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SENTENCING

# A Demise Greatly Exaggerated—*Apprendi* Is Extended to Criminal Fines

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Not surprisingly, public commentary at the end of the U.S. Supreme Court's October 2011 term tended to focus on the court's decision upholding the Affordable Care Act.[1] But escaping any significant notice in the shadow of that health care decision was a potentially far-reaching criminal law ruling the court handed down just one week earlier in *Southern Union Co. v. United States*.[2] That case foretells a change in the balance of power between the government and defendants—especially corporate defendants—in the prosecution of federal criminal charges.

In *Southern Union*, the court held that the Sixth Amendment's jury-trial guarantee extends to the imposition of criminal fines. The application of the jury-trial guarantee to sentencing was explained in the landmark case *Apprendi v. New Jersey*, decided in 2000. There, the court held that ''other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.''[3] Since then, the court has applied *Apprendi*'s rule numerous times to invalidate sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence. But all of these cases involved sentences of imprisonment or death.[4] In *Southern Union*, the court applied the *Apprendi* rule for the first time to criminal fines, thus reserving to juries the determination—beyond a reasonable doubt—of any fact that increases a defendant's maximum authorized fine.

Although relatively straightforward in its reasoning, the *Southern Union* holding has potentially far-reaching consequences. As *Apprendi* and later cases did with respect to sentences of imprisonment or death, *Southern Union* will strengthen the relative bargaining position of criminal defendants in plea negotiations over fines. This is particularly true for corporations and other organizational defendants, for whom the most potent available punishment is a large fine and for whom

[1] *National Federation of Independent Business et al. v. Sebelius*, 132 S. Ct. 2566 (2012).

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[2] 132 S. Ct. 2344, 91 CrL 415 (2012).

[3] 530 U.S. 466, 476, 67 CrL 459 (2000).

[4] See *Ring v. Arizona,* 536 U.S. 584, 71 CrL 373 (2002) (statute authorizing death penalty upon judge's finding of aggravating factor); *Blakely v. Washington,* 542 U.S. 296, 75 CrL 284 (2004) (statute authorizing ''exceptional sentence'' upon judge's finding of aggravating factor); *United States v. Booker,* 543 U.S. 220, 76 CrL 251 (2005) (mandatory U.S. Sentencing Guidelines enhancements); *Cunningham v. California,* 549 U.S. 270, 80 CrL 415 (2007) (scheme authorizing schedule of longer prison terms if judge finds aggravating circumstance).

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the most likely resolution of criminal misconduct allegations is a settlement agreement.

*Southern Union* also can be expected to usher in new battles regarding the admissibility at trial of evidence that the decision now makes relevant to establishing a defendant's maximum fine.

Finally, *Southern Union* suggests that the court—including its two newest members, Justices Sonya Sotomayor and Elena Kagan, both of whom joined the majority—is firmly committed to *Apprendi* and may consider recognizing that its constitutional protection extends to another financial penalty in criminal cases: restitution. In short, reports of *Apprendi*'s possible demise—which started circulating after the court's 2009 decision in *Oregon v. Ice*[5]—appear to have been greatly exaggerated.

## 'On or About' in *Southern Union*

**What Did The Jury Find, And Does It Matter?** In 2007, a federal grand jury in Rhode Island indicted Southern Union, a Texas-based natural gas distributor, for storing hazardous waste without a permit, in violation of the Resource Conversation and Recovery Act. Since 2001, the company had been storing outdated mercury-sealed gas regulators (MSRs), as well as loose liquid mercury, in a brick building in Rhode Island. By July 2004, that building contained 165 MSRs and more than 140 pounds of loose mercury. Despite the potential safety risks posed by the hazardous mercury, Southern Union's management took no action to remove or recycle it. In late September 2004, children from a nearby apartment complex broke into the building, spilling mercury on the ground and tracking it into several homes in the apartment complex. The indictment charged criminal misconduct ''from on or about September 19, 2002 until on or about October 19, 2004,'' when Southern Union discovered the break-in—a period of 762 days.

