ARTICLES

THE INSIDIOUS EFFECT OF SOUNDBITES: WHY FENCES AREN'T PUNISHMENT

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This Article was inspired by two recent Supreme Court decisions dealing with the ability of the Securities and Exchange Commission to seek disgorgement of unlawfully obtained profits. The topic, however, is not disgorgement. That is a different article, published by the author in the Cornell Law Review in 2020, on which this one builds. This Article focuses instead on jurisprudential methodology. The Court has begun to exhibit an unfortunate penchant for jurisprudence by soundbite—the functional equivalent of Googling its own precedents for pithy quotes taken out of context from inapt cases. The results are, to put it politely, mischievous.

This Article makes its point by unpacking a proposition the Court has articulated flatly and succinctly. That proposition is that deterrence (evidently all deterrence) is a form of punishment. After providing necessary background, the Article examines the definition of "punishment" and its variants. Both commonsense arguments and the work of legal philosophers are considered before critiquing the Court's most recent forays into the area.

As it turns out, using the "soundbite approach" (rather than legal reasoning) to decide a case leads a court—or at least one of them—to treat precedents as mix-and-match and renders both common sense and context irrelevant. This is demonstrated when the Article introduces soundbites that the Court could have used but did not—soundbites that would have pointed to a conclusion

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diametrically opposed to the one suggested by the soundbites the Court actually chose. The Article then mines the precedents generating the quotes relied upon by the Court and rejects them in favor of a more structured examination of the different possible contexts invoking the concept of punishment.

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INTRODUCTION

We all know that many hands make light work but too many cooks spoil the broth. We also know that although a stitch in time saves nine, haste makes waste. What we may not have suspected is that disgorgement remedies are punitive if they operate as a deterrent,[1] but that depriving a wrongdoer of ill-gotten gains "serves a deterrent purpose distinct from any punitive purpose."[2]

This Article was inspired by *Kokesh v. SEC*,[3] a Supreme Court decision dealing with whether a statute of limitations generically attaching to penalties applies when the Securities and Exchange Commission (SEC or "Commission") seeks disgorgement of unlawfully obtained profits.[4] Disgorgement, however, is not what it happens to be about. That is a different article. This one is about jurisprudential methodology. In both *Kokesh* and a follow-up case, *Liu v. SEC*,[5] the Court exhibited an unfortunate penchant for jurisprudence by soundbite—the functional

1. Kokesh v. SEC, 137 S. Ct. 1635, 1643 (2017).
2. Bennis v. Michigan, 516 U.S. 442, 452 (1996).
3. 137 S. Ct 1635 (2017).
4. *See id.* at 1641–45.
5. 140 S. Ct. 1936 (2020).

equivalent of Googling its own precedents for pithy quotes taken out of context from inapt cases. The results are, to put it politely, mischievous.

Part II of this Article provides background on the SEC disgorgement remedy. It then briefly describes *Kokesh* and *Liu*, and touches on the tendency of courts and commentators to confuse the question of whether a remedy is equitable with whether it is punitive—a confusion showcased in *Liu*. After developing this necessary context, the Article turns to the definition of "punishment," "penal," and other variants.

Part III is a commonsense examination of the subject, as well as an acknowledgement of the work of great thinkers on the matter. Part IV emphasizes the extremely unfortunate tendency of some courts—or, at any rate, the Supreme Court—to assume that both common sense and context are irrelevant and that precedents are mix-and-match. Thus, it first introduces soundbites that the Court could have used in *Kokesh* but did not—soundbites that would have pointed to precisely the opposite conclusion from the one suggested by the soundbites the Court chose. It then mines the precedents relied upon by the Court before turning to a more structured examination of the different possible contexts invoking the concept of punishment.

Part V summarizes the case for concluding that *Kokesh*, turbocharged by *Liu*, is well-poised to take on a life of its own as some sort of "Phantom Blot"—a cartoonish threat of doctrinal mayhem prepared to disrupt not the life and fortunes of Mickey Mouse,[6] but a broad swathe of remedies and subject matters.

Lest the reader ultimately be disappointed, it does seem both kind and polite to make one point even more clearly before moving on. That point is about what this Article is not. It is not an analysis of the extent of the Commission's ability to seek the remedy of disgorgement. Neither is it an attempt to develop a perfect definition of punishment and/or explicate its justifications or the lack thereof. Instead, its purpose is to demonstrate that the Court and, to some extent, those who comment on it, really need to get a grip on themselves.

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6. The "Phantom Blot" is a Disney character known for his skills as a hypnotist and recurring in a number of Mickey Mouse comic book stories. *See, e.g.*, *Mickey Mouse Outwits the Phantom Blot*, AMAZON, https://www.amazon.com/Mickey-Outwits-Phantom-Disney-Comics/dp/156115024X (last visited Oct. 20, 2022).

I. BACKGROUND

A. The SEC's Disgorgement Remedy

For more than five decades, the SEC has repeatedly and successfully sought the remedy of disgorgement from violators of the federal securities laws.[7] In 2017 alone, the last year unaffected by the developments described below, the amount recovered was just under $3 billion.[8] It is perfectly clear—due to the SEC's annual reporting and references to disgorgement in various federal securities statutes—that Congress was well aware of, and endorsed, the existence of the remedy.[9] Nonetheless, until early 2021, Congress never expressly authorized disgorgement—if it had been, there might have been explicit attention paid to whether it was subject to a statute of limitations.[10] As it was, it fell to the courts to determine whether 28 U.S.C. § 2462, a generic five-year statute of limitations for "enforcement of any civil fine, penalty, or forfeiture," applied to the Commission's actions for disgorgement.[11] Prior to the decision in *Kokesh v. SEC*, courts generally resolved this by characterizing disgorgement as an equitable, rather than legal, remedy, and thus non-

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7. *See, e.g.*, SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 n.20 (2d Cir. 1968) (explaining that the SEC sought court orders designed to have the individual defendants disgorge any profits they enjoyed from Texas Gulf Sulphur, Co. transactions).

8. SEC DIV. OF ENF'T, ANNUAL REPORT: A LOOK BACK AT FISCAL YEAR 2017 7 (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf [https://perma.cc/D4B5-VBYS]. By 2021, that figure had fallen but still was a healthy $2.4 billion. *See SEC Announces Enforcement Results for FY 2021*, SEC (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 [https://perma.cc/VN2E-M49N].

9. Both legislative history and statutory wording have acknowledged the SEC's use of the disgorgement remedy and have specified how disgorged amounts are to be factored into other calculations, such as certain recoveries by private plaintiffs. There even is a statutory scheme dealing with the distribution of disgorged amounts to wronged investors. *See* Securities Exchange Act of 1934 § 20A(b)(1), 15 U.S.C. § 78t-1(b)(1) (setting the maximum allowable damages in a contemporaneous trading action at either the defendant's profit gained or loss avoided); *see also, e.g.*, 15 U.S.C. § 78t-1(b)(2) (reducing the total damages in the contemporaneous action by any disgorgement amount).

10. Ike Adams, Chris Mills, & David Petron, *SEC Disgorgement Authority May Be Limited Even After Recent Amendments to the Exchange Act*, ABA (Jan. 27, 2021) (stating that the amendments added to the Exchange Act expressly authorized disgorgement).

11. 28 U.S.C. § 2462.

penal in character.[12] This characterization also brought the remedy precisely within the bounds of an early 2000s statute authorizing the Commission to seek all equitable remedies.[13]

While enjoying the warmth of the judicial incubator, a few niceties of the SEC disgorgement remedy were sketched in and then became distinct. First, defendants' gains, rather than plaintiffs' losses, definitely were its measure (although the method of calculating those gains varied), and there was no requirement that any portion is paid to victims as restitution.[14] Second, as noted above, the lower federal courts fairly resolutely characterized the remedy as equitable in nature—which had several consequences. Among other things, it was not "jeopardy" for double jeopardy purposes,[15] and because it was not an action "at common law," it did not give rise to a right to trial by jury.[16] Similarly, it was not a debt for purposes of the Federal Debt Collection Procedures Act,[17] it at least arguably was discharged in

12. *See* Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (stating that a disgorgement that is causally related to the particular misconduct is not a penalty); SEC v. Rind, 991 F.2d 1486, 1492–93 (9th Cir. 1993) (noting that disgorgement is equitable in nature because it prevents unjust enrichment).

13. *See* 15 U.S.C. § 53(b) (authorizing the Commission to seek both preliminary and permanent injunctions as remedies for "any provision of law enforced by the Federal Trade Commission").

14. *See, e.g.*, Zacharias v. SEC, 569 F.3d 458, 471 (D.C. Cir. 2009) (per curiam) (noting that while harm to third parties may be useful it is irrelevant to whether disgorgement is an appropriate remedy).

15. *See* United States v. Bank, 965 F.3d 287, 301 (4th Cir. 2020) (stating that because double jeopardy applies to criminal penalties, it would not apply to a civil penalty like disgorgement).

16. *See, e.g.*, *Rind*, 991 F.2d at 1493 (stating that the right to a jury trial in the Seventh Amendment does not apply to purely injunctive actions); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 94–96 (2d Cir. 1978) (noting that monetary claims are equitable, and not triable by a jury, if they restore the status quo).

17. 15 U.S.C. § 1692.

bankruptcy,[18] it at least arguably was tax deductible,[19] and it clearly was enforceable by contempt sanctions.[20]

Before continuing, it is worth a moment to note this Article's use of what is intended to be clarifying nomenclature. As it turns out, it is important to distinguish between two types of at least superficially related remedies. One involves payments to injured parties, reckoned by the extent of their injuries. The other is measured by reference to the extent of the defendants' profits. Courts have recognized both types of measurement, albeit in different contexts, and often have used the single term "restitution" for both.[21] To avoid confusion, this Article will use the term "restitution" to refer to amounts paid or to be paid to injured parties, calculated by reference to the amount of plaintiff loss rather than by reference to the amount of defendant gain. The term "disgorgement" will refer to amounts calculated (even imprecisely) by reference to defendant gain, whether or not those amounts are paid to injured parties. When quoting or describing Supreme Court

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18. *Id.*
3) (remanding the case to the district court to reconsider defendants' inability to pay). *But see In re* Telsey, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992) (holding it was a "fine, penalty, or forfeiture" and thus not discharged).

19. *See* Peter J. Henning, *Deducting the Costs of a Government Settlement*, N.Y. TIMES: DEALBOOK (Mar. 24, 2014, 1:17 PM), https://dealbook.nytimes.com/2014/03/24/deducting-the-costs-of-a-government-settlement [https://perma.cc/K8S7-BNUY] (describing the disgorgement of a CEO's insider trading gains as "an equitable remedy" and, therefore, tax deductible); *see also* Robert W. Wood, *Insurance Industry Settlements Revive Old Questions: When Is a Payment a Nondeductible Penalty?*, 103 J. TAX'N 47, 48 (2005) ("Restitution (or disgorgement of profits) is generally deductible as a business expense."). *But see* Memorandum from Thomas D. Moffitt, Chief, Branch 2, Office of Chief Counsel, IRS, to Large Bus. & Int'l 5 (Jan. 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf [https://perma.cc/XPY9-FZY4] (applying section 162(f) prohibiting deductions for "any fine or similar penalty paid to a government for the violation of any law").

20. SEC v. Huffman, 996 F.2d 800, 803 (5th Cir. 1993) (explaining that because disgorgement is more like a continuing injunction, it could be enforced by contempt sanctions); SEC v. Goldfarb, No. C 11–00938 WHA, 2012 WL 2343668, at *6–7 (N.D. Cal. June 20, 2012) (holding the defendant in contempt because he continued to use his money to support his luxurious lifestyle rather than paying down his debt). *But see* SEC v. New Futures Trading Int'l Corp., No. 11–cv–532–JL, 2012 WL 1378558, at *2–3 (D.N.H. Apr. 20, 2012) (finding that because the U.S. does not recognize debtor's prisons, the SEC cannot hold defendants in contempt).

21. *See, e.g.*, Great-West Life & Annuity Ins. v. Knudson, 534 U.S. 204, 212–14 (2002) (noting that plaintiffs could obtain the legal remedy of restitution for breach of contract claims or the equitable remedy of restitution in the form of a constructive trust or an equitable lien).

decisions, however, this Article will use the actual terminology employed by the Court.

In 2021, Congress did adopt legislation specifically granting the SEC the authority to seek disgorgement without defining the term (although most likely intending—if there is such a thing as legislative intent—the usage adopted above).[22] That legislation and the complications it added to an already confounding subject matter are part of the story of the Commission's ability to seek disgorgement and thus, as noted above, the subject of a different article.[23] To reiterate, this Article is, instead, focused on the Supreme Court's casual and confusing approach to the nature of punishment and its interactions with equity. These are matters unaffected by the new legislation.

B. Kokesh v. SEC *and* SEC v. Liu

The Supreme Court decided *Kokesh v. SEC* in 2017.[24] It was a unanimous opinion in favor of appellant Charles Kokesh, determining that disgorgement actions brought by the Commission are penal and thus are subject to the statute of limitations imposed on civil fines, penalties, and forfeitures by 28 U.S.C. § 2462.[25] It was a significant holding, in more than one way. First and most obviously, the opinion authored by Justice Sotomayor came with a hefty price tag for the government, which since 1970, had enjoyed the ability to reach back through the mists of time to recover a defendant's ill-gotten gains.[26]

Even more foreboding from the Commission's perspective, the case had one of *those* footnotes, suggesting that the threshold matter of whether courts should be ordering disgorgement in SEC enforcement actions at all might be up for grabs.[27]

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22. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501(a)(1)(A)(ii), 134 Stat. 3388, 4625–26 (2021). For discussion of legislative intent, see generally Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1639–43 (2020) [hereinafter Gabaldon, *Equity and Punishment*].

23. Yet to be written.

24. 137 S. Ct. 1635, 1635 (2017).

25. *Id.* at 1639.

26. *Id.* at 1640.

27. *Id.* at 1642 n.3 reads as follows:

> Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement

That footnote aside, the Court's reasoning logically dictated that disgorgement be characterized as a civil monetary penalty.[28] This is something that previously was considered to be entirely different than disgorgement and subject to a specific schedule of amounts to which the Commission generally is restricted.

Most troubling, however, was the Court's broad—and flat—observation that deterrence is punitive.[29] The resulting soundbite, culled from earlier cases in which something substantially more subtle was going on, very well may resonate through the federal law of crime and punishment, and elsewhere.

