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DOUBLE JEOPARDY PROTECTION FROM CIVIL SANCTIONS AFTER *HUDSON V.* *UNITED STATES*

Hudson v. United States, 118 S. Ct 488 (1997).

I. INTRODUCTION

In 1989, the Office of the Comptroller of Currency ("OCC"), a federal administrative agency, imposed monetary penalties and occupational debarment on three bank officials from Oklahoma for violating several federal banking statutes and regulations.¹ The officials were later indicted on criminal charges arising from the same conduct, and subsequently moved to dismiss the criminal charges, claiming that the Double Jeopardy Clause of the Fifth Amendment protected them from being punished in a second proceeding.² A United States District Court dismissed the indictments,³ but the Tenth Circuit Court of Appeals reversed and reinstated the indictments, relying on the double jeopardy test set forth in *United States v. Halper*, and finding that the actual fines imposed by the OCC in the civil proceeding were not so grossly disproportionate to the costs of the Government as to constitute punishment under the Court's double jeopardy standard.⁴

The Supreme Court affirmed the decision of the Tenth Circuit, holding that the civil sanctions imposed on the bankers were not "criminal punishment" in the sense required to trigger the protection of the Double Jeopardy Clause.⁵ In doing so,

¹ See *Hudson v. United States*, 118 S. Ct. 488, 492 (1997), *aff'g* 92 F.3d 1026 (10th Cir. 1996).

² See *id.*

³ See *United States v. Hudson*, 879 F. Supp. 1113 (W.D. Okl. 1994), *rev'd*, 92 F.3d 1026 (10th Cir. 1996), *aff'd*, 118 S. Ct. 488 (1997).

⁴ See *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), *rev'g* 879 F. Supp. 1113 (W.D. Okl. 1994), *aff'd*, 118 S. Ct. 488 (1997). See *United States v. Halper*, 490 U.S. 435, 448 (1989), *abrogated by* 118 S. Ct. 488 (1997).

⁵ See *Hudson*, 118 S. Ct. at 496.

the protection of the Double Jeopardy Clause.⁵ In doing so, however, the Court "disavow[ed] the method of analysis used in *United States v. Halper* and reaffirm[ed] the previously established rule exemplified in *United States v. Ward*."⁶

This Note addresses the extent to which an individual may hope to be granted double jeopardy protection from civil penalties assessed by the State. Part II outlines some basic principles underlying the double jeopardy doctrine, and the development of the doctrine through the case law. Part III describes the facts and procedural history of the *Hudson* case. Part IV summarizes the opinions of the Court in the *Hudson* case, and Part V concludes with some thoughts on the implications of the *Hudson* decision for the interests protected by the Double Jeopardy Clause.

II. BACKGROUND

A. THE FUNDAMENTALS OF THE DOUBLE JEOPARDY DOCTRINE

The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."⁷ The philosophy underlying the Clause is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."⁸ Because double jeopardy protection was thus intended to protect the individual from the tyranny and power of the government, it does not pro-

⁵ See *Hudson*, 118 S. Ct. at 496.

⁶ *Id.* at 491.

⁷ U.S. CONST. amend. V. The Court clarified the meaning of "the same offense twice" in 1932 in *Blockburger v. United States*, explaining that "[a] single act may be an offense against two statutes; and if the statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (quoting *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

⁸ *Hudson*, 118 S. Ct. at 499 (Stevens, J., concurring in judgment) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

tect individuals from private suits brought by non-government parties.

The Supreme Court has recognized that the Double Jeopardy Clause protects individuals from being criminally prosecuted more than once for the same offense.⁹ Protection from subsequent or "successive" criminal prosecutions extends to any party who has already been the subject of a criminal prosecution for the same offense, regardless of the result of the first criminal prosecution.¹⁰ This protection is termed protection from "multiple prosecutions."

The Court has also concluded that the Double Jeopardy Clause protects individuals from the imposition of "multiple *punishments*" for the same offense.¹¹ A constitutional prohibition on multiple punishments suggests that *civil* sanctions imposed by the government (as well as criminal sanctions) are subject to the Double Jeopardy Clause.¹² However, there is dissension on this point on the Court—Justices Scalia and Thomas have criticized the multiple punishment doctrine.¹³ Other scholars have noted that the multiple punishment doctrine is problematic from a textual perspective¹⁴ and based on the legislative history surrounding the ratification of the Constitution.¹⁵

⁹ See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

¹⁰ See *id.*

¹¹ See *id.*

¹² See Patrick S. Nolan, Comment, *Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions After United States v. Ursery*, 80 MARQ. L. REV. 1081, 1081 (1997).

¹³ Most recently in the *Hudson* decision, Justices Scalia and Thomas indicate their disagreement with the notion of a prohibition against multiple punishments. See *Hudson v. United States*, 118 S. Ct. 488, 496-97 (1997) (Scalia, J., dissenting), *aff'g* 92 F.3d 1026 (10th Cir. 1996). See also *United States v. Ursery*, 518 U.S. 267, 297 (1996) (Scalia, J., concurring in judgment). Justice Scalia has provided a detailed analysis and criticism of the multiple punishment doctrine. See *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798-805 (1994) (Scalia, J., dissenting). See also Nolan, *supra* note 12, at 1104-07.

¹⁴ For example, the text "twice put in jeopardy of life or limb" suggests a protection only from successive criminal punishments, not protection from a civil punishment (such as a monetary fine or seizure of property). See Brian L. Summers, Note, *Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition*, 56 OHIO ST. L.J. 1595, 1605 (1995).

¹⁵ Legislative history indicates that James Madison initially proposed the predecessor of the Double Jeopardy Clause, which stated that "[n]o person shall be subject,

The idea that the Double Jeopardy Clause protects against multiple punishments originated in *Ex Parte Lange*, in which the Supreme Court held that “[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.”¹⁶ Based on the facts of the case, however, critics have found fault with using *Ex Parte Lange* as foundation for a double jeopardy doctrine against multiple punishments, finding that justification for the resolution of the case more reasonably evolved from the Due Process Clause of the Fifth Amendment.¹⁷ However, since *Ex Parte Lange*, the Supreme Court has stated repeatedly that double jeopardy protection extends to both successive criminal prosecutions and other successive punishments.¹⁸

Arguing that double jeopardy protection prohibits only multiple prosecutions, and not multiple punishments, Justice Scalia noted in *Kurth Ranch* that the Court has never found double jeopardy an impediment to imposing multiple punishments in strictly criminal proceedings.¹⁹ He concluded that government-imposed punishments are adequately controlled by other constitutional provisions; for example, “the Due Process

except in cases of impeachment, to more than one punishment or one trial for the same offence.” Summers, *supra* note 14, at 1607-08 (alteration in original). The Senate revised the text to read that no person shall “be twice put in jeopardy of life or limb by any public prosecution.” *Id.* at 1608. Much of the Senate’s draft was incorporated into the Fifth Amendment as it exists today, and “only Madison’s initial draft as proposed in the House used the term ‘punishment,’ and the reference to multiple punishments for the same offense is nowhere to be found in the Senate version or the final wording that exists today.” *Id.* Justice Frankfurter has also suggested that legislation providing for criminal and civil sanctions for the same conduct was common during the drafting of the Fifth Amendment, and that the drafters would have specifically prohibited “multiple punishments” had this been their intent. *Id.* at 1609.

¹⁶ *Ex Parte Lange*, 85 U.S. 163, 168 (1873). See *Kurth Ranch*, 511 U.S. at 798-800 (Scalia, J., dissenting) (discussing *Ex Parte Lange* and multiple punishments).

¹⁷ *Ex Parte Lange* involved an individual sentenced to a year of imprisonment and a \$200 fine for stealing mail bags. See *Ex Parte Lange*, 85 U.S. at 164. The judge in the case was authorized by federal statute to sentence the defendant to either a fine or a prison term, and the petitioner pled for habeas corpus relief. See *id.* at 163. See also Summers, *supra* note 15, at 1610-12.

¹⁸ See *United States v. Halper*, 490 U.S. 435, 440 (1989), *abrogated by* 118 S. Ct. 488 (1997); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). See also Summers, *supra* note 14, at 1610.

¹⁹ See *Kurth Ranch*, 511 U.S. at 801 (Scalia, J., dissenting).

Clause²⁰ keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses²¹ place substantive limits upon what those legislative bounds may be."²²

Until 1989, the Supreme Court generally ignored the multiple punishment doctrine, relying chiefly on the multiple prosecution doctrine for its double jeopardy analysis.²³ While the Court did consider that imposition of a civil sanction could be barred by the Double Jeopardy Clause, it did so within the analytical framework that the civil sanction imposed was not "essentially civil" but "essentially criminal," and thus constituted an illegal second criminal prosecution.²⁴ Not until the late 1980's did the Court specifically invoke the prohibition against multiple punishments as an independent constitutional basis for a double jeopardy claim.²⁵

B. DOUBLE JEOPARDY DOCTRINE: FOCUSING ON THE PROBLEM OF "MULTIPLE PROSECUTIONS"

Prior to *United States v. Halper*,²⁶ the Supreme Court consistently used a statutory construction test to determine whether the imposition of a civil sanction could violate the Double Jeopardy Clause.²⁷ The statutory construction test was formulated in *Helvering v. Mitchell* in 1938.²⁸ In *Mitchell*, the Commissioner of Internal Revenue determined that Mitchell had attempted to fraudulently evade a tax payment, and notified Mitchell that he would be required to pay the deficiency as well as a penalty for

²⁰ No person "shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

²¹ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

²² *Kurth Ranch*, 511 U.S. at 803 (Scalia, J., dissenting).

²³ See Summers, *supra* note 14, at 1607.

²⁴ See *infra* notes 33-35, 45-46, 54, 60 and accompanying text.

²⁵ See Summers, *supra* note 14, at 1606. The *Halper* Court found that the prohibition against multiple punishments precluded imposition of a civil fine following a criminal punishment. See *infra* notes 69-88 and accompanying text. The Court further relied upon the multi-punishment doctrine for its decision in *Montana v. Kurth Ranch*. See *infra* notes 89-105 and accompanying text.

²⁶ 490 U.S. 435 (1989).

²⁷ See Summers, *supra* note 14, at 1596-97.

