SEPARATING CRIME FROM PUNISHMENT: THE CONSTITUTIONAL IMPLICATIONS OF *UNITED STATES V. HALPER*

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Last Term, the Supreme Court in *United States v. Halper*,[1] unanimously created a rule of law that will disrupt federal, state, and local governments' ability to enforce a vast array of important regulatory schemes, including environmental protection, securities regulation, and tax collection. This likely disruption flows from the Court's recognition that certain constitutional protections, previously thought only available to criminal defendants, are at times equally accessible to civil defendants from whom government is attempting to collect civil penalties for proscribed activity. While the Court's decision in *Halper* focused only on the extension of the double jeopardy clause[2] to civil penalty proceedings, its reasoning and holding are sufficiently broad to allow the application of other constitutional protections to government-initiated civil penalty cases. These additional constitutional protections could include the eighth amendment, the self-incrimination clause of the fifth amendment, and the trial guarantees of the sixth amendment.

Turning initially to the more narrow double jeopardy issue addressed in *Halper*, the Court's application of double jeopardy protection to a civil penalty proceeding was a remarkable change in the law. By extending the reach of the double jeopardy clause, Justice Blackmun's opinion ignored a consistent line of cases recognizing double jeopardy protection only in the context of a criminal proceeding. Looking at *Halper* from a more panoramic angle, however, it is the Court's reasoning, apart from its holding on double jeopardy, that forms the core of the disruption created for government regulatory programs.

For example, in the process of justifying its ruling, the Court found it necessary: (1) to blur the line between civil and criminal punishment and

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1. 109 S. Ct. 1892 (1989).

2. The double jeopardy clause of the fifth amendment reads: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

to define punishment for constitutional purposes to include civil penalties; (2) to discard a statutory construction test used for over fifty years in deciding whether a legislature intended a criminal or civil penalty; (3) to reject the concept of deterrence as a legitimate objective of a civil statute; (4) to reduce the concept of government damage to a monetary formula while ignoring substantial precedent which recognized the possibility of nonmeasurable harm to government; (5) to create an accounting procedure for deciding when the line is crossed between remedy and punishment for constitutional purposes; and (6) to allow individual trial courts to replace the will of legislatures in deciding the rational level of indemnity to government for its loss.

In essence, all of the positions taken by the *Halper* Court lead to the overarching principle of the case: Once a court determines that awarding a civil penalty in a particular case serves the aims of retribution and deterrence, then the civil penalty as applied to that case creates the kind of punishment which triggers certain constitutional protections traditionally afforded only criminal defendants. The simplicity of this principle hides the radical points of departure it signals. This Article will discuss and analyze these points of departure in order to establish the danger the *Halper* doctrine poses to the orderly process of government.

First, this Article will discuss the Court's actual holding on the application of the double jeopardy clause to a civil penalty action initiated by government. The question in *Halper* was whether the double jeopardy clause is a barrier to a government attempting to obtain civil penalties following a criminal conviction when both the civil and criminal matters are based on the same facts.[3] The question was not new or novel. In prior cases, the Court analyzed similar facts by deciding whether the civil statute, itself, was actually intended by the legislature to be penal, thus creating a criminal sanction. If intended as penal, then certain constitutional protections, such as the double jeopardy clause, were triggered.

In *Halper*, however, the Court altered its form of analysis and discarded the statutory construction approach. It concluded that while the statute in question was civil in nature, intended by Congress to be reme-

3. This tandem approach to penalties is a common scenario in the everyday operation of government both on the state and federal level. See *infra* notes 100-110 and accompanying text for a discussion of government seeking civil penalties after obtaining a criminal conviction. Much of this Article addresses the problem from the position of federal litigation and the federal government. However, because the fourteenth amendment compels application of the double jeopardy clause to the states, the arguments advanced in this Article also apply to state procedures and civil penalty actions.

dial, the penalty as applied to the individual defendant constituted sufficient punishment to trigger double jeopardy protection. It is the position of this Article that extension of the double jeopardy clause to civil statutes, *as applied*, opens all civil penalty actions brought by a government to double jeopardy scrutiny. To hypothesize from current events, if Exxon is convicted of the federal criminal charges recently leveled against it resulting from the oil spill at Valdez, Alaska, a court could find that the double jeopardy clause prohibits the federal government from bringing against Exxon any subsequent civil penalty suit to enforce certain environmental civil statutes.[4]

The second point of departure in *Halper* is the Court's decision to separate the concept of punishment from the concept of crime. Prior to *Halper*, guarantees associated with a criminal trial, such as double jeopardy, were not available in cases brought under a civil statute unless a court first found that the statute itself was penal. However, *Halper* now permits a court to find sufficient punishment in the application of a civil statute to trigger these constitutional guarantees. Indeed, it is *Halper*'s separating crime from punishment that is likely to result in the extension of other constitutional guarantees to civil penalty cases. Until *Halper*, punishment for constitutional purposes came from penal statutes, not remedial ones; thus crime and punishment were inexorably intertwined. After *Halper*, remedial, nonpenal statutes also may result in punishment sufficient to invoke constitutional protections previously thought available only to criminal defendants.

The *Halper* doctrine injects a large measure of judicial activism into the process of distinguishing civil from criminal sanctions for constitutional purposes; this is a third point of departure from settled precedent. Prior to *Halper*, courts exhibited much deference to legislative determinations on whether a sanction was civil or criminal. By opting, however, for an ad hoc, case-by-case analysis of whether a remedy as applied constitutes punishment, the *Halper* Court created a doctrine which will lead to much judicial intervention. This Article will establish that this doctrine allows courts to ignore legislative decisions on the level of punish-

4. Not surprising, litigants have already discovered *Halper*'s holding on double jeopardy. In United States v. Hall, 730 F. Supp. 696 (M.D. Pa. 1990), the court granted the defendant's summary judgment motion and precluded the government from seeking civil penalties following a criminal conviction, citing *Halper* for authority. Moreover, three Florida Supreme Court justices dissented on double jeopardy grounds to the forfeiture of property following a criminal conviction, citing *Halper* as authority for this position. Florida v. Crenshaw, 548 So. 2d 223 (Fla. 1989).

ment required to invoke the procedural safeguards normally associated with criminal prosecutions.

As a fourth point of departure, this Article will discuss the refusal of the *Halper* Court to recognize the proper role of deterrence in a civil penalty scheme. This refusal will result in a considerable limitation on the amount of compensation government can claim in any civil penalty action. Consequently, after *Halper*, legislatures either will disguise a civil penalty's deterrent purpose or will draft penalties that are intended to return to government only its actual monetary loss in a particular case. This Article will argue that without penalties capable of deterring behavior, government will have fewer weapons after *Halper* to fight fraud and other types of economic or environmental malfeasance.

In conclusion, this Article will explain why it is unfortunate that the Court in *Halper* adopted this new doctrine because it: (1) fails to give guidance to either the executive or legislative branches in their task of devising and enforcing appropriate civil sanctions; (2) may require governments to choose between civil and criminal remedies without having sufficient information to make a wise choice; and (3) was an unnecessary revision because other constitutional provisions—the fourteenth amendment and the excessive fines clause of the eighth amendment—provide sufficient authority for correcting the problem of a disproportionate civil penalty.

I. THE DOUBLE JEOPARDY CLAUSE AND CIVIL PENALTY PROCEEDINGS PRIOR TO *HALPER*

A. A Brief History of Double Jeopardy

The Supreme Court traditionally has recognized three prongs of protection afforded by the double jeopardy clause: protection from a second prosecution after acquittal; protection from a second prosecution for the same offense after conviction; and protection from multiple punishments. The *Halper* decision focuses only on the third prong of double jeopardy protection—the protection from multiple punishments.[5] Yet some understanding of the historical origin of the entire clause, its meaning, and the course of its adoption into the Constitution will help in evaluating the Court's position in *Halper.*

Much doubt exists concerning the historical scope and applicability of

5. United States v. Halper, 109 S. Ct. at 1897.

the concept of double jeopardy in the early common law.[6] Nevertheless, the concept of protecting an individual from repeated prosecutions had some currency, although this protection was extremely limited by modern standards.[7] Not until the works of Coke and Blackstone was the concept clarified and given the importance that it subsequently attained in the United States.[8] Yet even with Coke and Blackstone, the protection from double jeopardy was much different than we understand it today. For example, to Coke the double jeopardy bar was "conditional, depending upon the quality of the prior acquittal,"[9] and Blackstone adopted, as England does today, the requirement of a conviction or an acquittal before an individual could invoke the protection.[10]

Eventually, the concept of double jeopardy was considered for adoption into the fifth amendment, but the historical data on this adoption is sparse.[11] Madison's first proposed draft read, "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."[12] This language was altered considerably when the protection eventually was placed in the fifth amendment. Little historical data exists on the reasons for these changes other than the objection that, as drafted, the clause could be construed to bar a convicted

6. A thorough discussion of the problems in tracing the historical roots of double jeopardy in English common law is found in J. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969). Mr. Sigler notes that because "the appeal by private accuser still held an important place in criminal law as late as the early thirteenth century," the development of double jeopardy protection was delayed in England until the "point where the state had the power to conduct criminal actions at its discretion." *Id.* at 8. Further, Sigler argues that "[t]he state of English law at the time when the American Constitution was written . . . does not permit the evaluation of double jeopardy as a clearly established fundamental restriction upon the organized power of the executive." *Id.* at 21. Moreover, according to Sigler, "Other parts of the Bill of Rights show a clearer historical development than does the double jeopardy clause." *Id.* at 4. *See also* Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 837 (1988); Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 3, 8-10 (1984).

7. J. SIGLER, *supra* note 6, at 15-21.

8. *Id.* at 16-18. In fact, according to Sigler, "To a considerable degree, Coke improvised the law of double jeopardy . . . By the time the *First Institute* (1642) was completed, the double jeopardy doctrine was clearly delineated as a purely criminal concept serving as a protection against the state even for relatively minor offenses." *Id.* at 19.

9. *Id.* at 18.

10. *Id.* at 20. This is in contrast, of course, to the modern American practice of triggering double jeopardy protection upon the swearing in of the jury. Crist v. Bretz, 437 U.S. 28 (1978).

11. J. SIGLER, *supra* note 6, at 27-34. Sigler summarizes this history by noting "that the double jeopardy clause was adopted by the First Congress of the United States without much debate or indication of its intended meaning." *Id.* at 32.

12. United States v. Halper, 109 S. Ct. at 1897 (quoting 1 ANNALS OF CONG. 434 (J. Gales ed. 1789)).

defendant from appealing.[13] At one point the proposed language stated that "no person shall be twice put in jeopardy of life or limb by any public prosecution"[14]—a much clearer directive that double jeopardy applied only to criminal proceedings than is the final version found in the Constitution. In any event, only Madison's initial draft used the term "punishment," [15] and no history is available to confirm whether the drafters of the double jeopardy clause intended it to apply to any type of "punishment" proceeding or intended to limit the protection to criminal prosecutions only.

B. Legislative Intent and Double Jeopardy

From the limited historical data, the Supreme Court over the years has had to construct its double jeopardy jurisprudence, including the application of double jeopardy to civil penalty proceedings. In doing so, the Court has not always acted consistently. In fact, early cases indicated the Court's willingness to apply the double jeopardy clause to certain civil penalty proceedings,[16] but the standard for such application was un-

13. J. SIGLER, *supra* note 6, at 30-31. Sigler discusses this objection to Madison's draft, and additionally notes the procedural course the double jeopardy clause took through the House of Representatives. For example, the House, by a considerable margin, defeated the amendment intended to correct the perceived ambiguity in Madison's draft, as well as other amendments to the language. In fact, the House language sent to the Senate for approval was virtually identical to that proposed by Madison. According to Sigler, the reasons for the House rejection of various amendments are not clear. *Id.*

14. *Id.* at 31. According to Sigler, the Senate proposed this language, and the House was resolved to disagree with the Senate version. *Id.* at 31-32. Nevertheless, much of the Senate language was ultimately adopted into the fifth amendment, but unfortunately, "[s]omewhere, beyond the ken of the recording secretaries, the words 'by any public prosecution' were eliminated from the phrase." *Id.* at 32. Hence, historical data cannot answer whether the deletion was intended to make double jeopardy applicable to civil actions, as well as criminal proceedings.

15. *Id.* See *infra* notes 148-66 and accompanying text for a discussion of the difference between "punishment" and "criminal punishment," and the effect this difference might have on constitutional law. This latter section of the Article will discuss the Supreme Court's refusal, prior to its decision in *Halper*, to apply certain constitutional guarantees to civil proceedings. The refusal created the inference that only "criminal punishment"—punishment from a criminal proceeding—triggered such constitutional provisions as double jeopardy protection and the sixth amendment trial guarantees as well as the cruel and unusual punishment clause of the eighth amendment. *Halper*, of course, changed this analysis: first, by applying double jeopardy to a civil proceeding; and second, by claiming that "punishment" can result from a civil penalty. However, this Article will argue that the Court was not successful in its attempt to limit the impact of *Halper* by seeming to distinguish between "punishment" and "criminal punishment."

16. See Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 392-93 (1976) for a discussion of this lack of consistency and the Court's flirting with the application of double jeopardy to civil proceedings. For example, in United

stated and undeveloped.[17]

Finally, in the 1930s, the Court articulated an approach that was followed consistently until the *Halper* decision. In *Helvering v. Mitchell*,[18] the Court considered the question of when double jeopardy should bar a civil action brought by the government subsequent to a criminal proceeding based on the same facts. The Court concluded that this was a problem of statutory construction. If the statute under which the penalty was sought was civil, then double jeopardy protection did not apply.[19] This

States v. Chouteau, 102 U.S. 603 (1881), the Supreme Court held that the United States was bound by its agreement with the defendant to look upon his payment after indictment "in full satisfaction, compromise, and settlement of said indictments and prosecutions." *Id.* at 610. Consequently, the Court held that the government could not maintain a penalty action against the defendant subsequent to signing this agreement because, even though a civil action, it was a punishment and thus barred by double jeopardy. *Id.* at 611. The Court did not hold that the statute was penal, but only that the penalty was a punishment and that the double jeopardy clause provided for "entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense." *Id.* at 611-12.

Similarly, in Coffey v. United States, 116 U.S. 436 (1886), the Court found that the double jeopardy clause precluded the government from proceeding in a forfeiture case because of a prior acquittal. The Court did not attempt to construe the statute as remedial or punitive. Indeed, if the Court had, it most likely would have reached the same decision because the forfeiture was brought under a criminal information, and the wording of the statute appeared to evince congressional intent to make the proceeding criminal in nature. *Id.* at 436-39.

Moreover, in United States v. LaFranca, 282 U.S. 568 (1931), the Court suggested, although did not hold, that a civil penalty may be characterized as punishment for double jeopardy purposes. Other than *LaFranca*, the Supreme Court did not cite these cases in deciding *Halper*, and its citation of *LaFranca* merely mentioned that the earlier case did not decide the issue of whether the double jeopardy clause applies to civil penalty proceedings. United States v. Halper, 109 S. Ct. at 1899.

The lack of any discussion of these cases by the *Halper* Court is mildly interesting because these cases would have supported its approach—a review of the purpose of the penalty as applied rather than a review of the civil or criminal purpose of the statute as a whole.

The Court in United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 555-56 (1943) (Frankfurter, J., concurring), criticized prior decisions that flirted with the application of double jeopardy protection to civil penalties. Moreover, scholars maintain that subsequent Supreme Court decisions rejected or reversed the trend observed in these earlier holdings toward applying double jeopardy to civil penalty cases. *See* Clark, *supra*, at 393 n.45; Levin, *OSHA and the Sixth Amendment: When Is a "Civil" Penalty Criminal in Effect?*, 5 HASTINGS CONST. L.Q. 1013, 1034 (1978). Considering the absence of any discussion of these early cases in the *Halper* decision, this scholarly position appears correct.