In a subsequent case, *Liu v. SEC*, the Court sought to answer the question it had raised in *Kokesh*'s ominous footnote. It took a somewhat more nuanced approach, following a template provided in an amicus brief filed by disapproving law professors chiding both the SEC and the defendants for their positions.[30] The Court thus rejected the Commission's claim that its clear statutory power to seek equitable remedies meant that it could seek disgorgement of a wrongdoer's gross profit without respect to whether the amount recovered was returned to defrauded investors.[31] It also refused to approve the assertion by defendants Charles Liu and Xin (Lisa) Wang that, as a matter of history, no form of either disgorgement or restitution could be classified as equitable.[32] The sweet spot, according to a majority opinion (again) authored by Justice Sotomayor, was that compensatory disgorgement of net profits did fall within the historic umbrella of equity, but equity courts "did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers."[33] The Court stated, again flatly and succinctly, that "equity never 'lends its aid to enforce a forfeiture or penalty.'"[34]

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proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.

28. *Id.* at 1644.

29. *Id.* at 1643.

30. *See* Liu v. SEC, 140 S. Ct. 1936, 1942, 1946 (2020); *see also* Brief of Amici Curiae Law Professors in Support of Petitioners at 2, 3, *Liu*, 140 S. Ct. 1936 (No. 18-1501) (arguing that the SEC's use of punitive disgorgement is improper with traditional understandings of equity).

31. Brief for the Respondent at 28–29, *Liu*, 140 S. Ct. 1936 (No. 18-1501).

32. Reply Brief for Petitioners at 6, *Liu*, 140 S. Ct. 1936 (No. 18-1501).

33. *Liu*, 140 S. Ct. at 1944.

34. *Id.* at 1941 (quoting Marshall v. Vicksburg, 82 U.S. (15 Wall.) 146, 149 (1873)).

As a logical matter, *Liu* completely mooted *Kokesh*, insofar as it appears (1) that the SEC could not ever bring what the Court views as a penal form of disgorgement and (2) that non-penal forms must not be penalties to which the relevant statute of limitations might apply. This seems like a detail the Court might have acknowledged even though the statute of limitations issue was not a matter directly before it. *Liu* does, however, take care of one problem created by *Kokesh*: if the SEC lacks the power to bring penal disgorgement actions, the prospect that disgorgement might be a form of civil monetary penalty subject to statutory caps should not arise.

Responding to the question mark raised by *Kokesh*, and evidently with no thought given to *Liu*'s intervention, Congress subsequently sought to specifically authorize the SEC to seek disgorgement and provided a tailor-made statute of limitations to govern subsequent actions.[35] This, of course, did nothing to clarify the nature of punishment and/or its relationship with equity. Nor does it address one of the largest difficulties presented by *Liu*. The decision solidified a dichotomy that had only dimly emerged in *Kokesh*. It now appears that the Supreme Court views compensatory remedies as non-punitive and all non-compensatory remedies as punitive.[36] According to the Court, this puts them beyond the reach of equity jurisdiction.[37] It also creates a torrent of other issues that turn on whether something is penal (a.k.a. punishment, a.k.a. a penalty).[38]

C. Equity and Punishment

Immediately after the *Kokesh* opinion came down, commentators began to claim that the case established that disgorgement was not an equitable remedy and thus could not be justified by the statutory language empowering the Commission to seek all equitable

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35. *See, e.g.*, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501(a)(1)(A)(ii), 134 Stat. 3388, 4625–26 (2021) (authorizing the SEC to seek disgorgement and defining a general five-year statute of limitations with a ten-year statute of limitations when the conduct violates one of a select few specific statutes).

36. Kokesh v. SEC, 137 S. Ct. 1635,1638 (2017).

37. *Id.*

38. *See supra* notes 14–20 and accompanying text (explaining that the penal nature of the remedy has implications for double jeopardy, right to trial by jury, debt and bankruptcy, tax deductibility, and contempt sanctions determinations).

remedies.[39] The basic idea was not just that disgorgement per se was not historically recognized at equity,[40] which is true, at least if one is a literalist. More broadly, the commentators asserted that "there are no penalties in equity,"[41] which is not true—although that is the canard for which the *Liu* Court clearly fell.

It is fairly easy to counter the notion that "there are no penalties in equity," sometimes paraphrased as "equity cannot punish."[42] Consider, after all, the longstanding power of courts of equity to issue contempt orders, which surely can be punitive.[43] The Judiciary Act of 1789[44] gave federal courts the "power . . . to *punish* by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ."[45] In England, both courts of law and courts of equity had already claimed this power.[46] One may argue that punishment by contempt is more of an enforcement method than a judicial goal, but power is power nonetheless.

Of a piece, the "equity cannot punish" soundbite loses steam when paired with *Kokesh*'s punchline to the effect that deterrence is punishment. If, under *Kokesh*, deterrence is punitive and, under *Liu*, equity cannot punish, then what is to become of injunctive relief?

To spare us, for the moment, the need to expand on these arguments, we can quite briskly extract guidance from straightforward historic sources, such as distinguished British jurist Henry Home Lord Kames, writing in the 18th century. Lord Kames tells us quite clearly

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39. *See* Stephen M. Bainbridge, Kokesh *Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASH. U. J.L. & POL'Y 17, 26 (2018) (observing that equity cannot punish); Sam Bray, *Equity at the Supreme Court*, WASH. POST: VOLOKH CONSPIRACY (June 10, 2017, 9:45 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/10/equity-at-the-supreme-court/?utm_term=.b27f569d9ef4 [https://perma.cc/2MGB-2QH4] ("[T]here are no penalties in equity.").

40. Bray, *supra* note 39.

41. Bainbridge, *supra* note 39, at 30.

42. *See id.* at 21, 30 (explaining that courts of equity cannot impose penalties because penalties are legal sanctions).

43. Civil contempt is generally characterized as coercive and remedial, rather than punitive. *See* Uphaus v. Wyman, 360 U.S. 72, 76, 81 (1959) (referring to contempt as a civil remedy and rejecting the claim that it was such a cruel and unusual punishment as to constitute a denial of due process). Criminal contempt clearly is punitive and does carry with it various due process protections. *Id.* at 95 (Brennan, J., dissenting).

44. Ch. 20, 1 Stat. 73, 73–93 (1789).

45. *Id.* § 17, 1 Stat. at 83 (emphasis added).

46. Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 8 (1961).

that the historic courts of equity recognized their own ability to inflict punishment.[47] He devoted an entire chapter of his 1760 treatise, *Principles of Equity*, to the "[p]ower of a court of equity to inflict punishment, and to mitigate it."[48] This simply cannot be reconciled with the claim that "equity cannot punish."

The source of modern confusion about whether equitable remedies can be punitive seems to be a matter of playing telephone with a string of historic authorities and emerging with exactly the wrong conclusion. This is the subject of—you guessed it—yet another article.[49] This Article turns, instead, to an extended contemplation of the Supreme Court's baseline assertions about the nature of punishment itself.

II. WHY FENCES AREN'T PUNISHMENT

A. *Few More Words about* Kokesh v. SEC

Charles Kokesh misappropriated $34.9 million of investors' funds between 1995 and 2009.[50] In its 2009 enforcement action, the SEC conceded that section 2462 governed its ability to seek the express civil monetary penalties it is permitted by statute to pursue, thus limiting it to the collection of $2.4 million for Kokesh's conduct commencing in 2004.[51] It sought and received the full $34.9 million (plus interest) in the form of disgorgement of his ill-gotten gains since 1995.[52] Kokesh appealed on the grounds that the disgorgement was either a "penalty" or a "forfeiture."[53] As a result, the Supreme Court's ruling dramatically trimmed the ordered disgorgement.

Justice Sotomayor's reasoning was so brief as to be almost vestigial. She first acknowledged the purpose of the federal securities laws as discerned exclusively from the Court's own precedents.[54] Next, she summarized the evolution of the Commission's enforcement authority to include the ability (by reason of statutory authorization) to pursue injunctive relief, the authority (judicially recognized) to seek disgorgement, and the ability (again by reason of statutory

47. HENRY HOME LORD KAMES, PRINCIPLES OF EQUITY 229 (2d ed. 1767).
48. *Id.*
49. *See generally* Gabaldon, *Equity and Punishment*, *supra* note 22.
50. Kokesh v. SEC, 137 S. Ct. 1635, 1641 (2017).
51. *Id.*
52. *Id.*
53. Brief of Petitioner at 12, 23; *Kokesh*, 137 S. Ct. at 1635 (No. 16-529).
54. *Kokesh*, 137 S. Ct. at 1639–40.

authorization) to obtain civil monetary penalties.[55] Then, she reviewed the facts and history of the case.[56] Five pages into the decision, Sotomayor (with citation only to the Court's own precedents) praised statutes of limitations as "vital to the welfare of society," quoted section 2462, and announced the Court's conclusion that SEC disgorgement constitutes a "penalty."[57] It is at this point that the ominous footnote appears to explain that the court was not opining on whether the federal courts have, in the first place, the authority to order disgorgement in SEC enforcement proceedings.[58]

The conclusion that SEC disgorgement is a penalty for purposes of section 2462 relied exclusively (once again) on a short-handed invocation of the Court's own precedents determining which sanctions were penalties (used interchangeably with "punishments") under three different constitutional provisions, none of which had anything to do with the issue in *Kokesh*.[59] This was an interesting contrast to lower court opinions that struggled mightily with legal history and statutory interpretation of section 2462 itself.[60] It may be (and very probably is) the case that self-citation is a method of Supreme Court team-building that permits the resolution of legal matters without messy arguments about the existence of such a thing as legislative intent and/or the legitimacy of legislative history in discerning any such intent. Nonetheless, as foreshadowed above, self-citation that functionally equates to Googling a term in a court's own precedents has little to commend it as a method of judicial reasoning.

Sotomayor's starting point was the 1892 declaration in *Huntington v. Attrill*,[61] a full faith and credit case, that a "penalty" is a "punishment . . . imposed and enforced by the State, for a crime or offen[s]e against its laws."[62] This definition, according to the *Kokesh* opinion, required two findings. First, the wrong sought to be redressed must be one against the public.[63] Second, the putative penalty must be sought "for the

55. *Id.* at 1640.
56. *Id.* at 1641.
57. *Id.* at 1641–42.
58. *Id.* at 1642 n.3.
59. *Id.* at 1643–44.
60. 28 U.S.C. § 2462.
61. 146 U.S. 657 (1892).
62. *Id.* at 667.
63. *Kokesh*, 137 S. Ct. at 1642.

purpose of punishment, and to deter others from offending in like manner."[64]

In checking off the first box, Sotomayor uncontroversially took as conceded by the government that the Commission acts in the public interest in seeking disgorgement.[65] Checking off the second box to conclude that the purpose of disgorgement is to punish seemed only slightly heavier lifting.[66] The Justice first looked to district and circuit court cases noting that deterrence is the primary purpose of disgorgement.[67] Establishing that deterrence is punitive then was a quick matter (three sentences) of quoting two of the court's own cases.[68]

Bell v. Wolfish[69] involved (although Sotomayor did not breathe a word about the facts) whether such practices as pre-trial double-bunking and intrusive body searches were punitive and thus deprivations of liberty for due process purposes.[70] *Bell* concluded that they were not.[71] In passing, in a footnote recharacterizing a different case's reasoning, the *Bell* Court noted that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."[72] It is an abbreviation of this footnote, pruned to refer only to deterrence, that was quoted in *Kokesh*.[73]

Sotomayor also quoted *United States v. Bajakajian*,[74] which answered in the affirmative the question of whether forfeiture of transported, undeclared currency lawfully owned by the defendant was a "fine" under the Eighth Amendment's prohibition of excessive fines.[75] *Bajakajian* stated that "[d]eterrence . . . has traditionally been viewed as a goal of punishment . . . ."[76]

After that, Sotomayor established that although disgorgement sometimes results in the compensation of injured investors, this is not

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64. *Id.* (quoting *Huntington*, 146 U.S. at 668).
65. *Id.* at 1640.
66. *Id.* at 1643–44.
67. *Id.*
68. *Id.* at 1645.
69. 441 U.S. 520 (1979).
70. *Id.* at 535, 541, 544, 558.
71. *Id.* at 560–62.
72. *Id.* at 539 n.20.
73. *Kokesh*, 137 S. Ct. at 1643 ("[D]eterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].").
74. 524 U.S. 321 (1998).
75. *Id.* at 337.
76. *Id.* at 329.

always the case.[77] At oral argument, the government offered the SEC's calculation that "for 2013 to 2016, 43 percent of disgorgement recoveries went to the Treasury, while from 2013 to 2015, the rate was 33 percent."[78] As a result, she concluded that disgorgement is penal.[79] As a final step, she responded to the SEC's argument that disgorgement represents a return of the defendant to the status quo, rather than a penalty, by declaring that the amount of the award sometimes exceeds a defendant's actual profit from wrongdoing.[80] In her view, the Court's own jurisprudence established that sanctions that are even partially non-compensatory are punitive.[81]

This Article takes the position that, quite apart from the perplexing (but ultimately explicable) take on equity contributed by *Liu*, *Kokesh* is a bit of a zombie apocalypse waiting to happen.[82] For one thing, its substitution of the Supreme Court's own decontextualized musings for any attempt whatsoever to discern statutory meaning is troubling. Then, there was the question raised in its troubling footnote—and not resolved by the statute leapfrogging *Liu*—with respect to whether the Commission's earlier quests for disgorgement were legitimate.[83]

In addition, "conflate" is always a fun word, and it seemed to aptly describe what the *Kokesh* opinion accomplished with respect to deterrence and punishment. This is more than a little bold,

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77. *Kokesh*, 137 S. Ct. at 1644.

78. Theresa Gabaldon, *Argument Analysis: Does a Statute of Limitations Apply to SEC Actions for Disgorgement?*, SCOTUSBLOG (Apr. 19, 2017, 12:09 PM), https://www.scotusblog.com/2017/04/argument-analysis-statute-limitations-apply-sec-actions-disgorgement [https://perma.cc/N8SD-8GV9]. The government also noted "that disgorgement is something requested by the [C]ommission at the district-court level, with a non-binding recommendation as to whether it should be disbursed to victims or paid to the Treasury (from which it might still be paid to victims)." *Id.*

79. *Kokesh*, 137 S. Ct. at 1644.

80. *Id.* at 1644–45.