²⁸ 303 U.S. 391 (1938).

committing tax fraud.²⁹ Mitchell had previously been criminally indicted for tax evasion arising from his failure to submit the alleged deficiency and had been acquitted of all charges.³⁰ Mitchell claimed protection under the Double Jeopardy Clause, contending that the penalty assessed by the Commissioner of Internal Revenue was a *criminal penalty* intended to punish him for the allegedly fraudulent act.³¹

The Court indicated that “[u]nless this sanction was intended as punishment, so that the proceeding is essentially criminal,” the Double Jeopardy Clause would provide no bar to the civil sanction.³² The Court developed a statutory construction test to assess the “essential” nature of the civil sanction: if the sanction was provided for by a statute that was “civil in nature,” then double jeopardy protection would not extend to the civil proceeding.³³ Using the statutory construction test, the Court determined that the penalty imposed by the Commissioner of Internal Revenue was “civil” and thus a permissible action under the Double Jeopardy Clause.³⁴ The Court also distinguished sanctions which were “remedial” in nature from those which were “punitive” in nature.³⁵

The Court confirmed the validity of the statutory construction test in *United States ex rel. Marcus v. Hess* in 1943.³⁶ The petitioners in *Hess* were electrical contractors who were indicted for defrauding the government through collusive bidding.³⁷ They pleaded *nolo contendere*³⁸ and were fined \$54,000.³⁹ Following

²⁹ *See id.* at 395. The deficiency amounted to \$728,709.84, and the penalty for committing tax fraud was 50% of the deficiency. *See id.*

³⁰ *See id.* at 396.

³¹ *See id.* at 398.

³² *Id.* at 398-99.

³³ *Id.* at 399-404. The statutory construction test became the standard for the Court’s analysis of subsequent cases involving the applicability of double jeopardy protection to civil sanctions and proceedings. *See Summers, supra* note 14, at 1596-97.

³⁴ *See Mitchell*, 303 U.S. at 405.

³⁵ *See id.* at 399-401.

³⁶ *See* 317 U.S. 537, 549 (1943).

³⁷ *See id.* at 539.

³⁸ A plea of *nolo contendere* has a similar legal effect as a guilty plea, but unlike a guilty plea, a plea of *nolo contendere* may not be used against a defendant in a civil action based on the same actions. *See* BLACK’S LAW DICTIONARY 1048 (6th ed. 1990).

the filing of the criminal charges, a private plaintiff brought an action against the petitioners in the name of the United States under the civil prong of the False Claims Act.⁴⁰ A judgment was issued against the petitioners in the amount of \$315,000.⁴¹ The Third Circuit reversed the judgment, finding that the fraud in this case was not reached by the statute authorizing the *qui tam* action.⁴² Upon review of the decision by the Court, the respondents (the contractors) attempted to support the judgment of the Third Circuit by introducing independent grounds for its decision, including double jeopardy grounds.⁴³ Using the *Mitchell* analysis, the *Hess* court found that the statute at issue was intended to be remedial, and was therefore civil in nature.⁴⁴ As the civil sanction was "civil in nature," it did not constitute a second criminal prosecution, and therefore the respondents were afforded no protection under the Double Jeopardy Clause.⁴⁵ The Court also noted that while the penalty imposed by the False Claims Act⁴⁶ might exceed the costs to the government in a specific case, the civil remedy under the False Claims Act "does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered."⁴⁷

³⁹ See *Hess*, 317 U.S. at 545.

⁴⁰ See *id.* at 539. Subsections 3491 and 3493 of the False Claims Act permitted "any" person to bring a False Claims suit on behalf of the government. See *id.* at 540. "[W]here such a *qui tam* action is brought, half the amount of the recovery is paid to the person instituting the suit while the other half goes to the government." *Id.* A *qui tam* action is "an action brought by an informer, under a statute which establishes a penalty for the commission . . . of a certain act, and provides that the same shall be recoverable in a civil action, [with] part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

⁴¹ See *Hess*, 317 U.S. at 540. \$203,000 was for double damages and the remainder reflected a civil penalty of \$2,000 for each of 56 violations. See *id.*

⁴² See *id.*

⁴³ See *id.* at 548.

⁴⁴ See *id.* at 551-52. Note that the False Claims Act is the same piece of legislation at issue in the *Halper* decision, where the Court found that the statute was potentially punitive in effect. See *United States v. Halper*, 490 U.S. 435, 452 (1989), *abrogated by* 118 S. Ct. 488 (1997).

⁴⁵ See *Hess*, 317 U.S. at 548-52.

⁴⁶ The penalty for each violation was 1) \$2,000 and 2) double the amount of damages sustained by the government, plus, 3) the costs of suit. See *id.* at 540.

⁴⁷ *Id.* at 550.

Kennedy v. Mendoza-Martinez, decided in 1963, was not a double jeopardy case, but it played a major role in the development of the "civil sanction as punishment" doctrine by questioning whether statutes imposing forfeiture of citizenship were "essentially penal in character."⁴⁸ The Court recommended that when determining whether a particular sanction was "penal or regulatory" in nature,⁴⁹ the lower courts should consider:

(1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation 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.⁵⁰

The Court indicated that "these factors must be considered in relation to the statute on its face."⁵¹ The Court found that the statutes at issue in *Kennedy* had a punitive effect because their "primary function is to serve as an additional penalty for a special category of draft evader."⁵² In subsequent cases, the Court began to incorporate the factor list into its growing double jeopardy analysis.

In 1980, *United States v. Ward* established a two-part test under which all civil sanctions would be reviewed for "criminal" essence capable of invoking the protections of the Fifth Amendment.⁵³ Ward operated an oil drilling facility in Arkansas.⁵⁴ When he discovered an oil leak from his property into a tributary of the Arkansas River system,⁵⁵ Ward followed the Fed-

⁴⁸ 372 U.S. 144, 164 (1963).

⁴⁹ *Id.* at 168.

⁵⁰ *Id.* at 168-69.

⁵¹ *Id.* at 169.

⁵² *Id.* at 169-70.

⁵³ See 448 U.S. 242, 248 (1980). See *id.* at 253 for a direct reference to Double Jeopardy. Protections under the Fifth Amendment include the right to protection from self-incrimination, and the right to protection from double jeopardy. See also U.S. CONST. amend. V.

⁵⁴ See *Ward*, 448 U.S. at 246.

⁵⁵ *Id.*

eral Water Pollution Control Act regulations and reported the leak to the Environmental Protection Agency.⁵⁶ The Coast Guard subsequently assessed a civil penalty against Ward in the amount of \$500.⁵⁷ Ward appealed the penalty, claiming that the Fifth Amendment's protection from self-incrimination should protect him from being sanctioned for the leak.⁵⁸ In considering whether Ward was entitled to protection under the Fifth Amendment, the Court noted that certain constitutional protections, including protection against self-incrimination and double jeopardy, would apply only to individuals facing *criminal* penalties.⁵⁹ The Court then considered whether the *Ward* sanction was remedial (and not criminal) or punitive (and criminal).⁶⁰

The Court noted that in assessing the nature of a civil sanction, the first line of inquiry is whether the legislature "indicated either expressly or impliedly" that the sanction was intended to be civil in nature.⁶¹ The second question is whether a statutory scheme purported to be civil is "so punitive either in purpose or effect as to negate that intention."⁶² *Ward* established that while the *Kennedy* factors could be helpful in considering the second question, none of the factors would be dispositive on the question of whether a purportedly civil sanction should be deemed a criminal penalty.⁶³ The Court also noted that in regard to the

⁵⁶ *See id.*

⁵⁷ *See id.* at 246-47. The penalty was assessed under § 311(b) (6) of the Federal Water Pollution Control Act. *See id.* at 245.

⁵⁸ *See id.* at 247.

⁵⁹ *See id.* at 248. The Court considered whether a penalty might be "criminal enough" to trigger the Self-Incrimination Clause of the Fifth Amendment, without being "criminal enough" to trigger the protections of the Sixth Amendment, the Double Jeopardy Clause, or the other procedural guarantees "normally associated with criminal prosecutions." *Id.* at 253-54. The Court declined to consider a penalty "criminal" for one purpose and "civil" for another. *See id.* at 254.

⁶⁰ *See id.* at 248-51. Using the *Kennedy* factors, the Tenth Circuit had concluded that the statute authorizing the civil penalty was sufficiently punitive to intrude upon the Fifth Amendment's protection against compulsory self-incrimination. *See id.* at 247-48.

⁶¹ *Id.* at 248.

⁶² *Id.* at 248-49.

⁶³ *See id.* at 249.

second question, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."⁶⁴

The Court concluded that Congress had intended the Federal Water Pollution Control Act sanction to be a "civil" sanction, and that the prescribed use of funds collected under the statute suggested a remedial intent.⁶⁵ In the absence of significant evidence of punitive intent or effect, the Court determined that the penalty was truly civil in nature.⁶⁶

C. DOUBLE JEOPARDY ANALYSIS EXTENDED TO ADDRESS THE PROBLEM OF "MULTIPLE PUNISHMENTS"

Prior to 1989, the Court's double jeopardy analysis relied chiefly upon the existence of a constitutional prohibition against "multiple prosecutions."⁶⁷ The Court then changed course with *United States v. Halper* and expressly invoked double jeopardy protection from a civil sanction on the basis of the constitutional prohibition against "multiple punishments."⁶⁸ In particular, the Court unanimously held that a civil penalty, while being "civil in nature,"⁶⁹ could be so excessive in certain cases as to constitute a punishment within the purview of the constitutional protection against multiple punishments.⁷⁰ The facts of the *Halper* case are quite compelling and probably explain why the Court felt inspired to make this new leap.

Irwin Halper, the manager of a medical services organization, overcharged the federal government on sixty-five occasions for services rendered to patients enrolled in the Medicare program.⁷¹ Each of the sixty-five violations involved an overcharge

⁶⁴ *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

⁶⁵ *See id.* at 247, 254.

⁶⁶ *See id.* at 255.

⁶⁷ *See Summers*, *supra* note 14, at 1607.

⁶⁸ *See United States v. Halper*, 490 U.S. 435, 440-46 (1989), *abrogated by* 118 S. Ct. 488 (1997), for a discussion of the multiple punishment issue. *See also supra* notes 12-25 and accompanying text for a discussion of whether the Fifth Amendment actually prohibits multiple punishments.

⁶⁹ *Halper*, 490 U.S. at 441-42.

⁷⁰ *See id.* at 443. The Court explained that a civil sanction which could not rationally be said to compensate the government (the aggrieved party) for its loss could only be considered to constitute punishment. *See id.* at 448.