17. This conclusion is apparent from reading the cases cited *supra* note 16. In these cases, the Court made no attempt to examine the underlying purpose of the statute or to formulate a rule that would help other courts distinguish civil remedies from criminal sanctions. The approach in these cases was simply ad hoc, and "rested on the inherently penal nature of the [penalty] being questioned, without articulating satisfactory criteria for determining such inherent nature." Levin, *supra* note 16, at 1033 (discussing the *LaFranca* case in particular).

18. 303 U.S. 391 (1938).

19. *Id.* at 404.

statutory construction approach became the standard used to resolve the issue of applying double jeopardy protection to civil penalty cases, and thus an analysis of *Mitchell* and its progeny are essential in evaluating the impact of *Halper*.

The defendant in *Mitchell* had been indicted and acquitted of tax evasion. Subsequently, he was assessed a tax deficiency for the same amount that the indictment claimed he had evaded, as well as a fifty percent penalty for fraud.[20] Mitchell claimed that the double jeopardy clause barred the government's attempt to recover a fifty percent penalty for the same acts that resulted in his acquittal.[21] The Supreme Court disagreed, and upheld the government's right to recover the penalty. The Court framed the issue as simply whether the penalty statute imposed a criminal or civil sanction and concluded that the issue would be resolved solely by

20. *Id.* at 395-96.

21. Even at present, the Internal Revenue Service has a standard procedure that requires an Internal Revenue agent, conducting a civil audit examination, to refer a case to the IRS Criminal Investigation Division whenever the civil examination uncovers firm indications of fraud. INTERNAL REVENUE MANUAL 9311.83 (Apr. 8, 1985) [hereinafter I.R.M.]; I.R.M. 9322.1(1) (Dec. 11, 1981); I.R.M. 9322.5 (Oct. 16, 1980). According to Internal Revenue Service policy statements, this requirement ensures that the criminal prosecution is not jeopardized "by giving the taxpayer a basis for claiming that the criminal case was substantially built by the Revenue Agent under the guise of making an audit for civil tax purposes." United States v. Toussaint, 456 F. Supp. 1069, 1073 (S.D. Tex. 1978) (quoting *Audit Technique Handbook for Internal Revenue Agents*).

The jeopardy in criminal tax cases is the possible suppression of evidence under the fourth amendment if a court finds that the evidence was gathered by a revenue agent under the guise of conducting a civil examination. *See* United States v. Toussaint, 456 F. Supp. at 1069; United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); United States v. Lockyer, 448 F.2d 417 (10th Cir. 1971). *But cf.* Groder v. United States, 816 F.2d 139 (4th Cir. 1987) (I.R.M. provisions requiring a referral upon a firm indication of fraud confer no substantive rights upon defendants. *Groder*, however, did not discuss the issues raised in *Tweel* or *Toussaint*.). Consequently, it is standard procedure for the Internal Revenue Service to conduct its criminal investigation first, and if the case merits, proceed to a criminal adjudication before seeking the civil tax or the civil tax fraud penalty. Considering the holdings in *Tweel* and *Toussaint*, a continuation of the civil tax examination is simply too risky to the criminal case. Moreover, even without this risk to the criminal case, it is likely that a court would stay any government action to obtain civil taxes or the civil fraud penalty during the pendency of the criminal investigation or criminal tax trial. See *infra* notes 220-28 and accompanying text for a discussion of the stay of civil proceedings during the term of a criminal investigation and criminal trial.

Current federal tax practice resolves these problems: The IRS halts the civil tax examination during the criminal investigation and case, but then resumes the civil suit and assesses tax and penalties when the criminal case is over.

Therefore, the unfairness is apparent if the Court were to adopt the defendant's position in *Mitchell* and preclude the federal government from seeking the civil fraud penalty after the completion of the criminal tax case. Prohibiting the government, for various reasons, from continuing the civil examination is unfair if, at the same time, the government may not seek the civil penalty after completion of the criminal case because of double jeopardy considerations.

way of statutory construction.[22]

In performing this act of statutory construction, the Court classified the civil tax fraud penalty with other remedial statutes, such as those that revoke a privilege or cause the forfeiture of goods.[23] The Court emphasized that this fraud penalty, as with other tax penalties, "[is] provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."[24] Thus, the Court noted that the tax fraud penalty had a purpose other than monetary compensation; it was also intended to safeguard the revenue, generally. Yet, despite the realization that a statute's goals may be more far-reaching than simple monetary compensation to a government for the harm done by a particular individual, the Court did not conclude that these other, more expansive, deterrent-like purposes caused a civil statute to lose its civil nature.[25]

Mitchell gave rise to three essential elements that formed the standard

22. Helvering v. Mitchell, 303 U.S. at 399.

23. *Id.* at 399-400. Comparing the tax fraud penalty with revocation of privileges and forfeitures is significant because in revocation and forfeiture proceedings, the person must give up something rather than merely pay damages for harm. From this comparison, the inference follows that the *Mitchell* Court did not view remedial compensation to the government as calculated only on a dollar for dollar standard. For a fuller discussion of the concept of compensation in *Mitchell* and other cases, see *infra* notes 24-25, 29-30, and 37-40 and accompanying text.

24. *Id.* at 401. The *Mitchell* Court was not specific on how this tax penalty safeguards the revenue. The language and the context of the statement suggest that the penalty's deterrent effect provides this protection. The Court's comparison of the penalty to forfeiture and revocation proceedings further reinforces the suggestion that deterrence is the key to revenue protection. *See supra* note 23. For a further discussion of whether deterrence is a proper remedial goal for a civil statute, see *infra* notes 175-83 and accompanying text.

25. The Court's analysis in *Mitchell* was less than forthright in dismissing prior precedent on the application of the double jeopardy clause to civil penalty proceedings. As stated *supra* note 16 and accompanying text, a handful of Supreme Court cases prior to *Mitchell* indicated a willingness to apply double jeopardy protection to certain civil penalty cases. Yet, the *Mitchell* Court dismissed the significance of these prior decisions. The *Mitchell* holding suggested that because these prior cases construed the relevant statutes as providing for criminal sanctions, they were inapposite given the *Mitchell* Court's conclusion that the tax fraud statute was civil in nature. This suggestion implied that the earlier decisions actually approached the problem as one of statutory construction. Helvering v. Mitchell, 303 U.S. at 402.

In fact, a reading of these earlier cases shows that the Court did not take the statutory construction approach. Rather, in these early cases the Court was concerned with whether the inherent nature of the penalty was sufficiently punitive to require double jeopardy protection. *See* United States v. LaFranca, 282 U.S. 568, 572 (1931) (use of the term "tax" did not convert the essential "punishing" nature of the penalty thus implicating double jeopardy considerations); Coffey v. United States, 116 U.S. 436, 443 (1886) (the consequence of the civil penalty was punishment, precluded by

approach followed by post-*Mitchell* cases for analyzing the application of double jeopardy to civil penalty proceedings. The three elements are: 1) to resolve the issue simply by construing the relevant statute; 2) to refuse to apply the double jeopardy clause to any civil penalty if the underlying statute is construed as remedial—namely civil; and 3) to suggest that a civil statute does not lose its civil nature by having as a purpose more than simple compensation to a government for its monetary loss.

The Supreme Court cases following *Mitchell*, and before *Halper*, reinforced *Mitchell*'s essential analysis. In *United States ex rel. Marcus v. Hess*,[26] the defendants were convicted of defrauding the government by rig bidding on certain projects. Following this conviction, a *qui tam* [27] action was brought based on the same transactions. The defendants claimed that the double jeopardy clause barred the civil action. Following *Mitchell*'s statutory construction approach, the Court concluded that the statute at issue was remedial, and hence civil in nature. Thus, the double jeopardy clause did not bar the civil action following the conviction, even though it was based on the same transactions as in the criminal

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the double jeopardy clause because of the prior acquittal); United States v. Chouteau, 102 U.S. 603, 611 (1881) ("The term 'penalty' involves the idea of punishment.").

Thus, *Mitchell*, just as *Halper*, ignored the implications from past decisions and failed to fully explain or distinguish its departure from these earlier cases. However, unlike *Halper*, the Court in *Mitchell* was not faced with an established approach to the problem. The decisions preceding *Mitchell* were not uniform in applying any standard by which to judge whether a penalty was civil or criminal or "punishing" in nature. See Clark, *supra* note 16, at 392-97, for a discussion of the Supreme Court's inconsistent approaches to determining the nature of a penalty.

The *Mitchell* approach also has been criticized as tautological. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 553-54 (1943) (Frankfurter, J., concurring); Clark, *supra* note 16, at 395-96 n.49. In making this criticism, Clark argues that every reason advanced by the Court as to why the double jeopardy clause does not apply to a civil penalty reduces eventually to "the familiar contention that the . . . penalty is not penal but remedial" because the penalty statute is not criminal in nature. *Id.* So, for example, reasoning that the double jeopardy clause does not prohibit a subsequent civil action because there is a different burden of proof in the civil case, "depends . . . on the prior assumption that the . . . proceeding is not criminal in nature, so that proof beyond a reasonable double is unnecessary." *Id.* at 395.

Arguably, therefore, both the reasoning in *Mitchell* and its statutory construction approach are logically suspect and do not provide answers to what is crime and what is punishment for constitutional purposes. *Mitchell*, however, did create an approach that had certain advantages as discussed *infra* note 151 and accompanying text.

26. 317 U.S. 537 (1943).

27. In a *qui tam* action, any person may bring a suit on behalf of the government. In *Hess*, 31 U.S.C. § 3730(b) provided for such an action brought by a party on behalf of the government, and if the suit was successful, then the statute permitted the private party to receive a reasonable portion of the penalty and damages, not to exceed 25% of this amount.

case.[28]

There are a number of interesting points in *Hess* apart from its reliance on the *Mitchell* statutory construction method of resolution. First, the *Hess* Court dismissed the argument that a statute loses its remedial nature when it provides for more than compensation to the government for its monetary loss. For example, to the *Hess* Court, a statute does not lose its civil character even if it provides for punitive damages.[29] The *Hess* Court also referred to other statutes, such as the treble damages provision of the antitrust laws, as examples of civil penalty statutes providing for more than compensation but whose purpose, nevertheless, is to make the government completely whole.[30] This suggested quite strongly that monetary compensation alone does not make the government "whole." It seems obvious from these examples that compensation to the *Hess* Court meant something more than recoupment of monetary loss, and that making the government whole referred to something other than dollar for dollar compensation.

Second, the *Hess* Court discussed the concept of punishment and concluded that even if the actual effect of a statute is to punish the wrongdoer, such punishment does not convert the civil penalty into a criminal statute.[31] Following the *Mitchell* bright line test, which gives double jeopardy protection only if the underlying statute is criminal in nature, the Court rejected the idea that if a civil statute "punishes," it then triggers double jeopardy protection.

In *Rex Trailer Company v. United States*,[32] the Court again relied on the statutory construction approach to determine the applicability of the double jeopardy clause to a civil penalty action. The federal government had convicted the defendant under the Surplus Property Act for defrauding the United States in the purchase of five motor vehicles. The Act gave preference to World War II veterans, permitting them to purchase government surplus property at especially good terms. The de-

28. United States *ex rel.* Marcus v. Hess, 317 U.S. at 549.

29. *Id.* at 550-51.

30. *Id.* at 551. The continued viability of this argument is suspect given the Supreme Court's dicta on the issue of punitive damages last Term in Browning-Ferris Industries v. Kelco Disposal, 109 S. Ct. 2909 (1989). In that decision, the Court rejected the claim that the excessive fines clause of the eighth amendment limited punitive damages sought by a private party. However, the Court strongly suggested that its decision might have been different if a government was the party seeking punitive damages. *Id.* at 2920 n.21.

31. *Hess*, 317 U.S. at 551-52.

32. 350 U.S. 148 (1956).

fendant fraudulently used the names of five veterans in order to purchase government surplus property on the beneficial terms.[33] After conviction, the government brought a civil penalty action against the defendant based on the same transactions and sought $2000 in penalties for each violation.

As in earlier cases, the defendant asserted that the double jeopardy clause precluded the government's civil penalty action. And again the Supreme Court rejected the argument by concluding that because the penalty provision of the Surplus Property Act was civil, the double jeopardy clause did not apply to its enforcement.[34] Drawing on *Mitchell* and *Hess*, the Court judged that the only question before it was whether the statute was civil or penal.[35]

The *Rex Trailer* decision contains several other points central to a critique of *Halper*. First, following the idea in *Hess* that a finding of punishment is not the critical factor in these cases, the Court suggested strongly that any punishment triggering double jeopardy protection had to be criminal punishment and result only from a penal statute. In a key paragraph of the holding, the Court stated:

> The only question for our decision, then, is whether section 26(b)(1) is civil or penal, for "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."[36]

Thus, the Court made clear that a civil penalty is not punishment for double jeopardy purposes. To the *Rex Trailer* Court, multiple punishment for double jeopardy purposes is multiple criminal punishment. This feature of *Rex Trailer* is important because, as we shall see in the discussion of *Halper*, the Court rejected the idea that multiple punishment for double jeopardy purposes was multiple criminal punishment. Rather, the *Halper* Court concluded that the double jeopardy clause also prohibited civil punishment following criminal punishment.

The second interesting issue in *Rex Trailer* was whether civil penalty statutes lose their civil, remedial nature if they do more than compensate the government for its monetary loss. The defendant in *Rex Trailer* argued that the government could not recover because it had failed to

33. *Id.* at 149-50.
34. *Id.* at 151.
35. *Id.* at 150-51.
36. *Id.* (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

prove specific damages; instead, it had asked only for $2000 per fraudulent act and had not added double damages. The *Rex Trailer* Court followed the *Hess* decision in rejecting monetary compensation as the only proper remedial goal for a civil statute. [37]

In rejecting this argument, the Court first compared the government's recovery to a liquidated damages provision for anticipated loss,[38] noting that such a provision is useful when damages are uncertain or unmeasurable.[39] Significantly, however, the Court did not stop with this comparison, which would have been sufficient for its purposes. Rather, the Court suggested a number of ways in which the defendant's acts had injured the government other than by causing direct monetary loss. The Court stated:

> It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances.[40]

As the discussion of the *Halper* decision will show, the *Halper* opinion seems to reject the concept that damage to the government may involve injury to matters impossible to price, such as war profit speculation or reduction of benefits to veterans.

The law on the application of double jeopardy protection to civil penalty proceedings established in *Mitchell* developed along the same path in a pair of forfeiture cases, *One Lot Emerald Cut Stones and One Ring v.*

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37. *Id.* at 152-53.

38. The Court's drift toward its decision in *Halper* may well have begun with its attempt to equate these civil penalties in *Hess* and *Rex Trailer* with liquidated damages provisions. This is true for several reasons. First, governments do not intend these penalty provisions only as liquidated damages to cover unanticipated or nonmeasurable losses but also intend for the provisions to deter. Therefore, equating penalties with liquidated damages is inaccurate and a weak argument. Given the weakness of this equation, the liquidated damages analogy was virtually useless in answering defendant Halper's equitable arguments.

Second, adoption of the liquidated damages comparison allowed the Court to sidestep the question of whether deterrence had a proper place in a civil penalty statute. See *infra* notes 175-83 and accompanying text for a discussion of the proper role of deterrence in a civil penalty scheme. Sidestepping this issue possibly created the impression that deterrence is not a proper remedial goal. Moreover, due to the lack of discussion on this issue, the *Halper* Court, when faced with it directly, had little definitive precedent on the question.

39. *Rex Trailer Co.*, 350 U.S. at 153.

40. *Id.* at 153-54.

