositive, the seven factors listed in *Kennedy v. Mendoza-Martinez*[38] are helpful in determining whether a statute is criminally punitive.[39] These factors are: (1) whether the sanction involves an affirmative disability or

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double jeopardy purposes.

31. *Ward*, 448 U.S. at 248-49.

32. The reasons for this high standard are articulated in *Flemming v. Nestor*, 363 U.S. 603 (1960). First, as the *Flemming* Court stated, "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming*, 363 U.S. at 617. This quote is squarely focused on the realization that courts are limited in their institutional capacity to reexamine the nature of congressional enactments. Second, the Court noted "the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Id.* at 617 (quoting Fletcher v. Peck, 10 U.S. 87 (1810)). This second reason, instead of focusing on the limitation of the courts' capacity, focuses on the powers given to the legislature and the just deference the courts give it. Both reasons support the "clearest proof" standard.

33. *See Ward*, 448 U.S. at 249.

34. 363 U.S. at 617-21.

35. *See id.*

36. *See id.*

37. *See id.*

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

39. *Ward*, 448 U.S. at 249-50.

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 for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[40]

All of the above seven factors consider the purposes or effects of a statute on its face, not on the conditions or results it creates for an individual. In fact, the *Kennedy* Court specifically mandated that "these factors must be considered in relation to the statute on its face."[41]

Though the phrase "purpose or effect" is clearly rooted in on its face precedent, there is still something counterintuitive about saying that the effects of a statute need to be determined by looking at a statute on its face. Indeed, reading the phrase "purpose or effect" seems to suggest deference to the statute on its face (purpose) *and* as applied (effects). One might even argue that a strictly on its face analysis blatantly ignores the effects of a statute. However, as shown above in the discussion of *Flemming*, *Ward*, and *Kennedy*, the phrase "purpose or effect," comes from an on its face analysis.

Yet, the question remains as to how to examine the effects of a statute on the face of the statute. It must be remembered that the motivation behind this second part of the *Ward* test is to make sure that, even when the legislature has labeled a statute civil, the statute is truly civil in nature. Essentially, the court is trying to protect against a legislature labeling what is really a criminal statute as a civil statute. Therefore, the effects considered in this analysis are the sanctions a statute would impose in general, and whether those effects connote a criminal or civil penalty.

For example, imagine a statute that mandates a 30-day minimum jail sentence for anyone who infringes a patent. Also, imagine that the legislature has written a preamble to this statute stating that the statute is intended to be civil and nonpunitive. From the first part of the *Ward* test, we know that the legislature has intended (or has at least stated) that the statute is civil. The next step is to examine the purposes and effects of the statute, and thus we look to the seven *Kennedy* factors. The statute's effect is to put violators in affirmative restraint, and, therefore, the first *Kennedy* factor weighs in favor of a finding that the statute is punitive. The effect of restraint has been histori-

40. *Kennedy*, 372 U.S. at 168-69.

41. *Id.* at 169.

cally regarded as punishment, and as a result, the second factor weighs like the first. Similarly, the fourth and seventh factors weigh in favor of finding that the statute is punitive.

Whether this provides the clearest proof[42] necessary to override the legislature's intent is the end question, but this hypothetical is meant to show not what the result is, but rather to demonstrate *how* a court examines the effects of a statute on its face. A court, using the *Kennedy* factors, looks at the effects in a general sense—in other words, it examines the effects of the statutory scheme, not the specific effects of a statute on an individual. In fact, the *Kennedy* factors lend themselves to an on its face approach when determining effects, not to a consideration of a statute's actual effect on an individual. Thus, despite the presumptive meaning of the word "effects," a closer look at the history behind the phrase and how it is used with the *Kennedy* factors supports the conclusion that determining the purposes and effects of a statute is strictly an on its face analysis.

In sum, the *Ward* test determines the criminal or civil nature of a statute, and accordingly determines the constitutional protections that flow from an application of the statute. The first part of the test, finding congressional intent as to the nature of the statute, is undeniably an on its face analysis. It in no way relates to the consequences a statute has on a particular individual. The second part of the test, the purposes or effects of the statute, at first glance, seems to suggest that what happens to an individual is relevant in determining the effects of a statute. But, a careful reading of the source of that phrase, as well as the tools the United States Supreme Court uses to specify and analyze it, mandate just one conclusion: that determining the purposes or effects of a statute requires an on its face analysis.[43] This was the state of the law before the *Halper* decision.[44]

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42. *See Ward*, 448 U.S. at 249.

43. In fact, considering that the purpose and effects test is part of a larger two part test, only the on its face approach makes sense. The first part of the *Ward* test is specifically limited to what Congress intended. The second part is meant to ensure that the nature of the law follows this congressional intent. If the purpose and effect of a statute was considered part of an as applied approach, it would not be necessary to relate back to the first part of the test at all; regardless of congressional intent, a statute would be punitive if it were carried out punitively. An as applied approach under the second part of the *Ward* test makes this second inquiry an entirely separate test, thus, the context of purpose and effects within the *Ward* test lends even more weight to the conclusion that this analysis is to be done exclusively on the face of the statute.

44. U.S. v. One Assortment of 89 Firearms, 465 U.S. 354, 365-66 (1984).

B. Halper: *The "As Applied" Approach Emerges*

Ironically, *Halper* was a unanimous decision,[45] and yet, only nine years later, it was specifically disavowed in *Hudson*.[46] In *Halper*, the defendant, Irwin Halper, was a manager of a medical service company.[47] Halper had submitted 65 false Medicare claims that overcharged the federal government a total of $585.[48] Halper was criminally convicted for making false claims and for mail fraud. He was sentenced to two years imprisonment and fined $5,000.[49] The federal government then brought another action against Halper, this time for a violation of the civil False Claims Act.[50] The government was granted summary judgment on the issue of Halper's liability, and the district court then turned its attention to damages.

The civil False Claims Act mandates a penalty of $2,000 for each violation.[51] Thus, for Halper's 65 violations, the fine was in excess of $130,000.[52] The district court, however, refused to apply the total fine because it concluded that, in combination with the criminal punishment, the fine would violate the Double Jeopardy Clause.[53] Instead, the district court read the penalty provision of the False Claims Act as discretionary and imposed the full sanction for only eight of the 65 counts, resulting in a total fine of $16,000.[54] The government was granted a rehearing by the district court, but the district court amended its judgment to further limit the government's recovery to double damages of $1,170.[55] The government appealed directly to the United States Supreme Court, which granted certiorari.[56]

Relying on *Ward*, as well as other cases, the Government[57] argued that the nature of a statute is an issue of statutory construction, and since this statute was intended to be civil, it could not violate the Double Jeopardy Clause.[58] The *Halper* Court examined these prior