⁷¹ *See id.* at 437.

of approximately \$9; thus, the government was overcharged by approximately \$585.⁷² Halper was convicted of criminal charges under the False Claims Act, which prohibits "mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."⁷³ He was sentenced to two years in prison and fined \$5000.⁷⁴

The government subsequently brought a civil action against Halper under the civil prong of the False Claims Act, which prohibits "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved."⁷⁵ Under this prong, and during the period in which Halper was making the false claims, a violator was liable for \$2,000 for each instance of violation, in addition to an amount "equal to two times the amount of damages the Government sustains because of the act of that person, and costs of the civil action."⁷⁶ The lower courts refused to authorize the judgment against Halper dictated by the statute (\$130,000), and the government appealed the matter to the Supreme Court.⁷⁷

Agreeing that the civil component of the False Claims Act was intended to be civil in nature, the Court indicated that the "statutory construction" test was not dispositive in all cases and that "the labels 'criminal' and 'civil' are not of paramount importance" in double jeopardy analysis.⁷⁸ The Court emphasized that true protection from double jeopardy requires a focus on the *actual impact* of a sanction, rather than the statutory origin of the sanction.⁷⁹

⁷² See *id.*

⁷³ *Id.* (alteration in original). See 18 U.S.C. § 287 (1994).

⁷⁴ See *Halper*, 490 U.S. at 437.

⁷⁵ *Id.* at 438. See 31 U.S.C. § 3729(a) (2) (1994). See also *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

⁷⁶ *Halper*, 490 U.S. at 438 (citing 31 U.S.C. § 3729 (1982 ed., Supp. II) (amended in 1986 to require that the civil penalty be assessed at not less than \$5,000 and not more than \$10,000; requiring also a sum three times the damages suffered by the government, with some exceptions)).

⁷⁷ See *Halper*, 490 U.S. at 438-40.

⁷⁸ *Id.* at 447.

⁷⁹ See *id.* at 447-48.

The *Halper* Court held for the first time that a disproportionately large civil sanction could constitute a second punishment in violation of double jeopardy.⁸⁰ The Court indicated that a civil penalty imposed following the imposition of a criminal penalty had to be rationally related to the loss suffered by the government, and that a lack of proportionality would mean that the sanction “may not fairly be characterized as remedial, but only as a deterrent or retribution.”⁸¹ The Court remanded the case to the district court for consideration of an appropriate remedial civil penalty pending an evaluation of damages to the government.⁸²

Perhaps in an attempt to limit the scope of its new ruling, the Court attached several limitations to the newly-expanded double jeopardy protection. First, the Court described the *Halper* decision as a “rule for the rare case,” narrowly based on its own unique set of circumstances.⁸³ Second, the Court held that the government was not prevented “from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties” where the penalties were assessed *in the same proceeding*.⁸⁴ Third, the Court clarified that nothing in its opinion would preclude a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment.⁸⁵ Fourth, in his concurring opinion, Justice Kennedy emphasized that under *Halper* the government would not be precluded from charging a civil penalty where the amount of the civil penalty bears a rational rela-

⁸⁰ See *id.* at 449.

⁸¹ *Id.* at 449. See Nolan, *supra* note 12, at 1094.

⁸² See *Halper*, 490 U.S. at 452.

⁸³ *Id.* at 449.

⁸⁴ *Id.* at 450. Theoretically there would be less opportunity for abuse of power and harassment where all penalties were assessed against the individual in one forum. The Court stated that “[i]n a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature.” *Id.*

⁸⁵ This is “the O.J. Simpson question.” In other words, nothing would prevent a private plaintiff from bringing a suit for damages against an individual previously subjected to criminal prosecution for the same conduct. In the same vein, the Court declined to express an opinion as to whether a *qui tam* action brought by a plaintiff in the name of the United States could give rise to double jeopardy protection. See *id.* at 451.

tionship to the damages suffered by the government.⁸⁶ The majority opinion left to the trial court "the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment."⁸⁷ Despite these limitations, some commentators complained that *Halper* had opened the door to a broad new field of spurious double jeopardy claims.⁸⁸

The Court invoked the prohibition on multiple punishments again in *Department of Revenue of Montana v. Kurth Ranch* in 1994.⁸⁹ Some critics suggested that *Kurth Ranch* "confirmed the potentially broad scope of the *Halper* rationale for invalidating civil penalties that were imposed along with criminal sanctions."⁹⁰ The opinion expanded double jeopardy protection against imposition of multiple punishments by invalidating a state tax on marijuana, indicating for the first time that a tax could be considered a punishment under the double jeopardy doctrine.⁹¹

Montana law enforcement officials raided the Kurth ranch and confiscated a number of marijuana plants.⁹² After six members of the Kurth family pleaded guilty to drug charges,⁹³ the Montana Department of Revenue attempted to collect from them almost \$900,000 for a state tax imposed on the possession and storage of "dangerous drugs."⁹⁴ The Kurths contested the tax assessment and challenged the constitutionality of the tax in a bankruptcy court proceeding.⁹⁵ The bankruptcy court, relying on *Halper*, held that the tax assessment was intended to serve as deterrence and as a punishment, and that it was therefore a

⁸⁶ See *id.* at 452-53.

⁸⁷ *Id.* at 450.

⁸⁸ See generally, Sarah Jean Watterson, Note, *Putting the Halper Genie Back in the Bottle: Examining United States v. Ursery in Light of Halper, Austin, and Kurth Ranch*, 1997 BYU L. REV. 235, 247.

⁸⁹ See *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994).

⁹⁰ Nolan, *supra* note 12, at 1096. See Watterson, *supra* note 88, at 248.

⁹¹ See *Kurth Ranch*, 511 U.S. at 779, 784.

⁹² See *id.* at 771.

⁹³ See *id.* at 772. The guilty plea was subject to a plea agreement.

⁹⁴ *Id.* at 773.

⁹⁵ See *id.*

second punishment in violation of the Double Jeopardy Clause.⁹⁶

The *Kurth Ranch* majority started its inquiry by considering whether a tax could be termed punitive in nature, and thus potentially violative under the double jeopardy doctrine.⁹⁷ While noting that tax statutes most often serve a revenue-raising purpose,⁹⁸ the Court found that it had recognized in past cases the potential for a tax to become “a mere penalty with the characteristics of regulation and punishment.”⁹⁹ The Court considered the extent to which the Montana Dangerous Drug Tax deviated from a traditional tax, and found that a number of conditions suggested that the tax was intended to have punitive effect.¹⁰⁰ The Court found that the Dangerous Drug Tax had a “remarkably high” taxation rate,¹⁰¹ that the tax was conditioned on the commission of a crime and necessarily followed the arrest of an individual for possession of a “dangerous drug,”¹⁰² and that the tax was levied on property that the taxpayer no longer possessed.¹⁰³ The presence of these characteristics led the Court to conclude that the tax was properly characterized as punishment and therefore constituted an illegal second punishment for double jeopardy purposes.¹⁰⁴ The Court declined to consider whether the tax was an acceptable and proportionally reasonable civil penalty under the *Halper* test, finding that the method of tax assessment was far removed from serving the remedial purpose of addressing the state’s damages.¹⁰⁵

Opponents of the expanded double jeopardy protection were relieved to see the Court’s decision in *United States v.*

⁹⁶ *See id.*

⁹⁷ *See id.* at 778-79.

⁹⁸ *See id.* at 779-80.

⁹⁹ *Id.* at 779 (citing *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934) (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922))).

¹⁰⁰ *See Kurth Ranch*, 511 U.S. at 780-83.

¹⁰¹ *Id.* at 780. The court noted that while the market value for “shake” (the less valuable portions of the marijuana plant) was estimated to be \$200/lb, the tax on shake was assessed at \$1,600 per pound. *See id.* at 774 n.12.

¹⁰² *See id.* at 781.

¹⁰³ *See id.* at 783.

¹⁰⁴ *See id.* at 784.

¹⁰⁵ *See id.*

Ursery,¹⁰⁶ which some read as a reversal of the new direction taken in *Halper* and *Kurth Ranch*.¹⁰⁷ In *Ursery*, the Court affirmed past decisions making double jeopardy protection inapplicable to civil forfeitures,¹⁰⁸ finding that civil forfeitures imposed on the defendants would *not* constitute punishment implicating the Double Jeopardy Clause.¹⁰⁹ After officials discovered a marijuana manufacturing operation in Ursery's home, the government filed a civil forfeiture suit to claim the home.¹¹⁰ Shortly before he settled with the federal government on the civil forfeiture issue, Ursery was indicted for manufacturing marijuana.¹¹¹ He was subsequently convicted of criminal charges and sentenced to sixty-three months in prison.¹¹² Ursery appealed the criminal conviction on grounds that the criminal sentence constituted an impermissible second punishment under the Double Jeopardy Clause, theorizing that the civil forfeiture action should count as a first punishment.¹¹³ The Court of Appeals reversed Ursery's criminal conviction, concluding that protection under the Double Jeopardy Clause would issue for a criminal conviction following a forfeiture action.¹¹⁴ The Supreme Court consolidated Ursery's case with another case and granted certiorari to consider the applicability of double jeopardy principles to civil forfeitures.¹¹⁵

In deciding the case, the Court referred to a line of cases reviewing *in rem* civil forfeitures under the double jeopardy doctrine.¹¹⁶ The Court concluded that it had historically made clear

¹⁰⁶ 518 U.S. 267 (1996).

¹⁰⁷ See Watterson, *supra* note 88, at 252.

¹⁰⁸ See *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); see also *Ursery*, 518 U.S. 267 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972).

¹⁰⁹ See *Ursery*, 518 U.S. at 270-71.

¹¹⁰ See *id.* at 271. The government was entitled to file a civil forfeiture claim on Ursery's home because it played a part in the commission of a crime, i.e., it was the locus for a drug manufacturing operation. See *id.*

¹¹¹ See *id.* Ursery eventually paid \$13,250 to settle the forfeiture claim. See *id.*

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.* at 270.

¹¹⁵ See *id.* at 270-71.

¹¹⁶ See *id.* at 274-79.

that civil forfeitures would not constitute "punishment" under the double jeopardy doctrine.¹¹⁷ "*In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause."¹¹⁸ Finding that the courts of appeals were interpreting the *Halper* and *Kurth Ranch* decisions as a signal that all civil sanctions were to be considered under a new test, the Court distinguished those earlier decisions by noting that neither dealt with the subject of *Ursery*: the vulnerability of *in rem* civil forfeitures under the Double Jeopardy Clause.¹¹⁹ The Court noted that its position throughout history was that *in rem* civil forfeitures always have a remedial civil purpose, and thus do not offend the Double Jeopardy Clause.¹²⁰

The Court then addressed the facts of *Ursery* using the two-part test established in the *Ward* case and subsequent civil forfeiture cases.¹²¹ First, the Court determined that Congress had intended the forfeiture statutes to be remedial in nature.¹²² Second, the Court determined that the forfeitures in the *Ursery* case were not so punitive in form and effect as to transform them into punitive criminal sanctions for double jeopardy purposes.¹²³ In addition to considering the *Kennedy* factors, the Court considered the important nonpunitive goals served by the statute.¹²⁴ The Court found that the evidence fell far below the "clearest proof" necessary to show that proceeding was criminal, and held that "these *in rem* forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause."¹²⁵

In summary, the Court's interpretation of the double jeopardy doctrine prior to *Hudson* was evolving into a ban on multi-

¹¹⁷ See *id.* at 279.

