Civil Penalties and Multiple Punishment under the Double Jeopardy Clause: Some Unanswered Questions

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CIVIL PENALTIES AND MULTIPLE PUNISHMENT UNDER THE DOUBLE JEOPARDY CLAUSE: SOME UNANSWERED QUESTIONS

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I. Introduction

In United States v. Halper,¹ decided in 1989, a unanimous Supreme Court held for the first time that a penalty imposed in a civil proceeding brought by the government can constitute "punishment" for purposes of the Double Jeopardy Clause of the Constitution.² Specifically, the Court concluded that an individual who has been punished in a criminal prosecution for her conduct may not be subjected to any additional civil sanctions for that same conduct to the extent the sanctions are punitive, as opposed to remedial, in nature.³

Like many cases setting forth a new legal principle, Halper has given rise to a number of questions concerning the scope of its holding. This article will examine four of those questions: first, whether, and how, the principle enunciated in Halper applies when the sequence of the proceedings is the opposite of that in Halper, that is, where an individual is prosecuted criminally after she already has been subjected to a sanction in a civil proceeding based upon the same conduct; second, whether, and how, Halper applies to a tax imposed upon the unlawful possession of marijuana and other controlled substances; third, whether, and how, Halper applies when the sanction imposed in the civil proceeding is not a monetary penalty, as in Halper; and finally, when the sanction imposed in the civil proceeding serves the remedial

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2. Id. at 448. The Fifth Amendment to the United States Constitution in part, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.
3. Halper, 490 U.S. at 448-49.

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purpose of compensating the government for its loss, how should the amount of that loss be determined.

II. The Guarantee Against Double Jeopardy

The Fifth Amendment to the Constitution of the United States provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." This guarantee against double jeopardy is "one of the oldest ideas found in western civilization." It is "fundamental" to the Anglo-American system of justice, and, consequently, applies to the states through the Due Process Clause of the Fourteenth Amendment.

The guarantee against double jeopardy encompasses several related protections. In an often quoted statement from North Carolina v. Pearce, the Supreme Court explained that "[i]t protects against a second prosecution for the same offense after acquittal.[] It protects against a second prosecution for the same offense after conviction.[] And it protects against multiple punishments for the same offense." In addition, in some circumstances, the guarantee protects against re-prosecution following the premature termination of a trial.


Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a "universal maxim of the common law." It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and that it has been recognized here as fundamental again and again. Today it is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations.

Id. (citations omitted).


6. Id. at 794 (overruling Palko v. Connecticut, 302 U.S. 319 (1937)). The Fourteenth Amendment to the United States Constitution, in part, provides: 

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.


10. E.g., Ex parte Lange, 85 U.S. (18 Wall.) 163, 176 (1873).

A number of policy considerations underlie the guarantee against double jeopardy. By barring re-prosecution following an acquittal or a conviction, it preserves the finality of judgments.\(^2\) Also, there are dangers in allowing the government to subject an individual to repeated trials for a single offense,\(^3\) and there is an inherent injustice in punishing a person twice for the same offense.\(^4\) Additionally, the guarantee helps to protect a defendant's "valued right to have his trial completed by a particular tribunal,"\(^5\) that is, his interest in "being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."\(^6\)

**III. Double Jeopardy and Civil Proceedings**

The "jeopardy" with which the Fifth Amendment is concerned is the risk that is "traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'"\(^7\) This risk is present in *all* criminal prosecutions, regardless of whether the offense charged is a felony or a misdemeanor.\(^8\) It also may be present in certain "civil" proceedings that are "essentially criminal"\(^9\) in character, such as an adjudicatory hearing to determine whether a juvenile is delinquent\(^10\) or in need of supervision.\(^11\) As a general matter, though, the risk to

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As the Supreme Court stated in Green v. United States, 355 U.S. 184 (1957):

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*Id.* at 187; *see also* Breed, 421 U.S. at 529-30.


16. Jorn, 400 U.S. at 486 (plurality opinion).


20. *Id.* at 531.

which the Double Jeopardy Clause refers is not present in civil proceedings.\textsuperscript{22} Therefore, a legislature "may impose both a criminal and a civil sanction in respect to the same act or omission"\textsuperscript{23} without running afoul of the Double Jeopardy Clause.

The underlying question in determining whether the Double Jeopardy Clause applies to a particular type of proceeding is "whether [the] proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial."\textsuperscript{24} This inquiry, in turn, proceeds upon two levels. First, one must determine "whether

\begin{quote}

a juvenile is not placed in jeopardy at a proceeding to determine dependency).
\end{quote}


\textsuperscript{24} \textit{One Assortment of 89 Firearms}, 465 U.S. at 362.
[the legislature], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.\textsuperscript{25} Second, where the legislature has indicated an intention to establish a civil penalty, one must question "whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention."\textsuperscript{26} With respect to the second aspect of this inquiry, "[o]nly the clearest proof that the purpose and effect of the [sanction] are punitive will suffice to override [the legislature's] manifest preference for a civil sanction.\textsuperscript{27} Among the factors that should be considered in determining whether a particular sanction is penal in nature are:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of \textit{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 . . . .\textsuperscript{28}

As the Supreme Court has noted, however, "[t]his list of considerations is . . . 'neither exhaustive nor dispositive.'\textsuperscript{29}

Applying this standard in \textit{United States v. One Assortment of 89 Firearms},\textsuperscript{30} the Supreme Court concluded that the forfeiture mechanism of the Gun Control Act of 1968\textsuperscript{31} is "not an additional penalty for the commission of a criminal act, but rather [is] a separate civil sanction, remedial in nature,"\textsuperscript{32} aimed at "[k]eeping potentially dangerous weapons out of the hands of unlicensed [gun] dealers.\textsuperscript{33} Therefore, an in \textit{rem} forfeiture proceeding under that Act is a civil proceeding to which the Double Jeopardy Clause does not apply.\textsuperscript{34} Accordingly, the Court held that a gun owner's

28. \textit{Id.} at 365 n.7 (quoting \textit{Kennedy v. Mendoza-Martinez}, 372 U.S. 144, 168 (1963)).
31. At the time of the forfeiture proceeding in \textit{One Assortment of 89 Firearms}, the forfeiture provision of the Gun Control Act of 1968, read:

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Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.
\end{quote}

33. \textit{Id.} at 364.
34. \textit{Id.} at 366. The Court first concluded that Congress "indicate[d] clearly that it intended a civil, not a criminal, sanction." \textit{Id.} at 363. The Court noted that Congress provided that an action to enforce a forfeiture under the Act was an \textit{in rem} proceeding and that, "[i]n contrast to the \textit{in personam} nature
acquittal of criminal charges that he had knowingly engaged in the business of dealing in firearms without a license did not bar a subsequent in rem forfeiture proceeding against those same firearms based upon their involvement in the same transaction for which the gun owner had been acquitted.  

Similarly, in One Lot Emerald Cut Stones v. United States, the Supreme Court held that the forfeiture provision contained in the Tariff Act of 1930 imposes a civil sanction aimed at aiding the enforcement of tariff regulations by preventing forbidden merchandise from circulating in the country. Also, through its monetary penalty, the enforcement is enhanced by "provid[ing] a reasonable form of

of criminal actions, actions in rem have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object." Id. The Court also pointed out that Congress created "distinctly civil procedures," id., for some forfeitures under the Act, namely, authorizing a summary administrative procedure for forfeiture of items valued at $2500 or less and providing that notice of a seizure of such an item could be by publication, id. In addition, the Court found it apparent from the differences in the language between the substantive criminal provisions of the Act, 18 U.S.C. § 922, and the forfeiture provisions, 18 U.S.C. § 924(d), that "the forfeiture provisions of § 924(d) were meant to be broader in scope than the criminal sanctions of § 922(a)(1)," id. at 364, the substantive criminal provision under which the claimant had been prosecuted. Id. at 363-64. Finally, the Court concluded that the forfeiture provision "plays an important role in furthering the prophylactic purposes of the 1968 gun control legislation by discouraging unregulated commerce in firearms and by removing from circulation firearms that have been used or intended for use outside regulated channels of commerce," id. at 364, a goal the Court characterized as "plainly more remedial than punitive," id.

With respect to the second part of the inquiry — whether the statutory scheme was so punitive either in purpose or effect as to negate the legislature's intention to establish a civil remedial mechanism — the Court found that only one of the factors relevant in determining whether a sanction is punitive or remedial — the fact that conduct giving rise to forfeiture proceedings under § 924(d) also could entail the criminal penalties of § 922(a)(1) — suggested that § 924(d) imposed a criminal penalty. After noting that Congress may impose both a criminal and a civil sanction in respect to the same conduct, the Court found that, "[b]ecause the sanction embodied in § 924(d) is not limited to criminal misconduct, the forfeiture remedy cannot be said to be co-extensive with the criminal penalty." Id. at 366. It then concluded that "[w]hat overlap there is between the two sanctions is not sufficient to persuade us that the forfeiture proceeding may not legitimately be viewed as civil in nature." Id.

35. One Assortment of 89 Firearms, 465 U.S. at 366. The Court also concluded that the difference in the relative burdens of proof in criminal and civil proceedings precluded application of the doctrine of collateral estoppel to bar the forfeiture proceeding. The Court pointed out that the gun owner's acquittal of the criminal charge did not prove he was innocent; it merely proved the existence of a reasonable doubt as to his guilt. Id. at 361. Thus, the jury verdict in the criminal proceeding "did not negate the possibility that a preponderance of the evidence could show that [the gun owner] was engaged in an unlicensed firearms business." Id. at 362.


37. At the time of the forfeiture proceeding in One Lot Emerald Cut Stones, the relevant section of the Tariff Act of 1930 provided:

Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture: and such person shall be liable to a penalty equal to the value of such article.


38. One Lot Emerald Cut Stones, 409 U.S. at 236-37.

39. In addition to the forfeiture of the undeclared article, the provision imposed a monetary penalty
liquidated damages for violation of the inspection provisions and serv[ing] to reimburse the Government for investigation and enforcement expenses." In reaching this result, the Court stated:

[S]uch purposes characterize remedial rather than punitive sanctions. Moreover, it cannot be said that the measure of recovery fixed by Congress in [the statute] is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.

Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings . . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

Accordingly, the Court held that a forfeiture action instituted by the government against certain articles alleged to have been brought into the country without the required declaration was not barred by their owner's prior acquittal of smuggling those same articles into the country without submitting to the required customs procedures.

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40. One Lot Emerald Cut Stones, 409 U.S. at 237.

41. Id. (citations omitted) (quoting Helvering v. Mitchell, 303 U.S. 391, 400 (1938)).

The Court also noted that the forfeiture provision fell within the title of the Tariff Act containing the "Administrative Provisions" and was part of the section entitled "Ascertainment, Collection, and Recovery of Duties," while another provision of the Act, which imposed what were clearly criminal sanctions, was part of the statute entitled "Enforcement Provisions" and became part of the Criminal Code of the United States. This led the Court to conclude that Congress intended "both civil and criminal sanctions, clearly distinguishing them," id. at 236, and that "[t]here [was] no reason for frustrating that design." Id. at 236-37.

42. Id. The owner had been charged with violating 18 U.S.C. § 545 by willfully and knowingly, with intent to defraud the United States, smuggling one lot of emerald cut stones and a ring into the United States without submitting to the required customs procedures.

The Court also concluded that collateral estoppel did not bar the forfeiture proceeding because the owner's "acquittal on the criminal charge did not necessarily resolve the issues in the forfeiture action." Id. at 234. The Court noted that to secure a conviction under 18 U.S.C. § 545 the prosecution had to prove the physical act of unlawful importation as well as a knowing and willful intent to defraud the United States, while to succeed in the forfeiture proceeding it only had to prove that the property was brought into the United States without the required declaration. Id. Thus, an acquittal on the criminal charge could have involved a finding that the physical act was not done with the requisite intent. Under such circumstances, the acquittal "may not be regarded as a determination that the property was not unlawfully brought into the United States, and the forfeiture proceeding will not involve an issue previously litigated and finally determined between these parties." Id. at 234-35 & n.5 (distinguishing Coffey v. United States, 116 U.S. 436 (1886)). Moreover, the Court concluded that the difference in the burdens of proof in criminal and civil cases precluded application of the collateral estoppel doctrine, because "[t]he acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" Id. at 235 (quoting Helvering, 303 U.S. at 397) (original quotation marks deleted). The Court stated: "As to the issues
In Helvering v. Mitchell, the Supreme Court held that an action brought by the government under the Revenue Act of 1928 to collect a tax deficiency and a 50% penalty from a taxpayer who fraudulently underpaid his income taxes was a civil proceeding. The Court concluded that the sanction of an addition to the unpaid tax was remedial in character, primarily intended to serve as a safeguard for the protection of the revenue and to reimburse the government for its expenses in investigating the fraud and for the resulting loss from the fraud. Consequently, the Court held that a taxpayer's prior acquittal in a criminal action for willfully attempting to evade income taxes did not bar the government from seeking recovery, on account of fraud, a 50% penalty for failing to pay those same taxes.

Additionally, in United States ex rel. Marcus v. Hess, a qui tam action by private plaintiffs in the name of the United States against a group of electrical contractors who allegedly defrauded the government, the Supreme Court concluded that a proceeding under a statute authorizing recovery of $2000 for each false claim against the government, double damages, and the costs of the suit was remedial in character and imposed a civil sanction. The Court found that the primary purpose of the statute was "to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." The Court

raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings."  
43. 303 U.S. 391 (1938).  
44. Id. at 398-405.  
45. Id.  
46. Id. at 401. The Court noted that "[f]orfeiture of goods or their value and the payment of fixed or variable sums of money are . . . sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789," id. at 400, and that "[i]n spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions," id. The Court also pointed out that Congress provided that collection of the 50% penalty could be made "by distraint," a distinctly civil procedure that could not constitutionally be used to collect a criminal sanction. Id. at 402. Finally, the Court noted that the Revenue Act of 1928 "contains two separate and distinct provisions imposing sanctions," id. at 404, one appearing in the section entitled "Penalties" and imposing a fine and imprisonment, sanctions that are clearly criminal in character, and the other, which includes the 50% penalty, appearing in the section entitled "Interest and Additions to the Tax," id. at 404-05, thereby indicating that the latter sanction "was clearly intended as a civil one," id. at 405.  
47. Id. at 406. The Court also held that "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata to bar the claim for the 50% penalty.  
49. Id. at 549.  
50. Id. at 551-52; see also id. at 549 ("We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete
therefore held that the action was not barred by the defendants' previous plea of nolo contendere and fine of $54,000 on an indictment for defrauding the government in connection with the same transactions.\(^5\)

**IV. United States v. Halper**

The guarantee against double jeopardy generally does not apply in proceedings in which only a civil sanction can be imposed. However, the Supreme Court held in *United States v. Halper*\(^2\) that, under certain circumstances, a civil penalty imposed by the government can constitute "punishment" for the purposes of double jeopardy analysis.\(^3\)

Halper, the manager of a company that provided medical services to patients eligible for benefits under the Medicare program, submitted to the federal government, through a fiscal intermediary, sixty-five separate false claims for reimbursement for services rendered. As a result, the government overpaid the company a total of $585.\(^4\) Halper subsequently was convicted on sixty-five counts of violating the criminal false-claims statute\(^5\) and sixteen counts of mail fraud, and was sentenced to two years' imprisonment and a fine of $5000.

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indemnity for the injuries done it."). The Court noted that the statute in question made "elaborate provisions both for a criminal punishment and a civil remedy." *Id.* It went on to state that the remedy did "not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered." *Id.* at 550. The Court reasoned:

As to the double damage provision, it can not be said that there is any recovery in excess of actual loss for the government, since in the nature of the qui tam action the government's half of the double damages is the amount of actual damages proved. But in any case, Congress might have provided here as it did in the anti-trust laws for recovery of "threefold the damages *** sustained, and the cost of suit, including a reasonable attorney's fee." Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured." This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. The law can provide the same measure of damage for the government as it can for an individual.

*Id.* at 550-51 (citations and footnote omitted). The Court also rejected the argument that the $2000 penalty was "criminal" rather than "civil" because the statute provided that a person who committed a prohibited act shall "forfeit and pay" that amount to the government. *Id.* It concluded that "[t]he words 'forfeit and pay' are wholly consistent with a civil action for damages." *Id.* at 551.

51. *Id.* at 548-52.
53. *Id.* at 448.
54. Halper mischaracterized the medical service performed by the company, demanding reimbursement at the rate of $12 per claim when the actual service rendered entitled it to only $3 per claim. *Id.* at 437 & n.2.
55. 18 U.S.C. § 287 (1988) (prohibiting a person from "mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent").
The government then brought an action against Halper under the civil False Claims Act. The Act provided that a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved" shall be "liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action." Based upon facts established by Halper's criminal conviction and incorporated in the civil suit, the trial court granted summary judgment for the government on the issue of liability. With respect to the remedy, however, the court concluded that the penalty called for by the False Claims Act — at least $130,000 ($2000 for each of sixty-five separate violations) — would constitute "punishment" and, in light of Halper's previous criminal punishment, would violate the Double Jeopardy Clause by punishing him a second time for the same conduct. The court recognized that the civil sanction of $2000 plus double damages for each false claim was designed to make the government whole, and therefore was not itself criminal punishment. Nevertheless, the court found that the authorized recovery of $130,000 would constitute a second "punishment" for double jeopardy purposes because it bore no "rational relation" to the sum of the government's actual loss of $585 plus its costs in investigating and prosecuting Halper's false claims. Therefore, the court limited the government's recovery to double damages of $1170 and the costs of the civil action.

On appeal, the Supreme Court agreed with the trial court that in a particular case a civil sanction imposed by the government may constitute "punishment" for purposes of double jeopardy analysis. Accordingly, it held that under the double jeopardy provision, an individual who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction based upon the same conduct, to the extent that the second sanction constitutes "punishment."

The Court began its analysis by rejecting the government's contention that the holdings in Helvering v. Mitchell, United States ex rel. Marcus v. Hess, and Rex

57. 31 U.S.C. § 3729 (1982 & Supp. II 1984). The False Claims Amendments Act of 1986 increased the civil penalty to "not less than $5,000 and not more than $10,000 plus 3 times the amount of damages which the Government sustains because of the act of that person," and "the costs of a civil action brought to recover any such penalty or damages." 31 U.S.C. § 3729 (1988).
59. Id. at 533-34.
60. Id.
61. Halper, 664 F. Supp. 852, 854-55 (1987). The trial court initially read the $2000-per-count statutory penalty as discretionary and, approximating the amount necessary to make the government whole, imposed the full sanction for only eight of the 65 counts. United States v. Halper, 660 F. Supp. 531, 533-34 (S.D.N.Y. 1987) On reconsideration, the trial court confessed error in holding that the $2000 penalty was not mandatory for each count, but remained firm in its conclusion that the $130,000 penalty could not be imposed without violating the Double Jeopardy Clause's prohibition of multiple punishments. Halper, 664 F. Supp. at 853-54.
63. Id. at 448-49.
64. 303 U.S. 391 (1938). For a discussion of the case, see supra text accompanying notes 43-47.
Trailer Co. v. United States66 foreclosed the argument that a sanction imposed in a civil proceeding, and specifically in a civil False Claims Act proceeding, may give rise to double jeopardy.67 The Court stated that

67. Halper, 490 U.S. at 441-42, 446. The Court stated that the government had "overread," id. at 441, the holdings of those cases.

Although, taken together, these cases establish that proceedings and penalties under the civil False Claims Act are indeed civil in nature, and that a civil remedy does not rise to the level of "punishment" merely because Congress provided for civil recovery in excess of the Government's actual damages, they do not foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment.

Id. at 441-42. The Court found that Mitchell, which involved a proceeding to recover a 50% penalty from a taxpayer who fraudulently underpaid his income tax, did not address the question of multiple punishments because the taxpayer previously had been acquitted in a criminal action for willfully attempting to evade the same taxes and therefore had not yet been punished for his conduct. Id. at 443. The Court went on to state:

If anything, Justice Brandeis' carefully crafted opinion for the Court [in Mitchell] intimates that a civil sanction may constitute punishment under some circumstances. [T]he Court distinguished between the Double Jeopardy Clause's prohibition against "attempting a second time to punish criminally" and its prohibition against "merely punishing twice." The omission of the qualifying adverb "criminally" from the formulation of the prohibition against double punishment suggests, albeit indirectly, that "punishment" indeed may arise from either criminal or civil proceedings.

Id. (citation omitted). The Court found that Hess, which involved a qui tam action brought by private plaintiffs in the name of the United States to recover double damages and a civil penalty of $2000 for each of 56 false claims made against the government by electrical contractors who previously had been fined $54,000 after pleading nolo contendere to an indictment charging them with defrauding the government, was "closer to the point," id., but nonetheless did not preclude the trial court's judgment. Id. The Court reasoned that the government's share of the recovery in Hess ($150,000) roughly equated the actual costs to the government (actual damages of $101,500 plus such ancillary costs as those of detecting and investigating fraudulent practices directed at the government), and that therefore,

in rejecting the defendants' double jeopardy claim [in Hess], the Court simply did not face the stark situation presently before us where the recovery is exponentially greater than the amount of the fraud, and, at least in the District Court's informed view, is also many times the amount of the Government's total loss.