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45. *Halper*, 490 U.S. at 436.
46. *See Hudson*, 522 U.S. at 96.
47. *Halper*, 490 U.S. at 437.
48. *Id.*
49. *Id.*
50. *Halper*, 490 U.S. at 438. The False Claims Act is located at 31 U.S.C. § 3729-3732.
51. 31 U.S.C. § 3729 (1994).
52. *Halper*, 490 U.S. at 438.
53. *Id.* at 438-39 (citing *Halper*, 660 F. Supp. 531, 533 (S.D.N.Y. 1987)).
54. *Id.* at 439 (citing United States v. Halper, 660 F. Supp. at 534).
55. *Id.* at 439-40 (citing United States v. Halper, 664 F. Supp. 852, 853-55 (S.D.N.Y. 1987)).
56. *Halper*, 490 U.S. at 440.
57. Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938). *See Halper*, 490 U.S. at 441.
58. *Halper*, 490 U.S. at 441-42.

cases and concluded they did not foreclose a civil penalty from being criminally punitive when the penalty is "so extreme and so divorced from the government's damages and expenses."[59] After its historical analysis, the *Halper* Court distinguished its decision from the rationale of *Ward*. The Court noted that *Ward* was a Sixth Amendment case, not a double jeopardy case.[60] The Court then held that statutory construction (on its face) analysis is proper for determining constitutional safeguards in proceedings, but it noted this approach is not well suited in the context of determining the "human interests" that the Double Jeopardy Clause protects.[61] The Court stated:

> This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the *character of the actual sanctions imposed on the individual* by the machinery of the state.[62]

The modern as applied double jeopardy approach was born.

The Court specified further that when a civil sanction as applied to an individual serves the goals of punishment, i.e., retribution and deterrence, as opposed to a "remedial" purpose, it constitutes punishment.[63] The *Halper* Court, perhaps in an attempt to mitigate the changes made to double jeopardy jurisprudence, did limit its holding to what it called a "rare case," where the civil sanction was "overwhelmingly disproportionate" and not "rationally related" to the actual damage caused to the government.[64]

The new rule announced in *Halper*, that the Double Jeopardy Clause's protections could be invoked where a statute is punitive as applied to an individual, stood for nine years, until the decision in *Hudson*. The *Halper* decision did not however, stand unassailed by legal commentators. Although some thought the decision correctly

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59. *Id.* at 442.
60. *Id.* at 447.
61. *Id.* at 447 (quoting *Hess*, 317 U.S. at 554 (Frankfurter, J., concurring)).
62. *Id.* at 447 (citation omitted and emphasis added).
63. *Id.* at 448.
64. *Id.* at 449

> We cast no shadow on these time-honored judgments. What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. (citation omitted).

focused on the protection of the individual against the government,[65] most commentary was negative.[66]

The first criticism of the *Halper* decision was doctrinal. The *Halper* Court ignored a consistent line of cases that laid out the procedure for determining the punitive/nonpunitive nature of a statute.[67] The second major criticism was that the *Halper* Court misapplied the prohibition against multiple punishments.[68] Specifically, before *Halper*, only second criminal punishments were prohibited, and thus only prosecutors and courts were limited by the prohibition against multiple punishments. However, after *Halper*, legislatures were limited in their ability to pass civil penalties because, if those penalties were punitive against an individual, they would violate the Double Jeopardy Clause as to that individual.[69] Though there were other criticisms of *Halper*,[70] these two are the most significant for our purposes. The first one led to the decision in *Hudson*, but, as this Comment will explain, it is a derivation of the second criticism that leads to the thesis of this article and to what *should have* been the basis of *Hudson*: that the as applied approach adopted in *Halper* is unconstitutional because it allows the executive branch to dictate the constitutionality of an otherwise valid statute through its implementation of the statute.

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65. *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 (1991).

66. Robin W. Sardegna, *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*, 33 VAL. U. L. REV. 115, 133-137 (1998).

67. *Id.* (citing Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929 (1990)).

68. *Id.* at 134-35.

69. *Id.* (citing Peter Michael Bryce, Note, *Second Thoughts on Punishments: Redefining the Multiple Punishments Prohibition*, 50 VAND. L. REV. 167, 177 (1997)).

70. These other criticisms are described by Sardenga. Though important to other issues, they were delegated to this footnote because they do not bear on the rest of the analysis presented in this Comment. In addition to the two criticisms listed *infra*, Sardenga cites four other criticisms of *Halper*. First, the *Halper* Court failed to recognize that civil penalties also serve a strong deterrence purpose, which historically has not changed a statute from civil to criminal. *Id.* at 135 (citing Eads, *supra* note 71, at 932). Second, the *Halper* decision put more of a burden on the government to administer between its civil and criminal enforcement departments. *Id.* at 135-36 (citing 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, 445 (1990)). Third, the *Halper* decision promoted strong judicial activism, without much guidance, at the trial court level, because it mandated that trial courts sift through the purposes and as applied effects of specific instances of enforcement. *Id.* at 136 (citing Eads, *supra* note 65, at 932). Finally, Sardenga criticized *Halper* for allowing "bad facts" to make "bad law" through a process which devalued prior double jeopardy precedents. *Id.* at 138.

C. Hudson: *A Reversion Back to an On Its Face Analysis*

The *Hudson* decision could not have been a clearer rejection of *Halper*. The *Hudson* Court "disavowed" *Halper* and "reaffirmed" the rule of *Ward* in the first paragraph of the opinion.[71] The order of the pertinent facts in *Hudson* is slightly different from those in *Halper*. In *Hudson*, the Office of the Comptroller of Currency (OCC) civilly fined three defendants for violations of various federal banking laws.[72] The defendants entered into a stipulation with the OCC, agreeing to fines significantly less than those originally assessed and agreeing not to participate in the banking industry in any manner.[73] Three years later, based upon the same conduct that led to the fines by the OCC, all three defendants were indicted in federal court on 22 counts of conspiracy and various other charges.[74]

The defendants moved to dismiss the indictment on double jeopardy grounds, but the district court denied the motion.[75] The defendants appealed, and the Tenth Circuit Court of Appeals held the nonparticipation provision of the stipulation did not raise double jeopardy concerns, but that the fines could possibly violate the Double Jeopardy Clause. The appeals court remanded that part of the case.[76]

On remand, the district court granted the defendants' motions to dismiss the indictment.[77] The court of appeals reversed, holding that under the *Halper* analysis, the fines imposed were not so disproportionate to the damages as to constitute punishment.[78] The United States Supreme Court granted certiorari "because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*."[79]

The United States Supreme Court began its analysis by restating the two-step rule from *Ward* and reemphasizing that the *Kennedy* factors, which are used to find the purpose or effect of a statute, are to be applied by examining a statute on its face.[80] The Court went on to describe two ways in which the *Halper* decision deviated from past double jeopardy principles. First, the Court stated that the *Halper* Court bypassed the "threshold" question of whether the statute in

71. *Hudson*, 522 U.S. at 95-96.
72. *Id.* at 96-97.
73. *Id.* at 97.
74. *Id.* at 97-98.
75. *Id.* at 98.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 98-99.

question was civil or criminal.[81] The *Hudson* Court criticized *Halper* for bypassing this question and instead just determining whether the sanction in question was excessive in relation to harm caused.[82] The *Hudson* Court characterized this action as elevating a single *Kennedy* factor, (whether the sanction appears excessive in relation to the other alternative purpose assigned),[83] to a dispositive status.[84] The second ground for the Court's criticism of *Halper* was that *Halper* used an as applied analysis of the sanction imposed instead of examining the statute on its face, as *Kennedy* commands.[85]

Having identified the two doctrinal departures made by the *Halper* Court, the *Hudson* Court characterized the *Halper* approach as "ill considered."[86] The Court then gave three reasons, apart from the aforementioned jumbling of prior jurisprudence, why the *Halper* as applied approach was not the appropriate method of analysis for determining what constitutes punishment for double jeopardy purposes.