¹¹⁸ *Id.* at 278.

¹¹⁹ See *id.* at 279-88.

¹²⁰ See *id.* at 274-78 (discussing *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931)).

¹²¹ See *id.* at 288.

¹²² See *id.* at 288-89.

¹²³ See *id.* at 290-92.

¹²⁴ See *id.* at 290-91.

¹²⁵ *Id.* at 292.

ple punishments. While the Court had determined that civil forfeitures would not be considered punishment for the purposes of double jeopardy, civil penalties would be evaluated for punitive value where they seemed not rationally related to the goal of compensating the government for a loss.¹²⁶ In the wake of *Kurth Ranch*, it also seemed that in rare instances, a tax could be deemed a punishment for the purposes of a double jeopardy analysis.¹²⁷

III. FACTS AND PROCEDURAL HISTORY

During the 1980's, the three petitioners in this case held responsible positions in two western Oklahoma banks. John Hudson was the chairman and controlling shareholder of the First National Bank of Tipton, in Tipton, Oklahoma ("Tipton") and the First National Bank of Hammon, in Hammon, Oklahoma ("Hammon").¹²⁸ Jack Rackley was the bank president at Tipton and on the board of directors at Hammon, and Larry Baresel was on the board of directors at both Tipton and Hammon.¹²⁹

In February of 1989, the OCC notified the petitioners, via a "Notice of Assessment of a Civil Money Penalty," of its charge that they had used their positions as bank officials to arrange loans in violation of 12 U.S.C. § 84 and § 375b.¹³⁰ The OCC alleged that during 1986 and 1987, the petitioners had arranged for twenty-one loans to be unlawfully made by Tipton, Hammon, and other institutions to third parties for Hudson's personal financial gain.¹³¹ The OCC alleged that the transactions had caused approximately \$900,000 in losses to the Fed-

¹²⁶ See *supra* notes 68-70, 78-87 and accompanying text for discussion of the Court's double jeopardy analysis with regard to civil penalties; see *supra* notes 121-126 and accompanying text for discussion of the Court's double jeopardy analysis with regard to civil forfeitures.

¹²⁷ See *supra* notes 91, 97-105 and accompanying text for discussion of the Court's double jeopardy analysis with regard to the Montana Dangerous Drug tax.

¹²⁸ See Brief for Petitioners at 3, *Hudson v. United States*, 118 S. Ct. 488 (1997) (No. 96-976).

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.*

eral Deposit Insurance Corporation.¹³² The OCC found that the loans were “attributable” to Hudson and the petitioners under OCC regulations,¹³³ and that the petitioners had caused the banks under their direction to exceed the limit of total unsecured loans that the banks could make to an individual.¹³⁴ The OCC also determined that petitioners had caused the banks to exceed the limit on money that the banks were permitted to lend to “certain insiders” absent prior approval of the board of directors.¹³⁵ The OCC concluded that the petitioners had violated 12 U.S.C. § 84 and § 375b, and assessed civil penalties in the amount of \$100,000 against Hudson and \$50,000 each against Rackley and Baresel.¹³⁶

In August of 1989, the OCC issued a “Notice of Intention to Prohibit Further Participation” against each of the petitioners.¹³⁷ The Notice stated that the Comptroller had concluded that the petitioners had demonstrated “a willful and continuing disregard for [the] safety and soundness” of the two banks.¹³⁸ This conclusion was based on the allegations which formed the basis of the money penalty assessment.¹³⁹ On the basis of this misconduct, the OCC sought to prohibit each of the three petitioners “from further participation, in any manner, in the conduct of the affairs of any insured depository institution.”¹⁴⁰

Each of the petitioners subsequently entered into a Stipulation and Consent order with the OCC.¹⁴¹ In those orders, petitioners agreed to the imposition of reduced civil monetary penalties: \$16,500 against Hudson, \$12,500 against Rackley, and \$15,000 against Baresel.¹⁴² They also signed a “nonparticipation

¹³² See *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), *rev'g* 879 F. Supp. 1113 (W.D. Okl. 1994), *aff'd*, 118 S. Ct. 488 (1997).

¹³³ Brief for Petitioners at 4, *Hudson* (No. 96-976).

¹³⁴ In violation of 12 U.S.C. § 84 (1994).

¹³⁵ In violation of 12 U.S.C. § 375b (1994).

¹³⁶ See Brief for Petitioners at 3, *Hudson* (No. 96-976).

¹³⁷ See *id.* at 5.

¹³⁸ *Id.*

¹³⁹ See *id.*

¹⁴⁰ *Id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

agreement,” stipulating that, absent “prior written consent of both the Comptroller and [other relevant regulatory officials],” they would not “participate in any manner” in the affairs of, *inter alia*, any insured depository institution, any institution treated as an insured bank, any insured credit union, or any institution chartered under the Farm Credit Act of 1971.¹⁴³ The agreements were executed in October and November of 1989.¹⁴⁴

In August of 1992, a grand jury for the United States District Court for the Western District of Oklahoma issued a twenty-two count indictment against the petitioners.¹⁴⁵ The grand jury charged the petitioners with misapplication of funds in violation of 18 U.S.C. § 656 and § 2, and with conspiracy to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. § 371.¹⁴⁶ The indictment also charged Rackley with two substantive counts of making false bank entries in violation of 18 U.S.C. § 1005.¹⁴⁷ The charges were issued for the same series of transactions in 1986 and 1987.¹⁴⁸

Each petitioner moved to dismiss the criminal charges on double jeopardy grounds.¹⁴⁹ The motions rested upon the theory that double jeopardy protection would be extended in a case where the “double prosecution” was in the form of a civil and subsequent criminal prosecution. The Western District Court of Oklahoma consolidated the three motions, and denied them, relying on *Halper* for its reasoning.¹⁵⁰ The court held that the nonparticipation agreement and money sanctions imposed by the OCC were “solely remedial” in nature, and thus were

¹⁴³ *Id.* Explicit language in each agreement indicated it did not preclude “any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.” *Id.* at 5 n.2.

¹⁴⁴ *See id.* at 5.

¹⁴⁵ *See id.*, Joint Appendix at 6-38.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See United States v. Hudson*, 879 F. Supp. 1113 (W.D. Okl. 1994), *rev'd*, 92 F.3d 1026 (10th Cir. 1996), *aff'd*, 118 S. Ct. 488 (1997).

¹⁴⁹ *See United States v. Hudson*, 14 F.3d 536, 538 (10th Cir. 1994).

¹⁵⁰ *See id.* The U.S. District Court of Western Oklahoma filed an order denying the motions on March 25, 1993. *See* Brief for Petitioners at 6-7.

permissible as civil sanctions and would not foreclose later criminal prosecution.¹⁵¹

The petitioners appealed denial of their motion to dismiss.¹⁵² On appeal, the Court of Appeals for the Tenth Circuit noted that its duty was to determine whether either sanction constituted "punishment" under double jeopardy standards.¹⁵³ The court concluded that a sanction could be termed punishment if it were not "solely" remedial.¹⁵⁴ Thus, if the sanction served punitive or deterrence goals, and as such was not "solely remedial," the sanction was "punishment" for the purpose of the double jeopardy analysis.¹⁵⁵ The court affirmed the lower court's decision that the nonparticipation sanction was remedial because it "was solely designed to protect the integrity of the banking industry by purging the system of corrupt influences."¹⁵⁶ However, it found that the money sanction was assessed in a manner which suggested that the OCC intended a punishment and deterrent effect.¹⁵⁷ Finding that the money sanction might as such be termed punishment, the court remanded the case to the district court for a determination of "the precise injury caused to the Government for which the sanctions are the remedy."¹⁵⁸

On remand, the district court held a hearing to determine whether the money sanctions assessed against the petitioners constituted a punishment under double jeopardy principles.¹⁵⁹ The Assistant Director of the Enforcement and Compliance Division of the OCC testified that the civil money penalties as-

¹⁵¹ See *Hudson*, 14 F.3d. at 539. The District Court alternatively concluded that the petitioners had waived any future double jeopardy claims by agreeing to the language in the Stipulations. See *id.* See also *supra* note 143 and accompanying text. The Court of Appeals reversed this decision, finding that the language in the Consent Orders could not act as a valid waiver. See *Hudson*, 14 F.3d at 539.

¹⁵² See *id.* at 538.

¹⁵³ See *id.* at 540.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 542-43.

¹⁵⁷ See *id.* at 543.

¹⁵⁸ *Id.*

¹⁵⁹ See *United States v. Hudson*, 879 F. Supp. 1113 (W.D. Okl. 1994), *rev'd*, 92 F.3d 1026 (10th Cir. 1996), *aff'd*, 118 S. Ct. 488 (1997).

essed against the petitioners were not intended to provide restitution to the government, but "to deter future violations of law or encourage the correction of existing violations."¹⁶⁰ The witness went on to state that such penalties were reserved for willful violations.¹⁶¹ The government presented evidence reflecting that its investigation cost approximately \$72,000.¹⁶² Finding no evidence that the investigatory costs were considered in the calculation of the penalties, the court concluded that the penalties were assigned at least in part for deterrence reasons, and were certainly not assigned "solely for remedial reasons."¹⁶³ The court further noted that the government conceded that the indictment and consent order were based on the same loan transactions, and that the *Blockburger* precedent should preclude the government from pursuing a criminal remedy in the case.¹⁶⁴ Based on these findings, the district court granted the petitioners' motion to dismiss the criminal indictments.¹⁶⁵

The Tenth Circuit reversed the decision, relying on *United States v. Halper*, and finding that the actual fines imposed by the government (totaling \$44,000) were not so grossly disproportionate to the proven damages to the government (\$72,000) as to render the sanctions "punishment" for double jeopardy purposes.¹⁶⁶ The court stated that "[u]nder the objective test outlined in *Halper*, a particular sanction is not punishment when it bears a rational relation to the goal of compensating the government for its loss."¹⁶⁷

¹⁶⁰ Brief for Petitioners at 9, *Hudson* (No. 96-976). See also *Hudson*, 879 F. Supp. at 1115-16.