Id. at 445. The Court reached the same conclusion with respect to Rex Trailer, which involved a civil action under the Surplus Property Act of 1944 to recover the statutory remedy of $2000 for each of five fraudulent purchases of trucks by a company that previously had pleaded nolo contendere to criminal charges based upon the same fraudulent transactions and paid fines aggregating $25,000. The Court stated:

The Court [in Rex Trailer] rejected the defendants' claim that the $2000-per-count penalty [, which the Court in Rex Trailer considered "comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss,"] constituted a second punishment. Although the Court recognized that the Government's actual loss due to the defendants' fraud was difficult if not impossible to ascertain, it recognized that the Government did sustain injury due to the resultant decrease of motor vehicles available to Government agencies, an increase in undesirable speculation, and damage to its program of promoting bona fide sales to veterans. Since the function of a liquidated damages provision was to provide a measure of recovery where damages are difficult to quantify, the Court found on the record before it — where the defendants were liable for only $10,000 — that they had not been subjected to a "measure of recovery . . . so
[The relevant teaching of these cases is that the Government is entitled
to rough remedial justice, that is, it may demand compensation according
to somewhat imprecise formulas, such as reasonable liquidated damages
or a fixed sum plus double damages, without being deemed to have
imposed a second punishment for the purpose of double jeopardy
analysis.\textsuperscript{68}

The Court concluded, however, that none of these cases decided "what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, and rough justice becomes clear injustice."\textsuperscript{69}

In answering that question, the Court rejected the government's argument that "punishment," for purposes of double jeopardy analysis, can be imposed only in criminal proceedings, and that whether particular proceedings are criminal or civil in nature is a matter of statutory construction. The Court found that recourse to statutory language, structure, and intent, while appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that apply in those proceedings as a general matter, "is not well suited to the context of the 'human interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."\textsuperscript{70} Rather, the Court concluded that because of the "intrinsically personal"\textsuperscript{71} nature of the protection against double jeopardy, "[i]tst violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state."\textsuperscript{72}

With respect to the circumstances under which a "civil" sanction constitutes "punishment" for purposes of the Double Jeopardy Clause, the Court stated:

[T]he labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishments barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment

\textsuperscript{68} Id. at 445-46 (footnote omitted).
\textsuperscript{69} Id. at 446.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 447.
\textsuperscript{72} Id. (footnote omitted) (emphasis added).
when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." From these premises, it follows that a civil sanction that cannot fairly be said to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand that term.73

The Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent."74

The Court emphasized, however, that cases in which a civil sanction constitutes "punishment" will not arise often. It stated that it "cast no shadow on [the] time-honored judgments75 that neither a reasonable liquidated damage clause nor, in the ordinary case, a fixed-penalty-plus-double-damages provision constitutes "punishment" for double jeopardy purposes.76 Additionally, the Court stated:

73. Id. at 447-48 (footnote and citations omitted). The Court made it clear that whether a particular sanction constitutes punishment should not be determined from the defendant's perspective, because "for the defendant even remedial sanctions carry the sting of punishment." Id. at 447 n.7. Rather, "it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." Id. Justice Kennedy, in a brief concurring opinion, stressed that the Court's holding in Halper:

constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands. In approaching the sometimes difficult question whether an enactment constitutes what must be deemed a punishment, we have recognized that a number of objective factors bear on the inquiry. In the case before us, I agree with the Court that the controlling circumstance is whether the civil penalty imposed in the second proceeding bears any rational relation to the damages suffered by the Government.

Id. at 453 (Kennedy, J., concurring) (citations omitted).

74. Id. at 448-49. The Court acknowledged that the determination of whether a particular sanction constitutes "punishment" for double jeopardy purposes "will not be an exact pursuit," id. at 449, because "the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain," id., and because it will be "difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment." Id.

75. Id.

76. Id. In a subsequent footnote, the Court stated:

It hardly seems necessary to state that a suit under the [False Claims] Act alleging one or two false claims would satisfy the rational-relationship requirement. It is only when a sizable number of false claims is present that, as a practical matter, the issue of double
What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.77

Applying this standard to the facts before it, the Court concluded that the disparity between the civil penalty authorized by the statute ($130,000 for false claims made to the government amounting to $585) and the trial court's approximation of the government's costs arising from the fraud ($16,000) was sufficiently disproportionate that the sanction constituted "punishment" for double jeopardy purposes.78 It further concluded that imposition of such a sanction would violate the Double Jeopardy Clause because the defendant already had been convicted in a criminal proceeding for the same conduct and sentenced to a jail term and a fine of $5000.79 Nevertheless, the Court remanded the case to the trial court to afford the government an opportunity to present an accounting of its actual costs arising from the defendant's fraud, to seek an adjustment of the trial court's approximation of its costs and to recover its demonstrated costs.80

V. Criminal Prosecution Following Imposition of "Punishment" in a Civil Proceeding

Halper involved the imposition of a civil sanction in a separate proceeding following the defendant's criminal conviction and punishment for the same conduct. Indeed, the precise holding of the Supreme Court in Halper was that "under the

jeopardy may arise.

Id. at 451 n.12.

77. Id. at 449-50 (footnote omitted). The Court made it clear that its decision does not "preclude[] the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive," id. at 450, or "from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding," id., and that it also does not "preclude[] a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment," id. at 451. The Court expressed no opinion, however, "as to whether a qui tam action . . . is properly characterized as a suit between private parties for purposes of this rule." Id. at 451 n.11.

78. Id. at 452.

79. Id.

80. Id.
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."\(^{81}\) Moreover, the Court in *Halper* limited its holding to the precise factual situation presented in that case, stating:

> [T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.\(^ {82}\)

The question arises, however, whether the Court's reasoning in *Halper* applies when the sequence of the proceedings is reversed, that is, when an individual is prosecuted criminally after she already has been subjected to a civil sanction for the same conduct and that civil sanction is of such a magnitude that it constitutes "punishment" for purposes of double jeopardy analysis. If so, then one must ask whether the Double Jeopardy Clause requires dismissal of the criminal charges prior to trial, or is some other remedy effective to protect the defendant's double jeopardy rights?

Courts that have considered the first question have "not regard[ed] timing as crucial"\(^ {83}\) to the reasoning in *Halper* and have held that "[i]f in fact a civil sanction may fairly be characterized 'only as a deterrent or retribution,' then its exaction before imposition of criminal punishment should have the same double jeopardy effect as exaction afterwards."\(^ {84}\) In answering the second question, courts have concluded that

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81. *Id.* at 448-49 (emphasis added).
82. *Id.* at 451 (footnote omitted) (emphasis added).
84. *Id.* (citation omitted); see also United States v. Furlatt, 974 F.2d 839, 843 n.2 (7th Cir. 1992) ("[W]e see no reason for holding that *Halper* should apply only to civil proceedings that post-date criminal ones."); United States v. Sanchez-Escareno, 950 F.2d 193, 200 (5th Cir. 1991) ("[T]he order of proceedings matters not to the analysis . . . ."); *cert. denied*, 113 S. Ct. 123 (1992); United States v. Reed, 937 F.2d 575, 577 n.3 (11th Cir. 1991) ("[T]he sequential order of the 'civil' and 'criminal' proceedings is irrelevant . . . ."); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) ("[T]he distinction is not significant."); United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir.) (per curiam) ("Although in this case the civil penalty preceded, rather than followed the criminal indictment, the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment."); *cert. denied*, 498 U.S. 865 (1990); Taylor v. Sherrill, 819 F.2d 921, 929 (Ariz. 1991) ("We do not believe the order of the proceedings is significant."); Johnson v. State, 622 A.2d 199, 203 (Md. Ct. Spec. App. 1993) ("The rule in *Halper* has now been extended to factor civil penalties into the double jeopardy matrix where the civil penalty precedes, as well as follows, criminal proceedings."); State v. Darby, 587 A.2d 1309, 1315-16 (N.J. Super. Ct. App. Div. 1991); Ex parte Rogers, 804 S.W.2d 945, 947 (Tex. Ct. App. 1990) ("We view this distinction in the timing of the criminal prosecution as irrelevant."); State v. Strong, 605 A.2d 510, 512 (Vt. 1992) ("[T]he difference in the timing of the events in this case, in which the ostensibly civil penalty addressing the same conduct came first, is not determinative."). *But see* United States v. Furlatt, 781 F. Supp. 536, 541 (N.D. Ill. 1991) ("The notion that *Halper* applies [in this situation] must give some pause."); *aff'd*, 974 F.2d 839 (7th Cir. 1992).
the Double Jeopardy Clause does indeed require dismissal of the criminal charges prior to trial.\textsuperscript{85}

With respect to the first question, it must of course be conceded that the sequence of the proceedings is irrelevant to the question of whether the double jeopardy provision bars a second punishment. There is no principled basis for distinguishing between a second punishment imposed in a civil proceeding following a criminal conviction for the same conduct, as in \textit{Halper}, and a second punishment imposed in a criminal proceeding following the imposition of "punishment" in a civil proceeding based upon the same conduct. In both cases, the defendant is being punished twice for the same offense.\textsuperscript{86}

It is by no means certain, however, that the imposition of "punishment" in a civil proceeding should, under the Double Jeopardy Clause, serve as a bar to a subsequent criminal prosecution for the same conduct. Under the Supreme Court's holding in \textit{Halper}, the government is entitled to convict and punish an individual in a criminal prosecution and also impose a penalty upon her in a separate civil proceeding, even though both sanctions are based upon the same conduct. The only limitation placed upon this principle by \textit{Halper} is that the penalty imposed in the civil proceeding not

\footnotesize

85. \textit{Sanchez-Escareno}, 930 F.2d at 203 ("If the defendants actually pay the civil fines [for which they executed promissory notes], then any subsequent criminal prosecution would be double jeopardy . . . [I]f the government attempts to collect on the notes, jeopardy would attach when the court begins to hear evidence in that action."); \textit{cert. denied}, 113 S. Ct. 123 (1992); \textit{United States v. Walker}, 940 F.2d 442, 443 n.2 (9th Cir. 1991) ("Neither side disputes that, under . . . \textit{Halper}, [the Double Jeopardy Clause] would prevent the government from prosecuting Walker for possessing and importing the drug if the civil penalty the government imposed for bringing the drug through customs without declaring it constitutes criminal punishment."); \textit{Mulvatt v. Miller}, 816 F.2d 251, 254-55 (Ariz. Ct. App. 1991) ("In the event that the administrative penalty [imposed by the Arizona Corporation Commission] is determined to be a punishment, the underlying criminal proceeding must be dismissed, to the extent that the charges are based on the same conduct that was the basis of the proceeding before the Commission."); \textit{cert. denied}, 112 S. Ct. 1245 (1992); \textit{Darby}, 587 A.2d at 1316 ("If punitive penalties were imposed [in the civil proceedings], according to the \textit{Halper} standard, they serve to bar the State from seeking further punishment by way of criminal proceedings for the same conduct."); \textit{Walker v. State}, 828 S.W.2d 485, 490 (Tex. Ct. App. 1992) ("If the forfeiture does negate the legislature's civil intent, then Walker's criminal conviction violates his protection from multiple punishments."); \textit{Small v. Commonwealth}, 402 S.E.2d 927, 928 (Va. Ct. App. 1991) (en banc) (reversing trial court for reasons stated in panel opinion at 398 S.E.2d 98, 100-01 (Va. Ct. App. 1990)) (holding that $3000 in penalties imposed upon a paving contractor in a civil contempt proceeding for failing to comply with an order enjoining him from engaging in certain conduct constituted "punishment" for double jeopardy purposes and barred a subsequent criminal contempt proceeding based upon the same conduct). But see \textit{United States v. Amiel}, 813 F. Supp. 958, 961 (E.D.N.Y.) ("By seeking to preempt this criminal prosecution rather than awaiting the outcome at trial, . . . defendants' argument appears to be that a substantial civil forfeiture effectively bars any subsequent criminal prosecution. Such an argument, taken to its logical conclusion, would seriously undermine efforts at law enforcement."); \textit{aff'd}, 995 F.2d 367 (2d Cir. 1993).

86. \textit{See United States v. Mayers}, 897 F.2d 1126, 1127 (11th Cir.) (per curiam) ("Although in this case the civil penalty preceded, rather than followed the criminal indictment, the \textit{Halper} principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment."); \textit{cert. denied}, 498 U.S. 865 (1990); \textit{Furlett}, 781 F. Supp. at 542 ("[T]here would seem to be no legitimate reason to find that a civil sanction may constitute punishment for purposes of the Double Jeopardy Clause only when it is imposed after a criminal prosecution, and not before.").
be of such a magnitude as to constitute "punishment" for purposes of double jeopardy analysis. Where a tribunal imposes a civil sanction that an appellate court subsequently concludes constitutes "punishment" for double jeopardy purposes, a prior criminal conviction and sentence based upon the same conduct will stand, and the government will be able to obtain the maximum civil penalty permitted by the Double Jeopardy Clause. This is true because, according to Halper, the appropriate remedy in that situation is to reduce the amount of the civil penalty to a level that does not constitute "punishment." However, if a civil penalty that constitutes "punishment" for double jeopardy purposes is held to bar the government from subsequently prosecuting the individual criminally for the same conduct, the government will be deprived of the opportunity to obtain a criminal conviction and to impose the full range of permissible sanctions, both criminal and civil, upon the individual. Such a result appears to be inconsistent with Halper.

Moreover, because the remedies available in a civil proceeding are limited in nature and range, barring a subsequent criminal prosecution would preclude the government from seeking both sanctions of a nature similar to those available in the civil proceeding, such as a fine, as well as sanctions that are beyond those available in the civil proceeding, most notably, incarceration. The court recognized this problem in United States v. Furlett, a case involving the criminal prosecution of two commodities brokers for the same conduct that served as the basis for the imposition of civil sanctions upon them under the Commodity Exchange Act.

87. Since the Double Jeopardy Clause allows the imposition of cumulative punishment under two statutes in a single trial, so long as the total punishment does not exceed that authorized by the legislature, e.g., Missouri v. Hunter, 459 U.S. 359, 368-69 (1983), the government can "seek[] and obtain[] both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." Halper, 490 U.S. at 450.

88. Halper, 490 U.S. at 452.

89. See Amiel, 813 F. Supp. at 961.

90. Furlett, 781 F. Supp. at 541.


92. In Furlett, an administrative law judge, acting upon a complaint filed against two commodities brokers by the Division of Enforcement of the Commodities Futures Trading Commission (CFTC), concluded that the brokers had violated various sections of the Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1988), by committing fraud in the trading of commodity futures contracts. Furlett, 781 F. Supp. at 538. As sanctions, the administrative law judge revoked the CFTC registrations of the two brokers, prohibited them from trading on or subject to the rules of any contract market, ordered them to cease and desist from any further violations of the Commodity Exchange Act, and imposed a civil penalty of $75,000 upon each of them. The government subsequently obtained an indictment charging the two brokers with various criminal offenses based upon the same conduct that was the subject of the proceeding before the administrative law judge. Prior to trial, the brokers moved to dismiss the indictment on the ground that it was barred by the Double Jeopardy Clause, because they previously had been punished by the CFTC for the same conduct. The trial court denied the motion, holding that the civil sanctions imposed by the CFTC were remedial measures only and therefore did not constitute "punishment" for double jeopardy purposes. Id. at 543-48. Although the court assumed that Halper's double jeopardy analysis applies where imposition of the civil penalty precedes the criminal prosecution for the same conduct, it acknowledged that that result is not self-evident. It stated that "[t]he notion that Halper applies to cases like this one must give some pause," id. at 541, and pointed out that "there are grounds to wonder whether Halper should be applied in a rote manner here," id.
To a great extent, proceedings before the [Commodities Futures Trading Commission] are designed to ensure the integrity of the commodities markets. The remedies available to the government are commensurate with this purpose. Consequently, although an ALJ [administrative law judge] may enjoy relatively broad authority to revoke registrations, prohibit further violations, impose fines, and fashion other appropriate remedies when rules are violated, her powers do not extend so far as those an Article III judge possesses under the criminal laws. Most obviously, an ALJ cannot impose a term of incarceration.93

These problems are compounded when the criminal prosecution is brought while the judgment in the civil proceeding is under review and, hence, not yet final.94 If the trial court finds the criminal charges are barred by the Double Jeopardy Clause and dismisses them accordingly,95 and the sanctions imposed in the civil proceeding subsequently are vacated or modified to an extent that they do not constitute "punishment," the offender might avoid not only a criminal conviction, but also all "punishment" for her misconduct.96 To make matters worse, the dismissal of the criminal charges would not in fact have been required by the double jeopardy provision.

93. Id. (citations omitted).
94. Id. at 541-42; e.g., United States v. Amler, 995 F.2d 367, 368 (2d Cir. 1993) (although defendants, with the agreement of the government and the approval of the court, withdrew their appeal without prejudice to its reinstatement within 30 days after the district court ruled on their motion to dismiss the indictment against them).
95. The trial court may, however, deny the defendant's motion to dismiss on the ground that it would be premature to decide the double jeopardy issue until after resolution of the appeal of the sanctions imposed in the civil proceeding. Amler, 995 F.2d at 370.
96. Even if the prosecutor could reinstate the criminal charges against the individual without running afoul of either the Double Jeopardy Clause, see, e.g., Serfass v. United States, 420 U.S. 377, 387-94 (1975) (holding that where a trial court grants a defendant's pretrial motion to dismiss an indictment prior to the attachment of jeopardy, the Double Jeopardy Clause does not bar the government from appealing that ruling and, if successful, from trying the defendant upon the original indictment); see also United States v. Scott, 437 U.S. 82, 94-101 (1978) (holding that where a trial court grants a defendant's motion to dismiss an indictment after the attachment of jeopardy, but before a determination of her guilt or innocence, the Double Jeopardy Clause does not bar the government from appealing that ruling and, if successful, from trying the defendant upon the original indictment), or the speedy trial provisions of the Constitution, see, e.g., United States v. Loud Hawk, 474 U.S. 302, 310-12 (1986) (stating that when a court dismisses charges against a defendant and those charges subsequently are reinstated, the period during which no charges were pending generally does not weigh towards a Sixth Amendment speedy trial claim); United States v. Lovasco, 431 U.S. 783, 790 (1977) (holding that the Due Process Clause requires dismissal of charges for pre-accusation delay only when compelling the defendant to stand trial would "violate[ ] those 'fundamental concepts of justice which lie at the base of our civil and political institutions' . . . and which define the community's sense of fair play and decency"); see also United States v. MacDonald, 456 U.S. 1, 7 (1982) (holding that the Speedy Trial Clause of the Sixth Amendment does not apply to the period between the government's good faith dismissal of charges and the subsequent reinstatement of those charges), obtaining a conviction probably would be more difficult because of the intervening delay. Witnesses may have died or otherwise become unavailable; memories may have faded; and physical evidence may have been lost or destroyed.
Sixth Amendment concerns also might arise if a civil sanction deemed to be "punishment" for double jeopardy purposes were held to bar a subsequent criminal prosecution for the same conduct. The court in Furlett recognized this problem, stating:

If the doors to a later criminal prosecution may be closed depending on the type and severity of sanctions an administrative law judge decides to impose, the government and the prospective defendant alike have a keen stake in how those sanctions are framed. Oddly enough, the traditional interests of the parties may be reversed in this setting: The government likely will not want whatever administrative sanctions are imposed to be so severe that they might bar separate criminal proceedings; on the other hand, the prospective defendant may well want the sanctions to be just harsh enough that he can invoke the Double Jeopardy Clause and escape a criminal trial and the possibility of a jail term. Courts traditionally have been reluctant to impose upon administrative investigations and other proceedings the rigorous requirements which the Constitution demands of criminal prosecutions. Rules which up the constitutional ante in the administrative setting may well render this line of authority obsolete. If the outcome of an administrative charge against an individual can determine whether or not the government has the right to indict that person, for example, it becomes difficult to see why certain of the safeguards which attend criminal prosecutions should not be imposed in the administrative context.\textsuperscript{97}

One could of course argue that the government can avoid these problems by bringing the criminal prosecution before attempting to impose any civil sanctions, and that the government, therefore, should be required to make a choice: prosecute the criminal action first or suffer the possibility that the relief obtained in a civil proceeding might be deemed "punishment," thereby foreclosing the possible criminal conviction and the wider array of criminal penalties available.\textsuperscript{98} However, "[s]uch a rule might have far-reaching ramifications."\textsuperscript{99} As the Furlett court explained,

In effect, regulatory bodies . . . would be prevented from proceeding expeditiously on administrative charges and forced to await the resolution

\textsuperscript{97} Furlett, 781 F. Supp. at 542 (citations omitted). But see Halper, 490 U.S. at 447 (stating that "[T]his Court has followed [the] abstract approach [of using statutory construction to decide whether proceedings are criminal or civil] when determining whether the procedural protections of the Sixth Amendment apply to proceedings under a given statute."); United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir.) (holding that "[T]he applicability of Sixth Amendment protections to statutory proceedings . . . are determined not with reference to the particular sanction ultimately imposed, but rather by considering the proceeding's inherent nature . . . ")., cert. denied., 113 S. Ct. 55 (1992).

\textsuperscript{98} See Furlett, 781 F. Supp. at 542; cf. United States v. Park, 947 F.2d 130, 133 (5th Cir. 1991) (when the defendant waived his right to immediate civil forfeiture proceedings, the Customs Service held those proceedings in abeyance pending the outcome of the criminal prosecution of defendant), vacated in part on grant of reh'g on another issue, 951 F.2d 634 (5th Cir. 1992).

\textsuperscript{99} Furlett, 781 F. Supp. at 542.
of criminal prosecutions which arise from the same set of facts. The wheels of criminal justice often grind slowly; months or years might pass while the criminal proceedings were resolved, and witnesses and other evidence might vanish in the interim. The resulting delays would effectively hamstring regulatory agencies in their efforts to serve their roles as overseers, depriving them of their ability to work concurrently with prosecutors.\textsuperscript{100}

It therefore must be asked whether, in a situation where "punishment" has already been imposed upon an individual in a civil proceeding, there is any way to avoid the imposition of a second punishment without bar a subsequent criminal prosecution of that individual. One possibility is to allow the government to return, before the criminal trial, to the tribunal that imposed the civil sanction and have that sanction reduced to a level that does not constitute "punishment" for double jeopardy purposes.\textsuperscript{101}

However, two Supreme Court cases indicate that, at least where the defendant already has suffered the "punishment" imposed in the civil proceeding, for example, by paying a civil fine, the government cannot avoid the limitations of the Double Jeopardy Clause in this manner.\textsuperscript{102} In Ex parte Lange,\textsuperscript{103} the defendant was convicted of stealing mail bags, a federal offense punishable by either imprisonment for up to one year or a fine not exceeding $200. Nevertheless, the trial court sentenced the defendant to one year's imprisonment and a fine of $200. The defendant began serving his jail sentence and paid the fine to the clerk of the court, who, in turn, paid the money into the treasury of the United States, where it was beyond the legal control of the court. Five days after the defendant had begun serving the jail sentence, the trial court, recognizing its error, vacated the judgment and sentenced the defendant to imprisonment for one year from that date. The Supreme Court discharged the defendant, holding that because he already had paid the fine, the second sentence imposed by the trial court was invalid under the Double Jeopardy Clause as a second punishment for the same offense.\textsuperscript{104} The Court first noted that if the second sentence were enforced, the defendant would end up paying a $200 fine and serving one year and five days in jail. It then stated:

We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. [The Double Jeopardy Clause] then

\textsuperscript{100} Id.