81. *Id.*

82. In addition to the issues raised in the text, questions also remain regarding Sotomayor's remarks on the forced disgorgement of amounts exceeding a defendant's profits. She used as a platform for her analysis the recovery from a tipper of a tippee's gains on inside trading. *Id.* She quoted without criticism or question various lower courts' statements more or less to the effect that the ability to obtain disgorgement from a tipper of a tippee's profits is "well settled." *Id.* It is true that lower courts have so held, but the Supreme Court has not. There are interesting issues outstanding having to do with the relationship of tippers and tippees and what effect that relationship may have on whether tipping is a violation of the federal securities laws, and Sotomayor's comments may have an impact on their resolution.

83. This is a matter I have addressed at length in *Equity and Punishment*, *supra* note 22, at 1644–47.

particularly given that the reasoning with respect to exactly why deterrence is punitive consisted of the quotation of very few words from cases far afield from the one at hand.[84] *Kokesh* clearly sanctions a one-size-fits-all approach to the definition of punishment and its variants and evidently establishes a dichotomous view (solidified in *Liu*) of SEC enforcement actions. If the *sole* purpose of such actions is to seek compensation for investors, they are—duh—compensatory. If there are other purposes, including deterrence, they are punitive.

This Article takes the position that this dichotomy is not only bold, it is incorrect and apt to ripple unhappily through other areas where disgorgement may be sought. It also has consequences (not considered by the Court) for such practical matters as whether certain payments (of disgorgement or otherwise) are deductible for federal income tax purposes or reimbursable by insurers.[85] In addition, it has obvious implications for a panoply of deterrent remedies, including industry bars and, of course, all injunctions against violations of the law. Lower courts are already facing such issues head-on.[86]

B. Loose Talk About Punishment

In something of an ouroboros effect, the characterization of a remedy as "penal" has, in the past, sometimes been taken to mean that the remedy is not equitable. Eliding for another day the legal versus equitable divide,[87] we turn to the question of whether the Court in *Kokesh* was adequately justified (which is different from correct!) in concluding that disgorgement is a form of punishment, either for

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84. One might also fear that the *Kokesh* approach could have an unintended spill-over effect on issues such as fiduciary liability for self-dealing transactions where rules are quite expressly bottomed on prophylaxis.

85. *See, e.g.*, 26 C.F.R. § 1.162-21(a)(2) (2021) (stating that payments, fines, or penalties to or at the direction of the government or a government entity are generally not tax-deductible).

86. *See, e.g.*, SEC v. Gentile, No. 16-1619 (JLL), 2017 WL 6371301, at *4 (D.N.J. Dec. 13, 2017) (holding that an "obey-the-law" injunction and industry bar are penalties), *vacated*, 939 F.3d 549 (3rd Cir. 2019); Saad v. SEC, 873 F.3d 297, 301, 304 (D.C. Cir. 2017) (noting that a lifetime industry ban must be evaluated for penal character); SEC v. Collyard, 861 F.3d 760, 764 (8th Cir. 2017) (providing examples where some injunctions could be penal).

87. *See* Gabaldon, *Equity and Punishment*, *supra* note 22 at 1672–76 (describing the right to trial by jury as being the most significant factor to determining whether the remedy is legal or equitable); Theresa A. Gabaldon, *Party Games: The Supreme Court's 21st Century Jurisprudence by Telephone*, RUTGERS L.J. (forthcoming) [hereinafter Gabaldon, *Party Games*].

statute of limitations purposes or otherwise. As the reader already will have noted, no one (including the author) is particularly punctilious in distinguishing the terms "punishment," "penal," and their variants. The Article eventually will circle back to the question of whether this practice is unfortunate, but until it does so, we shall simply assume their synonymity.

This Section considers various commonsense intuitions about punishment. Its purpose is simply to warm up the mental muscles for (1) a more meaningful contemplation of Section III.C, in which philosophers debating the parameters and justifications of punishment are acknowledged, and (2) delving more thoroughly into *Kokesh* and its precedents in Part IV.

It is interesting to think for a moment about the *Kokesh* Court's naked proposition that deterrence, which is said to be one of the purposes of all forms of punishment, is itself punishment. As we begin the process, we should note that indeed deterrence sometimes is said to be one of two goals of all forms of punishment—retribution is the other.[88] (There are others, such as rehabilitation and incapacitation, that are regarded as the goals of some, but not all, punishments.)[89] Let's then turn to the common definitions of "deter" and "punish."

Merriam-Webster defines "deter" in the alternative as "(1) to turn aside, discourage, or prevent from acting" and "(2) inhibit."[90] The most relevant meanings of "punish" are "(1a) to impose a penalty on for a fault, offense, or violation" and "(1b) to inflict a penalty for the commission of (an offense) in retribution or retaliation."[91] This evidently means we will have to consult at least one more page, the one on which the word "penalty" is defined. Sports, bridge, and contract

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88. *See, e.g.*, Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 266 (2013) (describing the accepted adage that retributive justice is served by giving offenders what they deserve). This seems to be a gross simplification of a mound of literature exploring the deontological and consequentialist (utilitarian) uses of punishment, but it will do for our purposes.

89. *See The Purposes of Punishment*, *in* CRIMINAL LAW (online ed. 2012) http://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment [https://perma.cc/VZV6-848S] [hereinafter *Purposes of Punishment*] ("Punishment has five recognized purposes: deterrence, incapacitation, rehabilitation, retribution, and restitution.").

90. *Deter*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/deter [https://perma.cc/2PT6-KVLL].

91. *Punish*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/punish [https://perma.cc/FT7E-SZZL]. Two less relevant alternatives are "(2a) to deal with roughly or harshly," and "(2b) to inflict injury on: hurt."

clauses aside, the most relevant meaning given for penalty is "the suffering in person, rights, or property that is annexed by law or judicial decision to the commission of a crime or public offense [i.e.,] trespassing forbidden under penalty of imprisonment."[92]

We thus are armed for a few mental experiments. There are several set out below; some are based on the facts of cases, some are not. Readers are encouraged to devise their own hypotheticals as well. Let's start with "The Fence."

1. The Fence

Do fences deter trespasses? Given the Merriam-Webster alternative definitions, it would seem that they do. Do fences inflict a penalty on trespassers? Let's go with "probably not." Actually, let's shorten that to a straight "no." A little not-so-hard thinking in reaction to this example, however, probably would lead us to conclude that we really should not be talking about *all* deterrence, but only those forms that are consequences imposed in reaction to an act. How about a fence erected in response to a neighbor's repeated trespasses? Nope, still not punishment, which means that the "reaction" requirement may be a necessary condition of punishment (although we will confuse this below), but it is not a sufficient one. Suppose the previously trespassing neighbor "suffers" because said neighbor really, really wanted to trespass again. Surely we cannot concede that there is suffering (in the penal sense) in being prevented from doing what one has no right to do—thus involving no loss of entitlement, and therefore no suffering

92. *Penalty*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/penalty [https://perma.cc/C9X2-ZANA]. Although the purpose of this section is the pursuit of common sense, some readers may be curious about what Black's Law Dictionary has to say on these subjects. "Deterrence" is the 'act or process of discouraging certain behavior." *Deterrence*, BLACK'S LEGAL DICTIONARY (11th ed.). The definition of "punishment" is "[a]ny pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." *Punishment*, THE LAW DICTIONARY, *https://thelawdictionary.org/punishment* [https://perma.cc/2FDC-JYKJ] (citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); Featherstone v. People, 62 N.E. 684, 687 (Ill. 1901); *Ex parte* Howe, 37 P. 536, 537 (Or. 1894); State v. Grant, 79 Mo. 113, 130 (1883)). "Penalty" is defined as "[a] punishment; a punishment imposed by statute as a consequence of the commission of a certain specified offense." *Penalty*, THE LAW DICTIONARY, *https://thelawdictionary.org/penalty* [https://perma.cc/BT7T-LL5F] (citing Lancaster v. Richardson, 4 Lans. 136, 139–40 (N.Y. App. Div. 1871); People v. Nedrow, 13 N.E. 533, 535 (Ill. 1887); Iowa v. Chicago, B. & Q.R. Co., 37 F. 497, 498–99 (C.C.S.D. Iowa 1889)).

in right or property. If it were otherwise, the property and other rights of others would become meaningless.

2. The Apple

Fine. Enough about the fence. Next, imagine yourself in a small grocery market. You hear the shopkeeper shouting at an urchin heading for the door with an apple in his hand, "Hey, you, put that down or pay for it!" Does that deter the would-be shoplifter? Maybe yes, maybe no, but the clear intent of the shopkeeper is deterrence. If the would-be shoplifter *is* deterred—that is, puts the apple down—has he also been punished? One thinks not; although he may have "suffered" disappointment or perhaps even mild embarrassment, he has not lost anything to which he was entitled. Perhaps, then, as an intuitive matter, if a putative punishment involves removal of property, we should add some notion of loss of one's own property, rather than that belonging to someone else.

Move on to suppose that instead of shouting, the storekeeper actually removes the apple from the urchin's hand. Has the theft been deterred? Yes. Has the would-be thief been punished? No.

Perhaps, however, the problem with this example is that it involves the deterrence of a would-be miscreant rather than a consequence imposed on an actual miscreant. Although deterrence of course always relates to future acts, we speculated above that in order for something to be punishment, it must be the consequence of—that is, a reaction to—an act. We can, for the moment, say that the urchin has committed attempted shoplifting, saving until a bit later the idea that consequences imposed on those who are entirely innocent but suspected of wrongdoing function as "punishment" for most intuitive purposes.[93]

We might also note that although the would-be miscreant is himself deterred (specific deterrence), the shouting and/or taking of the apple were not for the purpose of deterring third parties (general deterrence).[94] This is not a distinction drawn in *Kokesh*, but perhaps it

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93. *See infra* Section III.B.4 (expanding on this idea in a scenario called "The Putative Plagiarist"). The analysis is further complicated by the Supreme Court's speculation in *Kennedy v. Mendoza-Martinez*, discussed at *infra* notes 202–209 and accompanying text, that a consequence inflicted only if the defendant acted with scienter is more likely to be punitive.

94. *See The Purposes of Punishment*, *supra* note 89:

makes sense to explore it as a dividing line. Assume, then, that the shopkeeper took the apple with the intent of publicizing it by posting a video still of the event on the shop door with the legend "Zero Tolerance for Shoplifting." The purpose clearly is general deterrence, but if the identity of the would-be shoplifter is not known, it still is difficult to see any whiff of punishment. He still has given up no more nor less than the apple to which he was not entitled, and he has suffered nothing. (It probably is worth noting, however, that if would-be shoplifters get the impression that the only consequence of theft is losing the forbidden fruit, a general deterrent effect is apt to be quite limited.)

3. The Plagiarist

Now, suppose that the students of a law school are told that there will be absolutely no credit given for papers that are plagiarized. Will this deter plagiarism? One would think it would deter plagiarism more than a policy that awarded full or partial credit for recycled papers, so let's go with "yes." Then, student X turns in an entirely plagiarized paper. The plagiarism is discovered, and student X is told, sure enough, that no credit for the paper will be given. This means that a different, unplagiarized paper must be submitted for student X to pass the course. Have student X and other students been deterred from future acts of plagiarism? Presumably so, at least if it is reported that the school is consistently enforcing its policy. Has student X suffered punishment? Or (like the would-be trespasser and the would-be thief) has she simply been disappointed and prevented from enjoying something to which she was not entitled?[95] Compare a policy of expulsion from school for plagiarism, however, and then we may be

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Specific deterrence applies to an *individual defendant*. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. General deterrence applies to the *public* at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that an individual defendant was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution.

95. Let us confirm our reaction to the last example. Suppose that student Y, rather than turning in a paper, paints herself blue and says she has created a performance paper. The professor refuses to give her a grade. Has Y been punished?

talking about punishment (although we could bog down in the circularity of having consented to compliance with an honor code and therefore lacking entitlement to proceed with one's education).

4. The Putative Plagiarist

It would seem, as a technical matter, that if punishment is a reaction to an offense, one logically cannot be punished for something one has not yet done. This proves too much, however, for surely a student who did not plagiarize a paper would feel just as punished by a mistaken expulsion as a student who actually did plagiarize. This means that it must be possible to punish suspected transgressions as well as actual ones. For that matter, the innocent student also would feel punished by a denial of credit, while the guilty student should not. Similarly, someone about to eat their own apple on the street, only to be accused of theft and have the apple taken, would be suffering a loss. This presumably explains why some sort of process to determine entitlement seems a fair demand.

5. Entitlement and Obey the Law Injunctions

Obviously, one thesis being developed is that being denied property or credit to which one is not entitled is not punishment. Of a piece, since people are not entitled to disobey the law, being made the subject of an "obey the law" injunction must not be punishment, even if it is imposed as a reaction to a prior transgression.

Suppose, however, that the injunction triggers a cascade of other consequences, such as inability to hold certain jobs. That feels quite different. Alternatively, suppose that the injunction is imposed for the purpose of embarrassing the subject. That, too, feels different; the role of deliberate shaming is further investigated below. Absent a cascade of consequences or a purpose to shame, though, "obey the law" injunctions surely are no more than invisible fences deterring subsequent acts that the would-be actors have no right to perform. This example gives us an opportunity to remind ourselves that injunctions are the heartland of equity but regularly serve the purpose of both specific and (presumably) general deterrence. In the rubric of *Kokesh*, then, they would be punitive, notwithstanding their traditional equitable character.[96]

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96. In cases involving financial industry bars, which clearly are more than "obey the law" injunctions and injunctions against future violations of the securities laws, a

6. Government Fences and Public Schools

In most of the thought experiments offered above (all save "obey the law" injunctions), only private interests were at stake. Is the difference we are looking for a matter of private versus public interest? The dictionary definition of "penalty" actually refers to "suffering . . . annexed by law," so one might dismiss ruminations about private apple-plucking as inapposite.[97] In addition, *Kokesh* stipulates that action in the public interest is one of the requisites of penal action.[98] Surely, though, a government fence is still a fence and not a punishment (unless, perhaps, one is inclined to take a libertarian argument way too far). A policeman plucking apples from shoplifters' hands and returning them to the bin is not punishing the wrongdoers, and it would seem that the plagiarism example should not differ depending on whether the school is public or private. It clearly is not the case that every consequence imposed for public purposes is punitive—as demonstrated above, "obey-the-law" injunctions are not punitive in the dictionary sense unless imposed for embarrassment or to trigger another harm. The element of suffering simply is lacking.

The proposition that not all publicly motivated, non-compensatory (on which more is said below) consequences are punitive can be further illustrated by the example of the federal excise tax on cigarettes or similar "sin" taxes imposed on goods that are regarded as unnecessary, although not illegal. Paying the tax (or, technically, "for" the tax if it is imposed on the manufacturer) is a consequence of buying the product. The increase in the effective price of the product foreseeably deters some use, but the purpose of the tax is widely acknowledged to be fund-raising.[99] In any event, since purchasing the unnecessary product is not an offense, the usual requirements for identification as punishment are lacking.