¹⁶¹ See Brief for Petitioners at 9, *Hudson* (No. 96-976). See also *Hudson*, 879 F. Supp. at 1115-16.

¹⁶² See *Hudson*, 879 F. Supp. at 1116.

¹⁶³ *Id.*

¹⁶⁴ See *id.* at 1114-15.

¹⁶⁵ See *id.* at 1116.

¹⁶⁶ See *United States v. Hudson*, 92 F.3d 1026, 1029-30 (10th Cir. 1996), *rev'g* 879 F. Supp. 1113 (W.D. Okl. 1994), *aff'd*, 118 S. Ct. 488 (1997).

¹⁶⁷ *Id.* at 1028 (citing *United States v. Halper*, 490 U.S. 435, 449-51 (1989), *abrogated* by 118 S. Ct. 488 (1997)). Having concluded that the civil sanctions did not constitute punishment, the court declined to reach the question whether the civil sanctions were imposed for the "same offenses" as were charged in the indictment. See *id.* at 1208 n.3.

The Supreme Court granted certiorari "because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*."¹⁶⁸

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

On December 10, 1997, the Supreme Court denied the petitioners in *Hudson* the protection of the Double Jeopardy Clause.¹⁶⁹ Writing for the majority, Chief Justice Rehnquist disavowed the methodology developed in the *Halper* opinion and reaffirmed the test established in *Ward*.¹⁷⁰ The Court responded unanimously with respect to the judgment in the *Hudson* case,¹⁷¹ but Justices Scalia, Thomas, Stevens, Souter, Breyer and Ginsburg signed concurring opinions which vary in their support for the conclusions reached in the majority opinion.

Before submitting the *Hudson* facts to the *Ward* test, Chief Justice Rehnquist stated five major criticisms of the *Halper* decision.¹⁷² First, he reproved the *Halper* Court for deviating from traditional double jeopardy principles by bypassing the threshold question of whether the successive punishment at issue is a *criminal* punishment.¹⁷³ Stating that the Double Jeopardy Clause precludes only multiple *criminal* punishments for the same offense, the Chief Justice cited a line of doctrine dating to the *Mitchell* decision.¹⁷⁴ Second, he blamed the *Halper* court for fo-

¹⁶⁸ *Hudson v. United States*, 118 S. Ct. 488, 493 (1997), *aff'g* 92 F.3d 1026 (10th Cir. 1996).

¹⁶⁹ *See id.* at 496.

¹⁷⁰ *See id.* at 491. The *Ward* test requires two steps: first, the determination under statutory construction principles of whether the sanction was intended to be criminal or civil, and second, if the sanction was intended to be civil in nature, the determination (using the *Kennedy* factors) of whether the sanction is so punitive, either in purpose or effect, to rise to the level of a criminal punishment. *United States v. Ward*, 448 U.S. 242, 248 n.49 (1980). *See supra* notes 60-66 and accompanying text for a fuller description of the original *Ward* test.

¹⁷¹ *See Hudson*, 118 S. Ct. at 491.

¹⁷² *See id.* at 494-95.

¹⁷³ *See id.* at 494.

¹⁷⁴ *See id.* at 493 (citing *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943)).

cluding exclusively and dispositively on one of the six factors prescribed by the *Kennedy* test—the extent to which a sanction “appeared excessive in relation to its nonpunitive purposes.”¹⁷⁵

Third, Chief Justice Rehnquist criticized the *Halper* decision for focusing on the *actual* effects of the sanction.¹⁷⁶ Under his reading of the *Kennedy* opinion, the court is required to evaluate the statute for punitive value “on its face.”¹⁷⁷ Suggesting that the *Halper* decision required the Court to look at the actual effect of a sanction, the Chief Justice pointed out a concern that where a second sanction to be imposed is criminal, a court would have to wait for imposition of a verdict before determining that a petitioner should have protection from the Double Jeopardy Clause.¹⁷⁸ He indicated that subjecting a defendant to a complete criminal trial would fail to protect him from a second prosecution.¹⁷⁹

Fourth, Chief Justice Rehnquist indicated that the *Halper* decision created an unworkable test for determining whether a sanction was “punitive,”¹⁸⁰ finding that subsequent case precedent (including *Kurth Ranch* and *Ursery*) establishes that all civil penalties have some deterrent effect and that no civil penalties can be said to be purely remedial.¹⁸¹ Finally, noting that individuals are already protected from “irrational” sanctions and excessive civil fines by other provisions of the Constitution, the Chief Justice asserted that any additional protection from prosecution provided by *Halper* provided did not justify the concern and confusion generated in the lower courts by attempts to implement the *Halper* standard.¹⁸²

¹⁷⁵ *Id.* at 494.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See id.* at 495.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.* at 494.

¹⁸¹ *See id.* at 494-95 (citing *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994); citing *United States v. Ursery*, 518 U.S. 267, 285 n.2 (1996)).

¹⁸² *See id.* at 495. The Chief Justice seemingly finds adequate protection against the imposition of “irrational” sanctions and excessive civil fines within the Fourth Amendment (Due Process and Equal Protection Clauses) and the Eighth Amendment. *See id.*

Abandoning the *Halper* precedent, Chief Justice Rehnquist elected to apply “traditional double jeopardy principles” to the *Hudson* case using the *Ward* test.¹⁸³ He described the two-step *Ward* test as follows: first, the Court must determine whether the legislature intended the sanction at issue to be civil in nature.¹⁸⁴ This assessment can be made from the expressed or implied intent of the legislature.¹⁸⁵ Second, if the Court determines that the sanction was intended to be civil in nature, then it must determine whether the sanctions are so punitive as to render them criminal despite congressional intent to the contrary.¹⁸⁶ In making this determination, Chief Justice Rehnquist stated that the Court should use the *Kennedy* factors, considering them “in relation to the statute on its face.”¹⁸⁷ The Chief Justice further mandated that the petitioner provide “the clearest proof” of the sanction’s punitive nature to override congressional intent.¹⁸⁸

In imposing the *Ward* test, Chief Justice Rehnquist found that Congress intended the money and debarment sanctions in the *Hudson* case to be civil in nature.¹⁸⁹ Support for this proposition is implied by congressional conferral of authority to sanction on the OCC, an administrative agency.¹⁹⁰ He then reviewed the nature of the sanctions under the *Kennedy* factors, and concluded that neither sanction has historically been viewed as punishment,¹⁹¹ and neither is an affirmative disability or restraint.¹⁹² In doing so, he noted that although the sanction may deter others from committing similar conduct, the presence of this goal is insufficient to render a sanction criminal.¹⁹³ Chief Justice Rehnquist then found that there existed inadequate evidence—and certainly not “the clearest proof” required by the *Ward*

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 493.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 495.

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See id.* at 496.

¹⁹³ *See id.*

test—to support a finding that either the money or debarment sanction were so punitive as to render them criminal.¹⁹⁴ Upon concluding that the sanctions are not criminal in nature, the Chief Justice found that the Double Jeopardy Clause was “no obstacle” to the trial of the petitioners on criminal charges.¹⁹⁵

B. JUSTICE SCALIA'S CONCURRENCE

In his concurring opinion, Justice Scalia enthusiastically agreed that the *Halper* test for whether a sanction is punitive was “ill-considered and unworkable.”¹⁹⁶ However, Justice Scalia refused to fully endorse the “state of law” adopted by the majority opinion because to do so would acknowledge a constitutional prohibition against multiple punishments.¹⁹⁷ He declined to agree that “multiple punishments” are prohibited by the Double Jeopardy Clause, finding instead that the constitutional prohibition extends simply to “multiple prosecutions.”¹⁹⁸ Justice Scalia ended his concurrence by indicating that because the majority opinion would require successive prosecutions to trigger double jeopardy, he believed that the position adopted by the majority decision was “as harmless” as the state of the law existent before *Halper*.¹⁹⁹

C. JUSTICE STEVENS' CONCURRENCE

Although he did concur in the judgment, Justice Stevens offered a strong critique of the majority opinion. Justice Stevens found fault with the majority opinion on several grounds: first, for using the *Hudson* case to reverse the *Halper* decision;²⁰⁰ second, for its assessment of the *Halper* test as “unworkable” and a destructive precedent;²⁰¹ and third, for seemingly abandoning

¹⁹⁴ See *id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (Scalia, J., concurring in judgment). Justice Scalia was joined by Justice Thomas.

¹⁹⁷ See *id.* (Scalia, J., concurring in judgment).

¹⁹⁸ *Id.* at 496-97 (Scalia, J., concurring in judgment) (referencing his discussion of “putting the *Halper* genie back in the bottle” in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 804 (1994) (Scalia, J., dissenting)).

¹⁹⁹ See *id.* at 497 (Scalia, J., concurring in judgment).

²⁰⁰ See *id.* at 497-98 (Stevens, J., concurring in judgment).

²⁰¹ See *id.* at 498-99 (Stevens, J., concurring in judgment).

the *Halper* approach and for suggesting to the lower courts that double jeopardy protection can rarely be applied to civil sanction cases.²⁰²

Justice Stevens argued that the *Hudson* case was not an appropriate forum for the resolution of the Court's concerns about *Halper*.²⁰³ He noted that the case should have been easily decided using the *Blockburger* precedent,²⁰⁴ and that concerns about *Halper* would have been more appropriately addressed in a case that was either incorrectly decided or raised a close or difficult question.²⁰⁵ Claiming that review of the case would "amount to little more than an advisory opinion," Justice Stevens criticized the Court for reviewing the case out of concern about "evolving claims under *Halper*" rather than as an attempt to correct the decision of an inferior court.²⁰⁶

Justice Stevens also took issue with the Court's suggestion that *Halper* was a destructive precedent, indicating that the Court's opinion "seriously exaggerate[d] the significance of [its] concerns."²⁰⁷ Although the Court expressed a concern that the *Halper* decision had opened the door to opportunistic misuse of double jeopardy protection, Justice Stevens argued that a review of the implementation of the *Halper* decision by the lower courts illustrated that the Court's concerns were un-

²⁰² See *id.* at 499 (Stevens, J., concurring in judgment).

²⁰³ See *id.* at 498-500 (Stevens, J., concurring in judgment).