Following a nearly four-week trial, the jury convicted Southern Union of one count of knowingly storing hazardous waste (i.e., liquid mercury) without a permit.[6] The verdict form read: ''As to Count 1 of the Indictment, on or about September 19, 2002 to October 19, 2004, knowingly storing a hazardous waste, liquid mercury, without a permit, we the jury find the defendant Southern Union Company GUILTY.''[7] Neither party objected to the proposed verdict form or requested a special interrogatory to determine the precise duration of the violation.

RCRA violations are punishable by ''a fine of not more than $50,000 for each day of violation.''[8]

The probation department's presentence report stated that the maximum fine authorized by the jury's verdict was $38.1 million—$50,000 for each day of the 762-day period alleged in the indictment and mentioned on the verdict form. Southern Union objected, arguing that the jury had not necessarily determined the number of days of violation; rather, it argued, the instructions permitted the jury to convict upon finding only a single-day violation. Thus, imposition of any fine greater than the single-day penalty of $50,000 would constitute impermissible fact-finding by the wrong actor (the judge) based on the wrong standard (a preponderance of the evidence), in violation of *Apprendi*.

In response, the government acknowledged that the jury had not determined the precise duration of the violation. It also agreed with Southern Union that ''the dispute over whether Southern Union violated the statute during that entire period or for some lesser number of days cannot be resolved by reference to the verdict. Rather, the issue requires judicial fact-finding.''[9] Finally, the government admitted that the case squarely presented a legal issue about the scope of the *Apprendi* rule: ''If the holding in *Apprendi* . . . extends to fines, the Court would be barred from raising section 6928(d)'s fine maximum based on its own findings concerning the number of days that Southern Union violated the statute.''[10]

The government took the categorical position that *Apprendi* does not apply to criminal fines, relying on dicta from the Supreme Court's then-recent decision in *Oregon v. Ice*. In *Ice*, the court had suggested, somewhat ambiguously, that ''trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example . . . the imposition of statutorily prescribed fines and orders of restitution.''[11] The government also invoked the historical record, arguing that the imposition of criminal fines at common law was more often a judicial, rather than a jury, function. Finally, the government warned that the operation of more than 100 federal and state fine-per-day-of-violation statutes would be frustrated by applying *Apprendi* to criminal fines.

The district court imposed the government's requested fine of $38.1 million, and the First Circuit affirmed, but the courts diverged sharply in their reasoning. The district court, disagreeing with both parties, concluded that the jury had implicitly made the requisite finding—that Southern Union was in violation of the statute for a total of 762 days. The court of appeals, on the other hand, concluded that the verdict could not necessarily be interpreted as a finding of more than a single-day violation.[12] But that court went on to hold, on the basis of the Supreme Court's dicta in *Ice* and the purported historical record regarding common-law practice, that *Apprendi* simply does not apply to crimi-

[5] 555 U.S. 160, 84 CrL 400 (2009).

[6] The jury returned a verdict of not guilty on Count II (knowingly failing to properly report a mercury release of more than one pound, a violation of the Emergency Planning and Community Right-to-Know Act) and Count III (knowingly storing the MSRs without a permit).

[7] *United States v. Southern Union Co.*, 2009 WL 2032097, at *2 (D.R.I. July 9, 2009).

[8] 42 U.S.C. § 6928(d).

[9] United States' Response to Defendant's Memorandum Concerning the Maximum Possible Fine (Doc. No. 136), *United States v. Southern Union Co.*, Case 1:07-cr-00134-S-DLM, at 2.

[10] Id. at 3.

[11] 555 U.S. at 171. In *Ice*, the court determined that *Apprendi* does not prohibit judges, rather than juries, from finding facts necessary to impose consecutive, rather than concurrent, sentences for multiple offenses.