United States[41] and *United States v. One Assortment of 89 Firearms.*[42] In both cases, the defendants had been acquitted of federal criminal charges related to the forfeited goods. In *One Lot Emerald Cut Stones*, the defendant was indicted and acquitted on smuggling charges, and in *One Assortment of 89 Firearms*, the defendant was indicted and acquitted of knowingly engaging in the business of dealing in firearms without a license. Following acquittal in each case, the government instituted forfeiture proceedings to claim the goods involved—the emeralds and the guns respectively—and in each case the criminal defendant sought to bar the forfeiture on double jeopardy grounds.

In *One Lot Emerald Cut Stones*, the Court followed the dictates of *Mitchell* and approached the problem as one of statutory construction.[43] It concluded that the forfeiture statute was civil and remedial; hence, the double jeopardy clause did not bar government action. Significantly, the Court again noted that remedial statutes may provide for liquidated damages.[44] It also noted that forfeiture proceedings have been upheld as civil despite "their comparative severity."[45]

In *One Assortment of 89 Firearms* the Court again analyzed the underlying statute, concluded that it was civil in nature and, therefore, held that double jeopardy considerations did not bar government action on it.[46] Once again the Court pointed to remedial goals that had nothing to do with monetary compensation, including the "prophylactic purposes of . . . discouraging unregulated commerce in firearms . . . ."[47] It is, perhaps, clearest in the forfeiture cases that civil statutes may have a noncompensatory purpose that is remedial rather than penal.[48]

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41. 409 U.S. 232 (1972).

42. 465 U.S. 354 (1984).

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

44. *Id.*

45. *Id.* For a discussion of the problems created by the Court's equating civil penalty statutes with liquidated damage provisions, see *supra* note 38 and accompanying text. These problems are underscored by the *One Lot Emerald* decision in which the Court emphasized only that the penalty compensated the government for the expense of investigation and enforcement but ignored the deterrent value of the forfeiture provision. Consequently, the emphasis in dicta on the reimbursement purpose of liquidated damages in *One Lot Emerald* actually lends support to the Court's conclusion in *Halper*. For a discussion of the importance to the *Halper* Court that a civil penalty statute only have a compensatory purpose, see *infra* notes 83-87 and accompanying text.

46. *One Assortment of Firearms*, 465 U.S. at 366.

47. *Id.* at 364.

48. *Id.* Is there a difference between a noncompensatory purpose and a deterrent purpose? The answer is no. Reimbursement to a government for its costs associated with pursuing a penalty is compensation for loss. Arguably, even reimbursement by a defendant of a portion of a government's

These forfeiture cases also clarify that the severity of a civil penalty does not transform the penalty into a criminal one—a consistent theme in the cases and the literature, until *Halper*.[49] The reason for this conclusion on severity is both historical and functional.[50] "Historically, . . . English and colonial practice assessed severe money penalties, as well as forfeitures labeled 'civil,' without the use of criminal procedure" or the protections such as double jeopardy traditionally associated with criminal procedure.[51] Functionally, because most statutory penalties are broad in terms, judging the severity of the penalty would necessarily have to proceed on a case-by-case basis, thus introducing an unacceptable degree of uncertainty in the government's pursuit of civil penalties.[52]

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cost of operating a national enforcement program is pure compensation, even though that cost is not entirely related to a particular defendant. However, a purpose to stop the sale of firearms, to protect the revenue generally, or to stop speculation in government goods has deterrence, not compensation, as the goal. In fact, most civil penalty statutes have deterrence as at least one goal.

Deterrence as a goal is most clearly seen in forfeiture cases involving harmless contraband. What purpose does a government have in confiscating the gems in *One Lot Emerald*, for example, rather than just assessing a penalty for recoupment of the lost tariff together with the enforcement costs? Arguably, gems will not harm the populace, as will narcotics or firearms. The purpose of confiscating the gems is to deter others who would violate the law if payment of the customs duty and costs of enforcement were the only price of violation. For a discussion of the punitive nature of forfeiture provisions, see generally, Clark, *supra* note 16, at 475-81.

In fact, the Court itself, has recognized the deterrent purpose of forfeiture statutes. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974). After *Halper*, it is questionable whether forfeiture statutes can retain the deterrent function and not be converted into punishment for constitutional purposes. For a discussion of *Halper*'s impact on the appropriate role of deterrence in a civil statute, see *infra* notes 175-83 and accompanying text.

49. *See* Helvering v. Mitchell, 303 U.S. at 400; Clark, *supra* note 16, at 404-05.

50. Clark, *supra* note 16, at 404-06.

51. *Id.* at 404-05.

52. Writers have argued that the important question is not the uncertainty facing the government, but rather the right of an individual to face "punishment" only by way of a criminal proceeding. *See, e.g.*, Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974). Other writers have noted that to equate "severe" with "criminal" might result in the application of criminal procedure to every penalty or forfeiture case. Clark, *supra* note 16, at 405. Because the expense of such a universal application is prohibitive, it is more likely that equating "severe" with "criminal" would result in a case-by-case approach to whether the severity of the statute as applied creates a criminal penalty. This adds much uncertainty to the process for all parties and much burden on the court system.

"Severity" is a possible criteria in evaluating the criminal nature of a statute as a whole. In fact, the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) announced several factors as important for determining whether a statute was civil or criminal in nature. Among these criteria was whether the penalty "appears excessive." *Id.* However, saying severity may convert the nature of a nominal civil statute to criminal is very different than saying that the application of a civil statute to a particular individual may convert it to a criminal penalty. In the latter situation, the standards are problematic since they will depend on the circumstances of each individual.

In summary, *Mitchell* and its progeny provide a number of lessons. First, when the government sought a civil penalty following a criminal case based on the same facts, the Court viewed the application of double jeopardy protection only as an issue of statutory construction. If the statute was civil in nature, double jeopardy was not a bar to the subsequent penalty proceeding. Second, the Court considered double jeopardy to apply only when the punishment at issue resulted from a criminal proceeding or under a criminal statute. Third, the Court did not intimate or suggest that a civil penalty statute could result in punishment without first holding that the statute itself, either in purpose or effect, was criminal. Fourth, the Court did not equate remedial with monetary compensation; a statute could be remedial without reference to monetary compensation. Fifth, the Court rejected a severity test for the application of double jeopardy principles.

This Article will now turn to an analysis of *Halper* and the Court's break from these principles and precedent.

II. *UNITED STATES V. HALPER*

A. The Break from Past Precedent

The facts reported in the three *Halper* opinions[53] portray a case of small-time fraud that causes one to puzzle over why the government chose to pursue the matter criminally—a puzzle solved only by examining more of Halper's behavior than discussed in the reported cases. Irwin Halper was the manager of New York City Medical Laboratories, a facility that provided medical services to patients eligible for Medicare benefits. In this capacity, Halper submitted various claims for Medicare benefits, some of which were fraudulent. A jury convicted him of sixty-five counts of filing false claims.[54] For each of the sixty-five claims, the falsification amounted to $9.00, for a total of $585 in overcharges to the federal government. Upon conviction on all counts, Halper was sentenced to imprisonment for two years and fined $5,000.[55]

Moreover, the latter approach encroaches on the will of the legislature in devising criminal and civil punishments and penalties. For a discussion of this possible abridgement of the will of the legislature, see *infra* notes 85-88 and accompanying text.

53. These opinions include, in addition to the Supreme Court case, two district court decisions: United States v. Halper, 660 F. Supp. 531 (S.D.N.Y. 1987) and United States v. Halper, 664 F. Supp. 852 (S.D.N.Y. 1987).

54. United States v. Halper, 109 S. Ct. at 1895-96.

55. *Id.* at 1896.

Halper's recidivist behavior was the reason why the government pursued his acts of fraud criminally and also probably why he received a relatively harsh sentence. In an earlier, unrelated case, Halper had been convicted of Medicare fraud and tax evasion. This earlier conviction, however, was set aside due to prejudicial joinder.[56]

Following the criminal action, the government filed a civil suit against Halper under the False Claims Act,[57] the same statute involved in the *Hess* case.[58] The statute provides "for a civil penalty of $2000, [and] 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."[59] Because Halper violated the Act each time he submitted a false claim, he was subject to the statute's $2000 penalty for each of the sixty-five fraudulent claims. Thus penalties totaled more than $130,000; that is, more than 220 times the amount of the fraud.

Understandably, the district court had a difficult time accepting the disparity between the amount of fraud and the amount of penalty. In its initial consideration of the case, the lower court held that it had discretion in awarding the $2000 penalty per violation, and therefore, entered summary judgment for the government in the amount of $16,000.[60] The United States asked for reconsideration of this decision, and upon reconsideration, the district court agreed that it did not have discretion to limit the statute's mandatory penalty of $2000 per violation. However, the district court, relying extensively on Justice Frankfurter's concurring opinion in *Hess*,[61] concluded, that as applied to Halper individually, the penalty was punishment and, thus, was barred by the double jeopardy clause because Halper had been previously convicted for the same

56. This information came from a discussion with the Assistant United States Attorney who handled the criminal case, as well as from the reported decision of the prior conviction. *See* United States v. Halper, 590 F.2d 422 (2d Cir. 1978).

57. 31 U.S.C. §§ 3729-3731 (1982).

58. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 382 (1943). See *supra* notes 26-31 and accompanying text for a discussion of the *Hess* case.

59. United States v. Halper, 109 S. Ct. at 1896.

60. United States v. Halper, 660 F. Supp. at 534. Because of the prior conviction, the government was entitled to summary judgment in the civil penalty case. The prior conviction was conclusive proof of all the facts necessary to prove a violation of the False Claims Act, and therefore, Halper was collaterally estopped from arguing any of these issues. *Id.* at 533. The application of the collateral estoppel doctrine to *Halper*-type cases is important to the government because it allows the government to use a criminal conviction to pursue civil penalties without having to conduct another trial. This saves the government time and money in cases involving tax fraud, securities fraud, and cases under the False Claims Act.

61. United States *ex rel.* Marcus v. Hess, 317 U.S. at 553-56.

behavior.[62]

Receiving the case in this posture, the Supreme Court had a variety of options. First, it could have followed fifty years of post-*Mitchell* precedent by analyzing whether the False Claims Act was penal or remedial and decided accordingly. But in the *Hess* decision, the Court had earlier held that this very statute was civil in nature. Thus, the *Mitchell* statutory construction method of analysis would have allowed the *Halper* Court to find for Mr. Halper only by overruling *Hess* and, more importantly, only by holding the penalty provisions of the False Claims Act to be penal. This the Court was not prepared to do. The civil penalty aspect of the False Claims Act is an important weapon in the federal government's arsenal of civil remedies used to combat fraud against the government and to prevent sabotage of the government's extensive benefit programs. Holding this penalty penal would force the government to seek the penalty only by way of criminal proceedings. Obviously, this would increase significantly the government's time and expense in obtaining penalties under the Act and might inhibit the government's pursuit of such penalties.

The second possible alternative for the Court was to overrule the district court and conclude that the government's action in the civil suit did not violate double jeopardy because the False Claims Act was remedial, and hence civil. This option would have followed the dictates of *Mitchell* and its progeny, but was apparently viewed as an unattractive alternative given the disparity between the amount of fraud, $565, and the amount of penalty, $130,000.

The third alternative[63] was to follow the district court's lead and declare that while the statute itself was not penal, the application of the statute to this case constituted punishment. And, because Halper had been convicted previously, such punishment constituted multiple punishment barred by the double jeopardy clause. To take this approach, however, required the Court to ignore prior authority in a number of important ways.

The Court made obvious its decision to ignore prior authority early in the opinion by casting the issue in a novel manner. Rather than framing the issue as one of statutory construction, the Court focused on whether

62. United States v. Halper, 664 F. Supp. at 855.

63. For a discussion of other possible solutions, including the possible application of the due process clause of the fourteenth amendment or the excessive fines clause of the eighth amendment, in the event either provision is argued in a future case, see *infra* notes 230-39 and accompanying text.

the third prong of double jeopardy protection—the bar against multiple punishment—provided for protection against civil sanctions as well as criminal punishment.

In addressing this issue, the *Halper* Court initially attempted to find historical support for its ultimate conclusion that protection from multiple punishments in the double jeopardy clause includes protection from civil sanctions. However, these historical antecedents are unpersuasive. First, the Court considered it important that the Colony of Massachusetts' 1641 "Body of Liberties" did not distinguish between offenses, trespasses, and crimes in applying double jeopardy protection. From this the Court implied that when the fifth amendment was adopted, the drafters of the Bill of Rights also intended to include all government action, civil as well as criminal, within the ambit of double jeopardy protection—a conclusion based on no historical data.[64]

Second, the *Halper* Court emphasized Madison's initial draft of the double jeopardy clause and asserted that Madison "focused explicitly on

64. United States v. Halper, 109 S. Ct. at 1897. For a thorough discussion of the effect of Massachusetts' "Body of Liberties" on double jeopardy law, see J. SIGLER, *supra* note 6, at 21-23. Sigler notes that the "Body of Liberties" "bears a close resemblance to the bills of rights later to become a stock feature of American constitutions . . . ." *Id.* at 22. Further, this Massachusetts document "went beyond the usual assurances which governments extended to the citizenry." *Id.* This extension included double jeopardy protection to offense and trespass, which may suggest that the protection extended to civil actions. Sigler opines that perhaps the importance of double jeopardy in Massachusetts law explains "why the doctrine was elevated to constitutional dignity, instead of being treated as just another common law concept." *Id.* at 22-23.

While the influence of the "Body of Liberties" cannot be denied, the Court in *Halper* ignored other historical data showing that double jeopardy protection was limited to criminal matters in both colonial and post-Revolutionary America. For example, the Massachusetts Code of 1648 limited double jeopardy protection to criminal causes. *Id.* at 23. Moreover, the first bill of rights to expressly adopt a double jeopardy clause was the New Hampshire Constitution of 1784, and even then the protection was limited to criminal actions being brought after a formal acquittal. *Id.* Thus, in contrast to the Court's suggestion in *Halper*, the colonial and post-Revolutionary data actually prove that double jeopardy protection was limited to criminal matters at the time of the adoption of the Bill of Rights. For a discussion of the limited historical data on the Bill of Rights' adoption of double jeopardy protection, see *supra* notes 13-14 and accompanying text.

Further, Massachusetts' response to the double jeopardy clause eventually placed in the fifth amendment is instructive. According to Sigler, it is doubtful that Massachusetts ever ratified the double jeopardy portion of the fifth amendment. J. SIGLER, *supra* note 6, at 23. And at least until 1969, Massachusetts never provided for double jeopardy protection in its state constitution. *Id.* This historical data, therefore, indicates that Massachusetts itself did not rely on the "Body of Liberties" to extend double jeopardy protection to civil matters involving "multiple punishment." Consequently, the Court's reliance on the "Body of Liberties" is suspect because subsequent Massachusetts law, both post-Revolutionary and post-Bill of Rights, proves the proposition opposite to the Court's suggestion, if it proves anything at all.

the issue of multiple punishment."[65] Apparently, the Court based its conclusion solely on the distinction in Madison's draft between "one punishment" and "one trial."[66] While Madison's distinction may have indicated a desire to protect an individual from multiple punishment, it does not follow that Madison necessarily concluded that a civil sanction was the type for which double jeopardy protection was intended.[67]

At the same time that the *Halper* Court stretched the historical data to justify its opinion, it ignored more recent judicial statements on the kind of punishment referenced in the double jeopardy clause. For example, in its 1980 *United States v. Ward* opinion,[68] the Court discussed the constitutional significance of the distinction between a civil penalty and a criminal one. It noted that the language of the Constitution limits to criminal cases certain protections in the Bill of Rights, such as protection against self-incrimination and the criminal trial protections of the sixth amendment. The *Ward* Court then observed that while the double jeopardy clause is not on its terms limited to criminal proceedings, the *Mitchell* ruling had concluded that the "Double Jeopardy Clause protects only against two criminal punishments."[69] The Court in *Halper* thus ignored its own prior statement on the kind of punishment protected by double jeopardy—criminal punishment. Further, it ignored its own conclusion that *Mitchell* stands for this limitation on double jeopardy protection.