²⁰⁴ See *id.* at 497 (Stevens, J., concurring in judgment). Justice Stevens characterized the *Blockburger* test as a "same elements" test, finding that the two provisions are not the "same offense" if one contains an element not included in the other. *Id.* (Stevens, J., concurring in judgment). As the civil and criminal statutes in this case required different proofs, Justice Stevens found that the civil and criminal charges were clearly distinct and that the Double Jeopardy Clause should have presented no bar to criminal prosecution. See *id.* (Stevens, J., concurring in judgment). Writing for the majority, Chief Justice Rehnquist dismissed the *Blockburger* issue as a non-issue and outside of the scope for which certiorari was granted. See *id.* at 494 n.5.

²⁰⁵ See *id.* at 497 (Stevens, J., concurring in judgment).

²⁰⁶ *Id.* at 497-99 (Stevens, J., concurring in judgment). Justice Stevens also dismissed the majority's concern about the ordering of "punishments"—criminal, then civil—because they did not arise in this case. See *id.* at 498 (Stevens, J., concurring in judgment). In this case, the civil sanctions were administered first—if the charges now were on the same offense as that already sanctioned (meaning no *Blockburger* issue), then double jeopardy would absolutely have barred the criminal indictment from proceeding. See *id.* at 498 (Stevens, J., concurring in judgment).

²⁰⁷ *Id.* (Stevens, J., concurring in judgment).

founded.²⁰⁸ According to Justice Stevens, the cases that the majority opinion had cited to support its concern reflected opinions in which the courts of appeals had rejected double jeopardy protection claims.²⁰⁹ He contended that the lower courts had recognized and appropriately incorporated the principle that *Halper* was intended to be “a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.”²¹⁰

Rejecting the majority’s claim that the *Halper* test is “unworkable,” Justice Stevens wrote that the Court has misrepresented the *Halper* decision by suggesting that it allowed “only successive sanctions that are ‘solely’ remedial.”²¹¹ He argued that the express statement of *Halper*’s holding was much narrower, prohibiting only successive sanctions where “the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.”²¹² Justice Stevens also found that the Court had clarified the narrowness of *Halper*’s breadth in *Ursery*.²¹³ The *Ursery* opinion separated the question of whether a sanction “cannot fairly be said *solely* to serve a remedial purpose” from the usual test for determining whether a civil sanction is subject to the Double Jeopardy Clause, and clearly stated that the *Halper* decision had not intended to supplant the latter inquiry with the former.²¹⁴

²⁰⁸ See *id.* (Stevens, J., concurring in judgment).

²⁰⁹ See *id.* (Stevens, J., concurring in judgment). Justice Stevens noted that only one of the rulings cited by the majority opinion reflected favorably on one of the “novel” claims, and that the case involved the highly controversial “Megan’s Law.” *Id.* (Stevens, J., concurring in judgment).

²¹⁰ See generally *id.* at 497-500 (Stevens, J., concurring in judgment).

²¹¹ *Id.* at 498 (Stevens, J., concurring in judgment).

²¹² *Id.* at 498 n.3 (Stevens, J., concurring in judgment) (quoting *United States v. Halper*, 490 U.S. 435, 448-449 (1989), *abrogated by* 118 S. Ct. 488 (1997)). Justice Stevens quotes the express statement of the *Halper* holding: “We . . . hold 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.* (Stevens, J., concurring in judgment).

²¹³ See *id.* at 498 (Stevens, J., concurring in judgment).

²¹⁴ *Id.* (Stevens, J., concurring in judgment) (quoting *United States v. Ursery*, 518 U.S. 267, 285 n.2 (1996)).

Justice Stevens indicated his agreement with the majority philosophy that the Double Jeopardy Clause does prohibit the government from exacting multiple punishments for the same offense, and that this prohibition can extend to civil sanctions.²¹⁵ He surmised that this thread of the opinion would essentially reaffirm the central holdings of the *Halper* and *Kurth Ranch* decisions.²¹⁶ According to Justice Stevens' concurrence, the *Hudson* decision departed from the *Halper* and *Kurth Ranch* decisions chiefly by adopting the *Ward* multi-factor test and thus "recalibrating" the method of determining when a civil sanction is punitive.²¹⁷ Assessing the potential impact stemming from adoption of the multi-factor test, Justice Stevens concluded that while it would be difficult to predict the effect, the factors seem very close to the reasoning in *Halper*, and the effect may be negligible.²¹⁸ The chief danger, for Justice Stevens, was that the government and lower courts would be "unduly influenced by the Court's new attitude [in favor of eliminating double jeopardy protection for parallel civil and criminal prosecutions]."²¹⁹

D. JUSTICE SOUTER'S CONCURRENCE

Justice Souter, concurring in the judgment, agreed with Justice Stevens that application of the *Blockburger* standard would stop any inquiry into the *Hudson* case.²²⁰ Justice Souter agreed that the *Halper* standard for identifying a punitive sanction (for double jeopardy purposes) needed revision,²²¹ noted the value of using common criteria to assess the criminal nature of sanctions under the Fifth and Sixth Amendments,²²² and pointed out that the Court had started to clarify the *Halper* standard in the *Ursery* decision.²²³

²¹⁵ See *id.* at 499 (Stevens, J., concurring in judgment).

²¹⁶ See *id.* (Stevens, J., concurring in judgment) (holding "that sanctions imposed in civil proceedings constituted 'punishment' barred by the Double Jeopardy Clause").

²¹⁷ *Id.* (Stevens, J., concurring in judgment).

²¹⁸ See *id.* (Stevens, J., concurring in judgment).

²¹⁹ *Id.* (Stevens, J., concurring in judgment).

²²⁰ See *id.* at 500 (Souter, J., concurring in judgment).

²²¹ See *id.* (Souter, J., concurring in judgment).

²²² See *id.* (Souter, J., concurring in judgment).

²²³ See *id.* (Souter, J., concurring in judgment).

Justice Souter indicated his acceptance of the *Kennedy-Ward* “analytical scheme” subject to two caveats.²²⁴ First, he would require that use of the “clearest proof” standard of evidence (required to show that a civil sanction is truly criminal) be dependent on context and a function of the strength of the countervailing indications of the civil nature of the sanction.²²⁵ Second, he cautioned that given the rise in use of “ostensibly” civil forfeitures and penalties, the “clearest proof” requirement should not be as infrequently achieved in the future as it had been in the past.²²⁶

E. JUSTICE BREYER’S CONCURRENCE

Justice Breyer also concurred in the judgment.²²⁷ Justice Breyer agreed with the majority and with Justice Souter that *Halper* had not provided proper guidance for distinguishing between criminal and non-criminal sanctions, and further agreed that the *Ward* and *Kennedy* opinions set forth the proper approach for assessing the nature of sanctions.²²⁸ However, Justice Breyer disagreed with the majority reasoning on two grounds.²²⁹

The first point of departure was with regard to the level of proof required by the majority opinion (“only the clearest proof”) to “transform” a civil sanction to a criminal punishment.²³⁰ Justice Breyer indicated that maintaining such a required standard of proof would not be consistent with past Court practice, which instead saw the Court simply applying the *Kennedy* factors to each situation.²³¹ He called upon the example of the *Kurth Ranch* opinion, in which the Court reviewed the facts in light of the *Kennedy* factors and made its assessment

²²⁴ See *id.* at 500-01 (Souter, J., concurring in judgment).

²²⁵ See *id.* (Souter, J., concurring in judgment).

²²⁶ See *id.* at 501 (Souter, J., concurring in judgment).

²²⁷ See *id.* at 501 (Breyer, J., concurring in judgment). Justice Breyer was joined in the opinion by Justice Ginsburg. Justice Breyer did not comment on the *Blockburger* issue.

²²⁸ See *id.* (Breyer, J., concurring in judgment).

²²⁹ See *id.* (Breyer, J., concurring in judgment).

²³⁰ See *id.* (Breyer, J., concurring in judgment).

²³¹ See *id.* (Breyer, J., concurring in judgment).

without reference to “the clearest proof.”²³² Justice Breyer found the stated requirement of “clearest proof” to be misleading and improper in application.²³³

Justice Breyer further declined to support the majority in its assertion that the lower courts should evaluate statutes only “on [their] face”²³⁴ rather than by “assessing the character of the actual sanctions imposed.”²³⁵ Justice Breyer noted the troubling possibility that a sanction, appearing on its face to be civil in nature, could constitute criminal punishment “as applied in special circumstances.”²³⁶ To illustrate this point, he pointed out that although the civil penalty structure under the False Claims Act was not on its face punitive, the sanctions imposed under the law in *Halper* (\$130,000) were grossly disproportionate to the damage caused by the petitioner’s conduct.²³⁷ Justice Breyer noted that under the style of review urged by the majority opinion in this case, petitioner Halper would have found no relief.²³⁸

Justice Breyer found additional support for a review of “actual sanctions imposed” in the fact that *Kennedy* had never suggested that “there may not be further analysis of a penalty as it is applied in a particular case.”²³⁹ In fact, Justice Breyer concluded, most of the confusion among the lower courts in applying the *Halper* decision stemmed from “the problem of characterizing—*by examining the face of the statute*—the purposes of a civil penalty as punishment” and not from the application of double-jeopardy analysis to penalties imposed in particular cases.²⁴⁰

²³² See *id.* (Breyer, J., concurring in judgment).

²³³ See *id.* (Breyer, J., concurring in judgment).

²³⁴ *Id.* (Breyer, J., concurring in judgment) (citing *Hudson*, 118 S. Ct. at 494 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963))).

²³⁵ *Id.* (Breyer, J., concurring in judgment) (citing *United States v. Halper*, 490 U.S. 435, 447 (1989), *abrogated by* 118 S. Ct. 488 (1997)).

²³⁶ *Id.* at 502 (Breyer, J., concurring in judgment).

²³⁷ See *id.* (Breyer, J., concurring in judgment).

²³⁸ See *id.* (Breyer, J., concurring in judgment).

²³⁹ *Id.* (Breyer, J., concurring in judgment).

²⁴⁰ *Id.* (Breyer, J., concurring in judgment) (emphasis added).

V. ANALYSIS

A. THE EFFECT OF *HUDSON* ON DOUBLE JEOPARDY PROTECTION

In his concurrence to *Hudson*, Justice Stevens expressed concern that the majority opinion would give the lower courts the impression that double jeopardy protection from civil sanctions rarely could be sustained in the post-*Hudson* era.²⁴¹ Indeed, the criticisms levied at the *Hudson* majority opinion by Justices Stevens, Souter, Breyer and Ginsburg all suggest a concern that the majority opinion may have placed the bar too high for those attempting to prove that a civil sanction is "punishment" for the purposes of double jeopardy analysis.²⁴²

A review of activity in the circuits following *Hudson* suggests that this concern was well-founded.²⁴³ Although Chief Justice Rehnquist's approach to the double jeopardy analysis seemed innocuous on its face,²⁴⁴ the decisions of appellate courts implementing *Hudson* reflect that under the current doctrine even very punitive civil sanctions will be considered "civil" and exempt from double jeopardy protection.²⁴⁵ Use of the *Ward* test as it was outlined in *Hudson* has continually resulted in a determination that: first, the sanction was intended to be civil by the legislature; and second, there was not the "clearest proof" required to show that the civil sanction should be regarded as "criminal" for double jeopardy purposes.²⁴⁶

²⁴¹ See *id.* at 499 (Stevens, J., concurring in judgment).