The first reason the *Hudson* Court gave was that, "[a]s subsequent cases have demonstrated, *Halper's* test . . . has proved unworkable."[87] This refers to *Halper's* conclusion that if a civil sanction serves the goals of punishment, retribution, and deterrence, the sanction is punitive for double jeopardy purposes.[88] The *Hudson* Court noted that in cases subsequent to *Halper*, the United States Supreme Court had recognized that all civil penalties serve the purpose of deterrence.[89] Since all civil penalties serve some purposes of punishment, the *Hudson* Court reasoned that under the *Halper* test, all civil penalties would be subject to double jeopardy limitations.[90]

Though it may be true that *Halper's* test is unworkable, in light of history, this is a perplexing comment by Chief Justice Rehnquist, who wrote the majority opinion in *Hudson*.[91] Only one year earlier, in *United States v. Ursery*,[92] the Chief Justice, again writing for the majority, specifically disavowed a reading of *Halper* that suggested that

81. *Id.* at 101.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 101-02.
88. *Id.* at 101.
89. *Id.* at 102 (citing Department of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777, n. 14 (1994); United States v. Ursery, 518 U.S. 267, 284-85, n. 2 (1996)).
90. *Hudson*, 522 U.S. at 102.
91. *Id.* at 95.
92. *Ursery*, 518 U.S. 267 (1996).

only remedial, and not punitive, civil sanctions could survive a double jeopardy challenge.[93]

In his dissent in *Ursery*, Justice Stevens criticized the majority for not following the general rule of *Halper* that, if a civil sanction serves any purpose of punishment and is not solely remedial, it can be fairly characterized as punishment.[94] Chief Justice Rehnquist, speaking for the majority in *Ursery*, wrote that Justice Stevens' interpretation of *Halper* was "both contrary to the decision itself and would create an unworkable rule inconsistent with well-established precedent."[95] Yet, just one year later in *Hudson*, Justice Rehnquist and the majority adopted Stevens' reading of *Halper* and used it to conclude that the rule in *Halper* was unworkable.[96] While this inconsistency is not fatal to the holding,[97] it does point to a weakness in the *Hudson* Court's reasoning when considering past precedent, and thus weakens the credibility of the Court on this first rationale for disavowing *Halper*.

The *Hudson* Court's second attack on the *Halper* decision was that the *Halper* Court improperly looked to the sanctions actually imposed by the statute. In other words, *Halper* used an as applied approach.[98] While the *Hudson* Court chose the right target by attacking this issue, it used the wrong gun. The *Hudson* Court essentially made a procedural argument: with an as applied approach, when a civil sanction follows a criminal sanction, a court will not be able to determine whether the civil sanction is punitive until after the sanction has been imposed, which means after the civil proceeding. According to the *Hudson* Court, this goes against the notion that the Double Jeopardy Clause prevents the government from even "attempting a second time to punish criminally."[99] While this argument is valid, it invites misinterpretation, and, as pointed out by Justice Stevens in his concurrence, it is irrelevant to the outcome of *Hudson* because in that

93. *Id.* at 284, n.2. For specific discussions of the ramifications and reasons behind the *Ursery* decision, *see* Sean M. Dunn, Note, United States v. Ursery: *Drug Offenders Forfeit Their Fifth Amendment Rights*, 46 AM. U. L. REV. 1207 (1997); Patrick S. Nolan, Comment, *Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions After* United States v. Ursery, 80 MARQ. L. REV. 1081 (1997); J. Andrew Vines, Note, United States v. Ursery: *The Supreme Court Refuses to Extend Double Jeopardy Protection to Civil* In Rem *Forfeiture*, 50 ARK. L. REV. 797 (1998).

94. *See Ursery*, 518 U.S. at 306 (Stevens, J., dissenting).

95. *Id.* at 284, n.2.

96. *Hudson*, 522 U.S. at 101-02.

97. In fact, Justice Stevens raised this point in his concurrence. "Having just recently emphasized *Halper's* narrow rule in *Ursery*, it is quite odd for the Court now to suggest that its overbreadth has created some sort of judicial emergency." *Id.* at 109 (Stevens, J., concurring).

98. *See* id. at 101.

99. *Id.* at 102 (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1988)).

case the criminal prosecution occurred after the civil sanction.[100] Also, does the fact that a civil sanction occurs before a criminal sanction make an as applied approach permissible because the problem illuminated in *Hudson* is no longer applicable? From the explicit holding of *Hudson* the answer is no,[101] but as will be explained, a more profound reason exists for disallowing an as applied approach than just the chronological and procedural aspects of double jeopardy, which may or may not apply to a certain set of circumstances.

The *Hudson* Court's last attack on *Halper* was that the concerns raised in *Halper,* that the remedy involved was not rationally connected to the damages incurred by the government, are addressed by other constitutional provisions.[102] The Court cited the Due Process Clause[103] and the Equal Protection Clause[104] as protecting individuals from irrational sanctions.[105] The *Hudson* Court also cited the Eighth Amendment[106] as protecting individuals against excessive fines.[107] The *Hudson* Court concluded that because these protections are in place, any additional protection afforded by the Double Jeopardy Clause is "more than offset by the confusion created by attempting to distinguish between punitive and nonpunitive penalties."[108]

There are two major problems with this last attack on *Halper* by the *Hudson* Court. First, the analysis focuses on whether the Double Jeopardy Clause prevents certain civil sanctions. Regardless of whether that analysis is "confusing" or not, if the Double Jeopardy Clause affords any additional protection for individuals, it mandates enforcement against certain actions by the government if those actions constitute double jeopardy. In other words, the Court cannot refuse to enforce a constitutional provision, assuming, as the Court did, that it provides protection not found in other constitutional clauses, simply because the Court finds the analysis "confusing." Secondly, the Court's statement that it is confusing to attempt to distinguish between punitive and nonpunitive statutes is self-contradictory, as, regardless of whether the as applied approach or the on its face approach is used, whether a statute is punitive is *exactly* what is being

100. *Id.*, 522 U.S. at 109-10 (Stevens, J., concurring).

101. *Id.* at 96, 101.

102. *Id.* at 102-03.

103. U.S. CONST. amend. V.

104. U.S. CONST. amend. XIV, § 1.

105. *Hudson*, 522 U.S. at 103 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)).

106. U.S. CONST. amend. VIII.

107. *Hudson*, 522 U.S. at 103 (citing Alexander v. United States, 509 U.S. 544 (1993); Austin v. United States, 509 U.S. 602 (1993)).

108. *Id.* at 103 (quotations omitted).

determined. In fact, that is what the *Hudson* Court did in the remainder of the opinion.[109] Hence, a more realistic interpretation of the Court's statement is that an as applied approach, as advocated by the *Halper* Court, can lead to confusion. This misstatement by the *Hudson* Court is a prime example of careless judicial opinion writing.