[12] The First Circuit also rejected the district court's interpretation of the jury verdict: as even the government ''essentially concede[d],'' the jury had *not* necessarily determined the number of days of violation. The First Circuit thus rejected the district court's sole basis for imposing a fine in excess of the $50,000 single-day maximum.

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nal fines. A circuit split having been created,[13] the Supreme Court granted certiorari.

**Yes, It Matters: The Supreme Court Applies *Apprendi* to Criminal Fines** In a 6-3 decision, the Supreme Court reversed the First Circuit and remanded for resentencing. Sotomayor's opinion for the majority held ''there is no principled basis under *Apprendi*'' to distinguish criminal fines from imprisonment or death. The court found unpersuasive the government's trivialization of criminal fines as ''less onerous,'' noting that some corporate defendants have received fines in the hundreds of millions of dollars. The court also viewed the historical record in a manner different than the First Circuit and the government, concluding that juries at common law often determined specific facts that set the maximum fine, such as the value of damaged or stolen property.[14] Finally, the court was unswayed by the parade of horribles that the government predicted in the event *Apprendi* is extended to criminal fines: forcing confused jurors to analyze complicated facts on the basis of expert testimony; prejudicing defendants who might wish to deny violating a statute while at the same time arguing that any violation was of limited duration; and requiring the impractical consideration of facts that are unknown or unknowable at trial. The court concluded that these policy concerns—voiced in one manner or another since *Apprendi* became law more than a decade ago—could not trump the constitutionally mandated *Apprendi* rule.

## *Apprendi*: Alive and Well

The court's application of *Apprendi* to criminal fines is unsurprising. Indeed, in the wake of *Booker*—the 2005 decision rendering the U.S. Sentencing Guidelines advisory to avoid a Sixth Amendment violation—the federal government had *itself* conceded that *Apprendi* required proof to a jury beyond a reasonable doubt of each fact essential to imposing a fine above the maximum authorized by a Sherman Act conviction.[15] Sotomayor pointedly noted the government's about-face at the end of the *Southern Union* opinion.

The *Southern Union* decision rests on both legal reasoning and pragmatics. First, as Sotomayor explained at oral argument, the ruling affirms that the logic of *Apprendi* is ''a fairly simple algorithm.''[16] Under *Apprendi*, ''other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.''[17] Criminal fines are penalties, no less than imprisonment or the death sentence.

The court's decision was also informed by the practical consequences of exempting criminal fines from jury fact-finding. As amici curiae the U.S. Chamber of Commerce and the National Association of Criminal Defense Lawyers argued in support of Southern Union, ''in many criminal prosecutions, the most significant part of the penalty is the fine. Moreover, in cases where the defendant is a corporation, because a corporation cannot be incarcerated, the fine is not merely the most significant part of the penalty; it is the penalty.''[18] Indeed, in 2011, a fine was imposed on 70.6 percent of organizational defendants convicted of federal offenses—a fact cited by Sotomayor in her majority opinion.[19] And were criminal fines exempt from *Apprendi*'s constitutional protection, organizational defendants would be more frequently coerced by the threat of enormous fines into guilty pleas, which often have serious ancillary consequences such as debarment from government programs.[20]

Furthermore, in both the federal and state systems, the maximum amount of a fine is frequently calculated by reference to particular facts. Sometimes that fact is the duration of the violation,[21] such as in *Southern Union*, with certain federal statutes authorizing fines up to $1 million per day of noncompliance. Other criminal statutes provide for fines of up to twice the amount of the defendant's gain, the victim's loss, the value of money embezzled, the value of the bribe, or some other baseline fact.[22] As Sotomayor noted, ''In all such cases,

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[13] See *Southern Union*, 132 S. Ct. at 2349 (citing *United States v. Pfaff*, 619 F.3d 172, 87 CrL 838 (2d Cir. 2010); *United States v. LaGrou Distribution Sys. Inc.*, 466 F.3d 585 (7th Cir. 2006)); see also *United States v. Yang*, 144 Fed. Appx. 521, 524 (6th Cir. 2005) (reversing a fine based on *Apprendi* error without analyzing whether *Apprendi* applies to criminal fines).