While the *Halper* Court was selective in its discussion of history and precedent, it could not ignore the three major cases on which the government relied in its brief—*Mitchell*, *Hess*, and *Rex Trailer*.[70] The Court's attempt, however, to distinguish these cases is unpersuasive. First, the Court dismissed the key case, *Mitchell*, by noting that the case did not involve multiple punishment because Mitchell had been acquitted. This was a critical step to the Court's eventual holding in *Halper*. By casually discarding the significance of *Mitchell* to its decision, the *Halper* Court was able to discard other important language in the *Mitchell* opinion, such as:

1. Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the

65. United States v. Halper, 109 S. Ct. at 1897.

66. *Id.*

67. For a discussion of the limited legislative history regarding the adoption of the double jeopardy clause, see *supra* notes 13-14 and accompanying text.

68. 448 U.S. 242, 248 (1980).

69. *Id.*

70. United States v. Halper, 109 S. Ct. at 1898.

defendant in *criminal prosecutions* is not applicable;[71] or

2. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible [sic] by civil proceedings since the original revenue law of 1789 . . . . 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;[72] or
3. That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal sanction . . . and . . . in the civil enforcement of a remedial sanction there can be no double jeopardy.[73]

These quotes make evident that the *Mitchell* Court did *not* consider Mitchell's acquittal as significant. The *Mitchell* Court, unlike the *Halper* Court, did not distinguish between the three prongs of the double jeopardy clause, and the *Mitchell* Court, unlike the *Halper* Court, did not suggest that the multiple punishment prong was different because it could apply to civil sanctions. Rather, it is clear from these quotes and the holding that the *Mitchell* decision was premised on the conclusion that only a criminal proceeding triggers double jeopardy protection, whether from multiple punishment or charges brought after an acquittal. The *Halper* Court ignored this basic premise of the *Mitchell* decision.[74]

The *Halper* Court was unable to dismiss the precedential value of *Hess* and *Rex Trailer* as blithely as it had *Mitchell*, because in each case the civil sanction followed a conviction, not an acquittal. To the *Halper* Court, however, these cases were distinguishable because the damages were not "exponentially greater than the amount of the fraud."[75] As a

71. Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938) (emphasis added).

72. *Id.* at 400.

73. *Id.* at 402, 404.

74. One phrase in the *Mitchell* opinion is unclear on the issue of applying double jeopardy protection to civil matters. The *Mitchell* Court, in the course of discussing the power of Congress to impose both criminal and civil sanctions for the same act, held that "the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." Helvering v. Mitchell, 303 U.S. at 399. Because the phrase "merely punishing twice" is not qualified with the adverb "criminally," the *Halper* Court suggested that *Mitchell* intended to intimate that "a civil sanction may constitute punishment under some circumstances." United States v. Halper, 109 S. Ct. at 1899.

If viewed alone, this sentence in *Mitchell* can be construed as Justice Blackmun suggests in *Halper*. However, when viewed in the context of the opinion as outlined above, see *supra* notes 71-73 and accompanying text, the *Halper* Court's suggested interpretation of this ambiguous language in *Mitchell* is unpersuasive. Moreover, Supreme Court cases until *Halper* did not consider this sentence as intimating the application of double jeopardy protection to certain civil actions.

75. *Id.* at 1900.

result of this comparison between the amount of fraud and the amount of penalty, the Supreme Court in *Halper* for the first time fashioned a "severity test" for application of the double jeopardy clause. Moreover, by distinguishing the teachings of *Hess* and *Rex Trailer* in this fashion, the Court ignored crucial points made in each of these cases which, if followed, would have resulted in a different holding in *Halper*.

For example, the Court quotes the *Hess* Court out of context, suggesting that the *Hess* holding focused exclusively on the fact that the chief purpose of the statute was to provide restitution to the government.[76] In fact, the *Hess* Court gave little weight to the statute's goal of restitution in finding the statute to be remedial. Rather, the *Hess* Court concluded that "[a] remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damages is recovered . . . . Congress could remain fully in the common law tradition and still provide punitive damages."[77] In fact, the *Hess* Court discussed at considerable length the concept of punitive and treble damages awarded to the government, concluding that even when Congress provides for these type of damage awards, it does not create a penal statute.[78]

In neither *Hess* nor *Mitchell*, did the Court in any way consider whether the severity of the remedy was within an acceptable range vis-a-vis the amount of fraud. Further, neither opinion interpreted a proper remedial purpose to require only that the government take no more than compensation for its loss plus any ancillary costs.[79] Thus, by distinguishing *Halper* from *Hess* based solely on the "comparative severity test," the *Halper* Court failed to reconcile the *Hess* Court's conclusion on treble and punitive damages with the *Halper* Court's conclusion that the government can take no more than compensation for its loss.

Similarly, the *Halper* Court ignored the teachings of *Rex Trailer*. As noted previously,[80] in *Rex Trailer* the Court discussed how the civil penalties at issue compensated the government for various kinds of injuries—injuries such as precluding sales of material to veterans or

76. *Id.* at 1899.

77. United States *ex rel.* Marcus v. Hess, 317 U.S. at 550.

78. *Id.* at 550-51.

79. For a discussion of the *Mitchell* opinion's view of proper remedial purpose, see *supra* notes 23-25 and accompanying text. For a discussion of the *Hess* opinion's view of proper remedial purpose, see *supra* notes 29-30 and accompanying text.

80. See *supra* notes 37-40 and accompanying text for a discussion of the *Rex Trailer* Court's view on proper remedial goals.

promoting undesirable speculation. Further, the *Rex Trailer* Court explained that damages resulting from these kinds of injuries may be impossible to calculate. More important, the Court recognized that the government's effort to obtain damages for nonmeasurable injuries does not convert the statute to a penal one or convert the sanction to punishment within the meaning of the double jeopardy clause.

It is not difficult to see the analogy between the kind of harm to the government in *Rex Trailer* and the injury to the government in *Halper*. Just as undesirable speculation in war materials harmed the government in that case, so does rampant Medicare fraud, even by small offenders. By pursuing a civil remedy for such fraud, the government seeks not only compensation for its direct financial loss, but it also attempts to stop the depletion of the program's assets by the unscrupulous no matter how small the amount. *Rex Trailer* stands for the proposition that the government may do this, and the penalty in such a civil action remains civil in nature. However, the *Halper* Court ignored the analogy between Medicare fraud and the fraud in *Rex Trailer*. Further, the Court's remand, which allowed the government to recover only "[its] demonstrate[d] . . . injuries,"[81] suggests that nonmeasurable damages will no longer be available to the government when it brings a False Claims Act case after a criminal conviction.

In summary, the Supreme Court in *Halper* broke from its past precedent and ignored: 1) the statutory construction test as the favored test for determining whether a statute is penal or remedial;[82] 2) the concept and holdings that the double jeopardy clause applies only to a punishment that results from a penal statute; and 3) cases strongly suggesting that a statute can compensate the government for nonmeasurable damage without losing its civil nature. However, more important to the future than its refusal to acknowledge the application of past precedent to the facts of *Halper* is the remedy fashioned by the *Halper* Court and its thesis in support of the result.

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81. United States v. Halper, 109 S. Ct. at 1904.

82. In United States v. Ward, 448 U.S. 242, 248 (1980), the Court clearly stated the two-step approach for determining whether a statute was penal or remedial. First, the Court analyzes "whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* Second, once it finds a congressional intention to create a civil penalty, the Court further inquires "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.*

B. Halper's *Thesis and Remedy*

The Court in *Halper* declares its result to be a rule of reason, applicable only to the rare case.[83] Yet an examination of this result reveals that the Court extended the concept of double jeopardy protection beyond recognition, and in so doing created a new doctrine that courts and litigants will find difficult to confine. First, under *Halper*, a 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."[84] Second, the trial judge has discretion to decide when the size of the civil penalty crosses the line between remedy and punishment.[85] Third, for the first time, double jeopardy is only a partial bar to the government's requested sanction—*Halper* precludes the government only from recovering the amount that constitutes punishment, and allows it to retain any amount on the remedy side of the line.[86]

Consequently, after *Halper* one can expect defendants to argue that the civil penalty sought after a criminal conviction[87] bears no rational relation to compensating the government for its loss. Thus they will likely argue that the penalty is punishment to the extent it goes beyond compensation, and that the sanction should be reduced accordingly. Moreover, a defendant can force a government accounting by a mere showing that the penalty "appears to qualify as 'punishment.' "[88] This standard will not likely be a substantial barrier to obtaining an accounting.

The Court replaced the will of the legislature with the discretion of individual trial courts in deciding the rational level of indemnity to the government for its loss. Moreover, the Court discarded the concept of remedy for nonmeasurable loss by focusing on compensation, plus ancillary costs, and providing for an accounting mechanism to ensure that any loss listed by the government can be calculated.

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83. United States v. Halper, 109 S. Ct. at 1902.

84. *Id.* at 1902.

85. *Id.*

86. There is no discussion of how this double jeopardy scale would apply to forfeiture or license revocation cases. For example, will a convicted defendant in the subsequent forfeiture proceeding only have to forfeit a portion of the firearms or gems?

87. While the Court says that its ruling is limited to cases in which a civil penalty action follows a "criminal" penalty, there is little assurance that even this limitation on the scope of the decision will apply in the future because the *Halper* Court has confused the issue of what constitutes "punishment" for double jeopardy purposes. See *infra* notes 168-73 and accompanying text for a discussion of the possibilities that flow from the *Halper* view of punishment.

88. United States v. Halper, 109 S. Ct. at 1902.

This remedy was reached not simply by ignoring past precedent, but by creating new law, and this new law is apparent in a number of contexts. First, the *Halper* Court clearly distinguished for the first time the "multiple punishment" prong of double jeopardy protection from the other prongs of the clause—subsequent criminal actions filed after conviction or acquittal—and concluded that only the "multiple punishment" prong applies to the government's use of certain civil sanctions.[89]

In making this distinction, the Court ignored a basic justification for double jeopardy protection—an accused's interest in finality.[90] Conceptually under traditional double jeopardy analysis, an accused individual who is acquitted has as much interest in not facing another punishment ordeal as one who is convicted, and if the civil sanction is punishment, an acquitted individual has as much interest in avoiding it as a convicted one. Yet, the Court ignored this finality interest by applying only the "multiple punishment" prong of double jeopardy to civil sanctions.

Second, the Court attempted to distinguish the goals of the double jeopardy clause from other constitutional guarantees, suggesting that because the "humane interests" of the clause are "intrinsically personal," a violation of the clause can be determined only by evaluating the actual impact of the government's sanction on the individual.[91] On the other

89. For a discussion of the legislative history relating to the adoption of the double jeopardy clause, see *supra* notes 11-14 and accompanying text. The "multiple punishment" prong of the double jeopardy clause had not yet been classified as distinct from the other prongs of the protection at the time the clause was adopted. In fact, segmenting double jeopardy protection into three areas, as discussed *supra* note 5 and accompanying text, was not recognized by the Court until 1969 in North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The Court's recognition of these different applications of the double jeopardy clause apparently came from a 1965 student comment, which developed this three-prong scheme. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 264 (1965). However, even in decisions following *Pearce*, the Court did not suggest that one prong—such as "multiple punishment"—afforded greater or broader protection than did the other prongs of the clause.

90. The Court itself has suggested that an individual's interest in finality may be the paramount interest protected by the double jeopardy clause. Jeffers v. United States, 432 U.S. 137, 150 (1977) (plurality opinion). Scholars also have argued that the finality interest is the heart of double jeopardy protection. *See* Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1033 (1980) (stating that finality is "essentially more indigenous to the double jeopardy clause than its two companion values:" (1) the integrity of jury verdicts of not guilty and (2) the administration of sentences imposed). Professor Westen, however, does argue that the finality interest is soft and can be overridden by a strong and justifiable societal interest to the contrary. *Id.* at 1010, 1063. *See also* Thomas, *supra* note 6, at 839-40 (noting that "finality is almost surely the most important value that law itself serves," and especially the criminal law).

91. United States v. Halper, 109 S. Ct. at 1901.

hand, according to the *Halper* Court, the evaluation of actual impact on the individual is not necessary when "identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter."[92] This approach seems to suggest that even if a civil sanction is punishment as applied, the application of other criminal proceeding guarantees under the sixth amendment is not triggered because for some reason those guarantees do not involve the "humane interests" protected by double jeopardy and are not as "intrinsically personal." The Court's only authority for such a rarified classification of double jeopardy protection is Justice Frankfurter's concurring opinion in *Hess*.[93] Indeed, there is no other historical or judicial precedent for such a conclusion.[94]

Placing double jeopardy protection in a unique category radically departs from established precedent. Until *Halper*, cases and the literature assumed that there was no difference in the triggering mechanism for protection under double jeopardy, the sixth amendment, or the cruel and unusual punishment clause of the eighth amendment. The triggering mechanism for each was thought to be a criminal proceeding or a civil statute construed by a court as criminal in nature.[95]

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92. *Id.*

93. *Id.* (citing United States *ex. rel.* Marcus v. Hess, 317 U.S. at 554 (Frankfurter, J., concurring)).

94. Certainly, Athens and the Roman Republic recognized a form of double jeopardy protection. *See* Thomas, *supra* note 6, at 836; J. SIGLER, *supra* note 6, at 2-3. This leads to the conclusion that double jeopardy protection is the "oldest of all the Bill of Rights guarantees." *See* Thomas, *supra* note 6, at 828. Also, double jeopardy is distinguished from other constitutional guarantees because it protects against the state using the criminal process, rather than only curtailing certain aspects of the criminal process, as do other constitutional guarantees. *Id.* at 837.

While all this is conceded, it is also true that the idea of double jeopardy protection was not as developed as were other constitutional protections when the Bill of Rights was adopted. *See* J. SIGLER, *supra* note 6, at 34-37. In fact, considering the post-Revolutionary laws and constitutions, which often ignored double jeopardy protection, the protection may well have remained as only part of the common law without gaining constitutional importance if not for Madison's draft of the Bill of Rights. *Id.* at 23, 29. In the past, the Court itself has classified double jeopardy protection with other constitutional guarantees and has recognized only the self-incrimination clause of the fifth amendment as unique in its applicability to civil proceedings. For example, when faced with a penalty under the Federal Water Pollution Control Act, the Court decided that one question was whether the penalty, "although clearly not 'criminal' enough to trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions," was sufficiently criminal to trigger the self-incrimination clause of the fifth amendment. United States v. Ward, 448 U.S. 242, 253-54 (1980).

Consequently, one is hard-pressed to find justification for the *Halper* Court placing double jeopardy protection in some stratum above other constitutional guarantees.

95. For a discussion of the sixth amendment trial guarantees, see *infra* notes 162-66 and accom-

Lastly, the *Halper* Court altered the definition of punishment for constitutional purposes. As stated by Justice Rehnquist in *Ward*, "The distinction between a civil penalty and a criminal penalty is of some constitutional import."[96] Rather than recognizing this important distinction, the Court in *Halper* simply contended:

> [t]he labels "criminal" and "civil" are not of paramount importance . . . . *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 punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads . . . . Simply put, a civil as well as a criminal sanction constitutes punishment 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.[97]

The Court's analysis obscures the bright line that previously existed between civil sanctions and criminal penalties. Criminal penalties resulted from criminal proceedings or from civil actions brought under a civil statute later construed to be penal in nature.[98] In a constitutional sense, with few exceptions,[99] punishment resulted from criminal proceedings so that certain constitutional guarantees applied only to criminal actions or civil cases brought under a statute held to be penal. *Halper* removed this bright line, replacing it with shadows of a complicated, philosophical inquiry into what constitutes punishment and whether it is within the power of the state to impose it.