The dismissal of *Halper* by the *Hudson* Court was an inherently flawed analysis. The *Hudson* Court gave three reasons for disavowing *Halper*, but each reason suffers from doctrinal, procedural, constitutional, and textual inconsistencies. However, having readopted the *Ward* test, the *Hudson* Court went on to consider the facts of the case before it, and found that the sanctions imposed by the federal banking statutes were not criminally punitive.[110]

In *Hudson*, there were four concurrences with the majority opinion,[111] two of which are of some importance to this Comment.[112] In his concurrence,[113] Justice Stevens criticized the Court for unnecessarily deciding the case on grounds with constitutional consequences,[114] for unnecessarily revisiting *Halper*,[115] for revising its previous decision in *Ursery*,[116] and for using a procedural double jeopardy issue as one of the bases for deciding this case.[117] The last two of Justice Stevens' criticisms support the conclusion stated above that there are some serious flaws in *Hudson's rationale* for readopting the *Ward* test, but

109. *See Hudson*, 522 U.S. at 103-05.

110. *Id.* at 105.

111. *Id.* at 106, 112, 115.

112. Justice Scalia wrote a concurring opinion, in which Justice Thomas joined, restating his position that the Double Jeopardy Clause does not protect against multiple punishments at all, but rather multiple prosecutions only. *See id.* at 106 (Scalia, J., concurring) (citing *Kurth Ranch*, 511 U.S. at 802-05). Justice Souter also wrote a concurring opinion, in which he warns that the "clearest proof" standard necessary to override congressional intent of a civil statute is contextual, and will vary depending on the facts of the case. *Id.* at 113-14 (Souter, J., concurring). In addition, Justice Souter warned that with the advent of more and more civil penalties, the clearest proof standard may be easier to reach than it has been in the past. *Id.* at 114 (Souter, J., concurring).

113. *Id.* at 106-12.

114. Specifically, Justice Stevens concluded that *Hudson* should have been decided on the grounds of *Blockburger v. United States*, 284 U.S. 299 (1932). *See Hudson*, 522 U.S. at 107 (Stevens, J., concurring).

115. Justice Stevens noted that instead of granting certiorari to consider possible error by the court of appeals, the Court acknowledged it was concerned about these novel double jeopardy claims arising in the wake of *Halper*. *See Hudson*, 522 U.S. at 108-09 (Stevens, J., concurring). Justice Stevens concluded that these concerns were not as significant as the Court suggested, as only one case has upheld one of these novel claims. *Id.* (Stevens, J., concurring) (citing E.B. v. Poritz, 914 F. Supp. 85 (D.N.J. 1996), *rev'd* sub nom., E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997)). He therefore concluded that there was no need to revisit *Halper*, and that the Court's decision to revisit *Halper* was "a rather lame excuse for writing a gratuitous essay about punishment." *Id.* at 110 (Stevens, J., concurring).

116. *Id.* at 109-10.

117. *Id.* at 109.

not necessarily in the *decision* to adopt the test.[118] A more contrasting concurrence was made by Justice Breyer, in which Justice Ginsburg joined.[119] Justice Breyer rejected the notion that courts are limited to an on its face evaluation of a statute, instead advocating that the rule of *Halper* should still apply and that an as applied approach is proper.[120] Nevertheless, even adopting an as applied approach, Justice Breyer found no double jeopardy violation from the facts of *Hudson*.[121] One point that was ignored by Justice Breyer, but not by commentators,[122] is that the majority in *Hudson* failed to account for the personal nature of the Double Jeopardy Clause as a protection of individual rights against the government. Indeed, these "human interests" seemed to be one of the main rationales behind *Halper*.[123]

In sum, even though the *Hudson* Court reached the correct conclusion to readopt an on its face approach,[124] it did so for reasons and with arguments that are vulnerable to attacks on multiple levels. The distinction between an as applied analysis and an on its face analysis is too important to be allowed to rest on a weak decision. The United States Supreme Court should reaffirm its holding in *Hudson*, but on different grounds. This opportunity presents itself after the Ninth Circuit's decision in *Young*.

D. Young *and the Refusal to Follow* Hudson

In *Young*, the double jeopardy issue, as articulated by the Ninth Circuit, was "whether the Washington [sexually violent predator] statute violates the ex post facto and double jeopardy clauses of the United States Constitution, because the statute's effect is punitive . . ."[125] It is important to remember that the challenge by Young

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118. Other commentators have made similar criticisms of the rationale behind *Hudson*. *See e.g.*, Troy D. Cahill, Note, *The Supreme Court's Decision in* Hudson v. United States: *One Step Up and Two Steps Back for Multiple Punishment Protection Under the Double Jeopardy Clause*, 33 WAKE FOREST L. REV. 439, 456-58 (1998).

119. *Hudson*, 522 U.S. at 115 (Breyer, J., concurring).

120. *Id.* at 116 (Breyer, J., concurring).

121. *Id.*

122. Cahill, *supra* note 118, at 457-59.

123. *See Halper*, 490 U.S. at 447.

124. Other commentators have applauded the results reached by *Hudson* for various reasons. *See e.g.*, Sardenga, *supra* note 66, at 146-48 (asserting that an on its face approach is more reliable and efficient than the as applied analysis of *Halper*); Amy B. Tate, *Recent Development Case,* Hudson v. United States: *Imposition of Civil and Criminal Penalties Not an Automatic Violation of the Double Jeopardy Clause*, 28 U. BALT. L.F. 27, 28 (1998) (concluding that the *Hudson* decision continues the availability of civil sanctions that promote deterrence).

125. *Young*, 176 F.3d at 1198 (emphasis added). Young challenged the statute on substantive due process, Ex Post Facto Clause, and Double Jeopardy Clause grounds.

was to the statute itself, not to its implementation by an official.[126] In other words, Young was not asking that an official or agency be enjoined from applying the statute in a certain way. Instead, he asserted that the statute itself could not be applied at all because the way in which it was applied amounted to punishment.[127] The *Young* court, from the beginning of the opinion and despite the holding of *Hudson*, set out to analyze this issue using an as applied approach. The first sentence of the opinion reads, "[t]his case involves the constitutionality of Washington State's Sexually Violent Predator Statute as applied to petitioner Andre Brigham Young."[128]

There are essentially two arguments the *Young* court made to advance its as applied approach and to distinguish itself from *Hudson*. The first argument is based on the seminal sexual predator statute case, *Kansas v. Hendricks*.[129]

In *Hendricks*, the United States Supreme Court upheld Kansas's civil commitment statute as nonpunitive, and therefore determined that it was not in violation of the Ex Post Facto Clause or the Double Jeopardy Clause.[130] Because Washington's statute was modeled on, and is very similar to, the Kansas statute, the *Young* court conceded that Washington's statute was facially nonpunitive.[131] The *Young* court held, however, that *Hendricks* did not preclude an as applied method of analysis, and, in fact, the *Young* court claimed that both the majority and concurring opinions in *Hendricks* looked to conditions of confinement, and therefore used an as applied approach.[132]

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126. *See Young*, 176 F.3d at 1198-99.