[14] Distinguishing *Ice*, the *Southern Union* court characterized its statement about fines as ''at most ambiguous'' and suggested that it ''more likely refers to the routine practice of judges' imposing fines from within a range authorized by jury-found facts. Such a practice poses no problem under *Apprendi* because the penalty does not exceed what the jury's verdict permits.'' 132 S. Ct at 2352 n.5. Justice Ruth Bader Ginsburg, the author of the court's majority opinion in *Ice*, also joined the majority opinion in *Southern Union*—a fact that underscores the limited effect *Ice* is likely to have going forward.

[15] See Criminal Remedies: Hearings Before the Antitrust Modernization Comm'n 38 (2005) (testimony of Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement); see also Gov't C.A. Br. at 33-34, *LaGrou Distrib. Sys. Inc.*. Commentators agreed with this view that the *Apprendi* rule likely applied to criminal fines. See, e.g., Phillip C. Zane, *Booker Unbound: How the New Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What to Do About It*, 17 FED. SENT'G REP. 4 (April 2005).

[16] http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-94.pdf

[17] 132 S. Ct. at 2350 (citing *Apprendi*, 530 U.S. at 490, and *Blakely*, 542 U.S. at 303 (emphasis deleted)).

[18] Brief for the Chamber of Commerce and the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Petition, at 2-3.

[19] 132 S. Ct. at 2350 n.2.

[20] The government merely reinforced this point, in opposing Southern Union's petition for certiorari, by observing that ''nearly all organizational defendants (93.8%) are convicted pursuant to a guilty plea.'' The government's unpersuasive point was that because most fines imposed on organizational defendants are based on facts admitted by those defendants, the issue whether the Constitution requires jury findings is infrequently of consequence. See Brief for the United States in Opposition, at 12.

[21] See, e.g., 12 U.S.C. §§ 1467a, 1723a, 1785, 1829, 1847, 3111; 14 U.S.C. § 85; 15 U.S.C. §§ 717t, 2615, 3414; 16 U.S.C. § 825o; 30 U.S.C. §§ 201, 1463; 33 U.S.C. §§ 411, 1319; 42 U.S.C. §§ 300h-2, 2273, 4910, 6973, 6992d, 9152; 47 U.S.C. § 502.

[22] See, e.g., 18 U.S.C. § 3571(d); Fla. Stat. Ann. § 75.083(1)(f); N.J. Stat. Ann. § 2C:43-3(e); Haw. Rev. Stat. § 706-640(1)(f); Ky. Rev. Stat. § 534.030(1); N.Y. Penal Law § 80.00(1)(b); Pa. Cons. Stat. § 1101(8). See also *Southern*

requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.' ''[23]

Finally, the court was unpersuaded by the argument that applying *Apprendi* to criminal fines would hinder the prosecution of complex fraud and environmental offenses. To begin, as multiple justices suggested during oral argument, it is a ''very simple matter for the government to ask for jury findings'' regarding the baseline facts that will peg the maximum amount of a fine, such as the duration of the violation. Moreover, federal prosecutors have sought and obtained significant criminal fines even when required to comply with the Sixth Amendment's requirement of a jury finding. For example, three months before the court issued its decision in *Southern Union*, the Justice Department's Antitrust Division secured several high-profile convictions after an eight-week trial in the *AU Optronics* price-fixing prosecution. In that case, the Antitrust Division proved to the jury, beyond a reasonable doubt, that the defendants' gain derived from their anticompetitive conduct exceeded $500 million.[24] Under the applicable alternative fine provision, 18 U.S.C. § 3571(d), the jury's factual determination authorizes a potential maximum fine of twice the gain derived from the offense: $1 billion. This would be the largest fine ever imposed for an antitrust offense in the United States.[25]

## *Apprendi* Going Forward

*Southern Union* is a potentially consequential decision for at least three reasons.