\textsuperscript{101} See State v. Darby, 587 A.2d 1309, 1316 (N.J. Super. Ct. App. Div.) ("We need not decide whether the double jeopardy bar to criminal proceedings can be removed by returning, before the criminal trial, to the Chancery Division to reduce to a legitimate level the monetary penalties already imposed there. The State has made no effort to take that course."). cert. denied, 598 A.2d 898 (N.J. 1991).

\textsuperscript{102} See In re Bradley, 318 U.S. 50 (1943); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).

\textsuperscript{103} 85 U.S. (18 Wall.) 163 (1874).

\textsuperscript{104} Id. at 176-78.
interposed its shield, and forbid that he should be punished again for that
defence.\textsuperscript{103}

Similarly, in \textit{In re Bradley},\textsuperscript{106} the defendant was sentenced for criminal contempt to six months' imprisonment \textit{and} a fine of $500 under a statute providing only for imprisonment \textit{or} a fine. Three days after the defendant had begun serving the jail sentence, his attorney paid the fine in cash to the clerk of the court. That same day the trial court realized its mistake, amended its sentencing order by omitting the fine, and instructed the clerk to return the money to the defendant's attorney, who refused to accept it. Relying upon \textit{Lange}, the Supreme Court held that the defendant was entitled to be released.\textsuperscript{107} It stated that because the defendant had fully satisfied one of the alternative penalties of the statute, "the power of the court was at an end,"\textsuperscript{108} and that the subsequent attempt to avoid satisfaction of the judgment by amending the sentence was a "nullity."\textsuperscript{109}

Therefore, \textit{Lange} and \textit{Bradley} indicate that, at least where the defendant has suffered the "punishment" imposed in the civil proceeding, the government cannot avoid the restrictions of the Double Jeopardy Clause by reducing the sanction imposed in the civil proceeding to a level that does not constitute "punishment" and returning the difference to the defendant. A defendant in that situation — like the defendants in \textit{Lange} and \textit{Bradley} — has been "punished" already for her conduct, and under the holdings in \textit{Lange} and \textit{Bradley}, "the power of the court[s] to punish further [is] gone."\textsuperscript{110}

\textsuperscript{105} \textit{Id.} at 176.
\textsuperscript{106} 318 U.S. 50 (1943).
\textsuperscript{107} \textit{Id.} at 52.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} The Court said it was unimportant that the fine had not yet been paid into the treasury because it was paid to the clerk of the court, who was the governmental officer authorized to receive it, and the defendant's rights "did not depend upon what the officer subsequently did with the money." \textit{Id.}
\textsuperscript{110} \textit{Ex parte Lange}, 85 U.S. (18 Wall.) 163, 176 (1874); \textit{accord} \textit{In re Bradley}, 318 U.S. 50, 52 (1943). The Supreme Court held in \textit{United States v. Benz}, 282 U.S. 304 (1931), that a trial court does not violate the Double Jeopardy Clause by reconsidering and reducing a sentence during the same term in which it imposed that sentence. \textit{Id.} at 307. In the situation discussed in the text, the government would be asking the tribunal that imposed the civil penalty to reduce that penalty to a level that would not constitute punishment for double jeopardy purposes, which at first glance would seem to be permissible under \textit{Benz}. However, unlike the situation in \textit{Benz}, where the trial court merely imposed a lesser sentence upon the defendant, in the present context, the government (in most cases) ultimately would be seeking to increase the severity of the sentence from that initially imposed upon the defendant. That is, the government is seeking to reduce the civil penalty so that it can obtain a criminal conviction of the defendant and impose either a period of incarceration, a fine, or both.

\textit{Bozzi v. United States}, 330 U.S. 160 (1947), also is inapplicable in the situation being discussed in the text. In \textit{Bozzi}, the defendant was convicted under a statute providing for a minimum mandatory sentence of a $100 fine \textit{and} imprisonment. The trial court erroneously sentenced the defendant to a term of imprisonment only. About five hours after announcing the sentence, the trial court recalled the defendant from a local federal detention jail, where he was awaiting transportation to the penitentiary, and imposed the mandatory fine. The Supreme Court rejected the defendant's argument that the trial court's action in increasing the defendant's punishment violated the Double Jeopardy Clause. The Court stated:
Later Supreme Court cases, however, have limited the scope of Lange and Bradley. In United States v. DiFrancesco, the Supreme Court indicated that the second sentence imposed by the trial court in Lange violated the Double Jeopardy Clause's prohibition against multiple punishment, not because it was imposed after the defendant had fully satisfied one of the alternative punishments contained in the statute, but because it would have resulted in the defendant receiving a greater sentence than the legislature had authorized, that is, a fine and imprisonment instead of merely a fine or imprisonment.

The Supreme Court also read Lange narrowly in Jones v. Thomas. There, the criminal defendant was convicted in a single proceeding of attempted robbery and first-degree felony murder for killing during the attempted robbery. The trial court sentenced him to consecutive terms of fifteen years for the attempted robbery and life imprisonment for the felony murder, with the attempted robbery sentence to run first. After the defendant had fully served the attempted robbery sentence, and while he was in custody under the murder sentence, the trial court, acting upon the defendant's motion to set aside his sentence, ruled that it had acted improperly in imposing separate sentences for felony murder and the underlying felony. It vacated the defendant's attempted robbery conviction and fifteen-year sentence, but did not order his immediate release. Instead, the trial court credited the entire time he had already served against his sentence for murder.

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If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all... In this case the court "only set aside what it had no authority to do, and substitute[d] directions required by the law to be done upon the conviction of the offender." It did not twice put [the defendant] in jeopardy for the same offense. The sentence as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense. Id. at 166-67. The Court distinguished Lange on the ground that Lange had fully satisfied one of the alternative punishments at the time of the resentencing, whereas Bozza did not suffer any lawful punishment until the trial court announced the full mandatory sentence of imprisonment and fine. Id. at 167 n.2. In the situation being discussed in the text, however, the sanction initially imposed in the civil proceeding was not unlawful, and therefore any alteration of that sentence would not merely be an attempt to correct an "inadvertent error."

111. 449 U.S. 117 (1980) (holding that the portion of the Organized Crime Control Act of 1970 granting the government the right, under specified conditions, to appeal a sentence imposed upon a convicted "dangerous special offender" does not violate the Double Jeopardy Clause).

112. Id. at 139.

113. Id.; see also id. at 138-39 (limiting to Lange's specific context dictum in United States v. Benz, 228 U.S. 304, 307 (1911), to the effect that the Double Jeopardy Clause prohibits a trial court from increasing a sentence once the defendant has begun serving the sentence).


115. Several years after the defendant began serving the sentence for attempted robbery, that sentence was commuted.

116. While the defendant's motion to set aside his sentence was pending, the Missouri Supreme Court held that the state legislature had not intended to allow separate and cumulative punishments under the felony murder statute for both the murder and the underlying felony that produced the homicide. State v. Morgan, 612 S.W.2d 1 (Mo. 1981) (en banc); State v. Olds, 603 S.W.2d 501 (Mo. 1980) (en banc).

117. The Missouri Court of Appeals affirmed this judgment. Thomas v. State, 665 S.W.2d 621 (Mo. 1984).
The Supreme Court held that the trial court's remedy "fully vindicated [the defendant's] double jeopardy rights," rejecting the criminal defendant's argument, based upon Lange and Bradley, that the Double Jeopardy Clause requires the immediate release of a prisoner who has satisfied the shorter of two consecutive sentences that could not both lawfully be imposed.\textsuperscript{118} The Court acknowledged that "Lange and Bradley do contain language to the effect that once a defendant 'had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone.'"\textsuperscript{119} Nevertheless, it concluded that application of this language to the facts presented in Jones "is neither compelled by precedent nor supported by any double jeopardy principle."\textsuperscript{120} Citing DiFrancesco, the Court stated that Lange merely "stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature, and not for the broader rule suggested by its dictum."\textsuperscript{121} The Court acknowledged that Bradley provided "a closer analogy"\textsuperscript{122} to the case before it, stating that "[s]trict application of Bradley would support [the defendant] here."\textsuperscript{123} Nevertheless, it "decline[d] to extend Bradley beyond its facts."\textsuperscript{124} The Court stated:

We think [that strict application of Bradley] ignores important differences between this case and Bradley. Bradley and Lange both involved alternative punishments that were prescribed by the legislature for a single criminal act. The issue presented here, however, involves separate sentences imposed for what the sentencing court thought to be separately punishable offenses, one far more serious than the other . . . .

In a true alternative sentence case such as Bradley, it would be difficult to say that one punishment or the other was intended by the legislature, for the legislature viewed each alternative as appropriate for some cases. But here the legislature plainly intended one of two results for persons who committed murder in the commission of a felony: Either they were to be convicted of felony murder, or they were to be convicted separately of the felony and of nonfelony murder. It cannot be suggested

\textsuperscript{118} Jones, 491 U.S. at 382.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 383 (citation omitted).
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 387.
seriously that the legislature intended an attempted robbery conviction to suffice as an alternative sanction for murder.\footnote{126}

As in Jones (but no: Lange and Bradley), the question now being discussed does not involve a true alternative sentence case. Rather, it is clear that "the legislature plainly intended\footnote{127} to impose both a criminal sanction and a civil sanction upon the defendant, and, to use the language of Jones, "[i]t cannot be suggested seriously that the legislature intended [a civil sanction] to suffice as an alternative sanction for [the criminal offense in question].\footnote{128}" Thus, it can be strongly argued that, under Jones, the Double Jeopardy Clause does not bar the government from seeking to have the tribunal that imposed a civil sanction upon a criminal defendant reduce the magnitude of that sanction to a level that does not constitute "punishment" for double jeopardy purposes, thereby allowing the government to proceed with the criminal prosecution of that individual and, if successful, subject her to the prescribed punishment.

On the other hand, in distinguishing Bradley, the Court in Jones pointed out that "[t]he alternative sentences in Bradley . . . were of a different type, fine and imprisonment,\footnote{129} and stated that "it would not have been possible to 'credit' a fine against time in prison.\footnote{130}" The Court in Jones made no mention of the possibility of the trial court in Bradley ordering the fine returned to the defendant before resentencing him to a term of imprisonment. It therefore could be argued that Jones is inapplicable in the present context and that under Bradley (and Lange), the Double Jeopardy Clause precludes the tribunal that imposed the civil sanction from reducing that sanction to a level that does not constitute "punishment" for double jeopardy purposes, "returning" the "difference" to the defendant, and then punishing the defendant following a criminal prosecution for the same conduct as that involved in the civil proceeding.\footnote{131}

However, even if the Double Jeopardy Clause does not preclude the government from seeking to re-open the judgment in the civil proceeding in order to have the civil sanction imposed upon the defendant reduced so the government can prosecute her criminally for the same conduct, there may be other obstacles. In some cases, the civil sanction will have been imposed in a proceeding in which the government was represented by counsel not on the legal staff of the prosecutor in charge of the

\footnote{126} Id. at 384-85 (footnote omitted).
\footnote{127} Id. at 384.
\footnote{128} Id. at 384-85.
\footnote{129} Id. at 384.
\footnote{130} Id.
\footnote{131} Under this reading of Lange and Bradley, it is not clear whether the same result would be reached when the defendant has not yet suffered the "punishment" imposed in the civil proceeding. A rule prohibiting the criminal prosecution of a defendant who, for example, already paid a civil fine that constitutes "punishment" for purposes of the double jeopardy provision, but allowing such a prosecution when the fine has not yet been paid, has little to commend it. If payment of the civil fine before the commencement of a defendant's criminal trial will preclude the government from prosecuting her, one can foresee the possibility of untried defendants attempting to force their payments of civil fines upon reluctant court clerks or other government officials in order to "immunize" themselves from criminal prosecution.
subsequent criminal action, such as an attorney from an independent administrative agency with its own staff. For example, in *United States v. Furlett,* attorneys employed by the Commodity Futures Trading Commission represented the government in an administrative hearing on a complaint against a commodities broker, while the local United States Attorney represented the government in the subsequent criminal prosecution of the broker. In cases such as *Furlett,* the prosecutor in the criminal action will not be the proper representative of the government to seek a reduction in the sanction imposed by the administrative agency. Moreover, because the concerns of counsel who represented the government in the civil proceeding might differ substantially from those of the prosecutor in the criminal action, the former may be unwilling to seek a reduction in the magnitude of the civil sanction merely because the prosecutor "hopes" to obtain a criminal conviction of the defendant.

Even if the civil sanction was imposed by a court in an action in which the government was represented by attorneys on the legal staff of the prosecutor in charge of the subsequent criminal proceeding, such as where the Civil Division of the local United States Attorney's Office handled the civil action and the Criminal Division represents the government in the criminal prosecution, procedural rules may not allow the government to seek reduction in the magnitude of the sanction. In the federal courts, for example, Federal Rule of Civil Procedure 60(b) allows a trial court, "[o]n motion and upon such terms as are just," to "relieve" a party from a final judgment for five rather specific reasons (none of which are relevant here) as well as for "any other reason justifying relief from the operation of the judgment." This residual provision does not, however, empower a trial court to substitute its

132. 974 F.2d 839 (7th Cir. 1992).
134. Section 60(b) of the Federal Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FED. R. CIV. P. 60(b)
judgment of what the appropriate penalty is for the wrongful conduct of a defendant in place of the penalty mandated by Congress in the applicable statute. Therefore, a trial court is not allowed to reduce or remit a statutorily mandated civil penalty because it concludes that the amount of the penalty is excessive when compared with the gain realized by the defendant's false claims or because it thinks that the sanction would penalize the defendant beyond a degree commensurate with her culpability. By like reasoning, the residual clause of Rule 60(b) would not allow a trial court to disregard a civil penalty mandated by Congress — such as the $2000-per-false-claim penalty required by the civil False Claims Act in Halper — merely because, under the facts of the particular case, the penalty was "not rationally related to the goal of making the Government whole."

It is true, of course, that the Supreme Court in Halper held that the trial court could impose a fine less than that mandated by Congress in the civil False Claims Act. There, however, the criminal prosecution for the same conduct preceded the civil action, and the Double Jeopardy Clause therefore imposed limits upon the amount that the trial court could fine the defendant in the civil case. On the other hand, where a defendant is found liable in a civil action before she has been prosecuted criminally for the same conduct, the Double Jeopardy Clause is inapplicable. Therefore, the fine mandated by Congress would not be constitutionally impermissible and would have to be imposed by the trial court (and could not be altered by the trial court pursuant to Rule 60(b)).

Even where the trial court imposed a civil penalty under a statute allowing the trial court some discretion in the amount that it can fine a defendant, it does not seem that Rule 60(b) can be used by the government to re-open a judgment and reduce the penalty imposed by the trial court. In such situations the government would be the prevailing party in the civil proceeding and therefore would not actually be seeking "relief" from the judgment, which by definition was in its favor. Moreover, it is questionable whether the desire to prosecute the defendant criminally is a sufficient justification to alter the final judgment, especially in light of the Double Jeopardy Clause's interest in preserving the finality of judgments.

137. Cato Bros., 273 F.2d at 156-57. Although both Cato Brothers and Brown involved an attempt by a defendant to alter a judgment, the underlying rationale of those decisions applies equally to motions filed by the government under the residuary provision of Rule 60(b). See supra notes 135-36 and accompanying text. If a trial court lacks the power to substitute its judgment as to the appropriate sanction for that of Congress when a defendant moves to alter the judgment, it certainly cannot have that power when it is the government that does so.
139. Id. at 452.
140. For example, the current version of the civil False Claims Act provides for a civil penalty of "not less than $5,000 and not more than $10,000" in addition to three times the amount of damages sustained by the government because of the defendant's act and "the costs of a civil action brought to recover any such penalty or damages." 31 U.S.C. § 3729(a) (1988).
More than one-half of the states have a statute or rule identical in all material respects to Federal Rule of Civil Procedure 60(b), which presumably would not allow a state prosecutor to re-open a state court judgment in order to remove any double jeopardy bar to a criminal prosecution based upon the same conduct. Even in states without a statute or rule substantially similar to Federal Rule of Civil Procedure 60(b), the applicable statute or rule of court still may not authorize the government to re-open a civil judgment for the purpose of having the sanction imposed upon a defendant reduced to level that does not constitute "punishment" for double jeopardy purposes. For example, in Illinois, a statute allows a trial court, upon petition, to grant relief from a final judgment within two years after entry of that judgment. Aside from the time limitation, which could in some cases preclude


142. Ala. R. Civ. P. 60(b); Alaska R. Civ. P. 60(b); Ariz. R. Civ. P. 60(c); Colo. R. Civ. P. 60(b); Del. Super. Ct. Civ. R. 60(b); Fla. R. Civ. P. 1.540(b); Idaho R. Civ. P. 60(b); Ind. R.T.P. 60(b); Kan. R. Civ. P. 60-260(b); Me. R. Civ. P. 60(b); Mass. R. Civ. P. 60(b); Mich. Ct. R. 2.612(C); Minn. R. Civ. P. 60.02; Miss. R. Civ. P. 60(b); N.J. Civ. Prac. R. 4:50-1; N.M. R. Civ. P. 1-060(b); N.D. R. Civ. P. 60(b); Ohio R. Civ. P. 60(b); R.I. R. Civ. P. 60(b); S.D. Codified Laws Ann. § 15-6-60(184); Tenn. R. Civ. P. 60.02; Utah R. Civ. P. 60(b); Vt. R. Civ. P. 60(b); Wash. Super. Ct. Civ. R. 60(b); W. Va. R. Civ. P. 60(b); Wis. Stat. Ann. § 806.07 (1977); Wyo. R. Civ. P. 60(b).

143. 735 Ill. Comp. Stat. § 52-1401 (1993). The statute provides:

Relief from judgments. (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

Id.
the government from seeking to modify the judgment, it once again is questionable whether the government, as the prevailing party, would be seeking "relief" from the judgment.

It therefore seems that in most cases the government will be unable to remove a double jeopardy bar to a second "punishment" for the same offense by returning, before the criminal trial, to the tribunal that imposed the civil sanction and having that sanction reduced to a level that does not constitute "punishment" for purposes of double jeopardy analysis. If in a particular case the government is not precluded from having the initial civil sanction modified, that course clearly is preferable — from both the standpoint of the government and the standpoint of society — to dismissing the criminal prosecution based upon the same conduct that led to the civil sanction.

If, however, the government cannot have the civil sanction modified before the criminal trial, is there any way of avoiding imposition of a second punishment other than by dismissing the criminal prosecution? If the sanction imposed in the civil proceeding was a fine, one possibility is to allow the criminal prosecution to proceed, but, in the event of a conviction, preclude the trial court from imposing a fine upon the defendant.\textsuperscript{144} Although this would allow the defendant to avoid paying two "fines," it would not avoid two "punishments," because a term of incarceration, even without the imposition of a fine, still would constitute "punishment." And, because it would be a second punishment for the same offense, it would be prohibited by the Double Jeopardy Clause.

Nevertheless, a variation of this proposal has some appeal as the means for dealing with the problem. Because the initial proceeding against the criminal defendant was, by definition, a civil proceeding, she has not yet been subjected to a criminal trial. Indeed, she had not even been placed in "jeopardy" within the meaning of the Double Jeopardy Clause.\textsuperscript{145} The double jeopardy provision therefore does not bar the government from prosecuting (as opposed to punishing) the defendant, and a trial court should deny a motion to dismiss the charges against the defendant on double jeopardy grounds and allow the criminal action to proceed.\textsuperscript{146} If the criminal

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\textsuperscript{145} See supra text accompanying notes 17-23. In a criminal prosecution, jeopardy attaches when the accused is "put to trial before the trier of facts, whether the trier be a jury or a judge." Serfass v. United States, 420 U.S. 377, 388 (1975) (quoting \textit{Jorn}, 400 U.S. at 479 (plurality opinion)). In a jury trial, jeopardy attaches when the jury is empaneled and sworn. \textit{Crist}, 437 U.S. at 35, 38; United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). In a bench trial, jeopardy attaches when the judge begins to hear evidence; Lee v. United States, 432 U.S. 23, 27 (1977); \textit{Martin Linen Supply Co.}, 430 U.S. at 569, which has been taken to mean when the first witness is sworn. \textit{Crist}, 437 U.S. at 32-33. In cases in which the defendant enters a plea of guilty or nolo contendere, jeopardy attaches when the court accepts the plea. United States v. Baggett, 901 F.2d 1546, 1548 (11th Cir.), \textit{cert. denied}, 498 U.S. 865 (1990); Smith v. State, 559 So. 2d 1281, 1283 (Fla. Dist. Ct. App. 1990). But see United States v. Combs, 634 F.2d 1295, 1298 (10th Cir. 1980) (holding that jeopardy attaches at the imposition of sentence and formal pronouncement or entry of judgment upon a plea of guilty), \textit{cert. denied}, 451 U.S. 913 (1981).

\textsuperscript{146} Cf. Ohio v. Johnson, 467 U.S. 493, 499-500 (1984) (holding that a defendant who, over the

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prosecution results in a verdict or finding of not guilty, no double jeopardy problem arises: the defendant was subjected to only one criminal trial for her conduct; she was not prosecuted a second time for the same offense after an acquittal, after a conviction, or even after the premature termination of a criminal trial; and she was not punished twice for the same offense.