127. *See id.*

128. *Id.* at 1198. *See also id.* at 1199 ("The linchpin of this case is whether the Washington statute, as applied to Young, is punitive . . ."). Therefore, if Young's confinement pursuant to the Washington statute is punitive, then the statute, as applied to Young, violates the ex post facto and double jeopardy clauses of the United States Constitution. *Id.*

129. Kansas v. Hendricks, 521 U.S. 346 (1997).

130. *Id.* at 367-71. Statutes like the one in *Hendricks* are an extremely political and emotional issue, thus it was no surprise that the reactions to *Hendricks* were swift and severe. For criticism of the decision, *see generally* Rollman, *supra* note 4; Andrew D. Campbell, Note, Kansas v. Hendricks: *Absent a Clear Meaning of Punishment, States Are Permitted to Violate Double Jeopardy Clause*, 30 LOY. U. CHI. L.J. 87 (1998); Jeffrey R. Glovan, Case Note, *"I Don't Think We're in Kansas Anymore, Leroy":* Kansas v. Hendricks *and the Tragedy of Judicial Restraint*, 30 MCGEORGE L. REV. 329 (1999); Hirtz, *supra* note 4; Beverly Pearman, Note, Kansas v. Hendricks: *The Supreme Court's Endorsement of Sexually Violent Predator Statutes Unnecessarily Expands State Civil Commitment Power*, 76 N.C. L. REV. 1973 (1998). For positive treatment, *see* Todd M. Grossman, Comment, Kansas v. Hendricks: *The Diminishing Role of Treatment in the Involuntary Civil Confinement of Sexually Dangerous Persons*, 33 NEW ENG. L. REV. 475 (1999).

131. *Young*, 176 F.3d at 1198.

132. *Young*, 176 F.3d at 1199 (citing *Hendricks*, 521 U.S. at 361-63, 367-69, 371).

This statement by the *Young* court represents a profound and inexplicable misreading of *Hendricks*. In the passages cited by the *Young* court,[133] the *Hendricks* Court only once examines how the statute in question was actually applied to the committed person, Leroy Hendricks.[134] The rest of the analysis, dealing with whether the statute was punitive, makes references time and again to the statute on its face.[135] The one time the Court delves into the actual conditions of Hendricks' confinement, its inquiry is regarding the treatment Hendricks received.[136] The clear holding of this section, however, is that the act itself, by providing treatment, is rendered nonpunitive:

> By furnishing such treatment, the Kansas Legislature has indicated that treatment, if possible, is at least an ancillary *goal of the Act*, which easily satisfies any test for *determining that the Act is not punitive*.[137]

It is the nature of the statute, not the statute as applied to Hendricks, that is key to the Court's analysis. Even if one were to accept the *Young* court's summary of *Hendricks* as an as applied case, *Hendricks* was decided before *Hudson*, and thus, the *Young* court should have been strongly discouraged from engaging in an as applied analysis.

This leads to the second argument that the *Young* court made to rationalize its as applied approach. *Young* distinguishes *Hudson* in a footnote, stating "[w]hereas Hudson involved monetary penalties and occupational disbarment, . . . this case involves confinement. In cases considering the question whether confinement is criminal or civil, the Supreme Court has always looked to the actual conditions of confinement."[138] This cursory dismissal of the binding *Hudson* decision is unjustified on three levels. First, *Hudson* did involve confinement.[139] Second, the *Young* court cites three cases[140] to support the view that the United States Supreme Court has always looked to the actual conditions of confinement to determine whether a statute is civil or criminal. However, these three cases do not yield the results the *Young*

133. *See Hendricks*, 521 U.S. at 361-63, 367-69, 371.

134. *Id.* at 367-68.

135. *Id.* at 361-69.

136. *Id.* at 367-68.

137. *Id.* at 369, n.5 (emphasis added).

138. *Young*, 176 F.3d at 1199, n.4 (citations omitted).

139. Only on the subsequent criminal indictment, not at the first OCC administrative proceedings; the defendants in that case were facing possible confinement for their alleged crimes. *Hudson*, 522 U.S. at 97-98.

140. *Young*, 176 F.3d at 1199, n.4 (citing *Hendricks*, 521 U.S. at 361-67; Allen v. Illinois, 478 U.S. 364, 373-74 (1986); Bell v. Wolfish, 442 U.S. 520, 535-39 (1970)).

court claims, as none of them determine the punitive nature of a statute as applied to an individual.[141] Lastly, even if these cases had supported the *Young* court's claim, the constitutional protections of double jeopardy do not change because the punishment being inflicted is confinement. In other words, the Double Jeopardy Clause should apply with equal force regardless of whether the second punishment is confinement; confinement is merely one factor to consider in determining whether the statute in question is punitive.[142]

Confinement has never been dispositive of the proper approach to take when determining whether a statute is criminally punitive. Though the *Allen* court, which considered a sexual predator law similar to the one in *Young*, said it "might well be a different case" if the civil confinement was essentially identical to normal criminal confinement without any psychiatric care, *Allen* still does not stand for the proposition, as the *Young* court claimed, that an as applied approach is always used if confinement is involved in a double jeopardy claim.[143] The holding of *Allen* clearly relies on an on its face analysis.[144] Even after stating an as applied approach might be appropriate, the *Allen* Court states, "counsel for the State assures us that *under Illinois law* sexually dangerous persons must not be treated like ordinary prisoners."[145] Thus, while the Court intermixes an as applied approach and an on its face approach in one section of the opinion, this does not change the rest of the opinion, which delves into pure statutory construction and does not support the interpretation of the *Young* court.

After the panel decision in *Young*, the State of Washington moved for a rehearing *en banc* before the Ninth Circuit. Its motion was denied.[146] Consequently, the case was remanded to the district court for an evidentiary hearing on whether the statute, as applied to Young, was punitive.[147] The *Young* case presents a prime opportunity for the United States Supreme Court to make clear why an as applied approach is impermissible. Specifically, the Court should use the

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141. As discussed previously, the analysis in *Hendricks* was an on its face analysis, with only slight attention paid to the actual conditions of confinement and even that being tied back into an on its face analysis. *See Hendricks*, 521 U.S. at 361-67. The court in *Allen v. Illinois* examined whether conditions were punitive, but only in the abstract. A careful reading of the passage cited by the *Young* court reveals that the *Allen* Court did not analyze the statute as applied to the petitioner, but in fact analyzed its objective effects on all inhabitants. *See* 478 U.S. at 373-74. The passage cited by the *Young* court from *Bell v. Wolfish* likewise has no as applied confinement analysis; it is entirely an on its face analysis. *See Bell*, 441 U.S. at 535-39.

142. *See infra* pp. 113-14.

143. *Allen*, 478 U.S. at 377.

144. *See id.* at 373-74.

145. *Id.* at 374 (emphasis added).

146. Young v. Weston, 192 F.3d 870, 872 (9th Cir. 1999).

147. *Id.* at 877.