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few courts and commentators have noted a penal element generally relating back to the intent of the Commission in pursuing the remedy. *See generally* Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions,* 4 HARV. BUS. L. REV. 129 (2014) (reviewing instances in which various enforcement remedies may operate punitively).

97. *Penalty*, *supra* note 92.

98. Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017).

99. Jamie Yesnowitz & Emily Fiore, *The History and Purpose Behind Sin Taxes*, BLOOMBERG L: DAILY TAX REP. (Oct. 17, 2017), https://www.bloomberglaw.com/product/ tax/tax_home [https://perma.cc/G2ZS-HBUA].

7. Compensation

It frequently is said that if the monetary consequence of an act is based on the compensation of either an injured victim or the government for the cost of enforcement, the consequence is not punitive.[100] This is actually a little nonsensical, given that restitution is a common feature of criminal sentences and is now mandatory in federal courts in some instances.[101] What some have called "punitive compensation" attempts to make victims whole for "tangible and intangible, current and future losses."[102] Using the definition invoked above as developed thus far, under the practice of punitive compensation, defendants clearly can, as the result of their wrongdoing, suffer losses of previously lawfully owned property. If common sense cannot provide an explanation, perhaps the tradition of simply asserting that compensation is not punitive can—it has been suggested that the division has more to do with a desire to keep the tort system beyond the complications of punishment jurisprudence than anything else.[103] Whatever else the tradition accomplishes, though, it cannot logically prove that all non-compensatory consequences are punitive.

8. Proportionality and the Passage of Time

Before moving to a few new examples that are somewhat more central to the subject actually before the Court in *Kokesh* (and *Liu*), let us tweak some of the ones we already covered so as to think a bit more about the interesting issues presented by the timing and, then, the public nature, of a consequence. Let us return to the urchin and the actual plagiarist. If the urchin escapes the store but is pursued and the apple taken (by the shopkeeper or a police officer), has he been punished? He still has not suffered the loss of anything to which he was entitled. How about student X? If she graduates and five years pass before the plagiarism is discovered, whereupon her degree is revoked?

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100. *See, e.g.*, *Kokesh*, 137 S. Ct. at 1642, 1644 (noting that there is no requirement that the Court provide funds to compensate the victims, and thus the government may reap more than what is needed for compensation).

101. Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 103 (2015).

102. *Id.* at 100.

103. *See* Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JURIS. REV. 1, 27–28 (2016) (arguing that defining punishment in a manner that blurs the line between criminal law and tort law would make it impossible "to comply with the Constitution's mandates to give special protection to defendants in criminal cases").

We might predict, at that point, a cascade of events such as revocation of her bar passage and loss of a job and a promotion or two. Although she was not entitled to her degree, she may well suffer the loss of what she has done since her graduation, so some might feel she has been punished—although perhaps this example goes more to our feelings about proportionality than it does to the abstract nature of punishment.

The intuition about entitlement created by the passage of time and investment of effort is, of course, related to the Lockean vision of "homesteading" as a way of acquiring a moral claim to property.[104] It also is practically confirmed by the doctrines of adverse possession,[105] laches,[106] and (the admittedly vanishing) common law marriage.[107] From this standpoint, punishment might be proven simply by the timing of the invocation of a consequence—a nice bit of circularity, but perhaps an important one, when the question is what is penal for purposes of a statute of limitations.

9. Shame and Intent to Shame

Next up is the role of publicity. Suppose the video still of the would-be shoplifter is accompanied by his name, and the name of the law school plagiarist is revealed. The transgressors presumably would feel shame, but surely they are not entitled to have their misdeeds concealed. On the other hand, one must ask *why* their identities were disclosed. If it was simply unavoidable (something like the revelation of a defendant's identity in most lawsuits), it feels non-punitive.[108] If it was to embarrass in order to be hurtful and expose the transgressor to scorn (the modern equivalent of sitting in public stocks), that seems

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104. *See generally* Murray N. Rothbard, *Justice and Property Rights*, *in* PROPERTY IN A HUMANE ECONOMY 106–21 (Samuel L. Blumenfeld ed., 1974) (outlining the theoretical underpinnings of the "homestead principle").

105. *See generally* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2420–23 (2001) (describing the origin and purpose of the adverse possession doctrine).

106. *See generally* Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 BYU L. REV. 917, 918, 942, 952–54 (1992) (describing the origin and usage of the laches doctrine).

107. *See generally* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 710–11, 779 (1996) (describing the doctrine of common law marriage and its decline).

108. Of a piece, if the usual due process protections are observed, no one is entitled to be immune from the process of prosecution simply because their identity is revealed.

like punishment. If that hurt and exposure are not sought for themselves but are intended to heighten the general deterrent effect—letting third party would-be transgressors know that they would be similarly embarrassed—that also feels like punishment. Alternatively, if the hurt and exposure are necessary in order to initiate a cascade of other events that clearly are unpleasant and would constitute punishment, the exposure seems part and parcel and, therefore, punitive itself.

Perhaps, then, although there is no legitimate interest in having one's identity as a wrongdoer concealed—if one indeed is a wrongdoer—there may be a legitimate interest in not having that identity affirmatively broadcast for the purpose of hurt or initiating other punishments, or deterring third parties, at least without some sort of intermediating screening system that, at a minimum, ascertained that the wrongdoing occurred. As we move forward, we can, for purposes of convenience, refer to such an intermediating screening system as "due process."

This seems to add to our mix an element of intent or, possibly, the purpose of the person or body meting out the consequence. Of course, smoking gun admissions of intent may be rare, and in some instances (such as those involving legislatures), collective intent or even purpose may be non-existent. Perhaps, then, the best that can—or should—be done is to construct intent based on either lack of alternative explanations or the credibility of alternative explanations. Absent at least constructive intent to embarrass or initiate a cascade of consequences, however, it seems that stripping a wrongdoer of ill-gotten gains in order to deter others is no more punitive than building a fence to keep out all future trespassers, rather than simply the past known ones.

10. Purposes Other than Shame: Target Practice

Perhaps constructive intent can prove punishment in the case of some indeterminate consequences such as shame, which sometimes is unavoidable and other times is not, but why should intent be relevant in cases of clear harms/deprivations that are not unavoidable? For instance, if someone is put to death as a consequence of some sort of offense, do we really need to ask about even constructive intent to punish? This is further explored immediately below, but the intermediate proposition is that even constructive intent need only be relevant in some quite limited subset of consequences.

Suppose, then, that a law provides that government snipers will be posted to shoot all jaywalkers. Does it really matter whether the purpose is to (a) take retribution against jaywalkers, (b) deter jaywalking, (c) provide a triage method for reducing the population by eliminating scofflaws from the gene pool, or (d) provide live-action target practice to improve the snipers' shooting skills? The extremity of the consequence relative to the triviality of the offense actually may make us doubt the purpose is sheerly retributive. Whatever the reason otherwise might be, the example reminds us that "suffering" is the starting point in defining a penalty, and that is what is lacking in the case of fences, recovery of stolen goods, and refusing grades for plagiarized work. The example also may suggest, however, that extreme suffering (either proportionally or as an absolute) as a consequence of an offense may be enough to satisfy most people's intuition with respect to what constitutes punishment. This may mean that we are approaching a working definition of punishment that can be intent-free—if the consequence is either severe or disproportionate to plausible government goals aimed at public benefit, that fact should be enough.

11. Ostensible Purposes Other than Shame: Megan's Laws

Now let us suppose that certain types of sex offenders must, upon release from jail, register with local officials, have their names listed in a public data base, and refrain from living within a certain radius of schools or childcare facilities. The stated motivation for such regimes is public safety involving some amount of enhanced vigilance by law enforcement and concerned parents and some amount of individual incapacitation by denying the convicted sex offender access to prospective victims. Embarrassment may be incidental, and deterrence may be individual rather than general. Does that make it anything less—or more—than suffering annexed by law as a consequence of an offense? It is true that the Supreme Court, when facing similar facts in *Smith v. Doe*,[109] discussed below,[110] concluded that such laws are not punitive and could be imposed retroactively on offenders who committed their unlawful acts before passage without violating the

109. 538 U.S. 84 (2003).

110. *See infra* notes 146–147 and accompanying text (providing a soundbite from *Smith* regarding the relationship between deterrence and punishment); *infra* notes 222–227 (explaining the Court's reasoning and holding).

constitutional ban on *ex post facto* punishment.[111] This is a hard case, perhaps, but not at all not inconsistent with the proportionality element developed above. Moreover, the fact that there are hard cases does not mean that some cases—like recovering the fruit of crime—will not be much easier.

12. Purposes Other than Shame: Body Cavity Searches

Now let us consider a "corrective justice" system that requires that prisoners submit to daily body cavity searches. Perhaps it is to humiliate the prisoners as a form of retribution, perhaps it is to deter those not yet in prison from breaking the law, or perhaps it is just because the jailers are deviants who get a kick out of performing the searches. Once again, does it really matter insofar as determining that the prisoners are suffering and that the suffering is the consequence of their offenses? One can, of course, quibble about what "annexed by law or judicial decision" means and whether jailers operating under their own direction can punish, but just because one can does not mean one should.[112] In any event, this Article does not pursue the issue of who can "punish" for constitutional or other purposes.[113] To get past that complication, we simply shall assume that the searches are called for by statute (even if lobbied for by deviant jailers).

The picture is re-complicated, however, as soon as we concede an additional possible and even plausible motive: perhaps the searches are to deter the prisoners from smuggling to their cells the spoons, toothbrushes, and hair combs that can so easily (on TV) be turned into shanks. Is deterrence of some act *other* than the original offense any different? Is the distinction between individual and general deterrence an important one? (If you choose to explore the distinction, assume first that every inmate is searched every day and then that the searches are random).

We may worry about whether the motive is pretextual or the method of achieving it too draconian, in which case we suddenly are arguing

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111. *Smith*, 538 U.S. at 102–06.

112. *Penalty*, *supra* note 92. If one did, however, one would be in the company of Justice Clarence Thomas. *See* Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) (concluding that the "text and history of the Eighth Amendment together with the decisions interpreting it[] support the view that judges or juries—but not jailers—impose 'punishment'").

113. For insights on the subject, see generally Raff Donelson, *Who Are the Punishers?*, 86 UMKC L. REV. 259 (2017) (providing a comprehensive examination of the "missing addressee in the Punishments Clause").

about proportionality or less restrictive means. As hinted at above, the shift may be useful or even necessary. Still, if suffering is a consequence of an offense—and surely the prisoners would otherwise not be enduring the searches—we really also need to be concerned with whether the intermediating process exposing someone to the consequence was sufficient (a/k/a due). It is tempting to suggest that the process due was not afforded to anyone who is not actually guilty—that is, with respect to whom the process made a mistake—but that fails to reckon with emergency situations. It also overlooks the role of compensating victims of processes gone awry.

13. Purposes Other than Shame: The Fleeing Felon

Suppose that a murder is committed, and a suspect is observed loping away from the scene. Suppose, too, that the circumstances of the crime lead one to believe that the suspect is violent and likely to cause injury to others if not apprehended. The authorities wish to publicize the identity of the suspect in order to generate leads as to the suspect's whereabouts. Publicity will surely embarrass the suspect, whether or not the suspect is the actual wrongdoer. This is one of those situations in which publicity seems to punish the innocent but not the guilty. After all, if the suspect is the wrongdoer, evasion of apprehension is undeserved, as is concealment of identity.

This scenario surely tests our intuitions about what processes are due in emergency situations but also calls on us to contemplate suitable remedies for errors. Perhaps we should simply make the commonsense concession that the accused innocent person has suffered for public purposes and deserves compensation.[114] Tailoring both processes and remedies for errors may ultimately be more promising than seeking the grail of a constant definition of punishment. This, however, may be something that is not within our control—for instance, the Constitution says what it says with respect to punishment, deprivation, jeopardy, etc., and their consequences. Similarly, statutes say what they say with respect to fines, penalties, and the like. In the interstices, however, courts may have a great deal to say about process, proportionality, and the shaping of remedies.

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114. If the outcome were that the authorities who made the mistake of triggering the publicity lose their jobs, we would be concerned that their ability to capture fugitives might be undesirably impaired.

14. Section 16(b) Recoveries

Turning at last to those examples leading us back in the direction of SEC disgorgement, the subject of *Kokesh* and *Liu*, let us consider the cause of action created under Exchange Act section 16(b) to force disgorgement to a company of the profits of short-swing trading by that company's officers, directors, and significant shareholders—those who might be insiders likely to be privy to non-public information.[115] The section begins with a recitation that it is "[f]or the purpose of preventing the unfair use of information which may have been obtained by such [insiders]."[116] Sounds like a deterrent, right? Moreover, courts, including the Supreme Court, have referred to it as a "strict prophylactic rule."[117]

It is well known that, in some situations, the formula employed for the calculation of "profit" means that section 16(b) defendants disgorge more than their "real" profit,[118] and equally well known that corporations receiving the disgorged amounts have seldom suffered any offsetting injury.[119] In fact, there have been occasional casual references to section 16(b) as "punitive,"[120] but since it is a strict liability section and there is nothing at all illegal about short-swing

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115. 15 U.S.C. § 78p(b). Short swing trading is purchasing and selling, or selling and purchasing, a security in within less than six months. *See generally* Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425, 430–33 (1988) (explaining aspects of litigation under § 16(b)).

116. 15 U.S.C. § 78p(b).

117. Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232, 251 (1976).

118. *See* LAWRENCE D. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION 561, 584–87 (9th ed. 2018) (explaining that the profits should be calculated in relation to the profit lost by the corporation, not the profits gained by the inside trader).

119. *See* Phillip Goldstein, *Driving a Constitutional Stake through Section 16(b)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 2, 2009), https://corpgov.law.harvard.edu/2009/03/02/driving-a-constitutional-stake-through-section-16b [https://perma.cc/X6J2-7S37] (asserting that corporations do not have standing in section 16(b) litigation because they do not suffer injury from short swing profits made by 10% of shareholders).