On the other hand, if the government succeeds in its criminal prosecution of the defendant, the Double Jeopardy Clause, as interpreted in Halper, clearly bars the imposition of any punishment upon the defendant (unless of course the government at this point can return to the tribunal that imposed the civil sanction and have it reduced to a level that would not constitute "punishment" for purposes of double jeopardy analysis). Nevertheless, this result — despite its shortcomings — will in most cases be preferable to having the charges against the defendant dismissed before trial. Although the government will not be able to impose a term of incarceration or

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prosecutor's objection, pleaded guilty to two lesser included offenses could be tried for the greater inclusive offenses, and, if convicted, trial court would have to confront the question of multiple punishments as a matter of state law); United States v. Marcus Schloss & Co., 724 F. Supp. 1123, 1124 n.1 (S.D.N.Y. 1989) (noting that the trial court reserved a decision on the defendant's pretrial motion to dismiss several counts of an indictment pending the outcome of the trial). Despite the Supreme Court's holding in Abney v. United States, 431 U.S. 651 (1977), an order denying such a pretrial motion to dismiss an indictment would not be immediately appealable in those jurisdictions in which a defendant can appeal only a "final decision." In Abney, the Court held that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of [28 U.S.C.] § 1291." Id. at 652 (footnote omitted). Abney, however, involved a claim by the defendants that they previously had been tried and acquitted for the same offense, a claim contesting the very power of the government to bring them to trial. As the Abney Court correctly recognized, the defendants' protection against double jeopardy would be significantly impaired if review were deferred until after their trial.

[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense. . . . It thus protects interests wholly unrelated to the propriety of any subsequent conviction. . . . Obviously, [this] aspect[] of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Id. at 660-62 (footnotes omitted). The Court's reasoning in Abney is inapplicable, though, when a defendant merely claims that she already has been punished (but not tried criminally) for the same conduct on which the criminal charges are based. In these circumstances the Double Jeopardy Clause's protection against multiple punishments — the only protection at issue — "can be fully vindicated on an appeal following final judgment," id. at 660, by vacating any sentence imposed by the trial court in violation of that Clause. Courts that have reached the contrary result, United States v. Furlatt, 974 F.2d 839, 842 (7th Cir. 1992); United States v. Woods, 949 F.2d 175, 176 n.1 (5th Cir. 1991) (per curiam), cert. denied, 112 S. Ct. 1552 (1992); United States v. Reed, 937 F.2d 575, 576 n.1 (11th Cir. 1991); see also Purcell v. United States, 594 A.2d 527, 528 n.1 (D.C. 1991), have assumed that the Double Jeopardy Clause bars a criminal trial of a defendant who previously has been "punished" in a separate civil proceeding based upon the same conduct.
a fine upon the defendant, it will have obtained a criminal conviction of the defendant, as allowed by Halper, with all the collateral consequences such a conviction entails. In addition to labelling the defendant a "criminal," she may, as a convicted felon, be precluded, for example, from voting, from obtaining a license to engage in a particular profession or occupation, and from lawfully possessing firearms. The criminal prosecution therefore should not be viewed as an empty gesture merely because it might not result in any punishment being imposed upon the defendant by the trial court. Nor should it be viewed as the government's vindictively forcing the defendant to undergo the trauma and expense of defending himself in a meaningless criminal trial.

VI. Tax Upon the Unlawful Possession of Marijuana and Other Controlled Substances

Since the mid-1980s, more than half the states have enacted statutes imposing taxes upon those who unlawfully possess or deal in marijuana or other controlled substances. These statutes typically make one who fails to pay the drug tax owed subject to an additional monetary penalty, and make the failure to comply with the provisions of the statute a criminal offense. The Montana Dangerous Drug Tax Act, for example, imposes upon every person unlawfully possessing or storing dangerous drugs a tax equal to the greater of either 10% of the market value


148. E.g., ALA. CODE § 40-17A-9(a) (1993) (100% of tax); CONN. GEN. STAT. § 12-660(a) (West Supp. 1993) (100% of tax); 35 ILL. COMP. STAT. § 520/10 (1992) (four times amount of tax); IND. CODE ANN. §§ 6-7-3-11(a) (Burns Supp. 1993) (100% of tax); MINN. STAT. ANN. § 297D.09 (West 1991) (100% of tax); MONT. CODE ANN. § 15-25-113(2) (1993) (10% of tax); OKLA. STAT. § 450.8 (1992) (100% of tax); WIS. STAT. ANN. § 139.95(1) (West Supp. 1992) (100% of tax).

149. E.g., ALA. CODE § 40-17A-9(a) (1993); CONN. GEN. STAT. § 12-660(b) (Supp. 1993); 35 ILL. COMP. STAT. § 520/10 (1992); IND. CODE ANN. § 6-7-3-11(b) (Burns Supp. 1993); MINN. STAT. ANN. § 297D.09 (West 1991); MONT. CODE ANN. § 15-25-113(2) (1993); OKLA. STAT. § 450.8 (1992); WIS. STAT. ANN. § 139.95(2) (West Supp. 1992).

of the drugs or, *inter alia*, $100 per ounce of marijuana, $250 per ounce of hashish, and $200 per gram of various other controlled substances.\(^{151}\) It also makes one who fails to pay the tax subject to a penalty of 10% of the amount of the tax and provides that the purposeful or knowing failure to pay the tax, with the intent to evade the tax, is a misdemeanor punishable by a fine of up to $1000 or imprisonment for not more than one year, or both.\(^{152}\) Similarly, the Illinois Cannabis and Controlled Substances Tax Act\(^{153}\) imposes upon any "dealer" who possesses cannabis or controlled substances a tax of $5 per gram of cannabis, $250 per gram of controlled substance that is sold by weight, and $2000 on each fifty dosage units of a controlled substance that is not sold by weight.\(^{154}\) The Act defines a "dealer" as a person who illegally manufactures, produces, ships, transports, imports, sells or transfers, or possesses with intent to deliver to another person more than a specified amount of cannabis or controlled substance.\(^{155}\) It

151. The Montana statute provides:

Tax on dangerous drugs. (1) There is a tax on the possession and storage of dangerous drugs. Except as provided in [MONT. CODE ANN. §] 15-25-122 [exempting individuals authorized by state or federal law to possess or store dangerous drugs], each person possessing or storing dangerous drugs is liable for the tax. The tax imposed is determined pursuant to subsection (2). The tax is due and payable on the date of assessment. The department shall add an administration fee of 5% of the tax imposed pursuant to subsection (2) to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process.

(2) With the exception that the tax on possession and storage of less than 1 ounce, 1 gram, or 100 micrograms of dangerous drugs must be that set forth below for 1 ounce, 1 gram, or 100 micrograms, the tax on possession and storage of dangerous drugs is the greater of:

(a) 10% of the assessed market value of the drugs, as determined by the department of revenue; or

(b)(i) $100 per ounce of marijuana . . . or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) $250 per ounce of hashish . . . , as determined by the aggregate weight of the substance seized;

(iii) $200 per gram of any substance containing or purported to contain any amount of a dangerous drug included in Schedule I pursuant to [MONT. CODE ANN. §] 50-32-222(1), (2), (4), and (5), or Schedule II pursuant to [MONT. CODE ANN. §] 50-32-224(1) through (4), as determined by the aggregate weight of the substance seized;

(iv) $10 per 100 micrograms of any substance containing or purported to contain any amount of lysergic acid diethylamide (LSD) included in Schedule I pursuant to [MONT. CODE ANN. §] 50-32-222(3), as determined by the aggregate weight of the substance seized;

(v) $100 per gram of any substance containing or purported to contain any amount of an immediate precursor as defined under Schedule II pursuant to [MONT. CODE ANN. §] 50-32-224(5), as determined by the aggregate weight of the substance seized; and

(vi) $100 per gram of any substance containing or purported to contain any amount of dangerous drug not otherwise provided for in this subsection (2).


152. *Id.* § 15-25-113(2) (incorporating the provisions of §§ 15-53-111 and 15-30-321(3)).

153. 35 ILL. COMP. STAT. §§ 520/1 to /26 (1993).

154. *Id.* § 520/9.

155. *Id.* § 520/2.
also provides that a dealer who violates the Act is subject to a penalty of four times the amount of the tax and that a dealer who possesses or distributes cannabis or a controlled substance without affixing the stamps indicating payment of the tax is guilty of a Class 4 felony.\textsuperscript{156} Statutes such as these raise the question of whether a tax on the unlawful possession of dangerous drugs constitutes "punishment" for double jeopardy purposes. If so, then, under \textit{Halper}, a state cannot convict and punish an individual for the unlawful possession of marijuana or other controlled substances and also assess a tax against her for possession of those same drugs.

Courts that have considered this question have reached conflicting results. In \textit{Sorensen v. Department of Revenue},\textsuperscript{157} the Montana Department of Revenue had assessed a tax of $4216 on one individual for his possession of 21.08 grams of cocaine ($200 per gram), after he had been convicted and sentenced for criminal possession of the same cocaine. Furthermore, the Department had assessed a tax of $1260 on another individual for his possession of 12.6 ounces of marijuana ($100 per ounce), after he had been convicted and sentenced for criminal possession of the same marijuana. The Supreme Court of Montana held that neither assessment constituted a second punishment for possession of the dangerous drugs in question and therefore did not violate the Double Jeopardy Clause of the Fifth Amendment.\textsuperscript{158} The court initially found that the dangerous drug tax is not a criminal penalty, but rather an excise tax designed to raise revenue.\textsuperscript{159} It then rejected the argument that the tax imposes a second punishment under \textit{Halper}, apparently finding \textit{Halper} inapplicable for a number of reasons.\textsuperscript{160} First, it concluded that \textit{Halper}, by its language, applies only to statutory provisions imposing a fixed penalty for each offense regardless of the actual costs and damage incurred by the government, while the Montana dangerous drug tax 'is an excise tax based on the quantity of drugs in the taxpayer's possession.'\textsuperscript{161} Second, the court concluded that, unlike the civil sanction in \textit{Halper}, "a tax requires no proof of remedial costs on the part of the state."\textsuperscript{162} Finally, the court concluded that the tax is not excessive, because "[i]t is neither a fixed penalty as in \textit{Halper}, nor is the amount of the tax so grossly disproportionate as to transform this tax into a criminal penalty which violates double jeopardy."\textsuperscript{163} The court noted that the "rates of tax on various drugs are comparable to those in other states and also comparable to the amounts in effect for many years during the effective period of the Federal Drug Tax Act . . ."\textsuperscript{164}

\begin{footnotes}

\textsuperscript{156} \textit{Id.} § 520/10.
\textsuperscript{157} \textit{Id.} at 32.
\textsuperscript{158} \textit{Id.} at 33.
\textsuperscript{159} \textit{Id.} at 31-32.
\textsuperscript{160} The court's reasoning on this issue is far from clear.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} After finding the dangerous drug tax does not constitute a multiple punishment and does
\end{footnotes}
In *In re Kurth Ranch*, on the other hand, the United States Court of Appeals for the Ninth Circuit reached the opposite result with respect to a tax of $208,105 assessed by the Montana Department of Revenue on several members of an extended family who subsequently were convicted and sentenced for charges relating to the criminal possession and sale of the same dangerous drugs upon which the tax was levied. The court read *Halper* as requiring "a rational relationship between the sanction imposed and the damages suffered by the government," but noted that the Department of Revenue, despite opportunities to do so, "refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects." It concluded that allowing the state to impose the tax, without its showing even a rough approximation of its actual damages and costs, would be sanctioning an impermissible second punishment for the possession of the drugs.

Neither of these opinions, however, adequately addresses the relevant issue.

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165. *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir.), cert. granted, 114 S. Ct. 38 (1993).
166. The initial assessment by the Department of Revenue totaled nearly $865,000 for the possession of 2155 marijuana plants, 1811 ounces of harvested marijuana, and several gallons of hash tar and hash oil. The Kurths administratively challenged both the method of computation and the legality of the assessment, but before the challenge was resolved, they all pleaded guilty to criminal charges and received individual sentences. The Kurths then filed a voluntary petition in bankruptcy, and the Department of Revenue filed an amended proof of claim with the bankruptcy court, which both the Kurths and the trustee in bankruptcy challenged. The bankruptcy court eventually denied the Department of Revenue's claim, concluding that the taxes on the marijuana plants, hash tar, and hash oil were arbitrary, capricious, and violative of the drug tax statute, and that the remaining $208,105 tax on the harvested marijuana constituted a second punishment for possession of the marijuana, in violation of the double jeopardy provision. *In re Kurth Ranch*, 145 B.R. 61 (Bankr. D. Mont. 1990). The district court affirmed the bankruptcy court's order, *In re Kurth Ranch*, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), and the Department of Revenue appealed only the determination that the $208,105 tax on the harvested marijuana was unconstitutional.
167. *In re Kurth Ranch*, 986 F.2d at 1311.
168. Id. at 1312. The court saw "no reason to question the district court's refusal to 'take judicial notice' of drug abuse's general costs to society," id., at least in the absence of even a "rough" showing by the government of its actual costs in the case, id.
169. *In re Kurth Ranch*, 986 F.2d at 1311.
170. At least two other courts have been faced with the issue, but neither of them adequately dealt with it. In *Rehg v. Illinois Dep't of Revenue*, 605 N.E.2d 525 (Ill. 1992), the plaintiff, who previously had been convicted and sentenced for the manufacture or delivery of a controlled substance, contended that the $42,000 tax assessed against him under the Illinois Cannabis and Controlled Substances Tax Act, 35 ILL. COMP. STAT. §§ 520/1 to 526 (1992), for possession of the same controlled substance, plus a penalty of $168,000 (four times the unpaid tax), and interest of $3675, for a total liability of $213,675, did not bear a rational relationship to the damages suffered by the state and therefore constituted a second punishment under *Halper*. Agreeing with the plaintiff's formulation of the issue, the court apparently concluded that the drug tax itself did not constitute "punishment" for double jeopardy purposes because "the plaintiff's failure to pay the tax resulted in a loss to the State of $42,000 in tax revenue." *Rehg*, 605 N.E.2d at 536. However, even under the plaintiff's (and the court's) formulation of the issue, the court's
Under *Halper*, the critical question is whether the drug tax solely serves a remedial or other nonpunitive purpose, or whether, on the other hand, it also serves retributive or deterrent purposes, in which case it would constitute "punishment" for purposes of double jeopardy analysis.\(^{171}\)

One of the articulated purposes of a tax on the possession of marijuana and other controlled substances is to generate revenue to fund investigative efforts directed toward the identification, arrest, and prosecution of individuals engaged in illegal drug activities,\(^{172}\) and "to compensate the State for costs incurred as reasoning entirely misses the point. Whenever the government assesses a drug tax upon one who unlawfully possessed controlled substances, it can be concluded that the unpaid tax resulted in the loss of tax revenue to the state. But this conclusion does not answer what should be the relevant question under the plaintiffs' (and the court's) reading of *Halper* — whether the so-called tax serves to reimburse the government for the costs it incurred because of the "taxpayer's" illegal drug activity, or whether, instead, it is punitive in nature. More importantly, though, the *Rehg* court's analysis does not answer what should be the relevant question under a proper reading of *Halper*, namely, does the drug tax, even in part, serve to punish the "taxpayer" for her possession of controlled substances. See *infra* text accompanying note 171. The *Rehg* court's apparent conclusion that the tax assessment reimbursed the state for its lost tax revenue assumes that the sole purpose of the so-called tax is to raise revenue and not to punish the "dealer" for her possession of the controlled substances. The court in *Rehg* did, however, conclude that the $168,000 penalty imposed for nonpayment of the drug tax appeared excessive in relation to the costs the state generally would incur in investigating and prosecuting individuals for failing to comply with the drug tax statute and that it therefore might constitute a second punishment for double jeopardy purposes. *Id.* at 536-38. Accordingly, the court remanded the case to the trial court to allow the state to present evidence of its actual costs arising from the plaintiff's failure to comply with the Act. *Id.* at 538-39. Nevertheless, because the conduct for which the plaintiff was criminally punished (manufacture or delivery of a controlled substance) was different from that which was the subject of the civil sanction (failure to pay a tax on the controlled substance)," one must ask — as the *Rehg* court did not — whether the civil sanction was imposed for the "same offense" as the punishment imposed in the criminal proceeding. If it was not, the Double Jeopardy Clause would be inapplicable, regardless of whether a rational relationship existed between the civil sanction and the costs incurred by the state in investigating and prosecuting individuals for failing to comply with the drug tax statute.

In *Rosenow v. Commissioner of Revenue*, No. 5236, 1991 WL 227915 (Minn. Tax Ct. Oct. 15, 1991), an individual who previously had pleaded guilty to (and presumably was sentenced for) criminal charges arising out of his possession of marijuana challenged the assessment upon him of a tax of $4732 for possession of the same marijuana plus a nonpayment penalty of the same amount. *Id.* at *3. The court, without discussing the issue, apparently assumed that the tax itself did not constitute "punishment" for double jeopardy purposes, for it focused only upon the relationship between the nonpayment penalty and the unpaid tax, stating that "[t]he only question is whether the penalty of 1-to-1 constitutes an overwhelmingly disproportional state sanction similar to the 8-to-1 sanction prohibited in *Halper*." *Id.* at *4. The court concluded that "the 1-to-1 penalty for failure to pay the tax on time is a reasonable penalty that is rationally related to the state's loss of revenue caused by the taxpayer's failure to pay the tax and is remedial in nature." *Id.* Once again, as in *Rehg*, the court did not address the relevant issue.


172. See *Sorensen v. Department of Revenue*, 836 P.2d 29, 31 (Mont. 1992) (quoting preamble to 1987 Mont. Laws ch. 563); MONT. CODE ANN. § 15-25-122 (1993) (one-third of tax to be distributed to law enforcement agency that seized the drugs taxed, to be used to enforce drug laws). Some drug tax statutes specifically provide that a portion of the proceeds of the tax shall go to specific law enforcement agencies. ARIZ. REV. STAT. ANN. § 42-104(B)(2)(b) (Supp. 1993) (95% of moneys collected credited to anti-racketeering revolving fund for benefit of agencies responsible for seizure of the drugs taxed); IND. CODE ANN. § 6-7-3-16 (Burns Supp. 1993) (30% of total amount collected from an assessment to
a consequence of illegal drug manufacture and use."\(^{173}\) Raising revenue to detect and prosecute those individuals engaged in illegal drug activity and compensating the state for the damages directly caused by a particular individual's illegal drug activity clearly constitutes a remedial purpose. Such a purpose, however, is precisely the same as the purpose intended to be served by the civil sanction involved in *Halper*. If this were the only purpose of a tax on the unlawful possession of drugs, the *Kurth Ranch* court would have been correct when it held that, under *Halper*, the state must show that the amount of the "tax" in any given case is rationally related to the actual costs and damages suffered by it as a result of the particular individual's illegal drug activity. For, as that court stated, a state should not be allowed to evade the prohibitions of the Double Jeopardy Clause merely by labeling the assessment a "tax" instead of a "fine" or "penalty."\(^{174}\)

Revenue generated by a tax on the unlawful possession of dangerous drugs, however, is used for purposes other than merely compensating the state for the direct costs it incurred because of a particular individual's illegal conduct. Such revenue may be used to pay for government services in general,\(^{175}\) or it may be used to fund programs and services to combat or deal with the consequences of illegal drug use.\(^{176}\) In discussing the Illinois Cannabis and Controlled Substances Tax Act,\(^{177}\) the Supreme Court of Illinois stated:

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174. *In re Kurth Ranch*, 986 P.2d at 1310.
175. Some drug tax statutes specifically provide that the proceeds of the tax, or a portion thereof, shall be credited to the state's general fund. *ALA. CODE* § 40-17A-15 (1993) (all proceeds after payment of expenses of administration and enforcement of drug tax); *ARIZ. REV. STAT. ANN.* § 42-1204(B)(2)(a) (Supp. 1993) (5% of moneys collected); *KAN. STAT. ANN.* § 79-5211 (Supp. 1992) (50% of all moneys received from collection of assessments of delinquent taxes and penalties to be used for law enforcement and criminal prosecution purposes).
176. Some drug tax statutes specifically earmark the proceeds of the tax, or a portion thereof, for special purposes. *FLA. STAT. ANN.* § 212.0505 (West Supp. 1992) (creating "Drug Abuse Education Trust Fund," to be administered at discretion of legislature, and "Drug Enforcement Trust Fund," to be administered by Department of Revenue); *IDAHO CODE* § 63-4209 (Supp. 1993) (to be used for substance abuse treatment); *IND. CODE ANN.* § 6-7-3-16 (Burns Supp. 1993) (10% of amount deposited each month to law enforcement training board to train law enforcement personnel; other funds to drug free communities fund to be used to promote alcohol and drug abuse prevention); *LA. REV. STAT. ANN.* § 47:2609 (West Supp. 1993) (to Drug Treatment Fund to be used to fund drug treatment and rehabilitation programs); *MONT. CODE ANN.* § 15-25-122 (1993) (one-third of tax to department of family services to be used for youth evaluation program and chemical abuse aftercare programs and one-third to department of justice to be used for grants to youth courts to fund chemical abuse assessments and for grants to counties to fund services for detention of juvenile offenders in facilities separate from adult jails); *NEB. REV. STAT.* § 77-4310.01 (1990) (to County Drug Law Enforcement and Education Funds and to Nebraska State Patrol Drug Control and Education Cash Fund).
[T]he legislature's desire [is] to require those who profit from illegal drug use to reimburse the State for the costs of remedying the societal ills that stem from drug use. Those costs include not only increased law enforcement expense resulting from drug-related violence, but also the severe collateral consequences of drug traffic, such as drug addiction, lost productivity, greater health costs and more demands on public assistance. The tax also provides an additional source of revenue to help offset the costs of drug education and to provide reparation to victims of drug-related crime.\textsuperscript{178}

Where the funds generated by an assessment on the unlawful possession of dangerous drugs are used to pay for government services in general, or even for a wide array of government programs and services dealing with the consequences of drug abuse, that assessment can properly be characterized as a "tax," rather than a "fine" or "penalty." If the only purpose of a drug tax were to generate revenue for these purposes, \textit{Halper} would be inapplicable, and the tax would not constitute "punishment" for purposes of double jeopardy analysis. This is true regardless of whether the state could show a rational relationship between the amount of the tax in a particular case and the government's expenditures on the specific programs and services funded by the tax.\textsuperscript{179}

A fair analysis of the drug tax statutes, however, leads to the conclusion that a tax on the possession of marijuana and other controlled substances should be deemed "punishment" for purposes of double jeopardy analysis. As several courts have recognized, such a tax "seeks to punish and deter those in possession of illegal drugs."\textsuperscript{180} The retributive purpose of the tax is evidenced by the fact that it is intimately tied to criminal activity on the part of the "taxpayer," applying only to behavior that already is a crime, namely, the unlawful possession of, or trafficking in, dangerous drugs.\textsuperscript{181} As in \textit{Austin v. United States},\textsuperscript{182} where the

\textsuperscript{178} Rehg, 605 N.E.2d at 531.