²⁴² See *id.* at 497-502 (Stevens, Souter, and Breyer, J.J., concurring).

²⁴³ See *Cox v. Commodity Futures Trading Comm'n*, 138 F.3d 268 (7th Cir. 1998); see also *Securities and Exchange Comm'n v. Palmisano*, 135 F.3d 860 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 555 (1998); *Cole v. United States Dep't of Agric.*, 133 F.3d 803 (11th Cir. 1998); *S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 138 F.3d 686 (7th Cir. 1998); *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998).

²⁴⁴ Even Justice Stevens, the strongest critic of the majority opinion, hesitated to predict the response of the lower courts. See *Hudson*, 118 S. Ct. at 499 (Stevens, J., concurring in judgment).

²⁴⁵ Compare *Healy*, 138 F.3d at 688 (holding double jeopardy principles do not preclude imposition of 68 penalties for 68 violations of OSHA) with *United States v. Halper*, 490 U.S. 435, 447 (1989), *abrogated by* 118 S. Ct. 488 (1997).

²⁴⁶ See *Cox*, 138 F.3d 268; see also *Palmisano*, 135 F.3d 860; *Cole*, 133 F.3d 803; *Healy*, 138 F.3d 686; *Lippert*, 148 F.3d 974.

Three points in the majority opinion ensure that double jeopardy will rarely be considered an obstacle to the imposition of civil sanctions. First, the opinion stated that reviewing courts should first look at whether the legislature indicated either “expressly or impliedly” a preference for the civil label.²⁴⁷ The Court found that the sanctions imposed on the petitioners by the OCC were civil in nature, and rationalized that congressional conferral of authority to sanction on the OCC supported the notion that the sanctions were civil in nature.²⁴⁸ Following *Hudson*, a presumption has been made in some lower courts that where a regulatory agency has the authority to issue a sanction, there exists prima facie evidence that a sanction is civil.²⁴⁹ The lower courts have also presumed that if the legislature includes the term “civil” in the statutory text, the statute was intended to be civil in nature.²⁵⁰ In the post-*Hudson* era, the ease with which administrative sanctions achieve classification as “civil” assumes a new importance. This is so because under *Hudson*, a petitioner claiming double jeopardy protection from a sanction deemed to be *purportedly civil* must prove, under a heightened burden of proof, that the civil sanction is effectively “transformed” to a criminal sanction by its truly punitive nature.²⁵¹

This heightened burden of proof is the second hurdle created by the *Hudson* double jeopardy analysis. The *Hudson* majority opinion declared that under *Ward*, “only the clearest proof” of punitive nature would transform a purportedly civil sanction into a criminal sanction capable of invoking double jeopardy protection.²⁵² Several of the Justices expressed concern about the Chief Justice’s invocation of this heightened standard

²⁴⁷ See *Hudson*, 118 S. Ct. at 493 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). This is the first part of the two-part test established under *Ward* and affirmed in *Hudson*.

²⁴⁸ See *id.* at 495.

²⁴⁹ See *Cox*, 138 F.3d at 272; see also *Cole*, 133 F.3d at 806.

²⁵⁰ See *Lippert*, 148 F.3d at 976.

²⁵¹ See *Hudson*, 118 S. Ct. at 495-96.

²⁵² *Id.* at 493 (quoting *Ward*, 448 U.S. at 249).

of proof.²⁵³ Justice Souter warned that the “clearest proof” standard should be dependent on context and a function of the strengths of the countervailing indications of the civil nature of the sanction.²⁵⁴ He further noted his view that with rising use of “ostensibly” civil forfeitures and penalties, “the clearest proof” standard might be attained more frequently than in the past.²⁵⁵ In a separate concurring opinion, Justices Breyer and Ginsburg indicated disapproval that the “clearest proof” standard was established in the majority opinion, finding that the Court had not maintained such a standard in years past.²⁵⁶

Indeed, the balancing test that Justice Souter hoped to find has not come to fruition. The courts of appeal have instead regarded Chief Justice Rehnquist’s demand for “only the clearest proof” as a signal that they should give “considerable deference” to legislative intent.²⁵⁷ In *Cole v. United States Department of Agriculture*, the appellee was criminally prosecuted and acquitted of fraud charges relating to an incident in which he allegedly marketed tobacco in excess of a quota established by the Secretary of Agriculture.²⁵⁸ After his acquittal, the USDA assessed civil penalties of almost \$400,000 against the petitioner.²⁵⁹ The Eleventh Circuit found that the penalties were intended to be civil, and after weighing the *Kennedy* factors, concluded that the penalties were not “by clearest proof” so punitive as to be criminal in nature.²⁶⁰

The third component of *Hudson* which presents an obstacle to double jeopardy claims is the importance that Chief Justice Rehnquist placed on reading the *face* of the statute rather than

²⁵³ See *id.* at 500-01 (Souter, J., concurring in judgment); see also *id.* at 501 (Breyer, J., concurring in judgment).

²⁵⁴ See *id.* (Souter, J., concurring in judgment).

²⁵⁵ *Id.* at 501 (Souter, J., concurring in judgment).

²⁵⁶ See *id.* (Breyer, J., concurring in judgment).

²⁵⁷ *Securities and Exchange Comm’n v. Palmisano*, 135 F.3d 860, 864 (2nd Cir. 1998), *cert denied*, 119 S. Ct. 555 (1998).

²⁵⁸ See *Cole v. United States Dep’t of Agric.*, 133 F.3d 803, 804 (11th Cir. 1998).

²⁵⁹ See *id.*

²⁶⁰ *Id.* at 805-07. See also *Cox v. Commodity Futures Trading Comm’n*, 138 F.3d 268, 270-74 (7th Cir. 1998); *Securities and Exchange Comm’n v. Palmisano*, 135 F.3d 860, 864-68 (2nd Cir. 1998), *cert denied*, 119 S. Ct. 555 (1998).

reviewing the actual effects of the statute.²⁶¹ While the lower courts have included *Hudson* language about considering whether a statutory scheme was so punitive “either in purpose or effect” as to transform it to a criminal punishment, they have uniformly noted and rallied around the requirement that the *Ward* factors “must be considered in relation to the statute on its face.”²⁶² In other words, by condemning the *Halper* opinion in such strong terms for considering the actual impact of a civil sanction²⁶³ and by emphasizing that the *Ward* factors must be considered *in relation to the statute on its face*,²⁶⁴ the *Hudson* majority communicated to the lower courts that the actual effects of a statutory scheme are of minimal importance. Thus, the *Hudson* opinion did not simply retreat from the *Halper* method of looking at the actual effect of a civil sanction, but strongly encouraged the courts of appeals to look *only* at the statute on its face.

The lower courts following *Hudson* have not considered the sanctions *as imposed*, and *S.A. Healy Co. v. Occupation Safety & Health Review Commission* noted in particular that *Hudson* requires courts to review the statute “as written.”²⁶⁵ *Healy* is significant because it involves a penalty arrangement similar to the one illustrated by *Halper*—where the penalty structure as written is not overtly punitive, but where the structure as applied to multiple violations may be punitive.²⁶⁶ *Healy* was convicted of three misdemeanor offenses for a willful violation causing the death of an employee, and was fined \$750,000.²⁶⁷ The Secretary of Labor also cited *Healy* for sixty-eight violations of the Occupational Safety & Health Act and regulations and imposed a civil penalty for each violation (of not more than \$10,000 for each violation, but not less than \$5,000 for each willful viola-

²⁶¹ See *Hudson*, 118 S. Ct. at 494.

²⁶² See *Cole*, 133 F.3d at 806; see also *S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 138 F.3d 686, 688 (7th Cir. 1998); *United States v. Lippert*, 148 F.3d 974, 976 (8th Cir. 1998).

²⁶³ See *Hudson*, 118 S. Ct. at 494.

²⁶⁴ See *id.*

²⁶⁵ *Healy*, 138 F.3d at 688.

²⁶⁶ See *id.* at 687-88.

²⁶⁷ See *id.* at 687.

tion).²⁶⁸ The Seventh Circuit initially held under *Halper* that the civil penalty as applied was a “punishment” by double jeopardy standards,²⁶⁹ but on remand from the Supreme Court after *Hudson*, reluctantly found that the civil penalty *as written* did not rise to the level of a “criminal” penalty.²⁷⁰

The *Cole* decision also sheds an interesting light on the “actual impact” question.²⁷¹ *Cole* (the tobacco dealer) was acquitted of the criminal charges relating to the conduct in question, and denied that the conduct occurred.²⁷² That notwithstanding, the Eleventh Circuit found that the civil penalty (approximately \$400,000) applied in his case was not punishment, noting that one of the “flaws” in his argument was that “the double jeopardy inquiry focuses on the statute on its face, not on the facts of *Cole*’s particular case.”²⁷³

Chief Justice Rehnquist was correct to state that the *Ward* decision required a review of the *Kennedy* factors “in relation to the statute on its face.”²⁷⁴ However, Justice Breyer also correctly pointed out that the *Ward* opinion does not suggest that “there may not be further analysis of a penalty as it is applied in a particular case.”²⁷⁵

The Court’s present double jeopardy doctrine cannot be said to prohibit multiple punishments *or* multiple prosecutions. In combination with the easy passage to classification as a “civil sanction” and the heightened burden of proof associated with overcoming this classification, the majority opinion in *Hudson* has raised the bar so that civil sanctions are virtually beyond any protection normally extended by the Double Jeopardy Clause.²⁷⁶

²⁶⁸ *See id.*

²⁶⁹ *See id.*

²⁷⁰ *See id.* at 688.

²⁷¹ *See Cole v. United States Dep’t of Agric.*, 133 F.3d 803 (11th Cir. 1998).

²⁷² *See id.* at 807 n.4.

²⁷³ *Id.*

²⁷⁴ *See Hudson v. United States*, 118 S. Ct. 488, 493 (1997), *aff’g* 92 F.3d 1026 (10th Cir. 1996).