Young case to articulate how an as applied approach allows the executive branch to determine the punitive/nonpunitive nature of a statute by the way in which it implements a statute. Because of this encroachment into the legislative power, as well as the consequential separation of powers concerns the as applied approach raises, the United States Supreme Court should overturn the Ninth Circuit's decision to adopt an as applied approach in double jeopardy cases and mandate an on its face approach.

While the United States Supreme Court is the final decision-maker on separation of powers issues pertaining to the federal constitution, the same is not true for state constitutions. Unlike *Halper* and *Hudson*, *Young* involves the implementation of a state statute by a state executive branch, and thus, any separation of powers violations will be in reference to the Washington State Constitution. Whether the principles that the United States Supreme Court should lay out in the *Young* case apply to a state constitutional scheme will ultimately be the decision of the state courts. This does not mean, however, that the federal courts are precluded from making these kinds of analyses. Federal courts can still follow the general rule that as applied approaches allow for unconstitutional as applied vetoes by allowing executive branches to make a law punitive through their actions in applying it. Whether this general principle, which should be adopted by the U.S. Supreme Court in *Young*, will apply under a certain state's constitution and render the as applied approach impermissible is a question of law that changes in each state. However, the federal courts are capable of making this analysis, and after laying down the general rule in *Young*, the United States Supreme Court should either perform this analysis under the Washington Constitution or remand the case to the Washington State Supreme Court for its determination of whether an as applied approach violates the separation of powers principles incorporated into the Washington Constitution. Either way, the principle that must be invoked is the same. An as applied approach permits a violation of the separation of powers doctrine at both the state and federal level.

III. THE EVIL OF AN AS APPLIED APPROACH: SEPARATION OF POWERS

While the separation of powers concerns raised by an as applied analysis could apply equally to state and federal constitutions, for the sake of brevity, only the federal Constitution will be considered with any depth in this Comment. However, the principles that will be established can easily be transferred to specific state constitutions.

A. Basic Separation of Powers Principles

Nothing in the Constitution expressly dictates a separation of powers. Instead, a separation of powers is implicit in the way the Constitution is structured and in the way it sets out the roles of the different branches of government. The system of checks and balances outlined by the framers rests between two extremes. If the checks and balances are too weak, all the government's power flows to one branch.[148] On the other hand, the checks could stifle the practical operation of the government, causing it to collapse into "a heap of ineffectiveness and mutual recrimination."[149] Mindful of these concerns, the framers set out three branches that they hoped would achieve the dissemination of power desired without disabling the workings of an effective government.

For the purposes of this Comment, the most important grant of power in the Constitution is the veto power granted in Article I, Section 7. This power allows the President to veto a bill passed by Congress, which has been given certain legislative powers,[150] and prevents the bill's enactment into law unless the veto is overridden by a two-thirds vote of Congress. This veto power is independent and different from the rest of the "executive power" vested in the President by Article II, because the veto power[151] uniquely allows the President into the legislative realm.

The veto has not been the President's sole tool to prevent the enactment of laws. The President, through executive orders, has overridden laws passed by Congress, but only (properly at least) under the Property Clause[152] power. Outside of Property Clause legislation,

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148. *See* PETER M. SHANE AND HAROLD H. BRUFF, SEPARATION OF POWERS LAW, CASES AND MATERIALS 35 (1996).

149. *Id.*

150. U.S. CONST. art I, § 1.

151. This includes the pocket veto power contained in Article I, Section 7. *See* The Pocket Veto Case, 279 U.S. 655 (1929).

152. *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915). The precedential value of *Midwest Oil* has been consistently expanded beyond its holding. *Midwest Oil* rests on the principle that, since the laws passed by Congress were land laws under the Property Clause, they were not "of a legislative character in the highest sense of the term . . . but savor somewhat of mere rules prescribed by an owner of property." *Id.* at 474 (citing Butte City Water Co. v. Baker, 196 U.S. 126 (1905) (quotation marks omitted)). Because the laws involved in *Midwest Oil* were not "high" legislation, it was permissible for the executive to override them, especially with a long history of congressional acquiescence. *See id.* at 470-74. However, many judges have ignored this distinction between proprietary laws under the Property Clause, and normal, "high" legislation under Article I, and have subsequently cited *Midwest Oil* incorrectly for the proposition that historical congressional acquiescence allows an executive to override any law. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power' . . .

however, the federal Constitution limits the President's check on Congress to the veto, the procedural aspects of which are explicitly stated in Article I, section 7. Adding a de facto as applied veto to this enumerated veto power, extends the executive power into legislative power beyond these carefully prescribed limits, offending the separation of powers principles of the Constitution. The details of this thesis are explained in the next subsection.

B. How an As Applied Approach Violates Separation of Powers Principles

In an on its face approach, a court examines what the legislature has written and determines the punitive/nonpunitive nature of a statute from that language. With an as applied approach, the analysis goes further. An as applied approach examines how a statute is applied to an individual, but ignores the issue of who does the applying. Many statutes are administered by an executive agency.[153] If an as applied approach is allowed, an otherwise constitutional statute could be struck down as applied to an individual because of the way an executive agency administered the statute.

This is an as applied veto. The executive can make a law unconstitutional as applied to an individual through the implementation of the statute. But unlike other vetoes, the legislature has no binding means by which to override the executive's application.

Executives incorrectly administer statutes all the time. Why does this specific double jeopardy issue raise separation of powers concerns? First, when executives implement statutes, normally the punitive/nonpunitive *nature of the statute* is not legally changed. Second, the rational remedy for an executive's violation of a constitutional right is either a lawsuit for damages, assuming no executive immunity, or an injunction enjoining the executive from continuing to administer the statute in an unconstitutional manner.[154] A litigant who argues for an as applied approach is not asking for these results. Instead, the litigant is asking the court to determine the punitive/nonpunitive nature of the statue by examining how an executive agency administers the

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Such was the case of [*Midwest Oil*]."); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (citing *Midwest Oil* and Justice Frankfurter's concurrence in *Youngstown* for the proposition that acquiescence by Congress can give the president power in that area of acquiescence).

153. In the case of *Young*, the Washington Sexually Violent Predator Statute is administered by the State Department of Social and Health Services, which runs the commitment center for sexual predators. See WASH. REV. CODE § 71.09.060(1) (1994); *see also In re Young*, 122 Wash. 2d at 12-13, 867 P.2d at 993.

154. Indeed, Richard Turay did get an injunction in federal court forcing the SCC to provide adequate care and treatment. *See* Turay v. Weston, No. C91-664WD (W.D. Wash. 1994).

statute. This is neither a rational nor a constitutional approach, as it represents an extension of executive power over the legislature because the executive is allowed to dictate the nature of a law passed by the legislature.