\textsuperscript{179} In this context, the \textit{Sorensen} court's statement that "a tax requires no proof of remedial costs on the part of the state" would be correct. \textit{Sorensen}, 836 P.2d at 31.

\textsuperscript{180} Sims v. Collection Div. of State Tax Comm'n, 841 P.2d 6, 13 (Utah 1992); accord \textit{In re Kurth Ranch}, 145 B.R. 61, 75-76 (Bankr. D. Mont. 1990) (stating that "the Montana Act promotes the traditional aims of punishment — retribution and deterrence"), aff'd, 1991 WL 365065 (D. Mont. April 23, 1991), aff'd, 986 F.2d 1308 (9th Cir.), cert. granted, 114 S. Ct. 38 (1993); Rehg, 605 N.E.2d at 531 (stating that "the tax imposed by the Act tends to punish or deter those who possess or sell illegal drugs"); \textit{Sorensen}, 836 P.2d at 34 (Hunt, J., dissenting) ("[T]he purpose and effect of the [Montana Drug Tax Act] is . . . punishment and deterrence."); see also State v. Durrant, 769 P.2d 1174, 1181 (Kan. 1989) ("[T]he State conceding in its brief that the primary purpose of [the Kansas drug tax act] is to discourage or eliminate drug dealing."); State v. Roberts, 384 N.W.2d 688, 691 (S.D. 1986) ("[T]he intent of the statute imposing a luxury tax on controlled substances and marijuana is to provide an extra penalty on possessors of controlled substances"); Zissi v. State Tax Comm'n, 842 P.2d 848, 856 (Utah 1992) ("The legislative history of the Stamp Act reveals two objectives, namely, to raise revenue and to discourage illegal drug trafficking."); Sims, 841 P.2d at 15 (Stewart, J., concurring in the result) ("The primary purpose of [the] Act is to penalize, not to raise revenue. In effect, the Act imposes criminal penalties for the possession of illegal drugs.").

\textsuperscript{181} In \textit{re Kurth Ranch}, 145 B.R. at 76; Rehg, 605 N.E.2d at 531; Sims, 841 P.2d at 14; see also
Supreme Court recently held that in rem forfeitures of conveyances and real property under the Comprehensive Drug Abuse Prevention and Control Act of 1970\textsuperscript{185} are punitive in nature and therefore subject to the Excessive Fines Clause of the Eighth Amendment,\textsuperscript{186} the tax is "tie[d] . . . directly to the commission of drug offenses,"\textsuperscript{187} and "focus[es] . . . on the culpability of the owner,"\textsuperscript{188} thereby revealing a legislative intent "to punish . . . those involved in [illegal] drug [activity]."\textsuperscript{187}

The deterrent purpose of the tax is evident in the tax rates, which under all of the drug tax statutes are quite high.\textsuperscript{189} By imposing a significant tax on the unlawful possession of dangerous drugs, state legislatures clearly intend to deter the illegal possession of, and trafficking in, dangerous drugs by making such possession and trafficking costly and by "diminish[ing] the economic rewards associated with drug trafficking."\textsuperscript{189}

Moreover, in many of the drug tax statutes, the penalty provision also supports the conclusion that one of the objectives of the tax is to punish and deter those unlawfully in possession of dangerous drugs.\textsuperscript{190} More than one-half of the drug tax statutes impose a penalty equal to 100% of the tax owed (in addition to the base tax) upon those who fail to pay the required drug tax.\textsuperscript{191} Indeed, one state imposes

\begin{quotation}
\textit{Roberts}, 384 N.W.2d at 691 ("[T]he clear intent of [the statute imposing a luxury tax on controlled substances and marijuana] is to provide an extra penalty on possessors of controlled substances"); \textit{Sims}, 841 P.2d at 15 (Stewart, J., concurring in the result) ("The primary purpose of [the Utah Illegal Drug Stamp Tax] Act is to penalize, not to raise revenue. In effect, the Act imposes criminal penalties for the possession of illegal drugs.").
\end{quotation}

\begin{itemize}
\item 182. 113 S. Ct. 2801 (1993).
\item 183. 21 U.S.C. §§ 881(a)(4) and (a)(7) (1988).
\item 184. The Eighth Amendment to the United States Constitution provides, in part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
\item 185. \textit{Austin}, 113 S. Ct. at 2811.
\item 186. \textit{Id.}
\item 187. \textit{Id.}
\item 188. E.g., \textit{ALa. Code} § 40-17A-8 (1993) ($3.50 per gram of marijuana, $200 per gram of controlled substance sold by weight, and $2000 on each fifty dosage units of a controlled substance not sold by weight); \textit{COLO. REV. STAT.} § 39-28.7-102 (West 1990) ($100 per ounce of marijuana and $1000 per ounce of controlled substance); 35 ILL. COMP. STAT. § 520/9 (1992) ($5 per gram of cannabis, $250 per gram of controlled substance sold by weight, and $2000 on each fifty dosage units of a controlled substance not sold by weight); \textit{MONT. CODE ANN.} § 15-25-111(2) (1991) (greater of 10% of market value of the drugs or, \textit{inter alia}, $100 per ounce of marijuana, $250 per ounce of hashish, and $200 per gram of various other controlled substances).
\item 189. \textit{Rehg}, 605 N.E.2d at 531; \textit{see also In re Kurth Ranch}, 145 B.R. at 76 (stating that "the tax will promote elimination of illegal drug traffic"); \textit{Durrant}, 769 P.2d at 1181 ("[T]he State concedes in its brief that the primary purpose of [the Kansas drug tax act] is to discourage or eliminate drug dealing."); \textit{Zissi}, 842 P.2d at 856 ("The legislative history of the [Illegal Drug] Stamp [Tax] Act reveals two objectives, namely, to raise revenue and to discourage illegal drug trafficking.").
\item 190. It is, of course, highly unlikely that an individual who unlawfully possesses dangerous drugs will in fact pay the required tax, so virtually all of those liable for the tax also will be liable for the penalty for not paying of the tax. Accordingly, it is appropriate to consider both the tax and the applicable nonpayment penalty when determining whether the tax constitutes "punishment" under \textit{Halper}.
\item 191. \textit{ALa. Code} § 40-17A-9(a) (1993); \textit{CONN. GEN. STAT.} § 12-660(a) (Supp. 1993); \textit{IDAHO CODE}
a nonpayment penalty of three times the amount of tax owed, and another imposes a penalty of four times the tax owed. Tax penalties of 100% or more are far too onerous to justify the conclusion that the sole objective of the drug tax is to raise revenue.

Although state legislatures may not be forthright in expressing the true purposes of a tax on the unlawful possession of dangerous drugs, they undoubtedly intend to achieve the goals of retribution and deterrence. One should not conclude that the purposes of such a tax do not include these goals merely because the legislature conceals its true intent when enacting the tax. Moreover, while it is true that the Supreme Court "[i]n Halper . . . focused on whether 'the sanction as applied in the individual case serves the goals of punishment,'" it makes sense in this situation, as it did in Austin v. United States, with respect to the in rem forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and (a)(7), to focus on the drug tax statute as a whole. For, unlike Halper, which "involved a small, fixed-penalty provision, which 'in the ordinary case . . . can be said to do more than make the Government whole,'" the tax imposed by the drug tax statute is sizable and "any relationship between the Government's actual costs and the amount of the [tax would appear to be] merely coincidental."

In sum, because a tax on the unlawful possession of dangerous drugs is intended, at least in part, to serve retributive and deterrent purposes, it must be deemed "punishment" for purposes of double jeopardy analysis. The fact that the legislature may have chosen to achieve retribution and deterrence by what it terms a "tax" and a "penalty" should not change the result. Consequently, under Halper, a state


194. Sims, 841 P.2d at 13-14. This is not to say, however, that a drug tax imposed by a statute that contains a nonpayment penalty of less than 100% of the amount of tax due, e.g., MONT. CODE ANN. § 15-25-113(2) (1991) (incorporating the provisions of § 15-53-111, which imposes a nonpayment penalty of 10% of the tax owed); TEX. TAX CODE ANN. § 159.101(g) (West 1992) (nonpayment penalty of 10% of tax owed), does not constitute "punishment" for double jeopardy purposes. Even without such a stiff penalty, a drug tax still could be found to serve retributive and deterrent purposes.

195. For example, in § 40-17A-16 of the Alabama Code, the Alabama legislature declared that the intent of its drug tax statute is "to levy the tax upon illegal drugs in an effort to compensate for the lost revenue from a section of the economy that has not heretofore borne its fair share of the tax burden."
ALA. CODE § 40-17A-16 (1953).

196. Austin, 113 S. Ct. at 2812 n.14 (quoting Halper, 490 U.S. at 448).

197. 113 S. Ct. 2801 (1993).

198. Id. at 2812 n.14.

199. See supra note 186.


201. Sims, 841 P.2d at 14.
should not be allowed to convict and punish an individual for unlawfully possessing dangerous drugs and, in addition, impose a tax upon her for possessing those same drugs.

VII. Halper and Nonmonetary Civil Sanctions

The civil sanction imposed in *Halper* was a fine. This raises the question of whether *Halper* applies to other civil penalties, such as the forfeiture of property or the revocation or suspension of an individual's driver's license or license to engage in a particular profession or business. While some of the language in the *Halper* opinion applies only to a monetary penalty, or at least only to sanctions for which a monetary value can be readily determined,202 the Court's holding in *Halper* and its rationale are broader. The Court in *Halper* held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."203 This language in no way indicates that the Court's holding is limited to monetary sanctions. Indeed, it indicates just the opposite. That is, this language implies that any civil sanction — whether a monetary penalty or not — constitutes "punishment" for purposes of double jeopardy analysis to the extent it serves only as a deterrent or retribution. Moreover, the underlying rationale of *Halper* — that a sanction imposed to serve punitive purposes must be deemed "punishment" for double jeopardy purposes regardless of whether it was imposed in a civil proceeding or a criminal prosecution — leads to the same conclusion, because that rationale applies equally to monetary and nonmonetary sanctions alike.204 Thus, as the Supreme Court recently stated in *Austin v. United States*,205 "[any] 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" for purposes of *Halper* and the Double Jeopardy Clause.206

Of course, when dealing with a nonmonetary penalty, a slightly different test than that used by the Supreme Court in *Halper* must be applied. As one court explained:

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202. For example, the Supreme Court stated that "it would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment." United States v. Halper, 490 U.S. 435, 449 (1989) (emphasis added); see also id. at 450 ("We must leave to the trial court the discretion to determine on the basis of . . . an accounting [of the Government's damages and costs] the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.").

203. Id. at 448-49 (emphasis added).

204. See, e.g., Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992); United States v. Reed, 937 F.2d 575, 577-78 (11th Cir. 1991).

205. 113 S. Ct. 2801 (1993).

206. Id. at 2812 (quoting Halper, 490 U.S. at 448) (emphasis added by Court); see also id. at 2810 n.12 ("Under United States v. Halper, . . . the question is whether forfeiture serves in part to punish . . . ").
Where the civil sanction at issue is money damages imposed pursuant to a statutory provision, [as in Halper,] we are to look to the size of the award to determine whether it is rationally related to the remedial goal of compensating the government for its loss.

[Where] no damage award has been imposed on [the] defendant, the Halper test comparing money damages with the government's loss is inapposite . . . . Instead, we must look more broadly at "the penalty imposed and the purposes that the penalty may fairly be said to serve."

The remainder of this section will examine how both the holding and rationale in Halper apply to a variety of different sanctions that have been imposed in civil proceedings.

**A. Civil Forfeiture of Property**

In an effort to stem the recent increase in drug-related crime, Congress and numerous state legislatures have turned to the "ancient practice" of declaring property to be forfeited to the government. Statutes have been enacted providing

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207. Reed, 937 F.2d at 578; accord Manocchio, 961 F.2d at 1542; see also In re 1632 N. Santa Rita, 801 P.2d 432, 435 (Ariz. Ct. App. 1990) ("[i]t is only in the Halper-type fact situation that the government must give an accounting of its damages and costs. Such is not the case here and our inquiry narrows to the question of whether the forfeiture cannot be fairly characterized as remedial, but only as a deterrent or retribution."); State v. Clark, 844 P.2d 1029, 1035 (Wash. Ct. App. 1993) ("Halper calls for the characterization of a civil forfeiture statute as punishment only when the statute cannot be fairly characterized as remedial."); State v. Fonder, 469 N.W.2d 922, 926 & n.4 (Wis. Ct. App.) (finding it "inappropriate to apply the Halper analysis" to sanctions imposed in prison disciplinary proceedings because "[t]he factual contexts differ so significantly," but nevertheless finding no double jeopardy bar to a criminal prosecution based upon the same acts that led to the sanctions, "[b]ecause punishment was not the principal purpose of the disciplinary action"), cert. denied, 112 S. Ct. 614 (1991).


209. The Supreme Court discussed the historical background of forfeiture statutes in this country in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The Court stated:

At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required. See O. Holmes, The Common Law, c. 1 (1881). The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W. Blackstone, Commentaries *300. When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness.

Forfeiture also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. See 3 W. Holdsworth, History of English Law 68-71 (3d ed. 1927); 1 F. Pollock & F. Maitland, History of English Law 351 (2d ed. 1909). The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property. See 1 W. Blackstone, Commentaries *299.
for the forfeiture of controlled substances as well as currency, real property, vehicles, and other articles used to facilitate, or that are traceable to, illegal drug activity. In addition to forfeitures for drug-related offenses, forfeiture of property is authorized by federal and state statutes for a vast array of other violations, such as trafficking in weapons, failing to report certain currency transactions, and illegally importing fish, wildlife or plants.

Contemporary forfeiture statutes typically provide for an in rem proceeding against the article itself, as opposed to making forfeiture an additional penalty that can be imposed upon a convicted defendant at sentencing. Such in rem forfeiture proceedings have been held not to be criminal proceedings for purposes of the Double Jeopardy Clause. However, Halper raises the question of whether the

In addition, English Law provided for statutory forfeiture of offending objects used in violation of the customs and revenue laws — likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer. Statutory forfeitures were most often enforced under the in rem procedure utilized in the Court of Exchequer to forfeit the property of felons. See 3 W. Blackstone, Commentaries *261-262; C.J. Hendry Co. v. Moore, 318 U.S. 133, 137-138 (1943).

Deodands did not become part of the common-law tradition of this country. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54 (1916). Nor has forfeiture of estates as a consequence of federal criminal conviction been permitted, see 18 U.S.C. § 3563; Rev. Stat. § 5326 (1874); 1 Stat. 117 (1790). Forfeiture of estates resulting from a conviction has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor has been sanctioned, see Wallach v. Van RIswick, 92 U.S. 202 (1876). But "[l]ong before the adoption of the Constitution the common law courts in the Colonies — and later in the states during the period of Confederation — were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes," C.J. Henry Co. v. Moore, supra, at 139, which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws. See id., at 145-148; Boyd v. United States, 116 U.S. 616, 623 (1886). And almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country. The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.

Id. at 680-83 (footnotes omitted); see also Austin, 113 S. Ct. at 2806-08; United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1131-34 (1993) (plurality opinion).


*in rem* forfeiture of property in a civil proceeding can constitute "punishment" for purposes of double jeopardy analysis.\(^{215}\)

In the years immediately following the Supreme Court's decision in *Halper*, the vast majority of lower courts considering the issue held that the forfeiture of property (including currency)\(^{216}\) to the government in an *in rem* proceeding does not constitute "punishment" under *Halper*.\(^{217}\) Therefore, the courts reasoned that

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215. Of course, if the forfeiture is an additional criminal penalty imposed by the legislature upon a convicted defendant, double jeopardy principles clearly apply in the forfeiture action. State v. Casalichio, 569 N.E.2d 916, 921 (Ohio 1991) (interpreting the applicable forfeiture statute, which required a criminal conviction for a felony and insulated innocent lien holders and property owners from loss, as imposing an additional criminal penalty for the underlying felony, and holding that therefore the forfeiture of the defendant's automobile, in which the police discovered cocaine and a plastic tube used for inhaling cocaine, violated the Double Jeopardy Clause's prohibition against multiple punishments because the state sought the forfeiture after the defendant already had been sentenced for possession of cocaine and possession of a criminal tool).


217. United States v. Borromeo, 995 F.2d 23, 27 (4th Cir. 1993) (forfeiture of six parcels of land, two vehicles, and bank and investment accounts, securities, and insurance policies that allegedly were proceeds of a doctor's unlawfully dispensing controlled substances, following doctor's conviction for unlawfully prescribing controlled substances); United States v. Cullen, 979 F.2d 992, 994, 995 (4th Cir. 1992) (forfeiture of building housing a clinic and pharmacy in which a doctor and his wife illegally distributed controlled substances, following doctor's conviction for knowingly distributing controlled substances outside the scope of his legitimate medical practice); United States v. All Beneficial Interest in that Certain Installment Note Dated January 12, 1987, in the Principal Amount of $92,500, 978 F.2d 1266 (9th Cir. 1992) (mem.) (text in Westlaw) (forfeiture of two promissory notes traced to real property purchased with proceeds from illegal drug transactions, following claimant's conviction for operating a continuing criminal enterprise to sell cocaine); United States v. McCaslin, 959 F.2d 786, 788 (9th Cir.) (prosecution for, *inter alia*, manufacturing, through propagation, marijuana, following forfeiture of real property used by defendant to grow marijuana), *cert. denied*, 113 S. Ct. 382 (1992); United States v. Cunningham, 943 F.2d 53 (6th Cir. 1991) (per curiam) (text in Westlaw) (prosecution for cocaine distribution and money laundering, following forfeiture of money used by defendant to purchase cocaine); United States v. $446,172.00 U.S. Currency, No. CIV. A. 92-2656, 1993 WL 26769, at *4 (D.N.J. Feb. 3, 1993) (forfeiture of currency found in claimant's possession when he was leaving the country, following claimant's conviction for failing to file a report while knowingly transporting currency outside the country); United States v. $11,400 in United States Currency, No. CIV. 92-431 TUC JMR, 1992 WL 394244, at *1 (D. Ariz. Oct. 20, 1992) (forfeiture of currency found in one claimant's possession when he was leaving the country, following claimant's conviction for failing to file a report while knowingly transporting currency outside the country); United States v. United States Currency in the Amount of $145,139, 803 F. Supp. 592, 596-97 (E.D.N.Y. 1992) (forfeiture of currency found in claimant's possession when he was leaving the country, following claimant's conviction for failing to file a report
while knowingly transporting currency outside the country); In re 1632 N. Santa Rita, 801 P.2d 432, 435-36 (Ariz. Ct. App. 1990) (forfeiture of lot and home in which claimant unlawfully possessed marijuana, following claimant's conviction for unlawful possession of marijuana); In re Forfeiture of 1986 Pontiac Firebird, 600 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 1992) (per curiam) (forfeiture of automobile in which claimant possessed cocaine, following claimant's conviction for possession of cocaine); People v. 1988 Mercury Cougar, 607 N.E.2d 217, 223 (III. 1992) (forfeiture of automobile in which claimant possessed cocaine, following claimant's conviction for possession of cocaine); Allen v. State, 605 A.2d 994, 1000 n.4 (Md. Ct. Spec. App.) (prosecution for possession of marijuana, following forfeiture of truck in which defendant possessed marijuana), cert. denied, 612 A.2d 1315 (Md. 1992); see also United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir.) (forfeitures that are not overwhelmingly disproportionate to the value of the offense and those that serve other articulable, legitimate civil purposes cannot be classified as punishment), cert. denied sub nom. Levin v. United States, 113 S. Ct. 55 (1992).

A few courts apparently read Halper to require that the value of the forfeited property be rationally related to compensation of the government for its expenses in investigating and prosecuting the underlying criminal activity and for any damages it may have suffered as a result of that criminal activity, for these courts held that the particular forfeiture in question did not constitute "punishment" under Halper only after finding such a relationship. In United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222, 1223 (S.D. Fla. 1989), for example, the court, in denying the claimant's motion to dismiss the government's action for the forfeiture of a fishing boat used by the claimant to commit certain fish and game violations, pointed out that the government expended resources in investigating and prosecuting the claimant and that the claimant damaged the wildlife that the violated regulations sought to protect. It then concluded that the dollar value of the boat, $55,000, represented an amount rationally related to the injury caused to the government by the claimant. Similarly, in Ex parte Rogers, 804 S.W.2d 945, 951 (Tex. Ct. App. 1990), the court held that the forfeiture of $6406 in cash, two cars, a mobile phone, a television set, and two safes, which were seized during a search of the claimant's residence that resulted in the discovery of 653 grams of "crack" cocaine and which were derived from the sale, manufacture, or distribution of a controlled substance, was "reasonably related to the government's injury and expenses" from the large scale drug distribution operation apparently taking place from the claimant's residence. See also Walker v. State, 828 S.W.2d 485, 490-91 (Tex. Ct. App. 1992) (stating forfeiture of $7500 that was going to be used to purchase amphetamine not "so extreme that it subject[ed] the offender to a sanction overwhelmingly disproportionate to the damage caused"). And in United States v. 40 Moon Hill Rd., 884 F.2d 41 (1st Cir. 1989), the court, in holding Halper inapplicable to the forfeiture of a 17.9 acre tract of land (including a home and other buildings thereon) from which the police had seized approximately eighty live marijuana plants, fifty drying marijuana plants, and marijuana seed, stated:

Forfeiture of the entire property is a justifiable means to remedy the injury to the government itself that results from illegal marijuana operations; hence the forfeiture would be unlikely to constitute a "punishment" for purposes of the Double Jeopardy Clause . . . .