120. Phillip Goldstein, *Section 16(B)—If at First You Don't Succeed*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 1, 2017), https://corpgov.law.harvard.edu/2017/03/01/section-16b-if-at-first-you-dont-succeed [https://perma.cc/SN68-TV3U] ("[S]ince a statutory insider that realizes short swing profits without misusing any inside information has not violated any law, committed any wrongdoing, or harmed anyone, the disgorgement mandated by section 16(b) is clearly punitive."); Comm'r v. Obear-Nester Glass Co., 217 F.2d 56, 58 (7th Cir. 1954) ("The prime purpose of the Act is punitive, to discourage dealings of this type by persons having inside information as to the affairs of the corporation. Clearly the purpose is not compensatory.").

trading (as opposed to actually trading on confidential information), this clearly seems inaccurate—there simply is no crime or offense for which to be punished. Moreover, experts on the subject (perhaps surrendering to a bit of circular logic) note that section 16(b) recoveries are not precluded under Exchange Act section 28(a)'s requirement that "damages" be actual rather than punitive.[121]

As far as the commonsense intuitions developed in this Article are concerned, perhaps the best that can be offered is that the defendants are not losing anything to which they are entitled. After all, the statute essentially establishes that the profit in question is not really theirs—it belongs to the corporation.[122]

15. Fiduciary Disgorgement

More importantly, section 16(b) serves as another segue, this time to a more general consideration of the consequences of fiduciary duty. Recall, then, that fiduciaries, as a consequence of assuming that role, are *not* entitled to the unauthorized use of their beneficiaries' information or other property and must account for—that is, disgorge—all profits from such use.[123] This has been justified as a matter of prophylaxis, not punishment, and the rule has been invoked even in situations in which the fiduciaries may have believed their conduct did not detriment the beneficiary.[124] It sometimes is said, in fact, that the equitable orders requiring fiducial disgorgement are not a matter of enforcing a liability but rather an instance of commanding performance of a duty—the duty to render to the beneficiary what belongs to the beneficiary.[125] It is clear, then, that beneficiaries do

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121. *See* Goldstein, *supra* note 120 (criticizing Peter Romeo & Alan Dye, SECTION 16 TREATISE AND REPORTING GUIDE (1994)); *see also* Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986) (noting that section 28(a) precludes punitive damages).

122. See 15 U.S.C. § 78p(b) (asserting that corporations have the power to recover profits made by shareholders within six months, regardless of shareholders' intentions).

123. *See, e.g.*, SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968).

124. *See* Vikki Vann, *Causation and Breach of Fiduciary Duty*, 2006 SING. J. LEGAL STUD. 86, 89–90, 96 (explaining the prophylactic purpose of the unauthorized profits rule and that there is no causation requirement for breaches of the rule).

125. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. d(1) (AM. L. INST. 2006) (emphasis added):

> The law of restitution and unjust enrichment also creates a basis for an agent's liability to a principal when the agent breaches a fiduciary duty, even though the principal cannot establish that the agent's breach caused loss to

receive disgorged profits even when suffering no "felt" loss whatsoever. They receive them because, as a matter of law, they, rather than the fiduciary, own them.

Recoveries against fiduciaries (like those under section 16(b)) go into private pockets, of course, so we might think, before moving on, of revisiting the public versus private distinction. If so, we should think again. If fiduciaries obtain profits from the use of their beneficiaries' property, they are not entitled to retain those profits, and they suffer no loss if disgorgement is required.

Again before moving on, it is worth noting that fiduciaries generally are stripped of net, rather than gross, profits. This makes perfect sense because if beneficiaries had made use of their own property in the same manner and for the same purpose, they presumably would have incurred the same costs as were paid by the fiduciary.[126] This logic appears, however, to be coincidental to the explanation that accounting for profits generally is ordered as an equitable remedy. Equitable remedies, of course, do not include damages based on plaintiff's losses. Those damages are legal remedies and, to the extent they would constitute an adequate remedy, are beyond the jurisdiction of equity. It is at this point, perhaps, that the compensation versus punitive distinction totally breaks down.

16. Punchlines

What we may be left with, then, as we turn first to a brief disquisition on philosophers on punishment and then to a more in-depth analysis of Supreme Court precedents, are a few basic notions. Some seem quite clear and relatively easy to apply. One is that we do not suffer from losing something to which we are not entitled. Another is that our acceptance of entitlement can accrue as a result of applied efforts over a period of time. A third is that laws governing such matters as fiduciary duty can define lack of entitlement. A fourth is that suspected wrongdoers are as susceptible to punishment as actual wrongdoers. A fifth is that unpleasant consequences disproportionate to their alleged

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> the principal. If through the breach the agent has realized a material benefit, the agent has a *duty* to account to the principal for the benefit, its value, or its proceeds.

126. This calculation is not relevant, and the analogy is not compelling, when contemplating something more along the lines of restitution of stolen property (although if specific property—including money—cannot be identified, the remedy is characterized as legal rather than equitable).

public benefit are likely punitive. This may be because they are retributive or because they act as a general deterrent—or—perhaps it is just because inflicting unpleasant and disproportionate consequences is a bad thing we don't want governments to do.

Other propositions are more confounding. For instance, it does not seem entirely explicable why compensatory remedies cannot also be punitive, unless it simply boils down to the inherent proportionality of victim compensation. In addition, it seems that the constructive intent or purpose of the actor meting the consequence of shame (assessed in terms of proportionality) can be important, but otherwise, a purpose inquiry seems rather pointless.

On the other hand, inquiries into processes and remedies for their failure seem very important indeed. Why not just concede that a process can be reasonable yet fail, resulting in an infliction of a consequence that is punishment of an innocent that would not be punishment of an actual transgressor?

All that said, it seems vital to recognize that a one-size-fits-all definition of punishment is an elusive grail indeed. So elusive, in fact, that its pursuit almost certainly obscures more than it reveals. This is exacerbated by the observation noted above—the Constitution and statutes say what they say about the processes for, and the consequences of, concluding something is penal. Trying to pretend otherwise is futile.

This is not to say, yet again, that some cases are not easier than others.

C. The Shoulders of Giants

There are giants in the literature on punishment, and they have shoulders on which to stand.[127] Without in any way purporting to mount said shoulders, their existence nonetheless should be acknowledged, if for no other reason than to register awareness of their existence and to explain that they do not so very much matter to an article that is self-consciously not trying to define punishment, but

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127. *See generally* Michael Davis, *Punishment Theory's Golden Half Century: A Survey of Developments from (About) 1957 to 2007*, 13 J. ETHICS 73 (2009) (discussing what its title suggests and describing various contributors); Leo Zaibert, *Punishment, Restitution, and the Marvelous Method of Directing the Intention*, 29 CRIM. JUST. ETHICS 41 (2010) (discussing, among other punishment theorists, Michael Moore, Stephen Kershnar, Ted Honderich, Douglas Husak, George Fletcher, John Gardner, Heidi Hurd, and Paul Robinson).

simply to highlight the Supreme Court's jurisprudential shortcomings in doing so.

Although there are a great many notables who have published on the subject, this Article will briefly focus on just two. The first is H.L.A. Hart. Here is his well-known list of the elements of punishment with which legal systems (as opposed to, say, parents) are concerned:

> (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
>
> (ii) It must be for an offence against legal rules.
>
> (iii) It must be of an actual or supposed offender for his offence.
>
> (iv) It must be intentionally administered by human beings other than the offender.
>
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[128]

These elements correlate quite nicely with some of the commonsense insights developed above, but the fit is not perfect. Hart's scheme contemplates that punishment is a reaction rather than a preclusion, which does render a match. Its focus on human administrators other than the offender makes perfect sense, as do its references to legal rules and legal systems, so these elements will be cheerfully subsumed in this Article's analysis. The focus on a constituted authority has been criticized by others as problematic insofar as it allows the state to avoid constitutional consequences from actions taken by those not technically authorized to act.[129] That nuance is interesting, but not important for purposes of what this Article seeks to achieve. The greatest inconsistency is that Hart's elements do not focus on entitlement to an item as a requisite to pain from its loss (what this Article has called "suffering"). It seems clear that being required to give up even stolen property would, to most people, qualify at least as "unpleasant," if not outright painful.

Importantly, a great deal of Hart's volume *Punishment and Responsibility* is devoted to the purposes of punishment. He acknowledges the emphasis that others have placed on retribution but clearly indicates that the most valid purpose is that of deterrence.[130] That deterrence is a, or even the only, legitimate purpose of

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128. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (2d ed. 2008).

129. Zaibert, *supra* note 127, at 43.

130. *See* HART, *supra* note 128, at 128–29 (discussing the importance of deterrence in the context of punishing attempted crimes).

punishment does not mean, however, that all deterrents are themselves punishment. After all, weight loss is the goal of the Atkins diet. That does not mean that all weight loss *is* the Atkins diet. And fences aren't punishment. So there.

In *The Problem of Punishment*, David Boonin advances the thesis that all punishment should be abolished.[131] His definition of punishment seems quite similar to Hart's, right down to its emphasis on authority.[132] He does, however, prefer "harm," defined as being made worse off than one would otherwise be, to "pain" because it is a more neutral term.[133] Being made worse off than one would otherwise be could extend to being required to return something illegally acquired—but it does not, for Boonin quickly refines his notion of harm by specifying it must leave the punished worse off than they would otherwise *rightfully* be.[134] It seems clear, then, that disgorgement of ill-gotten gains could not be defined as punitive.

What most distinguishes Hart and Boonin, of course, is that Boonin finds no justification for punishment—at all—and advocates replacing it with a system of restitution.[135] He thus rejects deterrence (as well as retribution and other possibilities) as a legitimate goal, while not denying that it is an actual one. He concedes that restitution—which he broadly defines—might in some cases operate punitively[136] but would preclude it only when the actor enforcing restitution intended harm.[137] This Article shies from subjective intent determinations whenever possible but now concedes that manifest intent to punish should not be ignored.

III. MUCKING OUT THE STABLES

Although this Article will come across as critical of the *Kokesh* opinion, the shortcomings of the decision do not fall on the head of Justice Sotomayor. The precedents dealing with the subject of what is punitive generally seem to be poorly understood and ill-sorted, confusing, as they do, questions of whether a remedy is equitable with whether it is a penalty, questions of whether a remedy is a penalty with whether it is a criminal prosecution, and questions about what

131. DAVID BOONIN, THE PROBLEM OF PUNISHMENT 1, 3 (2008).
132. *See id.* at 24.
133. *Id.* at 6–7.
134. *Id.*
135. *Id.* at 1–3.
136. *Id.* at 28.
137. *Id.* at 14.

constitutes "jeopardy" for purposes of double jeopardy. When you add to the mix the complications of what is punishment for purposes of full faith and credit, attainder, and *ex post facto* analyses, and the basic question of whether constitutional parameters with respect to any or all of the above should be dispositive, or even helpful, with respect to the meaning of "penalty" in a particular statute, the situation is confounding.

Earlier Courts, acting before quite so much ill-considered conceptual incest had taken place, found themselves a bit more able to recognize—and articulate—the possibility that what is a penalty for one purpose may not be penal for another.[138] For instance, in *Huntington v. Attrill*, an 1892 case cited in *Kokesh*, the Court specifically declined to follow earlier cases establishing what was "penal" for purposes of applying a rule of strict construction of statutory language.[139] The Court reasoned that was a different question from the meaning of "penal" for establishing the parameters of the full faith and credit clause.[140] More broadly, it noted that penal laws are excluded from the full faith and credit doctrine because of the principle of international law that "[t]he courts of no country execute the penal laws of another . . . In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language."[141]

A. Soundbites

One important point to be made, then, is that the *Kokesh* opinion's casual invocation of soundbites from other cases without considering either their context or their provenance is more than a bit troubling and likely to lead to further confusion. After all, if one does choose to play the soundbite game, there are other tidbits that might be considered.

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138. More recently, *United States v. Ursery*, 518 U.S. 267, 281 (1996) does as well.

139. 146 U.S. 657, 673–74 (1892).

140. *Id.* at 679–80. The cases *Huntington* distinguished were *Steam-Engine Co. v. Hubbard*, 101 U.S. 188 (1879) and *Chase v. Curtis*, 113 U.S. 452 (1885). *Huntington*, 146 at 679-80.

141. *Id.* at 666 (quoting The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825)); *see infra* Section IV.B.1 (discussing *Huntington* further).

For example, in *Hecht Co. v. Bowles*,[142] the Court noted that "[t]he historic injunctive process was designed *to deter, not to punish*,"[143] signaling, it would seem, that deterrence alone is not punitive.[144] Similarly, and perhaps more strongly, in *Bennis v. Michigan*,[145] the Court stated that "forfeiture . . . *serves a deterrent purpose distinct from any punitive purpose*. Forfeiture of property prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'"[146] *Smith v. Doe* also makes for interesting reading: "The State concedes that the statute might deter future crimes. Respondents seize on this proposition to argue that the law is punitive, because deterrence is one purpose of punishment. This proves too much. *Any number of governmental programs might deter crime without imposing punishment.*"[147] *Department of Revenue of Montana v. Kurth Ranch*[148] observed that "neither a high rate of taxation *nor an obvious deterrent purpose* automatically marks this tax as a form of punishment."[149]

Turning to quotes directly relating to disgorgement of ill-gotten gains, *Tull v. United States*[150] contains the statement that "the District Court intended *not simply to disgorge profits but also to impose punishment* [in the form of additional civil penalties]."[151] *Johannessen v. United States*[152] observes that "[t]he act *imposes no punishment . . . . It simply deprives [the wrongdoer] of his ill-gotten privileges . . . It imposes no new penalty*

142. 321 U.S. 321 (1944).

143. *Id.* at 329 (emphasis added); *see also id.* at 321, 328–29 (holding that the injunctive relief provision of the Emergency Price Control Act of 1942 did not mandate a court sitting in equity to issue injunctions in all cases). Admittedly, *Hecht* did not involve the legitimacy of ordered restitution. *See id.* at 326 (describing the voluntary efforts of the petitioner to repay customers harmed by the overcharges brought to light in the investigation).

144. This seems to make sense, although there are arguments that some injunctions against violations of the federal securities laws are pursued in punitive fashion. *See, e.g.*, SEC v. Gentile, 939 F.3d 549, 561 (3d Cir. 2019) (explaining how the Fifth and District of Columbia Circuits have held that certain types of injunctions under the securities laws may be considered punitive).

145. 516 U.S. 442 (1996).

146. *Id.* at 452 (alteration in original) (emphasis added) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974)).

147. 538 U.S. 84, 102 (2003) (emphasis added) (citation omitted).

148. 511 U.S. 767 (1994).

149. *Id.* at 780 (emphasis added).

150. 481 U.S. 412 (1987).

151. *Id.* at 423 (emphasis added).