Therefore, in reaching its conclusion, the *Halper* Court: (1) ignored a consistent line of cases holding the double jeopardy clause applicable only to criminal proceedings; (2) reduced the concept of government damage to a monetary formula and ignored precedent which acknowledged nonmeasurable harm to the government; (3) created a new distinction between the "multiple punishment" prong of the double jeopardy clause and the other prongs of the protection; (4) discarded the bright

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panying text. See *infra* notes 155-57 and accompanying text for a discussion of the eighth amendment.

96. United States v. Ward, 448 U.S. at 248.

97. United States v. Halper, 109 S. Ct. at 1901-02 (emphasis added).

98. For a discussion of this bright line test, see *supra* notes 18-52 and accompanying text.

99. *See* Clark, *supra* note 16, at 401-03. Clark discusses a small group of cases, classified as "infamous" punishments, which include imprisonment with hard labor, disqualification to hold public office, and loss of citizenship. If the punishment falls within this category, then according to Clark, the underlying state action is considered a criminal prosecution which triggers the application of the sixth amendment even without labelling the proceeding as criminal.

line test for distinguishing between a criminal penalty and a civil sanction; (5) ignored the individual's interest in finality as a justification for double jeopardy protection; (6) distinguished, for the first time, the double jeopardy clause from other constitutional criminal trial guarantees; (7) gave to trial courts the authority to reject the legislative decision that a penalty was necessary to compensate the government for its loss; (8) created an accounting procedure for deciding when the line is crossed between remedy and punishment; and (9) permitted selective use of the double jeopardy clause to void only the part of the government's damages that crosses the line between remedy and punishment.

III. THE IMPACT OF *HALPER* ON GOVERNMENT PROSECUTIONS AND CIVIL PENALTY ACTIONS—THEORETICAL CONSIDERATIONS

Given the remarkable positions taken by the Court in *Halper*, the decision will clearly have a substantial impact on the government's pursuit of civil penalties. Some possible consequences are obvious. First, after a criminal conviction, the government can no longer combat a double jeopardy defense to a civil penalty action by arguing that double jeopardy applies only to criminal proceedings. Second, courts can review any government action brought under a clearly civil statute in order to determine if the penalty, as applied, results in punishment. Consequently, a government will no longer feel assured that a legislature's desire to create a civil penalty will prevail over a judge's determination that punishment—with constitutional implications—results from the sanction as applied. Third, a government may have to justify its sought-after penalty by accounting for its costs if the sanction "appears to be punishment."

The large number of statutory provisions providing for both civil and criminal sanctions for the same activity renders the changes made by *Halper* even more significant. To appreciate the full impact of *Halper*'s holding, one should examine three categories of changes: (1) the post-*Halper* application of double jeopardy to civil proceedings; (2) the post-*Halper* application of the concept of punishment in a constitutional sense to civil proceedings; and (3) the confusion caused by *Halper* concerning the proper role deterrence serves in a civil penalty scheme.

A. The Application of Double Jeopardy to Civil Proceedings

Numerous federal statutory provisions provide for both civil and crim-

inal penalties.[100] Moreover, some of these provisions affect government activity in matters vitally important to the nation—tax, securities regulation, bank regulation, environmental issues, and the False Claims Act. For example, standard Internal Revenue Service procedure is to stop all civil action against a taxpayer while a criminal investigation is active[101] and then to proceed civilly to collect the tax and penalties at the completion of the criminal matter. If the taxpayer is convicted of a tax crime, then the Service issues a notice of deficiency for the amount of tax due, plus the fifty percent or seventy-five percent penalty for fraud.[102] If the taxpayer contests this deficiency, and depending on the kind of tax crime involved in the conviction,[103] the Service simply asks for summary judg-

100. First, 33 U.S.C. § 1321(b)(6)(b) (1982) imposes civil penalties for discharging oil into navigable waters while 33 U.S.C. § 1321(b)(5) and (6)(A) (1982) make the same activity a crime. Second, 19 U.S.C. § 1497 (1982) imposes civil penalties for smuggling while 18 U.S.C. § 545 (1982) makes the same activity a crime. Third, 18 U.S.C. § 924(d) (1982) imposes a forfeiture on an individual holding a firearm in violation of the statute while 18 U.S.C. § 922(a)(1) (1982) makes the same activity a crime. Fourth, 30 U.S.C. § 820(a)-(c) (1982) imposes civil penalties for violating mandatory health and safety standards set forth in the Federal Coal Mine Health and Safety Act of 1969 while 30 U.S.C. § 820(d) (1982) makes the same activity a crime. *See* United States v. Finley Coal Co., 345 F. Supp. 62 (E.D. Ky. 1972), *aff'd*, 493 F.2d 285 (6th Cir.), *cert. denied*, 419 U.S. 1089 (1974) (sanctions under both the civil and criminal statutes for violation of mine safety did not implicate the double jeopardy clause). Fifth, the Securities and Exchange Commission may permanently bar an individual from association with any broker, and the government may prosecute the same individual for the same acts under 15 U.S.C. § 77(q) (1982). *See* United States v. Naftalin, 606 F.2d 809, 812 (8th Cir. 1979). Sixth, 40 U.S.C. § 489(d) (1982) imposes civil penalties on anyone who engages in a fraudulent trick or scheme to obtain United States property while 40 U.S.C. § 489(b) makes the same activity a crime. Seventh, 42 U.S.C. § 1320a-7a (1982) imposes civil penalties under the Social Security Act for improperly filed claims under Medicare and Medicaid while 42 U.S.C. § 1320a-7b (1982) makes the same activity a crime. Eighth, 29 U.S.C. § 666(a) (1982) imposes civil penalties for violation of the Occupational Safety and Health Act while 29 U.S.C. § 666(e) (1982) makes the same activity a crime. For a discussion of civil and criminal penalties imposed for the same behavior in violation of the Securities and Exchange Act of 1934, see *infra* text accompanying notes 138-40. For a discussion of civil and criminal penalties imposed for the same behavior in violation of the Internal Revenue Code, see *infra* notes 111-119 and accompanying text. This is neither an inclusive list of federal law nor one that includes state laws that impose both civil and criminal penalties for the same activity.

101. For a discussion of this Internal Revenue Service procedure and its rationale, see *supra* note 21.

102. 26 U.S.C. § 6653(b) (1986). The Tax Reform Act of 1986 amended this statute by raising the fraud penalty to 75% for returns due after December 31, 1986, and by limiting the assessment of the penalty solely against the portion of the underpayment of tax attributable to the fraud, rather than by computing the penalty on the entire tax due.

103. For example, courts have held that a conviction under 26 U.S.C. § 7201 (1988) (tax evasion) estops a convicted taxpayer from raising most issues at a subsequent civil tax fraud proceeding. Gray v. Commissioner, 708 F.2d 243, 246 (6th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); Moore v. United States, 360 F.2d 353, 356 (4th Cir. 1965), *cert. denied*, 385 U.S. 1001 (1967). However, a

ment and makes its proof relying solely on the criminal conviction. The IRS follows this procedure each year in thousands of civil penalty cases.

Similarly, under the False Claims Act, the government often pursues a defendant for civil damages after conviction,[104] and collateral estoppel acts again to preclude many defense arguments. Cases in which the False Claims Act was used following a criminal conviction include: medicare fraud,[105] bid rigging government contracts,[106] false loan applications to a federally insured bank,[107] false loan applications to the government generally,[108] false statements to procure Department of Housing and Urban Development insurance,[109] and false claims submitted for payment by defense subcontractors.[110]

Consequently, this change in the law of double jeopardy will affect cases that are substantial in both number and subject, and nothing in the *Halper* decision would limit its applicability to only civil actions brought under the False Claims Act. Therefore, after *Halper*, the government may expect to see an increase in the use of the double jeopardy defense. It is likely that various civil tax penalties could be the next statutory target for the civil application of double jeopardy protection, especially the civil tax fraud penalty,[111] the abusive tax shelter promoter penalty,[112] and the aider and abetter penalty.[113]

Until the Court's *Halper* decision, it seemed settled that the government could seek a civil tax fraud penalty against a convicted or acquitted taxpayer without fear that the double jeopardy clause would bar the pen-

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conviction under 26 U.S.C. § 7206(1) (1988) (filing a false return) does not collaterally estop the defendant from contesting the fraud in a civil tax fraud action. Wright v. Commissioner, 84 T.C. 636 (1985). Moreover, a conviction under 26 U.S.C. § 7203 (failure to file a return) does not collaterally estop a defendant from denying the fraudulent intent of the failure to file in the civil tax fraud penalty proceeding. Stoltzfus v. United States, 398 F.2d 1002, 1005 (3d Cir. 1968), *cert. denied*, 393 U.S. 1020 (1969). For a further discussion of the application of collateral estoppel to civil tax fraud penalty proceedings, see 2 D. MCGOWEN, D. O'DAY & K. NORTH, CRIMINAL AND CIVIL TAX FRAUD 974-81 (1986).

104. 31 U.S.C. § 3730 (1982).

105. Berdick v. United States, 612 F.2d 533 (Ct. Cl. 1979).

106. Brown v. United States, 524 F.2d 693 (Ct. Cl. 1975).

107. United States v. Rapoport, 514 F. Supp. 519 (S.D.N.Y. 1981).

108. United States v. Hill, 676 F. Supp. 1158 (N.D. Fla. 1987).

109. United States v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt. 1961).

110. United States v. DiBona, 614 F. Supp. 40 (E.D. Pa. 1984).

111. 26 U.S.C. § 6653(b) (1986).

112. *Id.* at § 6700 (1986).

113. *Id.* at § 6701 (1986).

alty. The Court's decision in *Mitchell*[114] seemed dispositive on the issue that the tax penalty statute was civil, precluding a double jeopardy defense. After *Halper*, the question is open to whether double jeopardy protection applies when the government seeks the civil tax fraud penalty following conviction of a tax defendant.

Halper would apply double jeopardy protection to the imposition of a tax fraud penalty if the "civil penalty . . . 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 . . . ."[115] Further, if "the goal of compensating the Government for its loss" is viewed as the amount of money it would take to make the government whole vis-a-vis a particular defendant, then it is difficult to see how the fifty percent penalty could be considered anything but punishment in certain cases.

For example, if a defendant pled guilty to tax evasion in the amount of $1,000,000, the civil fraud penalty would be $500,000. This penalty is in addition to the payment of all taxes that the defendant owes the government. Assuming that the particular case was not difficult to investigate so that both the agents and the attorneys were handling other matters simultaneously,[116] and that the case reached the plea stage in one year, it is unlikely that the government spent anything close to $500,000 in pursuing this particular case.[117] Under the rationale of *Halper*, a court would be entirely correct in deciding that the number of hours spent to investigate and indict the case bears no rational relationship to the goal of compensation as applied. Moreover, because *Halper* permits the government only to establish its costs vis-a-vis a particular defendant,[118] and refuses to acknowledge that a civil remedy may include the cost of deterrence—costs such as maintaining an investigative force and monitoring

114. Helvering v. Mitchell, 303 U.S. 391, 404 (1938).

115. United States v. Halper, 109 S. Ct. at 1902.

116. In this writer's six years of prosecuting criminal tax fraud cases, she knows of only one case in which either the agents or the attorneys were assigned solely to that case. The case was somewhat singular since it was in trial for six months and under investigation for three years. *See* United States v. Daly, 756 F.2d 1076 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985). Thus, it seems unlikely that any case, except in the most unusual of circumstances, would require the total attention of government personnel.

117. One ancillary problem for the government created by *Halper* is to institute a record-keeping system that will allow the government to account for time spent on each case. It is unlikely that government agents, lawyers, secretaries, or paralegals currently maintain these records in the same order as do lawyers or other professionals who must account for billable time. Yet after *Halper*, the government should require its employees to keep these records meticulously.

118. United States v. Halper, 109 S. Ct. at 1903-04.

compliance nationwide—the trial court would be wrong to calculate the government's loss to include a share of the cost of the national deterrence program. Consequently, the trial court could reduce the fifty percent penalty to a level that the trial judge decides would compensate the government for its expenditures in a particular case and no more.

Thus, *Halper* is not limited only to the unusual case. Although the *Halper* Court indicated in dicta that its holding was 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,"[119] in the tax fraud area, the *Halper* holding is more likely to affect cases against large-scale tax evaders. This is true because the larger the evasion, the larger the penalty, and the more difficult it is to argue in the "easy" case, as outlined above, that the penalty bears any rational relationship to compensation for loss. Thus, while the Court may have helped a "little guy" in *Halper*, it actually may have created a rule that will benefit large-scale tax evaders.

Other tax penalties are equally vulnerable to the Court's "compensation" analysis. For example, the Internal Revenue Code provides for penalties for the promotion of abusive tax shelters.[120] The penalty provision of section 6700 requires a promoter to "pay a penalty equal to the greater of $1000 or 20 percent of the gross income derived or to be derived by such person . . . ."[121] Some courts interpret this provision to authorize a penalty of $1000 for each sale of a shelter interest rather than providing only a flat penalty regardless of the number of shelter units sold.[122]

Consequently, the following hypothetical is entirely possible. The mastermind of an abusive tax shelter hires John Doe as a salesman of the

119. *Id.* at 1902.

120. I.R.C. § 6700 (1982). Since the Tax Reform Act of 1986, the proliferation of abusive tax shelters has decreased because of the changes in the deductibility of losses from passive investment. I.R.C. §§ 465, 469 (1982). Nevertheless, these penalties remain on the books, and if not applied to traditional tax shelters, they continue to be used against tax protest groups that market "protest" kits to individuals. United States v. Kaun, 827 F.2d 1144 (7th Cir. 1987).

121. I.R.C. § 6700(a).

122. Hill v. United States, 720 F. Supp. 95 (W.D. Mich 1989); Johnson v. United States, 677 F. Supp. 529 (E.D. Mich. 1988), *appeal dismissed sub nom.* Cooper v. United States, 875 F.2d 862 (6th Cir. 1989); Waltman v. United States, 618 F. Supp. 718 (M.D. Fla. 1985); *contra*, Gates v. United States, 874 F.2d 584 (8th Cir. 1989); Bond v. United States, 872 F.2d 898 (9th Cir. 1989); Spriggs v. United States, 660 F. Supp. 789 (E.D. Va. 1987), *aff'd*, 850 F.2d 690 (1988).

shelter.[123] Doe makes 4000 sales to 4000 different investors.[124] He is convicted of conspiring to defraud the Internal Revenue Service by acting in concert with the promoter in making these sales.[125] He is also convicted of aiding and abetting in the preparation of the investors' false tax returns in which the investors took deductions based on the bogus shelter.[126] He is sentenced and fined.

Subsequently, the government seeks penalties against Doe under section 6700 for the promotion of the abusive shelter that formed the basis of the criminal case. Under the interpretation that the $1000 penalty applies to each sale, the government seeks penalties of $4,000,000 (4000 sales x 1000 penalty per sale). Under *Halper*, Doe would argue double jeopardy. He would assert that the government recouped any tax loss it sustained as a result of the deductions taken by the investors when the government denied the shelter deductions to the investors and assessed penalties against them for taking these deductions.[127] He also would argue that the penalty against him, given its "excessive" amount, bears no rational relationship to the goal of compensating the government. Under the rationale of *Halper*, his position would likely prevail.

The same scenario holds true for penalties under section 6701 of the Internal Revenue Code.[128] This section penalizes any person who aids or assists in the understatement of tax liability. The government typically uses this section against individuals who prepare documents that inves-

123. Under the statute, sellers of an abusive tax shelter are as liable for penalties as organizers. I.R.C. § 6700(a)(1)(B) (1982).

124. Four thousand is not an impossibly large number. This writer was a lawyer for the Department of Justice section that seeks injunctions and penalties related to the promotion and sale of abusive shelters. At one time, the writer worked on a case in which the promoter sold shelter units to over 6000 investors.

125. The indictment would be brought under 18 U.S.C. § 371 (1982). *See, e.g.*, United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986).