. . . Even for an infraction of the narcotics laws far smaller in magnitude than that of the appellants, forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government's injury and loss. The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement — not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention — easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance, in this case marijuana.

Id. at 43-44. In addition, at least one court found that the particular forfeiture statute in question served the remedial purpose of allowing the government to recover its costs of investigation and prosecution, and it upheld the forfeiture of the claimants' residence and motorhome, in which they had a total unencumbered interest of $30,921, apparently because it was "roughly equivalent" to the expenses of somewhat more than $26,000 that the government incurred in investigating and prosecuting the claimants.
the Double Jeopardy Clause does not bar the government from both convicting and punishing an individual in a criminal proceeding and, in a separate civil proceeding, obtaining the forfeiture of property used by that individual in connection with, or traceable to, the same criminal activity.\footnote{See supra note 217.}

A number of these courts concluded that an in rem forfeiture imposed in a civil proceeding can never constitute "punishment" for double jeopardy purposes because it is not a sanction imposed upon the criminal wrongdoer, but rather is a sanction against the property itself.\footnote{United States v. McCaslin, 959 F.2d 786, 788 (9th Cir.), cert. denied, 113 S. Ct. 382 (1992); United States v. $446,172.00 U.S. Currency, No. CIV. A. 92-2656, 1993 WL 26769, at *4 (D.N.J. Feb. 3, 1993); United States v. $11,400 in United States Currency, No. CIV. 92-431 TUC JMR, 1992 WL 394244, at *1 (D. Ariz. Oct. 20, 1992); People v. 1988 Mercury Cougar, 607 N.E.2d 217, 222-23 (Ill. 1992) (alternative holding); Allen v. State, 605 A.2d 994, 1000 n.4 (Md. Ct. Spec. App.) (alternative holding), cert. denied, 612 A.2d 1315 (Md. 1992); see also In re Forfeiture of 1986 Pontiac Firebird, 600 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 1992) (per curiam) ("A forfeiture proceeding constitutes a civil, in rem action that is independent of any factually related criminal actions.").} Support for this position can be found in the Supreme

for possession of cocaine and marijuana. State v. Clark, 844 P.2d 1029, 1033, 1035 (Wash. Ct. App. 1993). But see State v. Crenshaw, 548 So. 2d 223 (Fla. 1989), where the state obtained the forfeiture of an automobile based upon the owner's having possessed cocaine on his person while in the vehicle. There, three dissenting justices concluded:

Although the Halper case involves a civil false claims statute rather than a forfeiture statute, the reasoning applies to forfeiture with equal force. Forfeiture cannot be called a remedial sanction. The purpose of forfeiture is not to make the state "whole," but rather it is intended to deter drug possessors, sellers, and smugglers by seizing their assets and thus penalizing them financially. The state has not been harmed financially due to Crenshaw's possession of a small quantity of cocaine. Because the forfeiture statute is clearly intended to be penal in nature rather than remedial, the double jeopardy clause of the federal Constitution is implicated. The sole question here, as it was in Halper, is whether the civil penalty assessed against Crenshaw constitutes a prohibited second punishment.

The Court in Halper rejected the government's contention that criminal punishment can only be meted out in criminal proceedings. It is clear that the forfeiture statute in question here is penal in nature despite the civil proceeding in which it clothes itself. The penalty of forfeiture imposed by the statute in this case becomes a punishment because "it exceeds what 'could reasonably be regarded as the equivalent of compensation for the Government's loss.'" This forfeiture is, in my view, a second punishment and is prohibited by the double jeopardy clause of the fifth amendment to the United States Constitution.

... In the few cases which have addressed forfeiture in terms of double jeopardy, the United States Supreme Court has found that the double jeopardy clause did not apply because the forfeiture proceedings were in rem proceedings, intended to be remedial rather than punitive. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972). In each of those cases, the forfeiture was in fact remedial and rationally related to the criminal conduct. Here, there is specifically no rational relationship between the forfeited property and the criminal conduct. Thus, the civil penalty of forfeiture is considered punitive, as was the civil penalty imposed in Halper.

\textit{Id.} at 229 (Kogan, J., dissenting) (citations omitted).
Court's decision in *Various Items of Personal Property v. United States*, a civil *in rem* action for the forfeiture of property used in defrauding the government of a tax. There, the Court stated that in an *in rem* forfeiture proceeding:

[it] is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.

However, even if the holding in *Various Items of Personal Property* survived the Supreme Court's decision in *Halper*, which is doubtful, it cannot survive that court's recent decision in *Austin v. United States*. In *Austin*, the Supreme Court held that *in rem* forfeitures of conveyances and real property under 21 U.S.C. §§ 881(a)(4) and (a)(7) — two of the forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 — are punitive in nature and

220. 282 U.S. 577 (1931).
221. *Id.* at 581 (citations omitted).
222. The Supreme Court in *Halper* emphasized that the Double Jeopardy Clause's proscription against multiple punishment safeguards "humane interests," and that the protection it affords is "intrinsically personal." *Halper*, 465 U.S. at 447. The Court then concluded that in determining whether a sanction imposed in a civil proceeding constitutes "punishment" for purposes of double jeopardy analysis, the "civil" label affixed to the proceeding "is not of paramount importance." *Id.*; cf. *Hicks ex rel. Felock v. Felock*, 485 U.S. 624, 631 (1988) ("[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law."). Like the "civil" label in *Halper*, the "legal fiction" resorted to in *Various Items of Personal Property*, as well as in the lower court cases interpreting *Halper* in the context of *in rem* forfeitures, overlooks the realities of the situation. While it is true that the owner or possessor of the property technically is not the defendant in an *in rem* forfeiture proceeding, she is the one who in fact will suffer the consequences of a forfeiture. For that reason, "it is particularly appropriate to address the substance of [the *in rem* proceeding] and to "focus upon the effects of [the forfeiture] on the claimant who has violated the statute." United States v. 38 Whalers Cove Drive, 954 F.2d 29, 36 (2d Cir.), *cert. denied sub nom.*, *Levin v. United States*, 113 S. Ct. 55 (1992).
223. 113 S. Ct. 2801 (1993).

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* . . .

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution], except that —

* . . .

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

* . . .
therefore subject to the Excessive Fines Clause of the Eighth Amendment. In reaching this result, the Court rejected the argument that a statutory in rem forfeiture does not impose punishment upon the owner of the forfeited property because "the property itself is 'guilty' of the offense." The Court explained that "[t]he fiction 'that the thing is primarily considered the offender'... rest[s] on the notion that the owner who allows his property to become involved in an offense has been negligent," and that the forfeiture serves to punish the owner for his negligence. In addition, the Court stated that reliance by the government on the technical distinction between in rem proceedings and proceedings in personam to conclude that forfeitures under §§ 881(a)(4) and (a)(7) do not constitute punishment "would be misplaced," because "'[t]he fictions of in rem forfeiture were developed primarily to expand the reach of the courts,'... which, particularly in admiralty proceedings, might have lacked in personam jurisdiction over the owner of the property." In light of this language in Austin, the rationale that an in rem forfeiture imposed in a civil proceeding can never constitute "punishment" for double jeopardy purposes because it is a sanction against the property itself, and not against the criminal wrongdoer, cannot stand.

Other lower courts applying Halper to in rem forfeitures did not rely upon the fact that the forfeiture proceeding was an in rem action against the property itself. Rather, these courts concluded that the particular forfeiture in question did not constitute "punishment" for purposes of the Double Jeopardy Clause because it served a remedial purpose — either removing the instrument of a crime from general circulation, thereby preventing the further illicit use of a harmful object.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Id.

225. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

226. Austin, 113 S. Ct. at 2808.

227. Id.

228. Id. at 2809.

229. Id. at 2808-09.

230. Id. at 2809 n.9.

231. Id. (quoting Republic Nat'l Bank of Miami v. United States, 113 S. Ct. 554, 559 (1992)).

or reducing the incentive for engaging in illegal activity by preventing a wrongdoer from profiting from her illegal activity. For example, it was held that where the government seeks the forfeiture of an instrumentality of crime, i.e., "property [that] has been used substantially to accomplish illegal purposes, so that the property itself can be said to be 'culpable,'" to remove it from general circulation and thereby "mak[e] it more difficult for the crime to be repeated," the forfeiture "will not be presumed punitive," and Halper does not require an accounting, or even a rough estimate, of the government's damages and expenses in the particular case. As the court explained in United States v. Cullen, an in rem proceeding for the forfeiture of a building owned by a doctor and his wife and used by them to unlawfully distribute controlled substances:

Halper involved a civil penalty intended to substitute for damages suffered by the government for the fraudulent acts committed upon it. The remedial purpose of that penalty was one of compensation, and the amount sought by the government overwhelmed any realistic estimate of the government's pecuniary loss. Here, by contrast, the government seeks the forfeiture of the Cullens' building not to compensate itself for any costs of investigation or prosecution, but to remove what had become a harmful instrumentality in the hands of the Cullens. The public danger that the building poses in the hands of the Cullens bears little relation to its monetary value, small or large.

Moreover, to limit the forfeitability of assets to the costs incurred by the government in connection with a criminal case would undercut Congress' purposes in enacting the forfeiture provisions. It would tend to exempt from forfeiture the most substantial investments in the instrumentality of the drug trade. Granting constitutional immunity to

233. United States v. Borroneco, 995 F.2d 23, 27 (4th Cir. 1993) (forfeiture of six parcels of land, two vehicles, and bank and investment accounts, securities, and insurance policies that allegedly were the proceeds of a doctor's unlawfully dispensing controlled substances); see also United States v. Cunningham, 757 F. Supp. 840, 846 (S.D. Ohio), aff'd, 943 F.2d 53 (6th Cir. 1991) (table).


236. 38 Whalers Cove Drive, 954 F.2d at 36.


In People v. 1988 Mercury Cougar, the court rejected the claimant's contention that because he was a paraplegic and dependent upon his specially equipped automobile for transportation, the forfeiture of that vehicle, in which the police had discovered cocaine, constituted "punishment" for double jeopardy purposes. The court reasoned that "[t]he determination of whether a civil sanction constitutes punishment within the multiple-punishment prong of the double jeopardy clause . . . is not based upon a defendant's particular circumstances, including any physical disability." 1988 Mercury Cougar, 607 N.E.2d at 223.

238. 979 F.2d 992 (4th Cir. 1992).
those who employ extremely valuable assets when committing crimes would create a disparity between rich and poor defendants. As a principle of civil forfeiture, this makes little sense. So far as the public welfare is concerned, the Ferrari is at least as harmful an instrumentality as the Chevette.29

Similarly, Halper was held inapplicable to the forfeiture of assets traceable to illegal drug transactions, because "a rule permitting those criminals who had most successfully parlayed their drug-related income into substantial assets to retain those assets would frustrate a remedial purpose of the [forfeiture] provision"240 — "to reduce the incentive for engaging in such activity."241

Except in limited circumstances, however, the rationale that an in rem forfeiture serves a remedial purpose and, hence, does not constitute "punishment" for purposes of the Double Jeopardy Clause cannot survive the Supreme Court's decision in Austin v. United States.242 In holding that in rem forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7) constitute "punishment" and thus are subject to the Excessive Fines Clause of the Eighth Amendment, the Court in Austin first concluded that in the United States statutory in rem forfeitures "historically have been understood, at least in part, as punishment."243 The Court pointed out that in various statutes the First Congress listed the forfeiture of goods alongside other provisions for punishment and often used the word "forfeit" to mean "fine," as in section 12 of the Act of July 31, 1789,244 which provided that an individual "shall forfeit and pay the sum of four hundred dollars for every offence."245 The Court in Austin also noted that its prior cases had consistently recognized that statutory in rem forfeiture serves, at least in part, to punish the owner of the property.246

239. Id. at 995.
241. Id.
243. Id. at 2810.
244. Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39.
245. Austin, 113 S. Ct. at 2807 (quoting Act of July 31, 1789, 1 Stat. at 39). The Court in Austin noted that "[d]ictionaries of the time confirm that 'fine' was understood to include 'forfeiture' and vice versa." Id. at 2808.
246. Id. at 2810. The Court first relied upon Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808), where it held that goods removed from the custody of a revenue officer without payment of duties were not forfeitable for that reason unless they were removed with the consent of the owner or his agent. In Peisch, a unanimous Court stated:

The court is also of the opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him.

If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property.

Id. at 364 (emphasis added). The Austin Court then stated that its prior cases rejecting the "innocence" of the owner as a common-law defense to forfeiture rested upon "the notion that the owner [was] negligent in allowing his property to be misused and that he is properly punished for that negligence." Austin, 113 S. Ct. at 2808.
After examining the historical understanding of statutory in rem forfeitures, the Austin Court examined the specific provisions and legislative history of 21 U.S.C. §§ 881(a)(4) and (a)(7) and concluded that nothing in them "contradict[s] the historical understanding of forfeiture as punishment." 247 The Court found that the "innocent owner" defense contained in those sections serves "to focus the provisions on the culpability of the owner," 248 thereby revealing a legislative intent "to punish only those involved in drug trafficking." 249 The Court also noted that Congress chose "to tie forfeiture directly to the commission of drug offenses." 250 Finally, the Court found that by adding section (a)(7) to section 881, "Congress recognized 'that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable drug trade in dangerous drugs,'" 251 and "characterized the forfeiture of real property as 'a powerful deterrent.'" 252

More importantly, perhaps, the Court in Austin expressly rejected the government's arguments that forfeitures under sections 881(a)(4) and (a)(7) should be considered remedial because (1) "they remove the 'instruments' of the drug trade 'thereby protecting the community from the threat of continued drug dealing,'" 253 and (2) "the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade." 254 With respect to the government's first argument, the Court acknowledged that "the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." 255 Nevertheless, it concluded that neither conveyances used to transport or otherwise facilitate drug trafficking, nor real property used to commit or facilitate the commission of drug offenses, can be characterized as "instruments" of the drug trade, because "'[t]here is nothing even remotely criminal in possessing [these items].'" 256 As to the government's second argument, the Court found that "the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut any" 257 argument that these provisions are "'a reasonable form of liquidated damages.'" 258 Therefore, the Court concluded that "the 'forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.'" 259

247. Austin, 113 S. Ct. at 2810.
248. Id. at 2811.
249. Id.
250. Id.
251. Id.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id. (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).
257. Id. at 2812.
258. Id. at 2811.
259. Id. at 2812 (brackets supplied by Court).
Moreover, the Austin Court concluded that even if forfeitures under sections 881(a)(4) and (a)(7) serve some remedial purpose, they still must be deemed punishment for purposes of the Excessive Fines Clause. The Court reasoned that, under Halper, a civil sanction must be deemed punishment if it does not solely serve a remedial purpose. It found it obvious that "[i]n light of the historical understanding of forfeiture as punishment, the clear focus of sections 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," forfeiture under sections 881(a)(4) and (a)(7) does not serve solely a remedial purpose. Additionally, the Court noted that although in Halper it "focused on whether 'the sanction as applied in the individual case serves the goals of punishment,'" it made sense in Austin "to focus on §§ 881(a)(4) and (a)(7) as a whole." This was because, unlike Halper, which "involved a small, fixed-penalty provision, which 'in the ordinary case . . . can be said to do no more than make the Government whole,'" the value of the conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) . . . can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.

Although Austin dealt with the issue of whether certain statutory in rem forfeitures constitute punishment for purposes of the Excessive Fines Clause of the Eighth Amendment, the Supreme Court used the definition of "punishment" articulated in Halper to decide that issue. It thereby indicated that whatever constitutes "punishment" for Eighth Amendment purposes also constitutes "punishment" for Fifth Amendment double jeopardy purposes. Applying Austin in this latter context leads to the conclusion that the statutory in rem forfeiture of real or personal property that is not itself contraband, based upon the property's mere use in drug or other criminal offenses, constitutes "punishment" for purposes of double jeopardy analysis. Therefore, under Halper, the government cannot both convict and punish an individual in a criminal proceeding and, in a separate civil proceeding, obtain the forfeiture of noncontraband property used by that individual in connection with the same criminal activity.

Austin and Halper compel the same conclusion with respect to the forfeiture of money, negotiable instruments, and securities used to facilitate any controlled substance law violations; money, negotiable instruments, securities, and other things of value furnished in exchange for illicit controlled substances; and proceeds traceable to such an exchange for illicit controlled substances. These items, like the conveyances and real property at issue in Austin, do not constitute contraband,
because "[t]here is nothing even remotely criminal in possessing [them]."

Thus, their forfeiture cannot be justified on the ground of protecting the community by removing the "instruments" of the drug trade. Moreover, the legislative history of 21 U.S.C. § 881(a)(6) indicates that Congress intended the forfeiture of such items to serve as an additional punishment on individuals engaged in illegal drug activity.

Similarly, the in rem forfeiture of currency or monetary instruments used in transactions that were not reported to the government as required by law should be deemed "punishment" under Austin and Halper. Although it has been said that unreported currency or an unreported monetary instrument "becomes an instrumentality of crime at the moment the traveler fails to declare it," neither currency nor monetary instruments are dangerous or illegal in themselves. Thus, their forfeiture cannot be justified on the ground of protecting the public.

On the other hand, under Austin, the statutory in rem forfeiture of contraband, such as controlled substances and unlicensed guns, should not be deemed "punishment" for purposes of the Double Jeopardy Clause. These forfeitures serve the remedial purpose of "remov[ing] dangerous or illegal items from society." Thus, the government should not be precluded by the double jeopardy provision from convicting and punishing an individual for a criminal offense, such as the possession or manufacturing of a controlled substance, and obtaining, in a separate civil proceeding, the forfeiture of the contraband that serves as the basis for the criminal proceeding. The same result should be reached with respect to the in rem forfeiture of raw materials of controlled substances. For, although each particular item may not be dangerous or illegal in itself, their spatial relationship to each other, under circumstances indicating they were intended be used to produce illegal and dangerous drugs, should be sufficient to allow them to be deemed "contraband" for purposes of Austin.

B. Suspension or Revocation of an Individual's Driver's License

Courts have consistently held that the suspension of a person's driver's license because of misconduct related to the use of a motor vehicle, such as driving with

269. Id. at 2811 (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).

270. Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34,671 (1978) (noting "the penal nature of forfeiture statutes").


272. In conceding that it previously had recognized that the forfeiture of contraband may be characterized as remedial, the Court in Austin cited United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), where the Court concluded that the forfeiture mechanism of the Gun Control Act of 1968 "is a separate civil sanction, remedial in nature," id. at 366, aimed at "[k]eeping potentially dangerous weapons out of the hands of unlicensed [gun] dealers," id. at 364, and therefore held that a gun owner's acquittal of criminal charges that he had knowingly engaged in the business of dealing in firearms without a license did not bar a subsequent in rem forfeiture proceeding against those same firearms based upon their involvement in the same transaction for which the gun owner had been acquitted, id.

273. Austin, 113 S. Ct. at 2811.
a blood-alcohol content greater than a specified level or refusing to take a
breathalyzer test, does not constitute "punishment" under Halper.\footnote{274} As a result,
these courts conclude that the Double Jeopardy Clause does not preclude the
government from both convicting an individual in a criminal proceeding and, on the
basis of the same conduct, suspending her driver's license in a separate civil
proceeding.\footnote{275} As a general matter, this conclusion is undoubtedly correct.
Statutory schemes providing for the revocation or suspension of an individual's
driver's license for conduct involving the use of a motor vehicle clearly serve a
remedial purpose. As one court has explained:

The revocation of a driver's license is part of a civil/regulatory
scheme that serves a vastly different governmental purpose from
criminal punishment. Our State's interest is to foster safety by tempo-

erarily removing from public thoroughfares those licensees who have
exhibited dangerous behavior, which interest is grossly different from
the criminal penalties that are available in a driving while under the
influence prosecution.\footnote{276}

While this purpose may "not [be] 'remedial' in the sense meant by the Halper
decision,"\footnote{277} because it does not compensate an injured party for a tangible
loss,\footnote{278} the suspension or revocation of a person's driver's license should not be
characterized as a deterrent or retribution, and therefore should not be deemed
"punishment" for double jeopardy purposes.\footnote{279}


275. \textit{See supra} note 274.

276. \textit{Maze}, 825 P.2d at 1174; see also \textit{Nichols}, 819 P.2d at 999 ("'[t]he purpose of the implied
consent law is to remove from Arizona highways those drivers who may be a menace to themselves and others because of intoxication'"); \textit{Butler}, 609 So. 2d at 797 ("The [Implied Consent Law's] primary effect is remedial; it removes those drivers from our state highways who have been proven to be reckless or
hazardous. It effectuates their removal through a license suspension . . . ."); \textit{Johnson}, 622 A.2d at 205 ("The purpose of [the mandatory suspension statute] is to protect other drivers on the road from those who would drive while intoxicated and to deter those who would otherwise decide to drive drunk."); \textit{Strong}, 605 A.2d at 513 ("The summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads.").

277. \textit{Ellis}, 282 Cal. Rptr. at 94.

278. \textit{Id.; Freeman}, 611 So. 2d at 1261.