First, the vast majority of federal criminal prosecutions resolve by guilty plea.[26] And as Justice Stephen Breyer noted in his *Southern Union* dissent, the effect of ''complex jury trial requirements'' is most often felt during plea negotiations—particularly for organizational defendants, which frequently settle potential allegations of criminal misconduct by entering deferred prosecution agreements and nonprosecution agreements before formal charges are ever brought. Like *Apprendi* and its progeny, *Southern Union* strengthens the relative bargaining position of criminal defendants, in this instance by requiring—if the case were to go to trial—that the government prove to a jury beyond a reasonable doubt any fact that increases the maximum fine.

Second, now that the government must present evidence of additional facts at trial, there will be more frequent clashes over the admissibility of evidence arguably relevant to that requirement. For example, to invoke the alternative fine provision in Section 3571(d) for a fine that is twice the victims' losses, the government may propose to present trial testimony from numerous witnesses who would testify to little more than the amount of money they lost as a result of the defendant's fraud. Criminal defendants will likely attempt to keep such evidence from the jury on the ground that its probative value is substantially outweighed by the risk of prejudice under Fed. R. Evid. 403. Similarly, courts will need to grapple with whether to require the government to accept a defendant's offer to stipulate away substantial parts of such testimony.

Even when defense objections to such evidence are overruled, they will no doubt focus district courts on the manner in which the government will present trial evidence relevant to the defendant's maximum fine. In *United States v. Sanford Ltd.*, for example, the government charged defendants with seven felony counts related to the unlawful discharge of waste in connection with their operation of a fishing vessel in the South Pacific. Prosecutors sought to introduce evidence of defendant Sanford's nearly $25 million in gross revenues to establish the amount of gain derived from the offense—one of the measures for an alternative fine under Section 3571(d). District Judge (and U.S. Sentencing Commissioner) Beryl A. Howell held that the government could introduce such evidence only to the extent necessary to establish ''gross gain'' actually ''derive[d] from'' the charged offense, namely: ''monetary proceeds which are additional before-tax profit to the defendants that was proximately caused by the relevant conduct of the offense.'' Howell then directed the government to submit specific notice of the number of witnesses and kinds of evidence it intended to present to the jury to prove the gross gain derived from the offense.[27] Four days later, the government informed the

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*Union*, 132 S. Ct. at 2351 n.4 (citing 18 U.S.C. § 645 (fine for embezzlement by officers of United States courts of up to twice the value of the money embezzled), § 201(b) (fine for bribery of public officials of up to three times the value of the bribe)).

[23] *Southern Union*, 132 S. Ct. at 2351.

[24] Although the *AU Optronics* trial preceded the Supreme Court's June 2012 decision in *Southern Union*, the district court had determined that it would apply *Apprendi* and require the government to prove the amount of gain to the jury beyond a reasonable doubt. See Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 U.S.C. § 3571(d), *United States v. AU Optronics Corp.*, No. 09-CR-110, 2011 WL 2837418, at *4 (N.D. Cal. July 18, 2011).

[25] Moreover, after the U.S. Court of Appeals for the Second Circuit correctly anticipated the application of *Apprendi* to criminal fines in *Pfaff*, several U.S. Attorney's Offices continued their aggressive pursuit of significant twice-the-gain-or-less fines. See, e.g., U.S. Attorney, Northern District of New York, Former Avila Controller Pleads Guilty to Wire Fraud (June 28, 2012), available at http://www.justice.gov/usao/nyn/news/1683-3317-271933824.pdf; U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Charges Three Swiss Bankers with Conspiring to Hide More than $1.2 Billion in U.S. Taxpayer Accounts from the IRS (Jan. 3, 2012), available at http://www.justice.gov/usao/nys/pressreleases/January12/berlinkafreiandkellerindictmentpr.pdf; U.S. Attorney, Eastern District of New York, David H. Brooks, Founder and Former Chief Executive Officer of DHB Industries Inc., and Sandra Hatfield, Former Chief Operating Officer, Convicted of Insider Trading, Fraud, and Obstruction of Justice (Sept. 14, 2010), available at http://www.justice.gov/usao/nye/pr/2010/2010sep14.html.