C. *Application to* Halper, Hudson, *and* Young

As mentioned earlier, Andre Young is challenging the constitutionality of Washington's Sexually Violent Predator Statute as applied to him.[155] This statute was held to be facially compliant with the Double Jeopardy Clause by both the Washington Supreme Court[156] and, in discussing the analogous Kansas statute, the United States Supreme Court.[157] In passing the statute, the Washington Legislature specifically mandated that predators who are involuntarily civilly committed must receive "adequate care and individualized treatment."[158] When one considers the allegations made by Young regarding the conditions of his confinement (the statute as applied to him), it becomes clear that he is not attacking *the statute* as applied to him, but is in fact attacking *the way* the statute is being applied.[159] His complaints are, in effect, that he is not receiving adequate care and individualized treatment, even though the statute mandates such care and treatment.[160]

What makes *Young* remarkable is that the executive is administering the statute, either negligently or intentionally, against the mandate of the statute itself. While this kind of direct disobedience to a statute is not necessary to invoke a separation of powers rationale for disavowing an as applied approach, it makes for an even more striking case that the executive should not be allowed to dictate a statute's constitutionality under the Double Jeopardy clause. Under the Ninth Circuit's principles in *Young*, however, this is exactly what could happen.

It is easy to demonstrate how the Ninth Circuit's holding could lead to preposterous results. Imagine a civil law requiring drunk drivers, after their criminal punishment, to have their driver's licenses changed to a special color at their local police station. Imagine also that the law stated specifically that the police were not to intimidate, harm, touch, or punish these people in any way. Felon X, after being convicted of drunk driving, goes down to the police station and gets

155. *Young*, 176 F.3d at 1198.
156. *In re* Young, 122 Wash. 2d 1, 24, 857 P.2d 989, 999 (1993).
157. *Hendricks*, 521 U.S. at 371.
158. WASH. REV. CODE § 71.09.090(2).
159. *See Young*, 176 F.3d at 1200-01.
160. *See id.*

beat up by the police. The obvious remedy in this kind of case is either to sue the police for damages or to get an injunction against the police, ordering them to not administer the statute in a punitive manner. Under an as applied approach, however, the felon could claim that, as applied to him, this law is unconstitutional because it violates his double jeopardy rights and inflicts punishment on him for a second time. If a court adopted the as applied approach and found that the statute was applied punitively, the court in this hypothetical would have to prevent the application of this statute to the defendant. In other words, the defendant would be released from his obligation to change his license to a certain color because the law mandating this color change would be unconstitutionally punitive as applied to him. This may seem outlandish, but this is exactly what is happening in *Young*. The executive branch is violating the mandates of the Washington Sexually Violent Predator Statute, and the Ninth Circuit is allowing this violation to dictate the constitutionality of the statute itself as applied to an individual.

Although the difference between litigating to invalidate the statute as applied to an individual and suing to prevent unconstitutional application of the statute by an executive may seem slight, it is in fact monumental. If courts allow an as applied challenge to a statute and the statute is found to violate the Double Jeopardy Clause, the statute can no longer be applied. In our hypothetical, the drunk driver would not have to get his license changed; in a case like *Young*, the sexual predator would be released. If courts do not allow an as applied challenge, the right to litigate remains, but rather than seeking to have the statute declared unconstitutional, a litigant must sue the executive for damages, or, assuming immunity, an injunction against administering the statute in an unconstitutional way. This is the proper way to protect the "human interests" behind the Double Jeopardy Clause, as well as to safeguard the legislative domain from an executive's unconstitutional as applied veto.

The Felon X hypothetical demonstrates how an as applied approach is dubious because it mandates that a statute no longer be applied at all to a given defendant. However, to further clarify the separation of powers issue, another hypothetical is useful. Imagine that the statute in *Young* (mandating adequate care and treatment) was passed by the Washington legislature, but was then vetoed by the Governor. Imagine that the veto was overridden by the legislature, and the statute became law. Now, imagine a scorned Governor directing the executive agency that administers the statute to do so in an unconstitutional way so as to inflict punishment. What is the

plaintiff's remedy? With an as applied approach, a litigant can ask that the court declare the statute unconstitutional as applied to him. Assuming similar facts pertaining to every individual committed under the statute, and assuming every individual at the SCC will try to litigate his or her way out of involuntary commitment, it is not inconceivable that everyone at the SCC could be released if the conditions of their confinement are deemed punitive. Thus, the law will have been rendered entirely ineffective—which is exactly what the Governor wanted when he vetoed the law originally. Although the law technically remains on the books, the manner in which the executive has administered the law has, in essence, vetoed the law as applied to every individual to whom the law applies. This result allows an executive to side-step normal veto procedures and consequentially provides for an extension of executive power beyond its prescribed limits, whether in the United States Constitution, or, by analogy, in a state constitution.

It is not difficult to see why this creates such a problem in the sexual predator context when the sexual predator is released. But the principle of allowing an executive to administer a statute in such a way as to veto a law applies to most cases where an as applied approach is used in the double jeopardy context. This can be demonstrated by reexamining *Hudson* and *Halper* in light of the separation of powers concerns raised by an as applied approach.

Recall that in *Hudson*, the Office of the Comptroller of the Currency (OCC), an executive agency,[161] first levied *civil* fines against three people for various banking law violations.[162] The government then indicted the same people for the same acts under federal *criminal* statutes.[163] The double jeopardy issue in the case turned upon whether the initial fine by the OCC was punitive.[164]

Under an as applied approach, the court would have determined the punitive or nonpunitive nature, and thus the constitutionality of the civil fine, based on whether, as applied to the defendants, the fine was punitive. Simply put, the OCC could have made the civil federal banking laws punitive as applied if the fine had been too high. This, in turn, would have prevented any subsequent criminal penalty.

While the order of the proceedings in *Hudson* distinguishes it slightly from *Young*, the unconstitutional result is the same. In *Young*, the assessment of the civil law as punitive makes the civil law inappli-

161. The OCC is actually a bureau of the Department of the Treasury. *See* <http://www.occ.treas.gov/AboutOCC.htm> June 27, 2000.

162. *See Hudson*, 522 U.S. at 96-97.

163. *See id.* at 97-98.

164. *Id.* at 98.

cable, whereas in *Hudson*, a determination that the fine was punitive would have made the criminal law inapplicable. Though the effected laws differ, the separation of powers violation remains. In a *Hudson*-type scenario, the court would allow the executive's implementation of civil law to, in effect, veto any similar criminal law that would apply to an individual.

One might argue that the facts in *Hudson*, and therefore the resulting difference in which law (criminal or civil) is affected, do not raise the same types of separation of powers concerns. This argument stems from the fact that executive branch officials, namely prosecutors, make discretionary decisions every day as to whether a criminal law will apply to a defendant. This argument is severely misguided. When a prosecutor decides not to prosecute, that decision is not binding. In other words, if the United States Attorney in *Hudson* decided not to indict, that decision would not make the criminal law inapplicable to defendants in the future. It is simply an exercise of prosecutorial discretion, which may or may not be changed as new evidence arises. When a court allows executive action to change a civil law into criminal law, however, the consequence is more permanent. The criminal law can no longer be applied at all due to the Double Jeopardy Clause's protections. This is not a decision of discretion. It is an as applied veto that is just as permanent as a normal veto and cannot be tolerated under our constitutional scheme.

The facts of *Halper* present an exception to this thesis. Instead of a situation where an executive applied a statute in such a way as to make a law punitive, in *Halper*, the penalty awarded to the government was fixed by the civil statute being imposed.[165] Unlike *Young*, and unlike the hypothetical decision of *Hudson* under an as applied approach, here the factual issue is not how the executive is applying the statute, but instead how the *fixed penalties imposed by the statute* affect the individual. Because the executive is not acting to change the nature of the statute in any way, separation of powers concerns are not raised by the specific facts of *Halper*. The executive is not operating with any discretion that could change the legal analysis involving the nature of the statute.