²⁷⁵ *Id.* at 502 (Breyer, J., concurring in judgment).

²⁷⁶ *See 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, 464 (1998).

B. THE DANGER POSED TO THE PUBLIC BY UNRESTRAINED USE OF CIVIL SANCTIONS

It appears that under *Hudson*, double jeopardy protection from civil sanctions will attach only in the rarest of circumstances.²⁷⁷ Those who believe that the Double Jeopardy Clause was intended to protect against repeated prosecution by the government believe that the Clause should provide protection from the imposition of civil sanctions as well as criminal sanctions.²⁷⁸ Any other reading fails to fully protect citizens from abuse of power by the government.²⁷⁹ Concurring with the judgment in *Hudson*, Justice Stevens wrote:

. . . the Government cannot use the 'civil' label to escape entirely the Double Jeopardy Clause's command . . . that proposition is extremely important because the States and the Federal Government have an enormous array of civil administrative sanctions at their disposal that are capable of being used to punish persons repeatedly for the same offense, violating the bedrock double jeopardy principle of finality.²⁸⁰

Although Congress has long been permitted to impose both civil and criminal sanctions,²⁸¹ the "enormous array" of administrative sanctions to which Justice Stevens refers is a development of the recent past.²⁸² Regulatory administrative agencies have increasingly been given the discretion to pursue either civil or

²⁷⁷ See *id.*

²⁷⁸ 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, 1238 (1995) (arguing that an accurate interpretation of the Double Jeopardy Clause is that a defendant "cannot twice be put in jeopardy of punishment for the same actions, regardless of whether the punisher wears a civil or criminal hat"). See also Cahill, *supra* note 276, at 463-64; *id.* at 439 (noting the interests safeguarded by protection from double jeopardy).

²⁷⁹ See *Hudson*, 118 S. Ct. at 499 (Stevens, J., concurring in judgment).

²⁸⁰ *Id.* (Stevens, J., concurring in judgment).

²⁸¹ See *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *Id.* Congress has long acted as though it is authorized "to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking judicial power." *Id.* (citing *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

²⁸² The Court has previously noted the expanding use of civil forfeitures and sanctions. See generally *Hudson*, 118 S. Ct. at 501 (Souter, J., concurring in judgment). See also Cahill, *supra* note 276, at 442-43.

criminal sanctions or both,²⁸³ and of late, more agencies have resorted to the use of civil sanctions over criminal sanctions to punish errant parties.²⁸⁴ There are a variety of reasons for this development. Regulatory agencies have been permitted to perform administrative penalty assessments and impose sanctions subject only to a "limited review of the action."²⁸⁵ Civil sanctions tend to allow multiple remedies and are easier and cheaper for the government to pursue.²⁸⁶ Administrative agencies are also likely to prefer civil sanctions for procedural reasons: in the civil context the defendant is afforded less procedural protection than in the criminal context, and the lower burden of proof (preponderance of the evidence) in a civil trial "enhances the Government's ability to prove wrongdoing and impose a sanction."²⁸⁷ Civil sanctions also more effectively penalize culpable corporations than the array of available criminal sanctions.²⁸⁸

Finally, the federal courts are very deferential to the decisions of administrative agencies where the issue of sanctions are concerned.²⁸⁹ The courts will intervene in an agency's factual determinations only if those determinations are not supported by the weight of the evidence,²⁹⁰ and an agency's choice of sanc-

²⁸³ See Debra Marie Ingraham, Note, *Civil Money Sanctions Barred by Double Jeopardy: Should The Supreme Court Reject Healy?*, 54 WASH. & LEE L. REV. 1183, 1188 (1997).

²⁸⁴ See *id.* at 1193. See also Cahill, *supra* note 276, at 442-43; William Funk, *Supreme Court News*, 23 ADMIN. & REG. L. NEWS 12 (1998).

²⁸⁵ See Ingraham, *supra* note 283, at 1189. See also *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (allowing agencies to administratively assess sanctions).

²⁸⁶ See Ingraham, *supra* note 283, at 1189. For a discussion of the reasons administrative agencies prefer to use civil remedies, see Cahill, *supra* note 276, at 442-45. Perhaps as an unfortunate byproduct of the popularity of civil administrative sanctions, it is common to find extensive delays in agency adjudicatory decision-making. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE 211-12 (3d ed. 1994).

²⁸⁷ Ingraham, *supra* note 283, at 1190-91.

²⁸⁸ See *id.* at 1193-94. There are also reasons to continue imposing criminal sanctions, including a public desire to punish those who break laws, the perceived ineffectiveness of civil money sanctions, the deterrent effect of the threat of incarceration, and the larger fines associated with criminal prosecutions. See *id.* at 1194.

²⁸⁹ See generally DAVIS & PIERCE, *supra* note 286, at 174-202.

²⁹⁰ See *Cox v. Commodity Futures Trading Comm'n*, 138 F.3d 268, 272 (7th Cir. 1998) (citing *Monieson v. Commodity Futures Trading Comm'n*, 996 F.2d 852, 858 (7th Cir. 1993)).

tion will not be overturned by a court of appeals unless the court finds the decision to be "unwarranted in law or . . . without justification in fact."²⁹¹ Further, if an agency's sanction falls within the bounds prescribed by statute, it "must be upheld unless it reflects an abuse of discretion."²⁹²

One would expect to see the administrative agencies augment their prosecution efforts in the aftermath of *Hudson*, as they recognize their new freedom to prosecute freely for both civil and criminal sanctions. Indeed, as of this writing, announcements regarding increased prosecution efforts are beginning to emerge.²⁹³ In January of 1998, representatives of the Securities and Exchange Commission ("SEC") announced that the agency would begin to seek civil fines routinely in cases where parallel criminal prosecutions are ongoing.²⁹⁴ The *Wall Street Journal* noted that double jeopardy concerns had prevented the SEC from pursuing civil prosecution efforts in cases where the agency was pursuing criminal prosecutions.²⁹⁵ SEC officials indicated their belief that, under *Hudson*, "the issue of double jeopardy has largely been removed," and further, that the SEC was now in a position to "flex our muscle."²⁹⁶

There is obvious reason to be concerned about the unfettered proliferation of the civil sanction in the post-*Hudson* era. The lighter burden of proof for the government, less vigorous review by the federal court system, and the lesser protections available to the defendant all contribute to a greater burden on the citizen and greater opportunity for governmental abuse of power. Double jeopardy protection from the power of the State may be needed equally in the civil and criminal arenas.

²⁹¹ *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973).

²⁹² *Cox*, 138 F.3d at 272 (citing *Flaxman v. Commodity Futures Trading Comm'n*, 697 F.2d 782, 789 (7th Cir. 1983)).

²⁹³ See Paul Beckett, *SEC May Seek Civil Fines in Some Cases Involving Parallel Criminal Prosecutions*, WALL ST. J., Jan. 8, 1998, at B6; David Matthews, *Prosecutors Targeting Health Care Fraud*, BUS. J. PHOENIX & VALLEY SUN, Aug. 28, 1998, at 32 (district deputy chief of the U.S. Attorney's Affirmative Civil Enforcement Unit noting that "we've also intensified our focus on cases in which we are prosecuting violators under both civil and criminal statutes, concurrently").

²⁹⁴ See Beckett, *supra* note 293.

²⁹⁵ See *id.*

²⁹⁶ *Id.*

C. ONE POSSIBLE SOLUTION TO THE PROBLEM OF SUCCESSIVE CRIMINAL AND CIVIL PROSECUTIONS

The public's interest in freedom from successive prosecutions and punishment could certainly be better served than it is under the *Hudson* regime. An ideal compromise would address both the need to review civil sanctions in light of their actual impact as applied (established by *Halper*) and the desire to allow administrative agencies to use their full power to enforce both civil and criminal sanctions to discourage certain types of behavior (achieved in *Hudson*). The roots for such a compromise may be found in the *Halper* opinion.

Halper directed that double jeopardy protection could not attach where civil and criminal sanctions were imposed in a single proceeding.²⁹⁷ For *Halper*, the only questions remaining in such a forum involve constitutional issues other than double jeopardy questions.²⁹⁸ Coordinated prosecutions of this sort might be difficult to coordinate and would place additional burdens on the government, but it would also afford the optimal protection for individuals against a barrage of punishments sought by the State.²⁹⁹ One former prosecutor argued after *Halper* that those responsible for prosecuting civil and criminal violations should coordinate prosecution efforts to ensure that violators are subjected to maximum penalty without implicating double jeopardy concerns:

. . . problems come into being when the legislature has authorized both civil and criminal prosecutors to wield big sticks against the same offensive conduct. Because the legislature authorized either stick to be swung, executive branch prosecutors and agency enforcers of the law become the interpreters and implementers of congressional policy as to who should strike first and with which weapons. . . . It makes sense for each type of enforcer to try to understand why Congress authorized the other enforcement action, and to try to coordinate efforts, rather than to

²⁹⁷ See *United States v. Halper*, 490 U.S. 435, 450 (1989), *abrogated by* 118 S. Ct. 488 (1997).

²⁹⁸ *Halper* refers specifically to the question of whether the punishments are statutorily authorized—this is a Due Process question. See *id.* Presumably the defendant would also retain his constitutional right to be free of Excessive Fines and Cruel and Unusual Punishments.

²⁹⁹ See *Cox*, *supra* note 278, at 1299-1307.

march myopically ahead with only half of the legislative mandate. Congress' primary goal, one assumes, was to effectively combat the evil for which punishment was authorized.³⁰⁰

Coordinated prosecution may be the best compromise available to address the double jeopardy issue as it pertains to civil sanctions. Such prosecutions protect the interests of the individual against the threat of successive and continuing punishments by the government, while addressing the public's need to adequately and fully punish a perpetrator for crimes against the public.

VI. CONCLUSION

In *Hudson*, the Court disavowed the *Halper* methodology for determining when double jeopardy protection would protect against the imposition of a civil sanction and reverted to a form of the double jeopardy test established in the *Ward* decision. The Court affirmed that when considering whether double jeopardy protection would issue against a civil sanction, the lower court should consider (1) whether the legislature had intended the sanction to be a civil sanction, and (2) whether the petitioner could show "by clearest proof" that the purportedly civil sanction was so punitive on its face as to be transformed to a criminal sanction for the purposes of double jeopardy analysis. In application, *Hudson* has proven to present just the problem that Justices Stevens, Souter, Breyer and Ginsburg anticipated: the courts are reluctant to term *any* "purportedly" civil sanction violative of the Double Jeopardy Clause.

Lisa Melenyzer*

³⁰⁰ *Id.* at 1300.

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