279. \textit{Ellis}, 282 Cal. Fptr. at 94-95 ("The immediate purpose [of the drivers' license suspension
statute] is merely to facilitate the gathering of evidence. The long-range purpose is to protect public
safety by keeping drunk drivers off public roads."); \textit{Freeman}, 611 So. 2d at 1261 ("[T]he purpose of the
statute providing for revocation of a driver's license upon conviction of a licensee for driving while
intoxicated is to provide an administrative remedy for public protection and not for punishment of the
It is true of course that the suspension or revocation of an individual's driver's license may deter that person and others from engaging in the conduct that led to the suspension or revocation; it also may be viewed by the licensee as retribution. Indeed, the suspension or revocation of a person's driver's license can be extremely inconvenient and can have severe monetary ramifications on one who uses a motor vehicle in her occupation or profession. Nevertheless, the Supreme Court recognized in Halper that "for the defendant even remedial sanctions carry the sting of punishment." Consequently, where the suspension or revocation of an individual's driver's license is designed primarily "to protect public safety by keeping drunk drivers off public roads," the fact that it incidentally serves some of the purposes of punishment should not transform the sanction into "punishment" for double jeopardy purposes.

This is not to say, however, that the suspension or revocation of an individual's driver's license in a civil proceeding can never constitute "punishment" for purposes of the Double Jeopardy Clause. The revocation or lengthy suspension of an individual's driver's license for a relatively minor traffic offense, such as driving with a broken tail light or exceeding the speed limit by a few miles per hour, in the absence of any previous traffic violations, seems excessive and appears to serve a punitive, rather than remedial, purpose. Under such circumstances, at least a portion of the sanction would seem to constitute "punishment" for purposes of double jeopardy analysis. That is, a brief suspension of the individual's driving privileges would be "remedial," but anything beyond that must be deemed "punishment."

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280. See Butler, 609 So. 2d at 797; Johnson, 622 A.2d at 205-06; Strong, 605 A.2d at 513.
281. See Nichols, 819 P.2d at 999.
282. See, e.g., Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 342 (Mass. 1992) (two individuals whose driver's licenses were suspended were truck drivers and a third lived 30 miles from his place of employment without access to public transportation); see also Johnson, 622 A.2d at 205-06 (defendant claimed that "[o]ther than incarceration, no punishment handed down by any court is greater that denying to a person who relies on his automobile the use of that automobile by taking away his privilege to drive.").
284. Ellis, 282 Cal. Rptr. at 95.
285. Nichols, 819 P.2d at 1000; Butler, 609 So. 2d at 797; Johnson, 622 A.2d at 205-06; Strong, 605 A.2d at 514.
286. At least two courts have indicated that the length of the suspension must be rationally related to the remedial goal of the suspension. Butler, 609 So. 2d at 797 ("Unlike Halper's disproportionate fine, Butler's license suspension is temporary (90 days), the last 60 days of which he will be able to obtain a restricted license. Furthermore, Butler's license suspension, in contrast to Halper's fine, bears a rational relationship to the legitimate governmental purpose of promoting public safety on Louisiana highways. . . . To the end that a temporary revocation of driving privileges meets the stated objective of highway safety, we conclude that the statutorily authorized license suspension to be not so divorced from its intended remedial goal that it amounts to a second punishment for the same offense in violation of double jeopardy.") (emphasis added); Strong, 605 A.2d at 513 ("The minimum suspension period [in the driver's license suspension scheme] is not excessive in relation to the remedial purpose . . . .") (emphasis added).
The suspension or revocation of a person's driver's license for an offense unrelated to the operation of a motor vehicle would also seem to be punitive in nature. For example, in Johnson v. State Hearing Examiner's Office,287 the court concluded that a statutory scheme requiring the State Department of Revenue and Taxation to suspend the driver's license of a person under nineteen years of age who had been convicted of violating any law regarding the possession, delivery, manufacture, or use of a controlled substance or alcohol violated the double jeopardy provisions of the state and federal constitutions because it provided for a second punishment for the same offense.288 The court reasoned that the provision calling for the suspension of the minor's driver's license by an administrative agency, after judicial involvement in the case had ended with the sentencing of the minor, "was driven by deterrent and retribution concepts."289 Since the individual's driver's license could be suspended for an offense that did not involve the use of a motor vehicle, it is fair to say that the primary purpose of the suspension provision was not to protect the public from unsafe drivers. Instead, its purpose was to impose an additional punishment on certain underage drinkers and drug users as a form of retribution and a means of deterring them, and others like them, from engaging in such conduct in the future. The Johnson court therefore reached the correct result.290

C. Suspension or Revocation of an Individual's License to Engage in a Particular Profession or Business

As with the suspension or revocation of a person's driver's license, courts agree that the suspension or revocation of a person's license to engage in a particular profession or business, when based upon misconduct relevant to her fitness to engage in that profession or business, does not constitute "punishment" under Halper.291 Therefore, courts have found that the Double Jeopardy Clause does not

288. Id. at 180 (basing its decision solely upon state constitutional grounds).
289. Id. at 179 (stating that it "was certainly not intended to be remedial in repaying an injured victim").
290. Compare Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340 (Mass. 1992), which involved a statute requiring the Registrar of Motor Vehicles automatically to suspend, for a period not to exceed five years, the driver's license of a person convicted of violating the state's Controlled Substances Act. The Rushworth court held that although the suspension of an individual's driver's license under the statute constitutes "punishment," it does not violate the Double Jeopardy Clause. The court first noted that in the context of multiple punishments in a single proceeding the Double Jeopardy Clause merely prohibits greater punishment than the legislature intended. It then concluded that the legislature specifically authorized the cumulative punishment of a driver's license suspension and that the automatic license suspension by the Registrar of Motor Vehicles was "an ancillary part of the criminal proceedings." Id. at 345. The court distinguished Halper on the ground that it "involved the imposition of civil penalties in separate noncriminal proceedings against individuals who had been convicted in previous criminal proceedings." Id.
291. Moser v. Richmond County Bd. of Comm'rs, 428 S.E.2d 71, 72-73 (Ga. 1993) (revocation of business license to operate health spa); Kvitka v. Board of Registration in Medicine, 551 N.E.2d 915, 918 n.4 (Mass.) (revocation of medical license), cert. denied, 498 U.S. 823 (1990); In re Cobb, 402 S.E.2d 475, 477 (N.C. Ct. App. 1991) (five-year suspension of chiropractor's license, suspended with
preclude the government from both convicting an individual in a criminal proceeding and, in a separate civil proceeding and on the basis of the same conduct, revoking or suspending her business or professional license.\textsuperscript{292} Once again, as a general matter, these courts have reached the correct result.

The primary purpose of the revocation or suspension of such a license is not to punish; rather, it is to protect the public from individuals who are deemed unfit to practice that profession or engage in that business.\textsuperscript{293} For example, the disbarment or suspension of an attorney for committing a crime of moral turpitude is aimed at

\textsuperscript{292} See supra note 291.

\textsuperscript{293} \textit{Elias}, 282 Cal. Rptr. at 95 (dictum); \textit{Moser}, 428 S.E.2d at 72-73; see also \textit{State Bar Ass'n v. Frank}, 325 A.2d 718, 722 (Md. 1974) ("In [an attorney] disciplinary matter, the primary purpose is not to punish an offender; it is to protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client; it is to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so to deprive him of his previously acquired privilege to serve as an officer of the court."); \textit{Cocco v. Commission on Medical Discipline}, 384 A.2d 766, 768-69 (Md. Ct. Spec. App. 1978) ("[D]isciplinary proceedings against a professional have the unique purpose of protecting the public from the results of a professional's improper conduct, incompetence or unscrupulous practices."); \textit{aff'd in part, rev'd in part sub nom. Unnamed Physician v. Commission on Medical Discipline}, 400 A.2d 396 (Md.), \textit{cert. denied}, 444 U.S. 868 (1979); \textit{Wang v. Board of Registration in Medicine}, 537 N.E.2d 1216, 1219 (Mass. 1989) ("The board's purpose is protection of the public interest, and when the board exercises its statutory function of conducting disciplinary proceedings, it is pursuing that purpose."); \textit{In re Logan}, 358 A.2d 787, 790 (N.J.) (per curiam) ("The purpose of a disciplinary sanction [upon an attorney], whether it be a reprimand, suspension, or a disbarment, is not punishment, but maintenance of the integrity and purity of the bar, elimination of unfit persons from the practice of law, and vindication of public confidence in the bar and the administration of justice."); \textit{on reh'g}, 357 A.2d 419 (N.J. 1976); \textit{In re Oxman}, 437 A.2d 1169, 1172 (Pa. 1981) ("[T]he primary purpose of professional disciplinary proceedings is to protect the public."); \textit{cert. denied}, 456 U.S. 973 (1982); \textit{Haley v. Medical Disciplinary Bd.}, 818 P.2d 1062, 1069 (Wash. 1991) ("A medical disciplinary proceeding . . . is taken for two purposes: to protect the public, and to protect the standing of the medical profession in the eyes of the public.").
protecting the public by keeping an unfit lawyer from practicing law.\textsuperscript{294} Similarly, when a state board revokes or suspends a physician's license to practice medicine for unlawfully dispensing controlled substances, it is doing so to protect the public from an unscrupulous, and even dangerous, doctor.\textsuperscript{295} While this may not be "remedial" in the same sense as used by the Supreme Court in Halper,\textsuperscript{296} that is, it is not intended to compensate the government for its damages and costs resulting from the licensee's misconduct, it clearly does not constitute "punishment" as that term is used in Halper. Although the suspension or revocation may act as a deterrent, both generally and specifically, and may be viewed as retribution by the individual affected, neither deterrence nor retribution is the major goal of a license suspension or revocation.\textsuperscript{297}

One court has hinted, however, that the suspension or revocation of a person's license to engage in a particular profession or business may, in a particular case, be so disproportional to her misconduct that it would constitute "punishment" under Halper for purposes of double jeopardy analysis.\textsuperscript{298} In United States v. Furletti,\textsuperscript{299} the court held that a civil sanction prohibiting a commodities broker from trading on any contract market, even as a retail customer using another broker, imposed for fraud in the trading of commodity futures contracts, represented a remedial, rather than punitive, measure.\textsuperscript{300} The court reasoned that the decision to exclude the commodities broker from trading on any contract market could be seen as "an action to ensure the integrity of the markets and protect them from people like [the commodities broker]."\textsuperscript{301} The court concluded that in light of the "pernicious, widespread, and institutionalized"\textsuperscript{302} nature of the broker's fraud, which took place "without abatement or restraint over a period of years,"\textsuperscript{303} "the decision to bar him from all further trading activity reasonably can be viewed as a remedial measure

294. Ellis, 282 Cal. Rptr. at 95 (dictum); see also Helvering v. Mitchell, 303 U.S. 391, 400 & n.2 (1938) (disbarment is a sanction "free of the punitive criminal element"); State Bar Ass'n v. Frank, 325 A.2d 718, 722 (Md. 1974); In re Logan, 358 A.2d 787, 790 (N.J.) (per curiam), on reh'g, 367 A.2d 419 (N.J. 1976); In re Oxman, 437 A.2d 1169, 1172 (Pa. 1981), cert. denied, 456 U.S. 975 (1982); In re Disciplinary Action of McCune, 717 P.2d 701, 707 (Utah 1986).


296. See Ellis, 282 Cal. Rptr. at 94-95.

297. Moser, 428 S.E.2d at 72-73; see also Ellis, 282 Cal. Rptr. at 95.

298. See United States v. Furletti, 974 F.2d 839 (7th Cir. 1992).

299. Id.

300. Id. at 844-45.

301. Id. at 844.

302. Id. (quoting the opinion of the administrative law judge).

303. Id.
commensurate with his wrongdoing." It further stated that the trading bar "is not out of proportion to [the broker's] fraudulent practices."

This language in Furlett indicates that the permanent prohibition barring the commodities broker from trading on any contract exchange, even as a customer, might have constituted "punishment" if his misconduct had been less serious than it was, perhaps, for example, a single instance of fraud. Whether the court would have viewed the permanent revocation of his registration with the Commodity Futures Trading Commission (in effect, his license to engage in business as a commodities broker) in the same light is unclear. It could be argued that the revocation or lengthy suspension of an individual's license to engage in a particular business or profession because of a single, relatively minor transgression cannot be justified in terms of protecting the public, and that at least a portion of the revocation or suspension must be treated as "punishment" for double jeopardy purposes.

On the other hand, the revocation or lengthy suspension of a person's license to practice a particular profession or to engage in a certain business can be viewed as a means of protecting the public, regardless of the nature and frequency of the underlying misconduct. For example, a lawyer who has been convicted of a minor criminal offense or who has misappropriated a client's funds, whatever the amount, has shown her unfitness to practice law, and one would be hard put to argue that barring that person from practicing law, either permanently or for a lengthy period of time, would not be primarily for the purpose of protecting the public. The same would be true, for example, where a doctor has on a single occasion unlawfully dispensed a controlled substance. Even though the doctor may have misbehaved only once, she has shown her willingness, and perhaps propensity, to engage in illegal and even dangerous conduct. Permanently barring that doctor from practicing medicine, or suspending her from doing so for a lengthy period of time, certainly can be justified as a means of protecting the public.

D. Exclusion of an Individual from Participation in Government Programs

As a civil sanction for their misconduct, those who defraud the government, for example, by submitting false claims for services performed under a government program, can be precluded from participating in government programs for a specified period of time. Courts have held that such a sanction does not constitute "punishment" for purposes of double jeopardy analysis, so that an individual can be both excluded from participation in a government program and, on the basis of the same conduct, punished in a separate criminal prosecution.

304. Id. (emphasis added).
305. Id. at 845 (emphasis added).
307. Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992) (upholding exclusion of a doctor from participation in Medicare programs for not less than five years); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) (upholding exclusion of two real estate dealers from participation in HUD programs for 18 months and two years, respectively); Crawford v. Sullivan, No. 92C 3926, 1993
In *Manocchio v. Kusserow*,

for instance, the Department of Health and Human Services (HHS) excluded a physician from participating in Medicare programs for a period of not less than five years because he had been convicted of submitting a fraudulent Medicare claim. The court rejected the doctor's contention that the exclusion constituted an impermissible second punishment. It concluded that while the exclusion "undoubtedly carries the 'sting of punishment,' the purpose [the doctor's] exclusion serves is still remedial." This result is correct, for as the court explained:

The purpose of the exclusionary provision [in the Social Security Act] "is to enable the [HHS] inspector general to keep [those who defraud the programs] out of the Medicare and Medicaid Programs. They deprive patients of needed services or supplies, and they divert taxpayer funds from their intended purposes." Further, the mandatory exclusionary period "strengthens the ability of the Secretary of [HHS] to exclude from Medicare and Medicaid those health care providers and practitioners who fail to provide quality health services or who have engaged in fraud involving health care programs."

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308. 961 F.2d 1539 (11th Cir. 1992).

309. Id. at 1542.

310. Id.

311. Id. (citations omitted) (first bracketed material added); see also Greene, 731 F. Supp. at 840 ("[The government] simply seeks to protect the Medicare and Medicaid programs by excluding a person convicted of defrauding it. Its goals are clearly remedial and include protecting beneficiaries, maintaining program integrity, fostering public confidence in the program, etc."). In United States v. Bizzell, 921 F.2d 263 (10th Cir. 1990), the Department of Housing and Urban Development (HUD) filed administrative complaints against two real estate dealers alleging numerous counts of supplying false statements and violating other HUD regulations in the sale of five properties whose mortgages were insured by HUD. HUD sought to suspend and debar the real estate dealers from participating in any HUD programs for three years. The real estate dealers ultimately entered into settlement agreements with HUD whereby one accepted a voluntary exclusion from HUD programs for two years, conditioned upon his payment to HUD of $30,000, and the other agreed not to participate in any HUD programs for eighteen months. The government subsequently instituted a criminal prosecution against the real estate dealers based upon essentially the same transactions and violations set forth in the HUD administrative complaint leading to the settlement agreements. Rejecting the real estate dealers' claim that their exclusion from participating in HUD programs constituted "punishment" for purposes of the Double Jeopardy Clause and that the criminal prosecution therefore was barred, the court concluded that "the penalty of debarment is strictly remedial." Id. at 267. The court explained:

It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition. While those persons may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the "rough remedial justice" permissible [under Halper] as a prophylactic governmental action.

Id. (citation omitted).
As with the revocation or lengthy suspension of an individual's license to engage in a particular profession or business, even a sanction permanently (or for a lengthy period of time) barring a person from participating in particular government programs on the basis of a single, relatively minor transgression can be viewed as serving primarily remedial purposes and therefore not constituting "punishment" for double jeopardy purposes.

E. Sanctions Imposed Upon Inmates in Prison Disciplinary Proceedings

Halper has been held inapplicable to sanctions imposed upon inmates in prison disciplinary proceedings, such as solitary confinement, adjustment segregation, the forfeiture of good time, and the extension of a prisoner's mandatory release date. A number of courts reaching this result have held Halper inapplicable on the ground that the double jeopardy provision merely "protects an individual from multiple judicial punishments," and that therefore "[a]dministrative sanctions imposed by prison officials upon a prisoner for crimes committed within the prison do not bar subsequent prosecution for the crimes in a court of competent jurisdiction." While it is true that Halper involved two judicial proceedings, one criminal and one civil, there is no reason to believe the Supreme Court would have reached a different result if the civil fine in that case had been imposed upon the defendant in an administrative proceeding rather than a judicial one. As one court has stated, "the fact that [a purely punitive sanction] was imposed in an administrative proceeding, as opposed to a civil or criminal proceeding, does not change its nature. A cow, after all, does not become a horse simply by calling it a horse."

Nevertheless, these courts have not necessarily reached the wrong result. Courts have stated that the primary purposes of sanctions imposed upon inmates in prison disciplinary proceedings are the "maintenance of institutional order and safety and [the] assistance of individual rehabilitation." Such purposes, of course, are


314. Id. at 72; accord Quevedo, 832 S.W.2d at 424; Prysock, 817 S.W.2d at 785; State v. Garrison, 486 N.W.2d 38 (Wis. Ct. App. 1992) (per curiam) (text in Westlaw); see also In re Dandridge, 614 So. 2d 129, 130 (La. Ct. App. 1993) (holding expulsion of student by school board does not bar subsequent delinquency proceeding based upon same conduct, because school board "administrative proceeding resulting in expulsion does not constitute a criminal prosecution and trigger double jeopardy protection."); Fonder, 469 N.W.2d at 926 & n.4 (holding Halper "inapposite" because it "dealt with monetary damages sought by the federal government pursuant to a statute aimed at providing reimbursement for the costs of criminal prosecution," whereas this case deals with "administrative measures taken by a state agency pursuant to state regulations aimed at maintaining prison order and rehabilitating prison inmates."); cert. denied, 112 S. Ct. 614 (1991).


316. Fonder, 469 N.W.2d at 925; see also id. at 926 n.4 (stating prison disciplinary sanctions are "aimed at maintaining prison order and rehabilitating prison inmates"); State v. Garrison, 486 N.W.2d 38

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remedial in nature. On the other hand, placing an inmate in solitary confinement, taking away her good time, extending her mandatory release date, and other such sanctions seem to also serve the purposes of punishment — retribution and deterrence. That is, the sanctions appear to be aimed, at least in part, at punishing the inmate for her misconduct and deterring both her and other inmates from violating prison rules in the future. Indeed, it seems that the goal of maintaining institutional order and safety is sought to be achieved, in part, by using the threat of sanctions to deter inmates from engaging in misconduct. If sanctions imposed upon prison inmates at least partially serve punitive purposes, the Double Jeopardy Clause, as interpreted in *Halper*, should preclude the government from punishing an inmate in a criminal proceeding after she already has been subject to disciplinary action by prison officials on the basis of the same conduct.

Moreover, even if it is concluded that, in general, sanctions imposed on inmates in prison disciplinary proceedings solely serve remedial purposes, a particular sanction might at some point be so severe that it crosses the line between being "remedial" and "punitive" in nature. For example, a term in solitary confinement beyond a certain length may no longer be rationally related to the remedial purposes a prison disciplinary sanction is intended to serve. Such a sanction therefore should be deemed "punishment" for purposes of the Double Jeopardy Clause.217

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317. The extension of a prisoner's mandatory release date also might be considered punishment for double jeopardy purposes. *See Fonder*, 469 N.W.2d at 929 (Sundby, J., concurring).

In addition to the sanctions discussed in the text, courts have found that a number of other nonmonetary sanctions are remedial, rather than punitive, in nature and therefore do not constitute "punishment" for purposes of double jeopardy analysis. E.g., United States v. Woods, 949 F.2d 175, 177 (5th Cir. 1991) (per curiam) (holding that the Federal Home Loan Bank Board's declaring a savings and loan association insolvent and placing it in receivership does not constitute "punishment" because "[b]oth the goal and the operation of the receivership have been to protect the United States treasury from avoidable insurance losses by assuring proper management of the thrift according to the banking regulations"), *cert. denied*, 112 S. Ct. 1562 (1992); United States v. Reed, 937 F.2d 575, 578 (11th Cir. 1991) ("Where an individual and the government enter into an employment relationship governed by a collective bargaining agreement, arbitration awards against the employee made pursuant to that agreement can only serve as remedies for breach of contract, and necessarily 'do no more than make the Government whole.'"); United States v. Blocker, 33 M.J. 349, 351-52 (C.M.A. 1991) (holding that an administrative board's reducing a serviceman's rank pending his discharge under other-than-honorable-conditions for sexually assaulting several women — intended to ensure that the soldier "does not enjoy the status, authority or respect associated with military rank" — does not constitute "punishment," because it helps "to ensures the readiness and competence of the force and the orderly separation of the soldier," and it "could not in any sense be considered disproportionate to the damage which [the serviceman's] sexual offenses did to the cohesiveness and morale of the military command and community"), *cert. denied*, 112 S. Ct. 1214 (1992); *In re Blockett*, 490 N.W.2d 638, 647 (Minn. Ct. App. 1992) (holding that a civil commitment for an indeterminate period, as a psychopathic personality, does not constitute "punishment" because "[c]ommitment is not only for punitive purposes; persons committed as psychopathic personalities are entitled to treatment"), *aff'd on other grounds*, 510 N.W.2d 910 (Minn. 1994); Stuart v. Department of Social & Rehabilitation Serv., 846 P.2d 965, 969 (Mont. 1993) (holding that *Halper* does not apply where department refused to pay dismissed employees their accrued vacation benefits because their employment did not terminate for reasons not reflecting discredit upon themselves); State v. Darby, 587 A.2d 1309, 1316 (N.J. Super. Ct. App. Div. 1991) (holding that a bar against
VIII. Determining the Amount of the Government's Loss

The Supreme Court in Halper concluded that the government is "entitled to rough remedial justice" when seeking compensation for its damages and costs from a wrongdoer who has already been punished criminally. As a general matter, the government "may demand compensation [from such an individual] according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." However, where "one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, . . . rough justice becomes clear injustice," and the penalty, although imposed in a civil proceeding, must be deemed "punishment" for purposes of the Double Jeopardy Clause. The Court in Halper stated:

What we announce now is a rule for the rare case, . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, the trial court must determine if the penalty sought in fact constitutes a second punishment.