126. This part of the criminal case would be brought under I.R.C. § 7206(2) (1982). It is common to charge individuals involved in a tax shelter scheme with the crime of aiding and abetting in the preparation of false returns. *See* United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978); United States v. Crum, 529 F.2d 1380 (9th Cir. 1976). In such a case, the government alleges that the defendant aided and assisted in the preparation of the false investor tax return if the defendant prepared or distributed shelter documents to investors knowing they were false.

127. There are a number of Internal Revenue Code penalty provisions directed at investors in abusive tax shelters. For example, under I.R.C. § 6653(a) (1982) the government could assess a negligence penalty, and under I.R.C. § 6661 (1982), the investor might have to pay a substantial understatement of tax penalty. Of course, the government might consider assessing the civil tax fraud penalty against an investor if the facts indicate fraud. For a discussion of the civil tax fraud penalty, see *supra* notes 114-19 and accompanying text.

128. I.R.C. § 6701 (1982).

tors in tax shelters either attach to tax returns or use in calculating deductions flowing from such shelters.[129] Similar to section 6700, this "aider and abetter" statute provides that "the amount of the penalty imposed by subsection (a) shall be $1000."[130] Further, one court has held that this penalty applies each time an individual investor uses a document that results in an understatement of tax liability. [131]

Consequently, if a shelter promoter sent out a schedule of profit and loss to each shelter investor, the promoter could be subject to a $1000 penalty for each time an investor used such schedule to understate tax liability.[132] Thus, as with the section 6700 penalties discussed above, an individual possibly could face large penalties. Once the penalties are large and follow a criminal conviction for the same activity,[133] one can expect to see a double jeopardy defense under the *Halper* rationale.

Since the above tax penalties are essentially "fixed-penalty" provisions similar to the fixed-penalty under the False Claims Act, they may be readily compared to the facts in *Halper*. One could argue that the government can easily solve its double jeopardy problem with these statutes by simply changing the fixed penalties to maximum penalty amounts. For example, Congress could amend the False Claims Act by providing that the $2000 penalty per violation is the maximum penalty, leaving it to the trial court's discretion to fix the exact amount. A number of policy considerations militate against this approach—such as forcing the legislature to abdicate its wisdom over what is needed for true compensation and leaving the government unsure as to the amount of civil penalty it will recoup if it chooses first to prosecute—all of which will be discussed

129. Kuchan v. United States, 679 F. Supp. 764 (N.D. Ill. 1988).

130. I.R.C. § 6701(b)(1) (1982).

131. Kuchan v. United States, 679 F. Supp. at 769. But cf. Gates v. United States, 874 F.2d 584, 584 (8th Cir. 1989) and Bond v. United States, 872 F.2d 898, 898 (9th Cir. 1989), in which both courts refused to compute penalties under I.R.C. § 6700 on a per sale basis.

132. It is common for shelter promoters to send investors a K-1 form at the end of the tax year. This is a partnership tax form that tells investors the partnership's gain or loss. Most abusive tax shelters are formed as limited partnerships with the promoter serving as general partner. Therefore, at the end of the year, the general partner has to send the K-1 to all members of the partnership.

133. In this situation, the government would prosecute either under the general conspiracy statute, 18 U.S.C. § 371 (1982), see *supra* note 125 and accompanying text for a discussion of this statute; under the tax crime of aiding and abetting, I.R.C. § 7206(2) (1982), see *supra* note 126 and accompanying text for a discussion of this statute; or under both statutes. The government would use the profit and loss schedule on the K-1 form as proof of the defendant's assistance in the preparation of a false return or as proof of the defendant's membership in a conspiracy to defraud the government.

later.[134] However, apart from these policy considerations, this solution will not ease the problems created by *Halper*.

An examination of the insider trading civil penalties under the Securities and Exchange Act of 1934[135] will establish why changing fixed penalty provisions to maximum-discretionary ones does not cure the government's problems after *Halper*. In 1984, Congress amended the Securities and Exchange Act of 1934 to give the Securities and Exchange Commission authority, for the first time, to bring a civil lawsuit seeking penalties against "anyone found to have tipped or traded while in possession of material nonpublic information."[136] The statute provides for as much as treble damage penalties, to be awarded in the judge's discretion.[137] A host of other sanctions are, and were prior to the amendment, available for violation of the 1934 Act, including criminal prosecution.[138] Congress' reasons for the 1984 change centered on the greater deterrence that such civil penalties would provide to insider trading.[139] Scholars commenting on these insider trading penalties noted it was now possible that

> [a]n inside trader may pay five times his profit gained or loss avoided through a combination of disgorgement (equal to profit or loss), the ITSA penalty (up to three times profit or loss), damages to private plaintiffs (up to profit or loss), and a criminal penalty of up to $100,000 . . . .[140]

Yet these commentators concluded, relying on *Mitchell* and its progeny, that double jeopardy would not protect against the imposition of such multiple penalties because the statute was civil in nature.[141]

Halper obviously changes this once-assured conclusion. If the Commission seeks such penalties after a successful prosecution, a defendant will rely on *Halper*, arguing: (1) that a treble damage penalty bears no

134. For a discussion of the problems facing the government after *Halper* in deciding whether to bring a criminal action before it seeks civil penalties, see *infra* notes 206-29 and accompanying text.

135. 15 U.S.C.A. § 78u-1 (West Supp. 1989). For a discussion of these civil penalties, see Aldave, *The Insider Trading and Securities Fraud Enforcement Act of 1988: An Analysis and Appraisal*, 52 ALBANY L. REV. 893 (1988); Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 DUKE L.J. 960.

136. Silver, *supra* note 135, at 960.

137. 15 U.S.C.A. § 78u-1(a)(2) (West Supp. 1989).

138. 15 U.S.C.A. § 78ff (West Supp. 1989).

139. *See Insider Trading Sanctions and SEC Enforcement Legislation Hearings on H.R. 559 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 268-69 (1983).

140. Silver, *supra* note 135, at 1012 n.244.

141. *Id.* at 1014.

rational relationship to the government's compensation for its loss in this particular case and (2) that the trial court, under the holding of *Halper*, is not free to consider any government costs that do not apply to this particular defendant. Again, depending on the quickness, ease of the government's investigation, and other criteria that are case-specific, this argument may prevail.

What is the harm in this, one may ask, since the award of treble damages is discretionary in the first place? First, suppose a trial court does award treble damages after a criminal conviction, and the defendant appeals. An appellate court could find the award to be an abuse of discretion under the guidelines of *Halper*. It does not stretch the imagination to see such a scenario, especially if the defendant has already disgorged profits and been punished criminally. Also, an appellate court certainly could remand the case for an accounting "of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment."[142] Given this possibility, the government will be less certain as to the outcome of its penalty actions in insider trading cases, as well as under any statute that permits discretionary awards of penalties that are difficult to fit into a pure compensatory model.[143]

Second, any penalties awarded to government through an administrative proceeding also are subject to review. If an administrative agency awards the government damages that vary from the pure compensatory model espoused by the Court in *Halper*, then an appellate court could reverse the award on double jeopardy grounds and remand the case for

142. United States v. Halper, 109 S. Ct. at 1902.

143. In addition to the insider trading penalties discussed in the text, there are several other statutes that entitle the government to treble or punitive damages when appropriate. Some of these statutory provisions include: 12 U.S.C. § 2607(d) (1982) (providing for treble damages under the banking statute for violation of the prohibition against kickbacks and unearned fees); 15 U.S.C. §§ 1, 15, 16 (1982) (providing for treble damages for violation of various antitrust laws); 12 U.S.C. § 1723a (1982) (providing for punitive damages for violation of certain banking laws); 33 U.S.C. § 1514 (1982) (providing for punitive damages for violation of deepwater control measures); 42 U.S.C. § 9607 (1982) (providing for punitive damages for violation of certain environmental laws).

This last provision is colloquially called "Superfund" and was instituted in 1980 as the Comprehensive Environmental Response, Compensation & Liability Act of 1980. The award of punitive damages to the government under this Act is an example of how such a damage award may benefit the entire populace. Damage awards under the Act are placed into a trust fund for use in cleaning the environment. Such awards are expected to give the government more than compensation for harm done by any individual violator. The purpose of the legislation suggests that those who violate the statute should bear the cost of restoration even if in excess of the dollar amount of harm they actually caused.

an accounting.[144] In fact, one may anticipate that *Halper*'s greatest impact will emerge in the area of penalties awarded to governments through administrative agency action. Many of these penalties stem from acts that violate an important regulatory scheme such as water pollution prohibitions,[145] or controls over hazardous solid waste.[146] These regulatory prohibitions are not tied to dollar loss to the government, but penalize particular acts and usually fine violators on a per violation basis.

This kind of penalty framework does not satisfy the *Halper* Court's pure compensation test. A court considering a large penalty following a criminal conviction for the same act, especially a conviction based on a strict liability criminal statute,[147] could view *Halper* as authority for reversing the award. The court also could remand for an accounting, and thus force the agency to comport with a court's view of what level of penalty is rationally related to compensation for the government. Thus,

144. For years, scholars and others who research the efficacy of administrative agencies have argued that agencies should have the authority to impose civil money penalties. *See* Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS & REP. OF THE ADMIN. CONF. OF THE U.S. 896 (1972). The Administrative Conference of the United States used Goldschmid's evaluation as a basis for its recommendation to increase agency imposition of civil money penalties. The Conference suggested that this use might lead to greater administrative efficiency and perhaps even greater due process because there would be less delay than found in the criminal process. Moreover, Goldschmid suggested in his report that agency use of civil money penalties would result in greater deterrence, considering the wider reach of agency action. *Id.* at 914-15. *See also* Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995, 997, 1000 (1983) (arguing that civil penalties imposed by administrative agencies are needed to curb white collar crime and fraud against the government). The thrust of Chemerinsky's argument is that centralized government control over litigation in the hands of the Department of Justice is inefficient and causes the government to ignore much fraud because the Department of Justice can only handle so many cases. Chemerinsky argues that agencies should be allowed to pursue fraud through penalty actions in order to reach more violators.

The Department of Justice has always resisted such dilution of its control over litigation, arguing that loss of control could result in mistakes due to lack of coordination between agencies. Interestingly, *Halper* actually creates the need for more coordination so that the government will not initiate a criminal proceeding that could place a civil penalty at risk without first evaluating the potential danger. Thus, *Halper* has created a justification for having only one government agency overseeing penalty and criminal matters. As such, *Halper* actually may result in agencies having less chance of gaining the power to impose penalties. See *infra* note 229 and accompanying text for a discussion of why, after *Halper*, government needs to make informed decisions on the application of the double jeopardy clause to civil penalty actions, but may not have the facts necessary for such a decision.

145. 33 U.S.C. § 1321(b)(6) (1982).

146. 42 U.S.C. § 6928(g) (1982).

147. 33 U.S.C. §§ 407, 411 (1982), *analyzed in* United States v. Ashland Oil, Inc., 705 F. Supp. 270 (W.D. Pa. 1989). *See also* Morissette v. United States, 342 U.S. 246 (1952); United States v. Balint, 258 U.S. 250, 254 (1922).

even when the government seeks a civil sanction that is not a fixed penalty, it could well face a double jeopardy defense, again refuting *Halper*'s disclaimer that its rule applies only to the rare case.

B. The Application of the Concept of Punishment in a Constitutional Sense to Civil Proceedings

The foregoing analysis demonstrates that *Halper* will have repercussions on the development of double jeopardy law as it applies to civil penalty actions brought by the government. In a larger context, however, the Court's action in *Halper* has implications beyond the double jeopardy clause. The next two sections of this Article will deal with these implications.

The first of these centers on *Halper*'s definition of punishment and the results of its holding that a civil sanction can constitute punishment for constitutional purposes. Until *Halper*, the Court used a syllogism to answer the thorny question of when a civil sanction is punishment for purposes of applying the constitutional protections afforded a criminal defendant, no matter what nominal label the legislature attached to the sanction. This syllogism was: (1) punishment which triggered these constitutional guarantees was criminal punishment; (2) criminal punishment comes from a criminal proceeding; (3) a criminal proceeding is one specifically labeled as such or found to be one through the process of statutory construction.[148]

This syllogistic approach has received much criticism.[149] Critics have

148. See *supra* note 82 for a discussion of the Court's two-step approach in undertaking this statutory construction task.

149. See Levin, *supra* note 16, at 1035, who argues that the position taken by the Court in *Mitchell:*

> afforded no firmer support for the Court's conclusion that the challenged sanction was nonpenal than those stated in prior decisions that had supported a contrary result. To assert that a sanction is inherently remedial rather than inherently criminal scarcely advances analysis where no criteria defining the former classification are announced.

Levin also argues that the Court's approach in *Mitchell* resulted in the Court abdicating its responsibility to monitor congressional activity in these area. Levin thus claims that:

> *Mitchell* begged both the question of when sanctions *that Congress labels as civil* are criminal in effect, and the larger question of whether there exist any principled constitutional limits on the legislative power to sanction. If Congress could punish criminal conduct simply by creating two sanctions and denominating one of them as civil, the protections of the sixth amendment would be minimal indeed.

Id. at 1037. *See also* Clark, *supra* note 16, at n.49.

While these arguments have much force, the Court's decision in *Halper* does not address this criticism. The *Halper* Court does not provide a system or a methodology for determining when a civil statute is penal. Further, it clouds the debate on what constitutes a criminal statute by applying

noted that the approach allows the Court to abdicate its role in deciding when a congressional remedy violates the Constitution. They argue that the approach relies too much on whether the sanction has either a clearly articulated or possible remedial purpose, regardless of the sanction's effect in the specific case.[150]

Commentators, however, also have observed that this syllogistic method of determining punishment has the advantage of giving appropriate deference to the will of the legislature, which "is the forum constitutionally designated to strike the initial balance between those sanctions requiring the procedural safeguards of the sixth amendment and those for which 'a swift and [more] convenient remedy' should prevail."[151] Additionally, when compared with the prospect of determining punishment by looking at the application of the sanction to each individual in a specific case, the Court's standard, syllogistic approach has a decided advantage in terms of reliability and efficiency.

Yet in *Halper*, the Court ignored the opportunity to articulate a clearer methodology for determining when a statute is penal. Rather, the Court opted for an ad hoc, case-by-case approach for determining what constitutes punishment. Moreover, it avoided any explanation of how to distinguish "penal" from "punishment" or why the concept of punishment should be separated from the concept of crime. Instead, the Court simply asserted that the concept of punishment cuts across the division between civil and criminal law.[152] This, of course, is not a startling, metaphysical revelation. We all know that punishment comes in many forms, sizes, and amounts, and certainly can be imposed upon an individual in the form of a civil penalty. The Court's conclusion, however, is startling in that it applies a constitutional guarantee traditionally limited to criminal defendants without finding the punishment, itself, to be a criminal punishment.

In fact, the *Halper* decision seems to purposely avoid calling the punishment at issue a criminal punishment, and for good reason. If the Court had labeled the punishment in *Halper* criminal, then it would have suggested that a sanction under a civil statute, as applied, could consti-

a protection traditionally linked with criminal cases—double jeopardy—to a civil penalty while simultaneously maintaining that the statute, itself, is civil.

150. See Justice Black's dissent in Flemming v. Nestor, 363 U.S. 603, 626 (1960), in which he stated: "Whether this Act had 'rational justification' was . . . for Congress; whether it violates the Federal Constitution is for us to determine . . . ."

151. Levin, *supra* note 16, at 1068.

152. United States v. Halper, 109 S. Ct. at 1901.

tute a criminal punishment despite the underlying civil nature of the regulatory scheme. The label "criminal punishment" would then result in application of all constitutional guarantees associated with criminal trials to a civil penalty proceeding. Labeling the *Halper* sanction as only "punishment," the Court is now free to distinguish any attempts to apply the sixth amendment to such civil penalty actions. It may do this by claiming: first, the sixth amendment applies *only* in cases involving criminal punishment; and second, *Halper* separated the concepts of punishment and crime from each other solely for double jeopardy purposes, a separation that does not extend to other constitutional protections. Therefore, for purposes of the sixth amendment, crime and punishment are reunited.