In instances where an executive's acts do not change the nature of a statute, is an as applied approach permissible? No. Here is where the reasons articulated in *Hudson* come into play. It must be remembered and emphasized that the issue in these cases is whether the statute being imposed is criminally punitive. For all the reasons articulated earlier, this is purely an issue of statutory interpretation.

165. *Halper*, 490 U.S. at 438 (citing the civil False Claims Act, 31 U.S.C. §§ 3729-31).

Regardless of how proportionate or disproportionate a fine or judgment may be, the Double Jeopardy Clause's protections are only invoked by a criminal penalty. The way a law relates to a certain set of facts should not change the nature of a statute from civil to criminal. Of course, this begs the question of what role the factual scenario in a case plays. In other words, should any regard be given to how a statute applies to an individual?

How a statute impacts an individual can affect the statutory analysis, but only in a general sense. Recall that the *Kennedy* factors are phrased in such a way as to examine a statute in general, not in reference to any individual case or set of facts.[166] What the facts of an individual case can do, however, is expand the scope of this analysis beyond what might be obvious from the words of a statute. For example, the sixth *Kennedy* factor examines whether there is an alternative purpose for the sanction that may be rationally assigned for it besides punishment, and the seventh considers whether the sanction appears excessive in relation to that purpose.[167] In *Halper*, the Court could have looked at the facts of that case and found that, as a general matter, the law in question could impose sanctions that appear excessive in relation to the other purposes of the law. The facts could add up to a possible conclusion about the general properties of the law that could enter, and even change, the statutory analysis, but again, only in a general sense. So in *Halper*, the Court could have looked at the statute and concluded that, since the fixed statutory penalty will always apply, and since Medicare frauds are usually for small amounts but at high frequency, the effect of this law is punitive despite the civil legislative label. The purpose of the analysis in the first place is to determine if a law is punitive, and even though certain facts may add more possibilities to consider when looking at the effects of a statute, these facts should only be construed in relation to the law in general, and should not mandate or dictate the outcome in a certain case unless they would do so in all cases.

Some questions remain. First, do not the "human interests" protected by the Double Jeopardy Clause innately call for an as applied approach? In other words, the Double Jeopardy Clause protects an individual's rights, and therefore, the only way to assess those rights is to look at the facts of the actual case. Second, as applied approaches are commonly used in many other areas of constitutional law. What makes them impermissible here and yet permissible in other constitutional contexts? I will start with the first question.

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166. *See infra* pp. 113-14.

167. *See Kennedy*, 372 U.S. at 168-69.

To best examine the human interests protected by the Double Jeopardy Clause, it is useful to first recall the three types of abuses the Clause protects against and then see which branch of government is limited by the prohibition on those abuses. The first type of abuse is a second prosecution for the same offense after acquittal. The protection from this abuse is clearly a limitation on the executive because the executive has the discretion to decide when to prosecute. Similarly, the second prohibition, forbidding a second prosecution for the same offense after conviction, is also a limit on the executive for the same reason. The third prohibition, preventing multiple punishments for the same offense, constrains the legislature from passing laws that inflict civil penalties that are, in practicality, criminal punishments. Indeed, because this third prohibition limits the legislature, it has raised questions as to whether the Double Jeopardy Clause really protects against multiple punishments at all.[168]

An on its face approach is perfectly consistent with the protections against this third abuse. Since it is a limit on the legislature, the analysis focuses solely on what the legislature has done. However, an as applied approach also limits the executive because what the executive does then determines if the statute is punitive, and thus, applicable to an individual. The problem with extending the third prohibition on abuse to limit the executive is that the executive is already limited. The executive, generally, is bound to execute the laws that are enacted. The human interests protected by this prohibition against multiple punishments are already protected by the bounds of (1) the legislature passing a law that is nonpunitive, and (2) the executive following its mandate to enact the law according to the terms of the law and the Constitution. An on its face approach secures both these bounds. A court can either declare that the statute is punitive on its face, or the litigant can ask the court to enjoin the executive from applying the law in a punitive manner. Extending the protections of this third prong of double jeopardy to limit the executive is unnecessary, and, as shown above, it enables the executive to use an as applied veto against the will of the legislature.

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168. *See Hudson*, 522 U.S. at 106 (Scalia, J., concurring). *See also Kurth Ranch*, 511 U.S. at 798-98 (Scalia, J. dissenting) 'To be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions . . . The view that the Double Jeopardy Clause does not prohibit multiple punishments is, as Justice Frankfurter observed, 'confirmed in history. For legislation . . . providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional prosecution, and the other a . . . civil action . . . was quite common when the Fifth Amendment was framed by Congress.'" *Id.* (citations omitted)).

The second question concerns the distinction between an as applied challenge in the double jeopardy context and other as applied challenges. It is important to restate what a challenge like this will claim: because the executive *is acting* unconstitutionally, this law cannot be applied. Under a normal as applied challenge *the nature of the law* is not the issue. Thus, if the executive administers the statute unconstitutionally, the litigant can sue to have the executive administer it in a constitutional way or to prevent the statute from applying to the litigant at all. This is the normal type of as applied challenge.

What makes the as applied challenge different in double jeopardy cases is that the issue is not whether the executive *is acting* punitively within the bounds of the statute, but rather whether *the statute itself* is punitive because of the executive's actions. As described earlier, the prohibition against multiple punishments protects individuals from the legislature passing laws that impose two punishments for the same offense. The essential question is not whether certain acts are punitive, but instead whether the law itself is punitive. An as applied challenge in this context takes the way in which an executive administers a statute and uses that as the test to see whether the statute itself is punitive. A normal as applied challenge does not affect the nature of the law passed by the legislature, but instead simply judges the *actions* of the executive and whether those actions, in and of themselves, are unconstitutional. The intent and civil or criminal label attached to the law are not changed by a normal as applied analysis. However, in a double jeopardy case where the issue is whether the legislature has passed a criminally punitive law, an as applied approach uses the executive's actions to change the punitive nature of a law. This is the essential difference between a normal as applied challenge and the as applied challenge presented in the *Young* decision.

IV. CONCLUSION

In examining the last 20 years of double jeopardy jurisprudence, it becomes clear that determining the punitive nature of a statute is strictly an on its face analysis. Why that should be the case, however, is not so clear. Even the decision in *Hudson* failed to firmly establish the rationale behind prohibiting as applied challenges. This led to the decision in *Young*, which is now ripe for reversal on separation of powers grounds.

The United States Supreme Court should use the *Young* case to lay out the true principles that make an as applied challenge constitutionally impermissible—mainly that it violates the separation of powers doctrine. This would firm up the Court's own jurisprudence in

this area. Under the approach advocated here, mistakes such as those made by the *Young* court could no longer occur, and in the future, statutes would always have their punitive or nonpunitive nature determined by the legislature, not by the acts or omissions of the executive.