On the basis of such accounting, the trial court must determine "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." Although the Court in Halper recognized that "the trial court's judgment in these matters often may amount to no more than an approximation," it believed that "even an approximation will go far towards ensuring both that the Government is fully compensated for [its damages and] costs . . . and that, as required by the Double Jeopardy Clause, the defendant is protected

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securities-related activity, on account of securities fraud, is "clearly a remedial measure"; In re Young, 857 P.2d 989, 999-1000 (Wash. 1993) (holding that the civil commitment of a "sexually violent predator" for an indefinite period after he has served his sentence does not constitute "punishment" because the commitment does not serve any punitive goal, but rather is for the purposes of incapacitation and treatment, both of which are "legitimate civil goals").

318. United States v. Halper, 490 U.S. 435, 446 (1989); see also id. at 449.
319. Id. at 446.
320. Id.
321. Id. at 448-49.
322. Id. at 449 (footnote omitted).
323. Id. at 450.
324. Id.

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from a sanction so disproportionate to the damages caused that it constitutes a second punishment."

The Supreme Court's opinion in Halper envisions a two-step approach to determine whether a civil penalty intended to compensate the government for its loss constitutes "punishment" for double jeopardy purposes. First, it must be determined whether the civil sanction is "overwhelmingly disproportionate" to the damages and costs caused by the wrongdoer, and therefore does not bear a rational relation to the goal of compensating the government for its loss. If it is not "overwhelmingly disproportionate," then that sanction does not constitute "punishment" for purposes of double jeopardy analysis. This is true even if the

325. Id.
326. See Rehg v. Illinois Dep't of Revenue, 605 N.E.2d 525, 536 (Ill. 1992); see also United States v. 38 Whalers Cove Drive, 954 F.2d 29, 36-37 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992).
327. In some circumstances it may not be necessary to compare the amount of the civil sanction with the amount of the government's loss. For example, in United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir. 1991), cert. denied, 113 S. Ct. 123 (1992), customs officials arrested the defendants and assessed large civil fines against them for possessing marijuana and attempting to import it into the United States from Mexico. The defendants acknowledged the civil fines by executing promissory notes. The government subsequently brought criminal charges against the defendants based upon the same conduct for which they had been assessed the civil fines, and the defendants sought dismissal of the criminal charges on the ground that the double jeopardy provision barred the prosecution because they already had been "punished" for their conduct. Although the government conceded that under Halper the civil fines, if paid, would constitute "punishment" for double jeopardy purposes, id. at 195, the court nonetheless rejected the defendants' claim. The court held that the defendants' "execution of promissory notes, in the absence of a judgment or payment by [the defendants], does not constitute 'punishment' under the Double Jeopardy Clause." Id. at 201. The court reasoned:

The government has not yet attempted to take anything from the defendants, nor to deprive them of their liberty. Their property and liberty are as yet unmolested and free from the exercise of sovereign power. [The defendants] are but presumed to be personally obligated to the government, the holder thereof, unless and until they interpose a defense sufficient to relieve them of the obligations.

... The purpose served by having [the defendants] execute the promissory notes upon their arrest and pursuant to a civil statute was but to obtain evidence of their indebtedness, albeit prima facie evidence. The notes did not constitute actual payment or actual satisfaction whatsoever. The content of the promissory notes even anticipate the need for future legal action to enforce their terms. Further, in the Notice of Penalty or Liquidated Damages Incurred and Demand for Payment Document, the [defendants] were advised of a possible procedure for side-stepping the payments of these assessments. ... How can it be said that the government's attempt to confirm evidence of debt in circumstances where the government contemplates the possibility of further court action and where the government advises the defendant of an available procedural mechanism for relief from the notes is one which serves the goal of punishment?

... If the defendants actually pay the civil fines, then any subsequent criminal prosecution would be double jeopardy.

Id. at 202-03 (citations omitted); see also United States v. Park, 947 F.2d 130, 134-35 (5th Cir. 1991) (holding that $48,000 seized from defendant by customs officials when defendant failed to report he was taking the money out of the country, and retained by them pending the outcome of defendant's criminal trial, did not constitute "punishment," because defendant elected to delay civil forfeiture proceedings until after the completion of his criminal trial), vacated in part on grant of reh'g on another issue, 951 F.2d 634 (5th Cir. 1992).
328. E.g., United States v. WRW Corp., 986 F.2d 138, 142 (6th Cir. 1993) (civil penalty of $90,350
tribunal that imposed the sanction did not in fact consider the amount of the government's loss, for "[i]n Halper, the Supreme Court specifically called for an objective inquiry into what ends the fine reasonably may be said to serve."329 On the other hand, if the civil sanction is "overwhelmingly disproportionate" to the

assessed for violations of safety standards under the Federal Mine Safety & Health Act "is not so extreme and divorced from the United States' expenses incurred in the investigation and prosecution of the defendants' violations to constitute punishment, rather than the remedial goal of ensuring safe mining conditions and practices"; United States v. Furlett, 974 F.2d 839, 844 (7th Cir. 1992) (holding that $75,000 civil fine not so overwhelmingly disproportionate to the Commodity Futures Trading Commission's costs of investigating and litigating the defendant's fraudulent activities that it must be deemed punitive); United States v. J & T Coal, Inc., 818 F. Supp. 925, 928 (W.D. Va. 1993) (holding that while civil penalties of about $300,000, assessed for violations of safety standards under the Federal Mine Safety & Health Act, exceeded the $163,729 spent by the government in investigating the accident in question and pursuing sanctions, they did not "reach[] the point, as in Halper, where they did not 'remotely approximate the Government's damages and actual costs, and [where] rough justice [became] clear injustice.'"); Martin v. Rutledge, 807 F. Supp. 693, 697 (N.D. Ala. 1992) (holding that $724,149.25 sought as restitution for defendant's breaches of fiduciary duty as trustee of pension plans does not constitute "punishment" for double jeopardy purposes because it is the amount the pension plans lost on account of defendant's prohibited transactions); United States v. Fliegler, 756 F. Supp. 688, 697 (E.D.N.Y. 1990) (holding that government's costs of $110,564.90 incurred in prosecuting both the criminal and civil actions against defendants "bears a rational relation to the $115,000 civil penalty" imposed for 23 false claims submitted to the government by the sole shareholders and officers of a defense contractor, and therefore does not constitute "punishment" for double jeopardy purposes); United States v. Marcus Schloss & Co., 724 F. Supp. 1123, 1128 (S.D.N.Y. 1989) (holding that $19,650 penalty in settlement of civil action brought by the Securities and Exchange Commission, which represented twice the amount of allegedly illegal profits obtained by the defendant through insider trading, does not present "that 'rare case' where the fine paid is wholly divorced from the level of fraud and the government's expenses, including those of investigation and prosecution," but "[r]ather . . . presents the 'ordinary case [where] fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole'); United States v. Pani, 717 F. Supp. 1013, 1019 (S.D.N.Y. 1989) (holding that $32,460 civil penalty sought for presenting three false claims to the government, which represented the statutory penalty of three times the damage the government sustained because of the defendant's acts ($1280) plus $10,000 for each false claim minus $1380 the defendant paid in restitution in a previous criminal action based upon the same conduct, does not present "the 'rare case' of a 'prolific but small gauge offender' subject to a second punishment 'overwhelmingly disproportionate to the damages he has caused';", rather, it bears a rational relationship to the goals of compensating the government for its loss, considering the expenses of investigation and prosecution) (quoting Halper, 109 S. Ct. at 1902); Mitchell v. State, 818 P.2d 1163, 1164-65 (Alaska Ct. App. 1991) (holding that 50% penalty on the amount of unemployment benefits defendant fraudulently obtained does not constitute "punishment" under Halper); Purcell v. United States, 594 A.2d 527, 531 (D.C. 1991) (holding that "modest" fines paid for violating civil traffic regulations are not "punishment" for double jeopardy purposes because they "bore a rational relationship to the cost of enforcing the traffic regulations"); Merin v. Maglakl, 599 A.2d 1256, 1263-64 (N.J. 1992) (holding that maximum statutory penalty of $3000 for each of six false statements submitted by defendant in support of a fraudulent claim for insurance benefits "is rationally related to the expenses incurred by the government in the course of its investigation and prosecution of [defendant's] fraudulent claim," and "any penalty imposed, up to the maximum amount authorized by the statute, would not constitute punishment for double jeopardy purposes"); State v. Naydihor, 483 N.W.2d 253, 258-59 (Wis. Ct. App. 1992) (holding that civil "forfeitures" of $67, $97, and $61 for traffic violations do not "present[] the 'rare case' described in Halper," because "[t]hese civil sanctions bear a rational relation to the 'damage' to the state and are not so divorced from any remedial goal that they fairly can be said to constitute 'punishment' in double jeopardy terms").

329. Furlett, 974 F.2d at 844; accord WRW Corp., 986 F.2d at 142.
damages and costs resulting from the wrongdoer's conduct — as it was in Halper, where the applicable statute authorized a penalty in excess of $130,000 for fraud in the amount of $585 and investigative and prosecutorial expenses estimated by the trial court at approximately $16,000 — a rebuttable presumption arises that the sanction is punitive in nature. The government may attempt to rebut this presumption by presenting an accounting of the actual costs and damages attributable to the wrongdoer's conduct. Any portion of the civil sanction exceeding this amount constitutes "punishment" for double jeopardy purposes.

Because Halper requires that the amount of a civil sanction be compared with the amount of the government's loss, it must be determined which factors can be considered in computing the government's damages and costs. Clearly, any actual loss suffered by the government because of the wrongdoer's conduct should be included. For example, the trial court in Halper properly included the $585 that the government overpaid the defendant's company as a result of the defendant's false claims.

330. The Court in Halper characterized the situation in that case as one in which "the recovery [by the government] is exponentiably greater than the amount of the fraud, and, at least in the District Court's informed view, is also many times the amount of the Government's total loss." United States v. Halper, 490 U.S. 435, 445 (1989).

331. Id. at 449, 452; 38 Whalers Cove Drive, 954 F.2d at 36; see, e.g., United States v. Hall, 730 F. Supp. 646, 654-55 (M.D. Pa. 1990) (stating that the absence of any quantification of actual losses suffered by the government as a result of defendant's transporting bearer negotiable instruments in the amount of $1,035,000 out of the country without filing the required monetary instrument report, when coupled with the disproportionate relationship between the $1,035,000 civil fine and the damages apparently caused by defendant's conduct, leads to the conclusion that the fine is "not rationally related to the goal of making the Government whole"); Small v. Commonwealth, 402 S.E.2d 927, 928 (Va. Ct. App. 1991) (en banc) (reversing the decision of the trial court for the reasons stated in the panel opinion at 398 S.E.2d 98, 100 (Va. Ct. App. 1990)) (holding that a $3000 fine imposed in civil contempt proceeding for violating an injunction barring defendant, a paving contractor, from engaging in certain conduct bears no rational relation to the goal of compensating the state for its loss, because the trial court also awarded the state $16,999.50 to reimburse four of defendant's customers for damages they had sustained, $2,425.50 in attorney's fees, and $136.50 in costs arising from the contempt action); see also In re Kurth Ranch, 986 F.2d 1308, 1311-12 (9th Cir.) (holding that, in the absence of any evidence regarding the actual damages and costs incurred by the government, drug tax of $208,105 imposed on individuals following their convictions for possession and sale of dangerous drugs constitutes "punishment" for double jeopardy purposes), cert. granted, 114 S. Ct. 38 (1993); Kvitka v. Board of Registration in Medicine, 551 N.E.2d 915, 918-19 (Mass.) (holding that a $10,000 fine, imposed upon a physician to penalize him and to deter other physicians from engaging in similar misconduct, and not to reimburse the board for its expenses in handling the matter, constitutes "punishment" for double jeopardy purposes), cert. denied, 498 U.S. 823 (1990).

332. Halper, 490 U.S. at 449, 452; 38 Whalers Cove Drive, 954 F.2d at 37; see, e.g., Hall, 730 F. Supp. at 655 (refusing to grant summary judgment to defendant after concluding that the civil fine assessed against him by the government constituted "punishment" for double jeopardy purposes, but, instead, allowing the government an opportunity to present an accounting of its actual costs arising from defendant's conduct and to recover its demonstrated costs).

333. Halper, 490 U.S. at 449.

334. See id. at 444-45 (explaining why the sanction imposed in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), did not constitute "punishment" for purposes of double jeopardy analysis, the Court stated that the government's injuries from the defendants' fraud included "the amount of the fraud itself").
In addition to any actual loss suffered by the government, its injuries in a particular case also include "ancillary costs," such as the costs of detecting, investigating, and prosecuting the defendant's conduct. This includes, for example, direct personnel costs for the time spent on the matter by investigators and attorneys, as well as supplies, travel expenses, office expenses, and trial costs.

As the Supreme Court recognized in Halper, however, "the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain." Therefore, "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice." For example, in Merin v. Maglaki, the state filed a civil suit seeking the statutorily authorized maximum penalty of $5000 for each of six false statements submitted by the defendant in support of a fraudulent claim for insurance benefits. In holding that the civil penalty sought by the government was "rationally related to the expenses incurred by the government in the course of its investigation and prosecution of [the defendant's] fraudulent claim," the court stated:

We are not troubled by the fact that the State has not proven the exact extent of its damages nor provided precise calculations to support the penalties imposed. The [Insurance Fraud Prevention] Act established a Division of Insurance Fraud Prevention within the Department of Insurance. The Division assists the Commissioner of Insurance in investigating allegations of insurance fraud and in developing and implementing programs to prevent future frauds and abuse. The Division has full-time supervisory and investigative personnel as well as clerical and other staff to fulfill its responsibilities under the Act. All the costs associated with those activities represent expenses related to

335. Id. at 445.
336. Id. at 445, 446 n.6.
337. State v. Darby, 587 A.2d 1309, 1316 (N.J. Super. Ct. App. Div. 1991) (considering direct personnel costs of $205,000 incurred by the government in a civil action against defendants for violations of the state's securities law, almost three-fourths of which was for the estimated time spent on the matter by two deputy attorneys-general, while the remaining quarter was for the estimated time spent on the matter by employees of the Bureau of Securities); see also United States v. Furlett, 974 F.2d 839, 844 (7th Cir. 1992); United States v. Fliegler, 756 F. Supp. 688, 692, 697 (E.D.N.Y. 1990); Merin v. Maglaki, 599 A.2d 1256, 1263-64 (N.J. 1992) (including supervisory personnel, clerical personnel, and other staff at the Division of Insurance Fraud Prevention, which investigated the defendant's fraudulent insurance claim).
339. Id.
340. Id.
341. Fliegler, 756 F. Supp. at 692, 697 (including the costs of an expert witness); Darby, 587 A.2d at 1316 (stating that physical plant costs also can be considered).
343. Id.
345. Id. at 1263.
investigating fraudulent claims, like that of [the defendant's]... For the State to provide precise calculations of the costs associated with investigating and prosecuting a particular attempted insurance fraud would be difficult, if not impossible. Yet, that the State incurs a significant financial burden in uncovering and rectifying such activities is undeniable. In such circumstances, penalties act, in effect, as liquidated-damages clauses, with the purpose of avoiding the imposition of unnecessarily wooden restrictions on the State's right to recover damages.346

In a similar vein, the court in United States v. Walker347 concluded that a $500 civil penalty assessed by customs inspectors against the defendant for his failure to disclose that he was carrying approximately one gram of marijuana when he entered the country on a commercial airplane348 bore "a rational relationship to the government's costs."349 Although the government did not produce specific evidence of its expenses in the particular case, the court considered "the financial burden associated with maintaining check points and administering the customs system"350 when computing the government's investigation and enforcement expenses.351

346. Id. at 1263-64 (citations omitted). Similarly, in United States v. Valley Steel Prod. Co., 729 F. Supp. 1356 (Cl.Int'l Trade 1990), the court stated:

While it is obvious the Government sustained an assortment of damages as a result of the defendants' conduct [of importing steel products into the country by submitting entry documents with false and fraudulent statements and omissions], ascertaining the precise nature and extent of the injuries suffered by the Government in a trade case like the one before the Court, is a particularly difficult task. The defendants are not liable for antidumping duties, but they could have been subjected to the duties had they not engaged in the unlawful conduct with which they have been charged. In addition to absorbing the cost of investigating and prosecuting the matter, the Government suffers diffuse harm from trade, economic, and foreign policy repercussions due to defendants' conduct. "This kind of damage, [is] not the less real for being difficult or impossible to measure." It is the function of liquidated damages to provide recovery "when damages are uncertain in nature or amount or are unmeasurable."

Id. at 1359-60 (footnote and citations omitted); see also United States v. Furlett, 974 F.2d 839, 844 (7th Cir. 1992) (stating that an affidavit submitted by the government in support of its opposition to defendant's motion to dismiss the indictment on double jeopardy grounds could be relied upon even though it did "not specify the exact costs of investigating [defendant's] activities, [but] instead provide[d] only general approximations of the hours spent investigating the entire fraudulent scheme of [defendant] and [his codefendants]").

347. 940 F.2d 442 (9th Cir. 1991).

348. Although the relevant statute imposed a $5000 civil penalty on first offenders, a Customs Directive automatically "mitigated" that penalty to $500. Id. at 443.

349. Id. at 444.

350. Id.

351. The court was unpersuaded by the defendant's argument that the $500 penalty did not bear a rational relation to the government's loss because it took less than an hour for him to clear customs and involved only one government employee. Id.

In United States v. 40 Mcon Hill Rd., 884 F.2d 41 (1st Cir. 1989), where the government obtained the forfeiture of an entire 17.9 acre tract of land (including a house and other structures thereon) that the claimant used in the cultivation of marijuana, the court stated:

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Care must be taken, however, when apportioning the government's general enforcement costs to a particular defendant. As the court stated in *United States v. 38 Whalers Cove Drive*,

The assessment of costs and damages must be individualized. A reasonable allocation of the more generalized enforcement costs — in the nature of overhead — may also be allowed. The allocation must not be incommensurate with the portion of the overall enforcement problem represented by the offense at hand. While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large [sanction] can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual [defendant]. This is particularly so where the individual [defendant's] violations are relatively minor.

Even for an infraction of the narcotics laws far smaller in magnitude than that of [claimants], forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government's injury and loss. The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement — not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention — easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance, in this case marijuana.

*Id.* at 44 (alternative holding).


353. *Id.* at 37 (citations omitted); *accord in re* Forfeiture of 1986 Pontiac Firebird, 600 So. 2d 1178, 1180 (Fla. Dist. Ct. App. 1992) (Alvarez, J., concurring in part and dissenting in part); see also *United States v. Walker*, 940 F.2d 442 (9th Cir. 1991), discussed in *supra* text accompanying notes 328-32, where the dissenting judge pointed out that the approach taken by the majority in that case could justify unlimited civil fines being imposed upon a defendant. He stated:

The government maintains that the amount [of the civil penalty] is trivial in light of the expense required to maintain a system of customs inspection. No doubt it is. But why should a pro rata share of the customs inspection system be a measure? There would be no customs inspection system without the Department of the Treasury. Should not a pro rata share of Treasury expense be the measure? There would be no Treasury without the government as a whole. Should not a pro rata share of the expense of the government as a whole be the measure? These questions suggest how a pro rata share of the actual expense of setting up the structure which led to [the defendant's] detection could lead to the justification of astronomical fines. An amount of $500 is trivial in relation to a pro rata share of the expense of the Treasury or the government; so are $5000 or $50,000 or $500,000. In short, pro rata share of the expense gives the government an essentially arbitrary choice as to the system whose expense is shared and a virtual blank check as to the amount it can assess. Such unlimited discretion to determine the amount that may be imposed points to the punitive rather than the compensatory character of the fine assessed.

*Id.* at 444 (Noonan, J., dissenting).
IX. Conclusion

In *United States v. Halper*, the Supreme Court extended the protection the Double Jeopardy Clause affords by holding that a sanction imposed in a civil proceeding brought by the government can, under certain circumstances, constitute "punishment" for double jeopardy purposes. That decision, however, involved a monetary penalty imposed in a civil proceeding brought after the defendant already had been prosecuted and punished criminally for the same conduct. Therefore, *Halper* gives rise to a number of questions concerning the scope of this new protection. This article has tried to answer four of those questions. Specifically, it has concluded that although a civil sanction can constitute "punishment" for double jeopardy purposes even when imposed before a criminal prosecution for the same conduct, the Double Jeopardy Clause does not bar the subsequent criminal prosecution. Also, a tax imposed upon the unlawful possession of marijuana and other controlled substances constitutes "punishment" for purposes of the Double Jeopardy Clause. Although a nonmonetary civil penalty typically will not constitute "punishment" for double jeopardy purposes, there may be circumstances under which it will. Finally, this article has shown how the government's loss should be determined in cases in which the purpose of the civil sanction is to compensate the government for its damages and costs.

355. *Id.* at 448.