Yet the Court's effort to limit *Halper* with the distinction between "criminal punishment" and "punishment" will not necessarily succeed for a number of reasons. First, the Court's position on this distinction is not unequivocal or final. The Court did not clearly state that it intended to distinguish between punishment and criminal punishment. And while its holding is technically limited to the double jeopardy clause, its logic is expansive, especially on the notion of punishment. This approach will be difficult to limit.

Second, if punishment cuts across civil and criminal boundaries as the *Halper* Court states, and if punishment under a civil statute can require double jeopardy protection without a conclusion that the punishment is criminal, then it is easy to conclude that other constitutional guarantees could be applied to certain civil sanctions. In view of the Court's failure to hold other constitutional guarantees inapplicable under *Halper*, defendants in civil penalty actions can be expected to use *Halper* in attempting to obtain certain procedures usually associated with criminal trials.

Two likely areas for an extension of the *Halper* rationale are the cruel and unusual punishment clause of the eighth amendment,[153] and the fifth amendment's protection against self-incrimination.[154] With regard to cruel and unusual punishment, the Court has resisted attempts to extend this provision to civil actions despite repeated requests to do so.[155] In

153. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

154. The self-incrimination clause of the fifth amendment reads: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

155. Whitley v. Albers, 475 U.S. 318 (1986) (affirming the position that the cruel and unusual

fact, the Court has maintained in the context of the eighth amendment that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."[156]

Considering the range of sanctions available to governmental units—city, state, or federal—limiting eighth amendment protection to criminal adjudications is a wise policy. Nevertheless, the Court has recognized in the past that given its importance, the eighth amendment should apply to punishments not labelled "criminal" by the state but which are sufficiently analogous to criminal punishment to justify the application.[157] Thus in the context of the eighth amendment, the Court has formed a group of punishments that may be viewed as "quasi-criminal." The Court's willingness to look past the legislative label in the context of the eighth amendment suggests that the same willingness could invite the application of the *Halper* principles to certain eighth amendment cases.

The Court has specifically attached this "quasi-criminal" label in the context of fifth amendment protection against self-incrimination.[158] In fact, the Court has suggested that fifth amendment considerations are

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punishment clause was intended only to protect those convicted of crimes); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983) (refusing to apply the eighth amendment to state action following arrest but prior to conviction); Youngberg v. Romero, 457 U.S. 307 (1982) (acknowledging the case was properly brought under the fourteenth amendment, rather than the eighth amendment, for state action involving an individual involuntarily committed to a mental institution).

Ingraham v. Wright, 430 U.S. 651 (1977), is the most famous Court pronouncement of its position that the cruel and unusual punishment clause applies only to criminal cases, and that the punishment referred to in the clause is criminal punishment. In *Ingraham*, the Court considered the applicability of the clause to corporal punishment in public schools. The Court refused such an application and discussed thoroughly the history of the eighth amendment and its limitation to criminal actions. *Id.* at 664-71. The Court continued to maintain this position until last Term's decision in Browning-Ferris Industries v. Kelco Disposal, 109 S. Ct. 2909 (1989), in which the Court intimated that the eighth amendment might apply to civil actions brought by government. *See supra* note 30 and accompanying text.

Browning-Ferris also chose to emphasize a footnote in the *Ingraham* decision that had suggested the sensible and logical application of the cruel and unusual punishment clause to certain civil actions, such as juvenile and mental health commitments. Browning-Ferris Indus. v. Kelco Disposal, 109 S. Ct. at 2914 n.3. The emphasis in *Browning-Ferris* on this particular *Ingraham* footnote is another indication that the Court in the future might apply the eighth amendment to civil actions brought by the government. In fact, one could argue that *Halper* and *Browning-Ferris* are both indications of a new path being forged by the Court—a path that would apply certain constitutional principles to civil cases brought by government. Such principles previously had been limited to criminal prosecutions.

156. Ingraham v. Wright, 430 U.S. at 671-72 n.40.

157. *Id.* at 669 n.37. *See supra* note 155.

158. United States v. Ward, 448 U.S. 242, 251 (1980).

qualitatively different from double jeopardy and sixth amendment protections. Hence, while a penalty imposed under a civil statute is clearly not sufficiently "criminal" to invoke these other protections, it "is nevertheless 'so far criminal in its nature' as to trigger the Self-Incrimination Clause of the Fifth Amendment."[159] Indeed, the Court has applied the self-incrimination protection to civil proceedings,[160] giving substance to the notion that the fifth amendment's protection is somehow more inclusive than that of the sixth amendment or, until *Halper*, the double jeopardy clause, and is not limited to criminal trial proceedings.

These holdings noting the unique qualities of the fifth and eighth amendments suggest that courts and defendants may readily seek to apply *Halper*'s distinction between "punishment" and "criminal punishment" in these areas. The argument would be something like this: If a civil statute can create a sanction that constitutes punishment requiring double jeopardy protection, then other constitutional protections implicating the concept of punishment also should apply to certain civil proceedings. This is true because these other constitutional provisions have an even broader scope than does the double jeopardy clause. Further, a finding of "criminal punishment" is not necessary to the application of these safeguards because *Halper* makes it clear that simple "punishment" can trigger constitutional protections even under a civil statute.

If this argument is accepted, the self-incrimination clause could apply in any penalty case in which the penalty is deemed disproportionate or in any civil case in which a court concludes that a government's requested relief actually constitutes punishment—for example civil RICO suits

159. *Id.* at 253-54. The application of the self-incrimination clause to "quasi-criminal" proceedings began with Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, the government in a forfeiture action requested that Boyd produce an invoice. The Court found the self-incrimination clause implicated in this request, concluding that as to "suits for penalties and forfeitures incurred by the commission of offenses against the law," the nature of the action was quasi-criminal and the self-incrimination clause applied as well as the fourth amendment. *Id.* at 634.

Some cases have followed the *Boyd* doctrine. *See* United States v. United States Coin & Currency, 401 U.S. 715 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Lees v. United States, 150 U.S. 476 (1893). Other cases have distinguished *Boyd* and have refused to find a violation of the self-incrimination clause in a civil penalty context. *See* Allen v. Illinois, 478 U.S. 364, 369 (1986); United States v. Ward, 448 U.S. at 254. Moreover, the Court in Helvering v. Mitchell, 303 U.S. at 400 n.3, suggested that protection afforded by the self-incrimination clause is of broader scope than other constitutional guarantees.

160. In *Minnesota v. Murphy*, the Court held that the privilege against self-incrimination permits a person "not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." 465 U.S. 420, 426 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

brought by governments. With regard to the eighth amendment, the same kind of expanded protection could result whenever a court determines that a government remedy is punishment. In each case, *Halper* would support the extension of these protections without requiring a finding that the punishment was criminal in nature.

Indeed, it makes little sense to limit the logic of *Halper* only to the double jeopardy clause. As noted previously, the historical roots of the clause are in doubt,[161] and precedent before *Halper* suggests that the clause does not have the significance or scope of other constitutional provisions, especially the self-incrimination clause. This historical posture, combined with the *Halper* Court's claim that civil punishment triggers double jeopardy protection because the double jeopardy clause protects "humane interests," makes clear that the historically more potent "humane interests" protected by the self-incrimination clause and the cruel and unusual punishment clause should receive equal recognition in a civil penalty proceeding.

While the Court seems to have ignored the implications of *Halper* to self-incrimination and cruel and unusual punishment claims, the *Halper* Court was not unconcerned that its finding of punishment in a civil penalty proceeding has serious implications under the sixth amendment. The double jeopardy clause and sixth amendment trial guarantees have been linked traditionally as constitutional safeguards limited to criminal trials.[162] Thus, by analogy and precedent, it is easy to rely on *Halper* for the argument that sixth amendment protections—right to counsel, indictment, jury trial, confrontation, compulsory process—apply to a civil penalty proceeding.

Such an extension of *Halper* would cause severe problems for the government and the courts. The time and expense associated with criminal trial guarantees of the sixth amendment are well known. To infuse these into civil penalty proceedings on a case-by-case basis would be disruptive and expensive. Yet the connection between double jeopardy and the sixth amendment in prior cases makes this application of *Halper* likely.

To prevent this, the *Halper* Court attempted to distinguish double jeopardy from the sixth amendment. It distinguished the "humane interests" of double jeopardy from the less personal "constitutional safe-

161. See *supra* notes 6-14 and accompanying text for a discussion of the historical roots of the double jeopardy clause.

162. United States v. Ward, 448 U.S. at 248; Helvering v. Mitchell, 303 U.S. 400 n.3; Clark, *supra* note 16, at 394-96; Silver, *supra* note 135, at 1014.

guards that must accompany [criminal] proceedings as a general matter. . . ."[163] Further, it considered reliance on the *Mitchell* statutory construction approach appropriate when applying sixth amendment trial guarantees to a civil penalty statute, and thus intimated that sixth amendment safeguards would apply only if a statute were construed to be penal.[164] Consequently, the *Halper* Court attempted to distinguish the sixth amendment trial guarantees from double jeopardy in type—humane vs. procedural—and in form of judicial scrutiny—statutory construction vs. case-by-case analysis.

The survival of the forced distinction between double jeopardy and the sixth amendment is questionable. First, it is historically suspect.[165] Second, the Court in *Halper* did not explicitly make this distinction, but only suggested that statutory construction determines the application of sixth amendment trial guarantees to civil proceedings. Thus, a trial court, relying on *Halper*, could plausibly find that a civil penalty constituted sufficient punishment to trigger the sixth amendment. Such a holding could find support especially in the portions of the *Halper* decision discussing punishment, separating crime from punishment, and protecting the individual from punishment.[166]

Third, while the *Halper* Court attempted to limit its application by suggesting a difference between "punishment" and "criminal punishment," it did not elucidate the distinction. *Halper* does not preclude a court from finding that a civil statute, *as applied*, even if not found to be penal, constitutes criminal punishment sufficient to trigger the sixth amendment. In summary, *Halper*'s distinction between "punishment" and "criminal punishment" will fail to prevent defendants from relying

163. United States v. Halper, 109 S. Ct. at 1901.

164. *Id.*

165. See *supra* notes 6-14 and accompanying text for a discussion of the historical roots of the double jeopardy clause. These historical facts indicate that double jeopardy protection was much narrower at the time of the adoption of the Constitution than it is today, and indeed, that the reasons for the inclusion of double jeopardy protection in the Constitution are problematic. Therefore, history does not support the contention that the founding fathers considered double jeopardy protection more "humane" or important than the sixth amendment guarantees of jury trial and confrontation.

166. United States v. Halper, 109 S. Ct. at 1901-02. Undeniably, the Court painted with a broad brush in this portion of its opinion. It conceived that a finding of punishment would come after a particularized assessment of the penalty imposed and the purposes to be served by the penalty. Obviously, that standard gives great latitude to a trial judge. Further, it defined punishment as serving a retributive or deterrent function—also a sufficiently broad definition to be used in a variety of contexts.

on *Halper* to argue for its application to other constitutional criminal guarantees.

The distinction creates another difficulty. Will a civil sanction followed by another civil sanction implicate the "multiple punishment" prong of double jeopardy? While the Supreme Court was careful in *Halper* to limit its holding to civil penalty actions that follow a criminal conviction,[167] under *Halper*'s concept of punishment the double jeopardy clause in some cases may bar the government from pursuing in tandem two civil penalties.

To understand why, we must return to the definition of punishment in the *Halper* decision. Recall that under *Halper*: (1) The notion of punishment cuts across the civil and criminal law;[168] (2) evaluating whether a civil sanction constitutes punishment requires a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve";[169] (3) a civil sanction constitutes punishment when it serves the goals of punishment—retribution and deterrence;[170] and (4) a civil sanction is punishment if it "cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes."[171]

The precise meaning of the last statement is difficult to understand. On one hand, it suggests that the designation of "punishment" will apply unless a civil sanction has only a remedial goal—that is, it cannot involve retribution or deterrence. On the other hand, it also suggests that the "punishment" label will not apply unless the civil sanction has only retributive or deterrent goals. This latter meaning seems most accurate in light of the Court's subsequent statement: "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."[172] Considering these two possible interpretations, however, what the Court would consider proper goals for a civil sanction remains ambiguous. Also unclear is whether a court relying on *Halper* could conclude that a civil

167. *Id.* at 1902.
168. *Id.* at 1901.
169. *Id.*
170. *Id.* at 1902.
171. *Id.*
172. *Id.*

sanction was punishment if it had mixed purposes—remedial as well as retributive or deterrent.

Accordingly, a court considering a penalty case could decide that a civil sanction imposed in a prior case was remedial only to the point of compensation, and after that point it became punishment. *Halper* provides ample authority for this position. The same court could then conclude that a subsequent civil penalty also was punishment to the extent it sought more than compensation. Consequently, a court could preclude the imposition of two separate civil penalties.[173]

173. For example, imagine the following case. The Internal Revenue Service successfully imposes a penalty against an abusive tax shelter promoter under section 6700 of the Internal Revenue Code. I.R.C. § 6700 (1982). The penalty is computed as $1000 per sale for 500 sales, or $500,000. See *supra* notes 120-24 and accompanying text for a discussion of this tax penalty provision. The Internal Revenue Service later determines that the promoter also violated section 6701 of the Internal Revenue Code by supplying to investors the tax shelter's K-1 partnership forms. See *supra* notes 128-32 and accompanying text for a discussion of this tax penalty. The Service attempts to extract penalties under that provision, again computing the penalty as $1000 for each investor who filed the K-1 with the investor's return, resulting in another $500,000 penalty.

The shelter promoter, citing *Halper*, asserts a double jeopardy defense to this second civil penalty action. The promoter argues that the first penalty under section 6700 was a punishment as defined in *Halper* because its purpose was not *solely* remedial. United States v. Halper, 109 S. Ct. at 1902. The promoter also could argue that the section 6700 penalties were remedial only to a certain monetary level, but after that point the penalties crossed into the realm of punishment. *Halper* would provide the promoter with authority for the proposition that the trial court has the discretion to determine when the line between remedy and punishment has been crossed. *Id.*

The shelter promoter next asserts that the penalty in the second proceeding also is punishment, arguing again that the sanction, as applied, is not solely remedial, or if remedial, has lost this character after crossing a certain monetary point. The promoter concludes the argument by noting that the *Halper* decision made it clear that the "multiple punishment" prong of double jeopardy protection covers civil sanctions as applied, and asks the court to bar the second civil penalty, or the portion of it that is not remedial.

In this situation, it is indeed possible to see a trial or appellate court extending the *Halper* holding to preclude a portion of one civil penalty that has followed another civil penalty. For example, this scenario would apply easily to insider trading penalties sought after disgorgement. See *supra* notes 135-43 and accompanying text for a discussion of insider trading penalties.

The same rationale could be used to preclude a criminal prosecution that follows a civil penalty. If a trial court determines that a civil penalty imposed earlier could not "fairly be said solely to serve a remedial purpose," United States v. Halper, 109 S. Ct. at 1902, and thus constituted punishment, then the government's attempt to follow this civil penalty with a criminal prosecution would clearly be an attempt to follow a punishment with a punishment, violating the *Halper* Court's interpretation of the multiple-punishment prong of double jeopardy protection. See *infra* note 229 and accompanying text for a discussion of why the government prefers to lead off with the criminal case rather than the civil penalty action. Despite this government preference, however, initiating the civil action first is not prohibited.