[26] As Justice Stephen Breyer observed in his *Southern Union* dissent, ''ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.'' 132 S. Ct. at 2371 (citing *Missouri v. Frye*, 132 S. Ct. 1399, 1407, 90 CrL 849 (2012)).

[27] Memorandum Opinion (Doc. No. 171), *United States v. Sanford Ltd. et al.*, Crim. No. 11-cr-352 (BAH), 2012 WL 2930770, at *13-14 (D.D.C. July 19, 2012).

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court that it was abandoning proof of a twice-the-gain alternative fine under Section 3571(d).[28]

Third, *Southern Union* increases the likelihood that the Supreme Court will continue to extend *Apprendi*'s constitutional protection to another form of criminal penalty: restitution. Before *Southern Union*, federal courts of appeals routinely held that judges may impose restitution based on judge-found facts using a preponderance-of-the-evidence standard.[29] But those decisions—already doubtful in their persuasiveness even before *Southern Union*—must be re-examined now that the court has confirmed that *Apprendi* applies to criminal ''sentences, penalties, or punishments'' beyond imprisonment and death. Just as fines are ''sentences, penalties, or punishments,'' so too is restitution—a criminal penalty sought by the government (rather than by the victim) that must be explicitly authorized by statute and is tied to the offense of conviction.[30] Indeed, statutes such as the Mandatory Victims Restitution Act authorize restitution ''in the full amount of each victim's losses.''[31] Under *Southern Union*, the amount of each victim's loss would appear to be exactly the type of baseline fact that must be submitted to a jury and proved beyond a reasonable doubt to establish the statutory maximum sentence.

*Southern Union* may not have received as much attention as the Affordable Care Act ruling, but for many criminal law practitioners it will have a noticeable effect on the resolution of criminal charges where a fine is a significant component of the potential penalty.

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[28] Notice of Election Not to Pursue an Alternative Fine (Doc. No. 179), *United States v. Sanford Ltd. et al.*, Crim. No. 11-cr-352 (BAH) (D.D.C. July 23, 2012).

[29] See, e.g., *United States v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 78 CrL 596 (3d Cir. 2006) (en banc); *United States v. Nichols*, 149 Fed. Appx. 149 (4th Cir. 2005); *United States v. Garza*, 429 F.3d 165 (5th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451 (6th Cir. 2005); *United States v. Swanson*, 394 F.3d 520 (7th Cir. 2005); *United States v. Carruth*, 418 F.3d 900 (8th Cir. 2005) (rehearing en banc denied); *United States v. Bussell*, 414 F.3d 1048 (9th Cir. 2005); *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005); *United States v. Williams*, 445 F.3d 1302 (11th Cir. 2006).

[30] The overwhelming majority of courts of appeals characterize various restitution statutes as criminal sanctions, although the Seventh and Tenth circuits have held that it is a civil remedy. See *United States v. Serawop*, 505 F.3d 1112, 1122-23 and n.4, 82 CrL 159 (10th Cir. 2007) (discussing circuit split); *Leahy*, 438 F.3d at 334-35 and n.9. The Supreme Court has echoed the majority view. See *Pasquantino v. United States*, 544 U.S. 349, 77 CrL 63 (2005) (holding that ''the purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct''); *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (observing that ''although restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.'').

[31] 18 U.S.C. § 3664(f)(1)(A).