152. 225 U.S. 227 (1912).

upon the wrongdoer."[153] *United States v. Ursery*[154] found that "[t]o the extent that [the act calling for forfeiture] applies to 'proceeds' of illegal . . . activity, *it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts.*"[155]

This Article's invocations of the cases quoted above deliberately omit their contexts and gratuitously fail to distinguish specific from general deterrence. These are charges that also can be leveled at the Court's approach in *Kokesh*. Evidently, when you're playing the soundbite game, the whole point is not to bog down in the nitty gritty. Just as evidently, it may be worthwhile to pay a bit more—in fact, a lot more—attention to detail.

B. Kokesh and its Chosen Precedents

Section IV.A offered a selection of pithy quotes the *Kokesh* Court could have invoked had it wanted to support the conclusion that disgorgement is not a penalty. Although it is not at all clear that the Court chose precedential *cases*, rather than soundbites, this Section entertains the (really pretty unlikely) possibility that the cases yielding the Court's chosen language actually mattered to the Court. After demonstrating that they probably did not, this Article will step back to argue in favor of a more rigorous analysis.

Kokesh held that "SEC disgorgement thus bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate."[156] Its analysis was briefly outlined earlier in this Article.[157] Recall that the Court adopted the 1892 meaning of "penalty" advanced in *Huntington v. Attrill* for full faith and credit purposes[158] and worked on from there, requiring both a public purpose (which it regarded as easily satisfied in the case of SEC disgorgement as currently practiced) and that the purported penalty be "sought 'for the purpose of punishment, and to deter others . . . .'"[159] It then functionally discarded the conjunctive "for the purpose of punishment" and focused on deterrence alone.[160]

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153. *Id.* at 242 (emphasis added).
154. 518 U.S. 267 (1996).
155. *Id.* at 291 (emphasis added).
156. Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).
157. *See supra* Section III.A.
158. *Kokesh*, 137 S. Ct. at 1642.
159. *Id.* at 1642–43 (quoting Huntington v. Attrill, 146 U.S. 657, 668 (1892)).
160. *Id.* at 1642–44.

That compensatory remedies are not captured under *Huntington* and thus are entitled to full faith and credit is clear from other language in *Huntington* itself.[161] Still, the fact that compensatory remedies are not regarded as penalties (for full faith and credit purposes or otherwise) does not, of course, establish that all non-compensatory remedies are. Justice Sotomayor's opinion came somewhat close to making that claim, describing several cases that *did* involve compensation and thus were not penalties.[162] Those authorities included *Porter v. Warner Holding Co.*,[163] which, on the page cited, simply distinguished equitable restitution from a specific statutory compensatory remedy indisputably available as a legal remedy.[164] As noted above, however, the real crux of the *Kokesh* opinion was the conclusion that the purpose of disgorgement is to deter wrongdoers and that deterrence itself is punitive, so it is here that we must tarry—after just a bit more contemplation of *Huntington*, which purportedly framed the issues in *Kokesh*.

1. Huntington v. Attrill*, cont., and the public/private distinction: The first and perhaps only step*

It would be hard to overstate the importance of the public/private distinction in *Huntington*.[165] This is because the Full Faith and Credit Clause builds national unity by protecting U.S. citizens from the need

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161. *See Huntington*, 146 U.S. 657, 683 (1892):

> The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

162. The Court noted as much, citing, for example, *Brady v. Daly*, 175 U.S. 148, 152–54 (1899), which held that statutory copyright damages payable to plaintiff were not penal, rendering jurisdiction in circuit court appropriate, and *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915), which held that statutory compensatory damages were not subject to a statute of limitations applicable to penalties. *Kokesh*, 137 S. Ct. at 1642–43.

163. 328 U.S. 395 (1946).

164. *See id.* at 402; *Kokesh*, 137 S. Ct. at 1644.

165. Another passage of interest reads:

> The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

Huntington, 146 U.S. at 673–74.

to relitigate judgments and reestablish legal statuses (such as marriage) here, there, and everywhere.[166] It does not, however, extend to the enforcement of "penalt[ies]" imposed for crimes or public offenses, because these are deemed local matters, serving local public interests, that should not be visited on the courts of other states (which might, after all, have a different view of what acts are undesirable).[167] The rights of the citizenry are unimpaired by this exclusion, and the interests of one jurisdiction's courts in avoiding the distraction and burden of another jurisdiction's concerns are preserved. The concept of "penalty," therefore, is applied primarily to protect a jurisdiction's own courts and resources from another jurisdiction's demands.

Thus, in *Huntington*, the Court explained that it was applying a rule of international law that "forbids [penal] laws [of one country] to be enforced in any other country."[168] The rule

> had its foundation in the well[-]recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of someone representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly[,] no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci*, ought to be admitted in the courts of any other country.[169]

This justification does not really address why exactly the same test should apply for interpreting a statute of limitations, particularly in light of *Huntington*'s own pains to isolate a specific meaning of "penal" for full faith and credit purposes. On the other hand (the frivolous one), although the case has absolutely nothing to do with the removal of ill-gotten gains and says nothing to the effect that deterrence is the same as punishment, it does seem plausible that the predominantly public interests to be served by a suit brought by the federal government to force disgorgement for deterrent purposes could trigger an exclusion from the full faith and credit clause—if, for some

166. *See id.* at 684 (quoting Justice Story's explanation of the Full Faith and Credit Clause, which "was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them").

167. *Id.* at 669, 672–73.

168. *Id.* at 670.

169. *Id.* at 681.

unfathomable reason, the clause otherwise happened to apply, which, just saying, it never would.

This recognition prompts another, which is that identifying an exclusively public interest in a matter is not exactly a first step for a full faith and credit inquiry: it is close to the only step and one that also comes close to conflating penalty and public interest. After all, the relevant concern actually seems to be that taking money for the public is a matter of local interest that does not turn on whatever the perceived effect is on the defendant. One would expect that the same reasoning would apply to injunctions to obey the law, and indeed *Huntington* observed that non-monetary orders "not for the benefit of any other person . . . are doubtless strictly penal, and therefore have no extra-territorial operation."[170]

2. The second step: Punishment

a. Bell v. Wolfish

The Court invoked two cases in support of the proposition that deterrence is punitive. The first was *Bell v. Wolfish*. The court's entire purpose in citing the case was to paraphrase part of a footnote that in fact cited a different case—*Kennedy v. Mendoza-Martinez*,[171] which is further discussed below.[172] The original *Bell* footnote said that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."[173] The *Kokesh* Court edited the quotation down to "deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e]," thus omitting any reference to retribution and overlooking the implied distinction between retribution and deterrence.[174] More troublingly, the Court completely ignored *Bell*'s context and conclusion.

In fact, *Bell* arose in the context of the treatment of pre-trial detainees, who (like anyone else) could not constitutionally be "punished" (used in place of "deprived of life, liberty or property")

170. *Id.* at 673. One of the examples given was a decree rendering a convict incompetent to testify. *Id.*

171. 372 U.S. 144, 168 (1963).

172. *See infra* Section III.B.2.d.

173. 441 U.S. 520, 539 n.20 (1979) (paraphrasing *Kennedy*, 372 U.S. at 168).

174. Kokesh v. SEC, 137 S. Ct. 1635, 1643 (2017) (alterations in original).

without due process.[175] The *Bell* Court stated as follows in the text of the case:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish . . . , that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted . . . .[176]

It went on to find that double-bunking, unannounced cell searches, denial of hard-cover books not received directly from a publisher or book club, and body cavity searches were not punitive.[177] Instead, they were matters of administrative necessity.[178]

"Administrative necessity" may be one way to put it, but it seems quite obvious that, but for double-bunking,[179] the objectives of the other practices were specific and general deterrence. In fact, with respect to the body cavity searches, the Court said,

> That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.[180]

Given the Court's reasoning in *Kokesh* that deterrence *by itself* is punitive, where does that leave us—other than in obvious conflict?

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175. *Bell*, 441 U.S. at 535 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

176. *Id.* at 538–39 (alterations in original) (citations omitted).

177. *Id.* at 560–61.

178. *Id.* at 561–62.

179. It seems entirely reasonable to conclude that double-bunking is not a matter of deterrence—probably not many people are dissuaded or otherwise prevented from wrongdoing by the prospect of overcrowded cells rather than uncrowded cells.

180. *Bell*, 441 U.S. at 559.

One tempting road to reconciliation might be to return to basics and remind ourselves that penalties generally are understood as reactions to specific conduct. The detainees in *Bell* were being searched because of their situation, not because of what they had done—which of course had not yet been litigated. On the other hand, that would prove too much, and no conditions to which they were subjected could then be called "punitive." This seems to confirm the commonsense conclusion that suspects, as well as wrongdoers, can suffer punishment.[181]

A second path also is suggested by common sense. We discarded above the proposition that suffering imposed for the purpose of deterring others from the same wrongdoing of which the sufferer is accused is substantively different than suffering imposed to deter *other* acts. The suffering is still a reaction to the original act. It is possible, however, that the *Bell* Court did wish to observe the possible distinction. That is not at all, of course, what it said. Its comments about the deterrent nature of body cavity searching were in response to the argument that the practice was punishment because it had no legitimate governmental purpose and clearly do indicate that, *but for* its deterrent effect, it *would* be punitive. Perhaps, then, it is best simply to resolve that while the due process rights of pre-trial detainees to be free of punishment, like the interstate interests affected by the full faith and credit clause, they are an unreliable guide for the meaning of penalty in other contexts and move on.

Before doing so, however, it is worth pausing to note that in *Bell*, "punishment" is being used as a shorthand for the deprivation of life, liberty and property that is the subject of due process guarantees. These are types of "suffering" that have commonsense resonance that disgorgement of ill-gotten gains does not. In particular, the concept of "deprivation of property" does seem to turn on ownership of said property. Some understandings simply must be implicit—for instance, the Second Amendment right to bear arms presumably does not mean that people are entitled to steal guns and retain them.

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181. *See also* United States v. Salerno, 481 U.S. 739, 747, 747 n.4 (1987) (holding that the Bail Reform Act's pretrial detention procedures were not punitive because they were not excessive in relation to Congress's regulatory goals, thereby implying that suspects in pretrial detention could in fact be punished under other circumstances).

b. United States v. Bajakajian

The Court's second authority for its conclusion that deterrence is punitive is *United States v. Bajakajian*'s declaration that "[d]eterrence . . . has traditionally been viewed as a goal of punishment."[182] As a strictly logical matter, this does not establish that deterrence *is* punishment. As noted above, saying "weight loss is a goal of the Atkins Diet" does not establish that weight loss *is* the Atkins Diet. It would have been far more meaningful to consider the context of *Bajakajian*, which although hardly on all fours, actually was closer to the situation in *Kokesh* than was *Bell*'s. *Bajakajian* examined whether forfeiture of a large amount of lawfully owned but undeclared transported currency was, under the 8th Amendment, an excessive "fine."[183] The Court tells us in *Bajakajian* that "at the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'"[184] The Court also tells us that *in personam* forfeitures of property (as opposed to *in rem* forfeitures of "guilty property") were traditional punishments for felony and treason.[185] It is true that, in response to the argument of the government that forfeiture of unreported cash deters its illicit transportation, the Court issued its quote about deterrence as a goal of punishment, going on to add at the end of the sentence, "and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss."[186] Deterrence is thus acknowledged to be a goal of punishment and not necessarily compensatory, but this is still different from saying all deterrence *is* punishment. This is particularly striking when contrasted with *Bell*'s conclusion that deterrent effect was what prevented body cavity searches from being punitive.

In any event, it is vital to note that the forfeiture involved in *Bajakajian* was not a matter of disgorging ill-gotten gains. It was a question of confiscating lawfully owned money that was not reported because of a cultural "distrust for the Government."[187] The four-Justice dissent in *Bajakajian* (authored by Justice Kennedy and joined by

182. 524 U.S. 321, 329 (1998).
183. *Id.* at 324.
184. *Id.* at 327–28 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).
185. *Id.* at 332–33.
186. *Id.* at 329.
187. *Id.* at 326.

Justice Scalia) was based on the view that if there was a "fine," it was not excessive.[188] It noted the importance of the lawful possession/unlawful possession distinction, saying,

> If the items possessed had been dangerous or unlawful to own, for instance, narcotics, the forfeiture would have been remedial and would not have been a fine at all. If respondent had acquired the money in an unlawful manner, it would have been forfeitable as proceeds of the crime. As a rule, *forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right or ownership.* Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines.[189]

This distinction was not addressed by the majority, presumably because it was not necessary to do so in the context of a decision concluding that forfeiture of money that indeed was *lawfully owned* was a form of punishment.[190] It is worth noting, moreover, that the dissent apparently regarded restitution and disgorgement as two different ends, both of which are non-punitive.[191] This seems justified if we return to the commonsense notion that a penalty involves "suffering" in terms of loss of something to which otherwise entitled.

c. Austin v. United States

Toward the end of *Kokesh*, the Court responded to the government's argument that SEC disgorgement sometimes serves compensatory goals by citing *Austin v. United States*[192] to the effect that "[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[193]

Austin was an Eighth Amendment excessive fine case involving *in rem* forfeiture of a store and mobile home as a consequence of a two-gram

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188. *Id.* at 349 (Kennedy, J., dissenting).

189. *Id.* at 349–50 (emphasis added) (citing Austin v. United States, 509 U.S. 602, 621 (1993) (narcotics); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (unlicensed guns); Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841) (forbidden lottery tickets); United States v. Ursery, 518 U.S. 267, 284 (1996) (explaining that the forfeiture of a house used to grow marijuana was not "punishment" for purposes of double jeopardy).

190. *See id.* at 337 (majority opinion).

191. *Id.* at 349–50 (Kennedy, J., dissenting) (citing *Usery*, 518 U.S. at 284).

192. 509 U.S. 602 (1993).

193. Kokesh v. SEC, 137 S. Ct. 1635, 1645 (2017) (quoting *Austin*, 509 U.S. at 621).

cocaine transaction.[194] The chosen quotation was in fact taken from *United States v. Halper*,[195] a Fifth Amendment double jeopardy case involving a civil penalty of $130,000 for a governmental overcharge of $585, which also stated that "[w]e have recognized in other contexts that punishment serves the twin aims of retribution and deterrence."[196] The *Halper* Court's authority for both propositions was *Kennedy v. Mendoza-Martinez* (the same case alluded to in *Bell*'s feckless footnote), a due process case involving loss of citizenship as a consequence of draft evasion.[197] *Mendoza-Martinez*, further examined below, consistently refers to retribution and deterrence conjunctively when it discusses punishment and also found (as did the text of *Bell*) that whether a sanction appears excessive *in relation to* its non-punitive purpose is relevant to a determination of whether it is penal.[198] *Halper* ultimately concluded 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."[199] This is quite different than saying, as the Court did in *Kokesh*, that if a sanction has any purpose other than compensation, it must be deemed penal.

Moreover, it is important to note that the *Halper* case and its reasoning were firmly renounced in *Hudson v. United States*,[200] which reinstated a double jeopardy reading limited to multiple "criminal" proceedings, and in doing so followed a *Mendoza-Martinez* approach to determining what is punitive and therefore "criminal."[201] We apparently, then, are left with a statutory meaning case (*Kokesh*) (1)

194. *Austin*, 509 U.S. at 604–05.

195. 490 U.S. 435 (1989).

196. *Id.* at 436–38, 448. *Austin* also relied on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974), as referring to "punitive and deterrent purposes." *Austin*, 509 U.S. at 618. *Calero-Toledo*, like *Mendoza-Martinez*, actually uses the conjunctive "and." *See Calero-Toledo*, 416 U.S. at 686; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). Note, too, the suggested distinction between "punitive" and "deterrent."

197. *Mendoza-Martinez*, 372 U.S. at 146–47; Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979).

198. *See infra* note 202 and accompanying text (listing the factors enumerated in *Mendoza-Martinez*).

199. United States v. Halper, 490 U.S. 435, 448–49 (1989) (emphasis added). Presumably, though, in appropriate circumstances and by this way of thinking, a consequence justified—administratively or otherwise—by the perceived need to protect the public would also suffice (think Megan's laws).

200. 522 U.S. 93 (1997).

201. *Id.* at 109–10.

ostensibly resting on an Eighth Amendment approach relying on a discredited Fifth Amendment case (*Austin* and *Halper*) that facially requires that a remedy have no element of punishment in order to avoid the status of a fine but (2) also invoking a discordant Fifth and Sixth Amendment approach (*Bell*, *Bajakajin*, and *Mendoza-Martinez*) that examines whether a remedy is excessive in relation to its non-punitive goals. Perhaps it was obvious to the Court why, in a case involving statutory meaning, a disembodied Eighth Amendment definition was preferable to a free-floating Fifth and Sixth Amendment definition; if so, it would have been nice of the Court to share its insight. In any event, both *Austin* and *Halper* clearly involved forfeiture of property that was lawfully owned.

d. Kennedy v. Mendoza-Martinez

Kennedy v. Mendoza-Martinez is the dog that didn't bark. It was the original source of the cherry-picked quotations in both *Bell* and *Austin*, and once a reader drills through the precedents cited in *Kokesh* to reach it, one finds that something substantially more nuanced (or, at any rate, more complicated) than "deterrence is punitive" is going on. The actual test set out in that case was as follows:

> The punitive nature of the sanction here [loss of citizenship for draft evasion] is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[202]

It is important to note that although the case self-consciously and literally states a test for what is "punitive" (standing in for deprivation of life, liberty, or property), it now popularly is read as establishing the test for what is a "criminal prosecution" for purposes of the relevant

202. *Mendoza-Martinez*, 372 U.S. at 168–69.

Fifth and Sixth Amendment protections.[203] *Mendoza-Martinez*, nonetheless, is a due process case writ large and limns the "punishments" that would be regarded as impermissible losses of liberty for those such as the pre-trial detainees in *Bell*.[204]

The fact that *Mendoza-Martinez* states a substantially different test than *Kokesh* does not mean that the case was all that carefully reasoned nor that it was picky about its precedents—it actually relied willy-nilly on a number of cases going to the question of what is a "punishment" or a "penalty" for purposes of other constitutional clauses and amendments, as well as some that were matters of statutory construction.[205] In addition, its ultimate resolution swerved from applying its own multi-factor test to conducting an in-depth examination of manifest congressional intent to punish, digging through extensive legislative history and eventually concluding that "Congress was concerned solely with inflicting effective retribution upon this class of draft evaders and, no doubt, on others similarly situated."[206] A case concluding that a consequence with no purpose *but* retribution is punishment simply does not stand for the proposition that something is punishment if it has purposes *in addition* to victim compensation.

Moreover, *Mendoza-Martinez*'s earnest hunt through legislative history to discern congressional purpose obviously invites contemplation of legislative history (detailed by Professor Donna Nagy and, elsewhere, by the author of this Article) relating to SEC disgorgement.[207] That history clearly describes the purpose of disgorgement as other than punitive.[208] Perhaps it is for this very reason that the Court in *Kokesh* declined to acknowledge, much less discuss, *Mendoza-Martinez*. It is hard, after all, to imagine a time at which the use of legislative history has been more fraught than now.[209]

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203. *Id.* at 167.

204. *See supra* Section III.B.2.a (discussing Bell v. Wolfish, 441 U.S. 520 (1979)).

205. For apt criticism, see, for example, Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 126 (2008) (addressing confusion in *Mendoza-Martinez*).

206. *Mendoza-Martinez*, 372 U.S. at 182.

207. Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. REV. 895, 908 (2018); Gabaldon, *Equity and Punishment*, *supra* note 22, at 1630–1644.

208. Nagy, *supra* note 207, at 908 (discussing the legislative history confirming Congressional recognition of SEC remedy enforcement through disgorgement).

209. Gabaldon, *Equity and Punishment*, *supra* note 22, at 1639–44.

One might, on another day, pursue each of the individual precedents on which *Mendoza-Martinez* itself relied, but this Article will not do so. It simply will note that applying its factors and/or manifest intent approach might or might not lead to a conclusion that disgorgement, as sought by the SEC, is punitive, but it would make for much different reading than *Kokesh*.

C. Punishment in Other Contexts

Rather than mining *Mendoza-Martinez's* citations, this Article now turns to a non-exhaustive review—a.k.a. mere sampling—of the various contexts in which the Supreme Court itself has either carefully considered—or most recently just tossed around—the concept of penalty and/or punishment.[210] Its purpose is to further highlight the folly of disregarding both legal and factual context.

1. Full faith and credit

First, as noted in the discussion of *Huntington v. Attrill*, the concept of punishment has been important for full faith and credit purposes, where it functions to prevent the courts of one state from being burdened with the exclusive concerns of another.[211] The test, again as noted above, is essentially whether a legal consequence is inflicted solely for a public purpose.

2. Bills of attainder

Second, the concept has been central to analyses under the bill of attainder clause, which is read as prohibiting Congress from passing legislation singling out persons or groups for "punishment."[212] Three benchmarks generally are applied.[213] The first is whether the statute being challenged "falls within the historical meaning of legislative punishment."[214] The second is whether, when the statute is "viewed in terms of the type and severity of burdens imposed, [it] reasonably can

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210. In addition to those discussed in the text that follows, there are numerous other examples, including in the context of bills of attainder and *ex post facto* legislation. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 284–85 (1866).

211. *See supra* notes 165–167 and accompanying text (expanding on the *Huntington* Court's explanation of the Full Faith and Credit Clause).

212. *See generally* Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177, 1181–82 (2011) (discussing definition of punishment for bill of attainder purposes).

213. *Id.* at 1179.

214. Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 852 (1984).

be said to further nonpunitive legislative purposes."[215] The third is "whether the legislative record 'evinces a congressional intent to punish.'"[216]

In one view, the attainder clause plays a role in the separation of powers, limiting the legislature to making general rules, while the "case and controversy requirement of Article III limits the judiciary" to applying rules in individual cases.[217] This is important, because the procedural protections that attach to trials clearly are absent from the legislative process.[218] As has already been noted by others, however, attainder jurisprudence is unhelpfully circular, since each of the last two criteria is internally referent to either punishment or nonpunishment.[219] Academic commentary seems to attempt to fill the gap by considering whether the person or group singled out by Congress is being "deprived" of something—presumably (but not expressly) something to which they are entitled.[220]

3. The Ex Post Facto *Clause*

Third, in *Smith v. Doe*, convicted sex offenders (and the wife of one offender) brought a section 1983 action challenging the constitutionality of the Alaska Sex Offender Registration Act[221] ("SORA"), adopted after the offenders' crimes, as a violation of the *Ex Post Facto* Clause.[222] The Court's opinion referred to criminal actions and punishment interchangeably.[223] The two-part test employed to distinguish civil and punitive matters (established in an earlier case) looked first to whether the statute in question specifies that a remedy is civil.[224] If so, "only the clearest proof" that the scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil' . . . will suffice to override legislative intent."[225] In applying its first step, the Court found it important that SORA expressed a purpose

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215. *Id.* (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 475–76 (1977)).

216. *Id.* at 852 (quoting *Nixon*, 433 U.S. at 478).

217. Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 366 (1962).

218. *Id.* at 350.

219. Dick, *supra* note 212, at 1179.

220. *See, e.g.*, *id.* at 1194–95.

221. Alaska Sex Offender Registration Act, 1994 Alaska Sess. Laws ch. 41 (codified at ALASKA STAT. § 12.61.010-100).

222. 538 U.S. 84, 89 (2003).

223. *See, e.g.*, *id.* at 98–99.

224. *Id.* at 92.

225. *Id.* (alteration in original) (citations omitted).

of "protecting the public from sex offenders," noting that "where a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'"[226] Considering whether that evidence was overcome (which it was not) required the application of the factors identified in *Kennedy v. Mendoza-Martinez*.[227] To underscore (and be pedantic), the Court thus obviously regarded protection of the public (by deterring wrongdoing) a civil, non-punitive matter. It is quite clear that *Kokesh*'s approach is completely inconsistent with this insight.

4. Double jeopardy and other Fifth Amendment matters

The Fifth Amendment prohibition of double jeopardy at times has involved the assessment of whether multiple prosecutions have the aim of imposing "penalties."[228] That approach has now been rejected in favor of one that asks whether multiple prosecutions satisfy the now accepted test for what is a "criminal prosecution" (which originally was framed as a test for what was "punitive").[229] The same "criminal prosecution" approach appears to pertain to the Fifth Amendment's other guarantees, including that of due process, as well as the protections of the Sixth Amendment.[230] *Hudson v. United States*, alluded to above, chose to follow *Mendoza-Martinez* for this purpose.[231]

5. Right to trial by jury

By contrast, it is now clear that what is critical for purposes of the Seventh Amendment's right to jury trial is simply whether the matter is legal or equitable. This has long been complicated by the assumption—hopefully debunked above, as well as elsewhere—that one can determine what is *not* equitable by identifying an element of "punishment."[232] Now, however, there is a specific two-step test for

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226. *Id.* at 93–94 (quoting Flemming v. Nestor, 363 U.S. 603, 616 (1960)).

227. *Id.* at 97–106.

228. *See supra* notes 195–203 and accompanying text (discussing the *Halper* Court's assessment of double jeopardy.

229. *Supra* notes 195–203 and accompanying text.

230. *Supra* notes 195–203 and accompanying text.

231. *See supra* note 203 and accompanying text.

232. *See supra* Section II.C (musing whether equitable remedies can be punitive); Gabaldon, *Equity and Punishment*, *supra* note 22, at 1649–50 (discussing the English origins of equity).

determining what is equitable for Seventh Amendment purposes. According to *Chaufers, Teamsters and Helpers, Local No. 391 v. Terry*,[233]

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." The second inquiry is the more important in our analysis.[234]

The Court subsequently has managed to avoid importing the *Teamsters* test into either its penalty/penal/punishment jurisprudence or its cases determining the meaning of "equitable" for defining remedies authorized by statute. For instance, *Liu* had a single footnote reference to *Teamsters*.[235] It is conceivable, then, that in a case raising both statutory meaning and jury trial questions, the Court might wind up recognizing that what was denominated "equitable" by statute sometimes really is "at law" for purposes of the Seventh Amendment (or vice versa).

6. Excessive fines and cruel and unusual punishments

The Eighth Amendment has equated the concept of "fine"—which cannot be excessive—with monetary "penalty."[236] This does not seem at all incorrect, but the Eighth Amendment case law relies on a now discredited approach to interpreting the Fifth Amendment by reference to what is "penal."

The Supreme Court jurisprudence on cruel and unusual punishment is notorious for its diffidence on the subject of what constitutes "punishment," most often assuming its presence and

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233. 494 U.S. 558 (1990).

234. *Id.* at 565 (quoting Tull v. United States, 481 U.S. 412, 417–18 (1987) and citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) for the proposition that the second inquiry is the more important).

235. Liu v. SEC, 140 S. Ct. 1936, 1943 n.2 (2020). It quoted another case quoting *Teamsters* for the proposition that actions for restitution generally are equitable. *Id.*; *see also, e.g.*, Great-West Life & Annuity Ins. v. Knudson, 534 U.S. 204, 218 n.4 (2002) (deciding the meaning of "equitable" for purposes of the Employee Retirement Income Security Act and distinguishing *Teamsters*).

236. *See supra* notes 183–185 and accompanying text (discussing United States. v. Bajakajian, 524 U.S. 321 (1998)).

leapfrogging to its characterization.[237] We can infer, of course, that anything the Court has held violative of the Eighth Amendment is punishment. This would include fifteen years of "cadena" (hard labor in chains)[238] and deliberate indifference to the serious medical needs of prisoners.[239]

There are, however, a few cases that shed more light on what one commentator has called "the punishment question."[240] In *Trop v. Dulles*,[241] in concluding that denationalization is a cruel and unusual punishment for military desertion, a plurality of the Court stated that "[i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal."[242] In addition, in *Wilson v. Seiter*,[243] the Court reiterated its earlier recognition that there is an Eighth Amendment subjective "intent requirement" for conditions of confinement cases.[244] That requirement is, at a minimum, deliberate indifference.[245]

One might think that a minimum of deliberate indifference to suffering is necessary for a condition of confinement to be cruel, and the *Wilson* Court did state (quoting an earlier case) that it is not just the infliction of pain, but the "'unnecessary *and wanton* infliction of pain' that violates the Eighth Amendment."[246] One also can conclude, though, that a minimum of deliberate indifference is necessary for a condition of confinement to qualify as punishment in the first place, at least for Eighth Amendment purposes. In *Wilson*, the Court went on to favorably quote Judge Richard Posner as follows:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in

237. *See, e.g.*, Donelson, *supra* note 103, at 3 (explaining how the Supreme Court usually simply sidesteps the "punishment question"); Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences,"* 59 HOW. L.J. 341, 344–45 (2016) (chronicling "the development of an incoherent definition of punishment").

238. Weems v. United States, 217 U.S. 349, 358 (1910).

239. Estelle v. Gamble, 429 U.S. 97, 98–99, 101 (1976).

240. Donelson, *supra* note 103, at 3.

241. 356 U.S. 86 (1958) (plurality opinion).

242. *Id.* at 96.

243. 501 U.S. 294 (1991).

244. *Id.* at 300–01.

245. *Id.* at 297.

246. *Id.* at 298 (emphasis added).

> anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[247]

The intent requirement does, however, seem to be limited to conditions of confinement cases and has clearly not made its way into the Court's more general jurisprudence on punishment.

7. Statutory Construction

It is useful (and disciplined) to distinguish the Court's cases determining what is penal or punitive for constitutional purposes from its cases involving statutory meaning, although the Court itself—as manifest in *Kokesh* and *Mendoza-Martinez*—has not been inclined to do so. This Section will focus on just two of a much larger number of statutory meaning cases.

The first is *Helwig v. United States*.[248] It is a 1903 case involving a statute that conferred on district, rather than circuit, courts the exclusive jurisdiction for cases involving "penalties or forfeitures."[249] The question was whether the imposition of an "additional duty" on goods originally undervalued by their importer was a "penalty" for jurisdictional purposes.[250] The Court viewed this as something that Congress could control, saying,

> If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will . . . . Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, with reference to the further action of the officers of the government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual, and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act.[251]

This approach presumably should not be taken if the question is whether an additional duty is a penalty for some constitutional purpose. Notwithstanding *Mendoza-Martinez* and its fascination with

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247. *Id.* at 300 (alterations in original) (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).

248. 188 U.S. 605 (1903).

249. *Id.* at 610–11.

250. *Id.* at 612.

251. *Id.* at 613.

manifest legislative intent to punish, it seems a court could not properly find that an express legislative declaration that a remedy is *not* a punishment could be outcome determinative for, say, double jeopardy purposes (although a declaration of intent to penalize might be). That said, for *ex post facto* purposes, *Smith v. Doe* stopped short of giving manifest congressional intent that legislation not be deemed punitive dispositive value but did place great emphasis on it.

In any event, in *Helwig*, the Court went on to say that if the "additional duty" were "enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer," it would be a penalty—and concluded that the additional duty in question fit the bill.[252] This seems very much in line with the commonsense understanding derived in Section III.B.2: the importer suffers a loss of lawfully owned money as a consequence of an act of wrongdoing and thus is punished.

A second case involving statutory meaning is *Kelly v. Robinson*.[253] *Kelly* considered whether restitution ordered as part of criminal sentencing was a debt dischargeable in bankruptcy, given a statutory provision making non-dischargeable any "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, *[that] is not compensation for actual pecuniary loss*."[254] The Court noted the long-standing judicial tradition of treating criminal sentences involving restitution as non-dischargeable notwithstanding the italicized statutory language very arguably to the contrary, saying, "[t]his reasoning was so widely accepted by the time Congress enacted the new Code that a leading commentator could state flatly that fines and penalties are not affected by a discharge."[255] The tradition was, in part, premised on "a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."[256]

Although acknowledging that restitution "is forwarded to the victim, and may be calculated by reference to the amount of harm the offender has caused," the Court characterized the purpose of restitution ordered as part of a criminal sentence as rehabilitative rather than compensatory, and thus within the exclusion from

252. *Id.* at 613.
253. 479 U.S. 36 (1986).
254. *Id.* at 41 (emphasis added).
255. *Id.* at 46.
256. *Id.* at 47.

discharge.[257] The Court was careful to note that it did not want to interfere with the balance of goals state criminal sentences are designed to achieve.[258]

Kelly, thus is notable for at least three reasons. First, the Court clearly was willing to accept what essentially is a legislative reenactment argument. This signals interest in legislative intent, in accord with *Helwig* and appropriate (if one cares at all about the subject) in a case involving statutory meaning rather than the dictates of the Constitution.[259] Second, the reference to the views of a leading commentator is nicely textualist, insofar as statutory meaning is to turn on what well-read readers at the time would have understood language to mean.[260] Third, the Court expressed interest in rehabilitation as part of the mix of goals of punishment. This in fact is an argument that could be used *against* an attempt to establish that SEC disgorgement is non-punitive when it involves actual victim compensation.

IV. SUMMATION

This Article obviously takes the position that the Court's methodology in *Kokesh* (as well as *Liu*) was haphazard. Rummaging around in a random mix of cases relating to the meaning of "penalty" in different contexts had little to commend it, and it may, as detailed above, have unintended consequences. Essentially, the Court set loose a "Phantom Blot"—an amorphous doctrine with a very real ability to create mayhem in areas far outside SEC disgorgement. It would have been preferable to acknowledge that *Kokesh* was a case about statutory meaning, and that issues having to do with legislative intent and reenactment—or at least the likely textual understanding of contemporaneous readers—should be addressed.

Adding a little common sense to the mix might also have been helpful. Fences are not punishment, and statements that deterrence is

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257. *Id.* at 52.

258. *Id.* at 44.

259. *Id.* at 38.

260. The goal of the textualist judge in applying statutes thus is limited to deriving "[m]eaning . . . from the ring the words would have had to a skilled user of words at the time, thinking about the same problem." Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988). Former Supreme Court Justice Antonin Scalia was one of the best known textualists. *See generally* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 870 (2017) (discussing the role of Justice Scalia in promoting textualism).

punitive are simply too broad to be meaningful. Common sense also would reveal that (1) in each and every one of the cases on which *Kokesh* relied, consequences quite in excess of disgorgement would be suffered if not deemed penal, and (2) such consequences sometimes were actually deemed non-penal.

The Court did, as something of a coda, note its concern that SEC disgorgement, as practiced, could lead to payments in excess of profits wrongfully obtained. This does seem, from a commonsense standpoint, like punishment. Almost certainly this should have been a centerpiece of the Court's reasoning, not an afterthought, and it might have avoided the need for *Liu*. This Article does not attempt to resolve how a defendant's actual profit should be calculated, although *Kokesh* itself refers to the "marginal cost[]" of producing the ill-gotten gain.[261] Professor Dan Dobbs colorfully and more helpfully describes the measure as follows: "[t]he principle is disgorgement, not plunder . . . courts have recognized that some apportionment must be made between those profits attributable to the plaintiff's property and those earned by the defendant's efforts and investment, limiting [the] plaintiff to the profits fairly attributable to his share."[262]

Of a piece, it might also have been well for the Court to grapple a bit more significantly with its observation that statutes of limitation are vital to the functioning of society, relating it to the intuition that, after passage of time, ill-gotten benefits may have been employed in a manner giving rise to claims of entitlement. In this connection, it is worth noting that disgorgement orders sometimes have sought interest for the time value of money but have not often reached for investment or other earnings generated through the use of the initial fruits of crime.[263]

The *Kokesh* Court went to pains to distinguish penalties from compensatory recoveries, invoking cases that involved restitution as something like (illogically) reverse authority for the proposition that non-compensatory goals are punitive. Presumably, that would mean (*Kelly v. Robinson* and its ilk aside) that if disgorgement remedies were tailored to result in restitution to victims, they should be permissible.

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261. Kokesh v. SEC, 137 S. Ct. 1635, 1644–45 (2017) (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, cmt. h (AM. L. INST. 2010)).

262. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.5(3), 642–43 (2d ed. 1993).

263. *See, e.g.*, *Kokesh*, 137 S. Ct. at 1641 (describing the order of the District Court); Littlefield v. Perry, 88 U.S. (21 Wall.) 205, 230 (1875) (discussing orders of interest as sometimes necessary for full reimbursement).

Compensatory remedies based on the plaintiff's loss, however, generally equate to legal damages and thus lie outside the jurisdiction of equity. This conundrum was not addressed in *Kokesh*, of course, since that case elided the issue of the SEC's authority. *Liu* missed the same point by wandering off to talk about the inability of equity to punish, leaving us with a simple, if ultimately unsustainable, dichotomy between compensation and punishment. Compensation of victims with money damages generally is a legal matter and is not regarded as driven by a purpose to punish. Carving off part of that compensatory recovery in order to claim that the remedy qualifies as equitable because it is based on the defendant's profit makes at least a little sense—equity was supposed to supplement what was available at law, not duplicate it. It does not, however, make sense from the standpoint of separating what is compensatory from what is punitive. Making victims whole is entirely compensatory, even if defendants experience some part of a compensatory remedy as something like punishment.

In any event, the Court relied on the argument that defendants sometimes have been required to disgorge more than the amount of their own profit to indicate that they are, as a larger group, being punished. Justice Sotomayor did not carefully distinguish between cases in which defendants are not permitted to net their expenses and those in which they are called upon to disgorge profits accruing to third parties rather than themselves, but she seemed more concerned with the latter, as related to the facts before her.[264]

It is worth a moment to refocus, then, on that part of the Court's concern relating to the possibility that defendants may be required to disgorge other people's profits—specifically when tippers are charged with their tippees' gains.[265] It seems clear from the analysis above that the Court is not reading its older opinions in their entirety. One is prompted by the tipper/tippee point to wonder about whether the Court reads even its own *recent* opinions. A mere eight months before the decision of *Kokesh*, *Salman v. United States*[266] confirmed the holding

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264. Liu v. SEC, 140 S. Ct. 1936, 1949 (2020) (describing *Kokesh*'s concerns).

265. This also could occur in cases of joint and several liability. *See* SEC v. Whittemore, 659 F.3d 1, 10–12 (D.C. Cir. 2011) (ruling both participants in a pump and dump scheme could be liable); SEC v. Calvo, 378 F.3d 1211, 1215–16 (11th Cir. 2004) (calling joint and several liability in securities cases a "well settled principle" even where one defendant is more culpable than the other); SEC v. Hughes Cap. Corp., 124 F.3d 449, 455–57 (3d Cir. 1997) (upholding joint and several liability even where defendant only acted negligently).

266. 137 S. Ct. 420 (2016).

of an earlier case, reiterating that tipping inside information can be the equivalent of trading on the information oneself and making a gift of the proceeds.[267] There is no obvious reason why this characterization should not control in the disgorgement context and no reason whatsoever why the possibility should not at least be acknowledged.

Letting bygones be bygones, however, the Supreme Court is the Supreme Court, so let us take as givens that, going forward, (1) SEC disgorgement's purpose is deterrence, and (2) deterrence is punitive. What might those conclusions and their transitive character inform other than that the section 2462 statute of limitations applied until *Liu* prohibited the Commission's suit of what it viewed as penal disgorgement?

First, the conclusion that SEC disgorgement is punitive should not have determined whether the remedy is or is not equitable—although that, of course, was the direction chosen in *Liu*. As demonstrated above as well as elsewhere, equity can punish (as can, of course, law).[268]

Second, the conclusion that SEC disgorgement is punitive would seem to have implications for statutory, constitutional, and even contractual provisions adverting to "penalties" and their close relatives. For instance, there was an immediate question raised after *Kokesh* as to whether disgorgement necessarily would count toward the caps imposed on civil monetary penalties under the federal securities laws themselves.[269] The lower courts already have begun to grapple with other ramifications and have manifested a bit more dexterity than the Supreme Court in dealing with the possibility that "penalty" need not be a one-definition-fits-all proposition. For instance, in *U.S. Commodity Futures Trading Commission v. Reisinger*,[270] the court held that 28 U.S.C. § 2462 governed disgorgement sought by the Commodity Futures Trading Commission (CFTC) but perhaps did not limit its ability to pursue civil monetary penalties and injunctions.[271] Of a piece, *United States v. RaPower-3, LLC*,[272] denied a post-*Kokesh* demand for a jury trial on a disgorgement claim in a criminal trial.[273]

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267. *Id.* at 425–29.

268. *See supra* Section II.C (comparing equitable and punitive); Gabaldon, *Party Games*, *supra* note 87 (contending equity does not duplicate legal remedies but can punish).

269. *See supra* text following note 34.

270. No. 11-CV-08567, 2017 WL 4164197 (N.D. Ill. Sept. 19, 2017).

271. *Id.* at *1–3.

272. 294 F. Supp. 3d 1238 (D. Utah 2018).

273. *Id.* at 1241–42.

Third, the conclusion that SEC disgorgement is punitive could have unintended effects if extrapolated into other areas where a disgorgement remedy is sought. This would not necessarily be the case if all courts were punctilious about such matters as context and the irrelevance of punishment to the equity question, but the Supreme Court's own jurisprudence is not very reassuring on that exact point.

Finally, it is the sweeping declaration that deterrence is punitive that seems the most mischievous. For instance, there is no reason to think that, given the Court's eagerness to employ soundbites in place of reason, *Kokesh* will not crop up as authority for due process or other constitutional purposes.

CONCLUSION

Existence of the disgorgement remedy aside, there are any number of appurtenant questions, all of which almost certainly have been confused by the Supreme Court's declaration in *Kokesh* that disgorgement is a deterrent and, therefore, punitive. For the nonce, each of the appurtenant constitutional questions should simply be resolved on its own and by reference to cases with similar facts arising in the context of the same constitutional provision. For instance, whether a jury trial is required should turn on the question of whether the action is equitable, not on whether it is punitive. The requirements of due process should be based on an application of the factors listed in *Mendoza-Martinez*. Those same factors, echoed in *Hudson*, should determine whether actions (including SEC disgorgement, CFTC disgorgement, etc.) give rise to double jeopardy. Courts should, as to these questions, politely ignore *Kokesh* as possible precedent since, as this Article seeks to illustrate, it exhibited a noticeable lack of caution, both in its analysis and in the breadth of its declarations.

In addition to the constitutional questions that seem, by and large, to have their own distinguishable answers, there are questions of statutory meaning and contract enforcement that could be affected by *Kokesh*. The announced conclusion that deterrence is punishment was, of course, a matter of deriving the meaning of a single statute, but the opinion makes no attempt to self-limit. Lower courts increasingly will be called upon to grapple with its application in the context of disgorgement and beyond.

Exercising restraint and engaging in a careful examination of authorities is an important next step in the Supreme Court's jurisprudence on punishment. Once the precedents are unscrambled, there might come a time for the Court to engage in grand theorization

informed by common sense.[274] Only at that point might transportation of precedents across provisional lines be useful.

274. As an initial matter, this Article contributes to that far-off conversation the following thoughts. First, for a consequence to be deemed punishment/a penalty/penal in character, it must be imposed as a result of a supposed violation of law. Second, such a consequence must result in suffering, not including the loss of something to which one is not entitled. Third, the consequence must be disproportionate to any benefit to the public (including deterrence) ostensibly sought to be achieved. Fourth, suffering imposed on an innocent should always be regarded as punishment.