Thus, as the above analysis demonstrates, in any situation—civil penalty following criminal conviction, or civil penalty following civil penalty, or criminal case following civil penalty—a trial court's analysis of the civil sanction's deterrent or retributive goals will focus not on the intent of the

Finally, in distinguishing between "punishment" and "criminal punishment," the Court also may have created two different burden of proof standards. Supreme Court cases prior to *Halper* emphasized that only the clearest proof of a statute's criminal nature will overcome a congressional indication that the penalty is civil.[174] Under this standard, a defendant who invokes certain constitutional guarantees has the burden of proving the criminal nature of a civil statute. Yet *Halper* states that a civil sanction will be punishment if it cannot be said to serve solely remedial purposes. This suggests that the burden will be on the government to show a sanction's sole remedial purpose. Thus it is possible to construe *Halper* as imposing the burden of proof on a different side depending on whether the challenge is to the statute itself—the defendant's burden—or only to its application—the government's burden. Considering this change, it is difficult to imagine why any defendant in a government action for civil penalties would ever ask a trial court to construe a nominally designated civil statute as criminal, because challenging only the statute's application would entail a less onerous burden.

C. Confusion on the Proper Role of Deterrence in a Civil Statute

Halper states clearly that deterrence is not a legitimate, nonpunitive government objective.[175] This is a dramatic break from precedent and traditional understanding of deterrence. Prior to *Halper*, there was little doubt that a civil statute could have a deterrent purpose and yet not be criminal in nature. The Court in *Mitchell*, *Hess*, and *Rex Trailer* did not explicitly state that deterrence had a place in civil sanctions. Yet these cases clearly suggest that a deterrent purpose does not convert a civil statute into a criminal one.[176] In addition, that deterrence had a proper role in civil law was at one time considered axiomatic.[177] Moreover, the

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legislature or the effect of the entire statutory scheme, but only on the application of the sanction to the particular defendant.

174. United States v. Ward, 448 U.S. 242, 249 (1980).

175. United States v. Halper, 109 S. Ct. at 1902.

176. See *supra* notes 23-25 and accompanying text for a discussion of the role of deterrence in the *Mitchell* decision; see *supra* notes 30-31 and accompanying text for a discussion of the role of deterrence in the *Hess* decision; see *supra* notes 38-41 and accompanying text for a discussion of the role of deterrence in the *Rex Trailer* decision.

There are earlier Supreme Court cases suggesting that deterrence is not a proper purpose for a civil statute. *See* United States v. Constantine, 296 U.S. 287 (1935); United States v. LaFranca, 282 U.S. 568 (1931); Lipke v. Lederer, 259 U.S. 557 (1922). See also, Levin, *supra* note 16, at 1033, for a discussion of this aspect of these earlier Supreme Court cases.

177. Levin, *supra* note 16, at 1021-22. In fact, Congress made the proper role of deterrence in

list of civil statutes with an obvious deterrent purpose is long, including laws restricting insider trading and providing for environmental controls.[178]

How did the *Halper* Court reach a conclusion so contrary to earlier cases and to the nature of numerous existing statutes? An answer requires a look at a series of cases that led to *Halper*'s conclusion. This review will show that the Court's journey to its conclusion was one of small steps with little thought as to destination.

First, in *Kennedy v. Mendoza-Martinez*, the pivotal case on the definition of punishment until *Halper*, the Supreme Court concluded that "whether [a statute's] operation will promote the traditional aims of punishment—retribution and deterrence . . . ."[179] is an important test for determining whether a statute is criminal or civil in nature. The *Mendoza-Martinez* Court cited several cases for this general proposition, but none held that deterrence was an improper civil purpose.[180]

Next, the Court restated the *Mendoza-Martinez* proposition in a footnote in *Bell v. Wolfish*.[181] *Bell*'s restatement, however, changed the meaning of the *Mendoza-Martinez* formula without explaining the reason for the change. In the footnote, the Court asserted that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."[182] This formulation apparently converted deterrence from *Mendoza-Martinez*'s "traditional aim of punishment" to an illegitimate, nonpunitive governmental objective. But to justify the conversion, the Court gave no explanation or citation other than *Mendoza-Martinez*. This change without explanation is unfortunate. It is one thing to say that deterrence is a primary goal of the criminal law; it is another to say deterrence has no place in a civil remedy scheme.

Although unfortunate, the *Bell* characterization had little precedential value until its promotion by the *Halper* Court from a footnote to a much

civil sanctions so clear that in considering the insider trading penalty statute, it clearly articulated deterrence as a prime reason for passing the treble civil penalty provision. See *supra* notes 139-43 and accompanying text for a discussion of the insider trading penalty and deterrence as its objective.

178. For a list and discussion of civil statutes that could be affected by this aspect of the *Halper* decision, see *supra* note 100 and accompanying text.

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

180. *Id.* at 168 n.25. One case mentioned by the Court in this opinion, United States v. Constantine, 296 U.S. at 297, did suggest that deterrence was not a proper civil objective, but the actual holding of the case did not make this explicit.

181. 441 U.S. 520, 539 n.20 (1979).

182. *Id.*

more prominent place in constitutional adjudication. The Court elevated the *Bell* footnote by quoting it and by stating that if a civil sanction "can be explained only as also serving either retributive or deterrent purposes,"[183] it is punishment for double jeopardy purposes.

Thus, the Court's unexplained change initially made in the *Bell* footnote is now a part of constitutional jurisprudence on the issue of what constitutes proper, nonpunitive legislation. Because the *Halper* decision did not involve an attack on the statute itself, it is unclear whether statutes with stated or obvious deterrent purposes are subject to invalidation under the *Halper* rationale. If courts apply the *Halper* decision only to similar fact patterns, then the Supreme Court's language on deterrence will affect only those cases in which courts are asked to consider whether the application of a penalty constituted punishment. While this is a serious consequence and may mean that the government cannot assert deterrence as justification for a civil penalty's unique application to an individual, the consequences will be even more dramatic if courts begin to use *Halper*'s language to construe the civil or criminal nature of an entire regulatory program. If deterrence is now considered an illegitimate, nonpunitive government objective, then a host of penalty statutes are in jeopardy, ranging from SEC insider trading penalties to forfeiture provisions to the civil tax fraud penalty to penalties for protection of the environment and workplace.

IV. THE IMPACT OF *HALPER* ON GOVERNMENT PROSECUTIONS AND CIVIL PENALTY ACTION—PRACTICAL CONSIDERATIONS

The preceding discussion establishes that *Halper* will have a significant impact on important legal concepts. The decision will also affect the operation of governments in a more practical and immediate sense; *Halper* will force governments to choose between civil penalties or criminal punishment in some cases. Moreover, governments will be forced to make this choice before they have had an opportunity to develop sufficient facts for an informed decision on which course is best in any particular case. In addition, because complex fraud and economic crime schemes are untangled slowly, an inadequate decision-making procedure most directly affects the government's ability to make rational choices in these areas. Before explaining this conclusion, however, it is necessary to discuss several potential solutions to the problems created for government by

183. United States v. Halper, 109 S. Ct. at 1902.

Halper and to explain why these solutions will not work to lessen the impact of *Halper*.

A. Eliminate Fixed-Penalty Statutes

One possible solution is to eliminate fixed-penalty statutes in order to give trial courts discretion to award damages up to a certain level, thus freeing them to grant a penalty award that reflects the judge's view of the amount rationally related to compensation. As discussed previously, the elimination of fixed penalties only solves governments' problems at one level—that of the initial decisionmaker. It does not solve the problems on appeal from the decision of a trial court or an administrative agency.[184] Under the reasoning of *Halper*, remand for an accounting is proper if the appellate body believes that the penalty bears no rational relationship to compensation, that it therefore is punishment, and that the lower tribunal abused its discretion in awarding the penalty. Thus, eliminating all fixed penalties will not solve governments' problem of guessing whether a particular court will classify as punishment the amount of penalty sought or awarded.

B. Permit Government to Join Together in One Proceeding Its Civil Penalty Action With Its Criminal Prosecution

The *Halper* Court stated, without explanation, that its decision does not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding";[185] it thus suggested that the government may join its civil penalty action with its criminal prosecution. The one authority cited by *Halper* for this suggestion helps little in understanding this proposed hybrid procedure, because the cited case addressed only the question of combining two *criminal* penalties in one criminal proceeding; it did not discuss the combination of civil and criminal causes of action in one proceeding.[186] There appears to be no modern authority for the suggestion of a hybrid trial, and its practical application is fraught with problems.

A few examples of obvious procedural difficulties will demonstrate the impossiblility of this solution. What would the burden of proof be in a

184. For a discussion of the impact of *Halper* on administrative agency action and appellate review, see *supra* note 144 and accompanying text.

185. United States v. Halper, 109 S. Ct. at 1903.

186. Missouri v. Hunter, 459 U.S. 359 (1983).

combined civil penalty-criminal prosecution? Would it be preponderance for the penalty, and beyond a reasonable doubt for the crime, or beyond a reasonable doubt for both? If it is beyond a reasonable doubt for both, then the government is at a disadvantage. If it is a mixed burden, then the defendant is at a disadvantage because the jury, facing two different burden instructions, could easily be confused and apply the preponderance standard to both.[187]

What rules of discovery will govern the pretrial stages of the litigation—civil or criminal rules? The procedural choice is critical, given the substantial differences in the two discovery regimes. For example, criminal discovery is extremely limited.[188] A criminal defendant is not entitled to a witness list[189] and has no right to witness statements until after the witness has testified.[190] Further, most criminal rules provide for only a limited deposition procedure, which allows a party to take only the depositions of his own witnesses,[191] and then only by an order of the court upon a showing of exceptional circumstances. Both the government and the defense have an interest in this limited criminal discovery. The federal government, for example, maintains that limited criminal

187. See Steele & Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77 (1988), for a general discussion of juror problems in understanding legal instructions.

188. Federal Rules of Criminal Procedure 15, 16, and 17 are the core provisions that govern federal criminal discovery, and these provisions do not allow a defendant to discover the identity of witnesses or the prior statements of witnesses before the trial begins. For a discussion of the limited nature of criminal discovery under the federal criminal rules, see Eads, *Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery*, 67 N.C.L. REV. 577, 581-88 (1989). In addition, many states follow the federal criminal rules in providing for limited pretrial discovery. See *id.* at 581 n.17 for a discussion of state variations on standard federal criminal discovery.

On the other hand, federal civil discovery is governed by Federal Rule of Civil Procedure 26 and provides for extensive discovery through the use of interrogatories, depositions, and requests for admissions.

189. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981) (a criminal defendant has no right to such a list, but a court may order the government to produce such a list in special situations).

190. United States v. Taylor, 802 F.2d 1108, 1118 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); United States v. Algie, 667 F.2d 569, 571 (6th Cir. 1982); United States v. Campagnuolo, 592 F.2d 852, 858 (5th Cir. 1979).

191. FED. R. CRIM. P. 15. *See also* United States v. Ismaili, 828 F.2d 153, 159 (3d Cir. 1987). Some states do allow depositions in criminal cases. For example, Arizona permits the deposition of a witness who will not grant a personal interview. ARIZ. CRIM. P. 15.3(a)(2). Florida permits a defendant to take the deposition of any person who may have relevant evidence. FLA. R. CRIM. P. 3.220(d). For the most part, however, states do not provide for the taking of depositions for general discovery purposes in criminal proceedings. See Eads, *supra* note 188, at 581 n.17 for a discussion of state deposition procedures.

discovery serves to protect witnesses from harm, coercion, and intimidation.[192] A defendant, on the other hand, wants to ensure that discovery rules recognize the protection against self-incrimination afforded under the fifth amendment.

The limited discovery scheme under criminal rules is in stark contrast to civil discovery procedures. Requests for admissions, interrogatories, and discovery depositions are an inherent part of civil litigation.[193] In fact, the object of civil discovery is to find as much information as possible prior to trial in order to expedite the trial and encourage settlement. Thus, the policy concerns underlying civil discovery—full disclosure—are very different from the policy concerns underlying criminal discovery—disclosure but only after protection of witnesses and constitutional rights.

In a hybrid trial, three discovery options are possible: first, apply only criminal discovery rules; second, apply only civil rules; or third, apply criminal discovery rules to the criminal part of the proceeding, and apply civil rules to the civil case. All of these possibilities have a number of problems. Using only criminal discovery rules would hurt both the government and the defendant because neither side would have the benefit of full civil discovery in order to establish all the necessary facts pertaining to the civil penalty case. The government, for example, would not be able to depose the defendant or the defendant's witnesses.[194] The defendant also would be disadvantaged by not having a right to the government's witness list, nor access to the government's witness statements until after the witnesses have testified.

On the other hand, the use of civil discovery procedures to govern all aspects of this hybrid trial raises serious separation-of-powers questions. The government would claim that Congress, or the state legislature, limited criminal discovery of the government's files for sound reasons such as witness protection and as a guard against the manufacture of false

192. *Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 38-52 (1974) (testimony of W. Vincent Rakestraw) and 146-50 (testimony of Richard L. Thornburgh).

193. *See* FED. R. CIV. P. 26 (general provisions regarding discovery); FED. R. CIV. P. 30 (deposition rule); FED. R. CIV. P. 33 (interrogatory rule); FED. R. CIV. P. 34 (production of document rule); FED. R. CIV. P. 36 (request for admission rule).

194. See *supra* note 188 and accompanying text for a discussion of criminal discovery procedure. Moreover, after a criminal case is filed or indicted, the government cannot use the grand jury for purposes of discovery on that case. Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972); United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972).

evidence. Thus, the government would argue that disregarding these policy considerations, even in a hybrid trial, violates the principle of separation of powers.[195] As an additional problem, because a defendant cannot be forced to incriminate himself, any application of civil discovery principles to the hybrid trial would be less than total.

Lastly, any attempt to apply civil discovery only to the civil aspect of the hybrid trial and criminal discovery only to the criminal parts of the trial would be difficult to manage. Moreover, the government's concern that open criminal discovery will lead to the creation of false evidence and the coercion of witnesses is just as significant under a hybrid discovery scheme, especially when the civil and criminal matters involve the same activity. Consequently, the government would have a strong argument that reasons for limiting criminal discovery have force even in the hybrid discovery model. Furthermore, the government could legitimately claim that by circumventing the policy reasons for limited criminal discovery, the hybrid discovery also violates the separation-of-powers considerations discussed above.

The defendant, however, is the one most likely to be injured by any hybrid discovery scheme. This conclusion follows from an examination of the existing case law governing discovery in parallel civil and criminal investigations. As previously discussed, a large number of statutes provide for both civil and criminal penalties.[196] In pursuing these remedies, governments sometimes undertake parallel rather than unified civil and criminal investigations.[197] Interestingly, in parallel investigations, the defendants often complain that the government's use of civil discovery is a subterfuge for gathering evidence for the criminal case because it allows the government to use interrogatories, depositions and the like—discovery tools not usually available in criminal procedure.[198] Moreover, defendants involved in parallel investigations often doubt their ability to

195. United States v. Gatto, 763 F.2d 1040, 1044-46 (9th Cir. 1985) (discussion of how the principle of separation of powers limits the judiciary's use of its supervisory powers to expand criminal discovery).

196. See *supra* note 100 and accompanying text for a discussion and list of these statutes.

197. *See* 22 AM. CRIM. L. REV. 279, 613 (1985).

198. *See* United States v. Kordel, 397 U.S. 1, 13 (1970) (the prosecutor's use of information obtained during civil discovery did not infringe on constitutional rights); SEC v. Dresser Indus., 628 F.2d 1368, 1387 (D.C. Cir.) (permitting transmittal of information from SEC to the Department of Justice), *cert. denied*, 449 U.S. 993 (1980). Scholars have criticized these decisions. *See* Hassett, *Ex Parte Pre-Trial Discovery: The Real Vice of Parallel Investigations*, 36 WASH. & LEE L. REV. 1049 (1979) (discussing the problems created by interagency cooperation during parallel investigations); Note, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 TUL. L. REV. 769, 781-89

protect themselves from self-incrimination without also jeopardizing their chances of prevailing in the civil suit.[199] Consequently, the parallel investigation cases make clear that the hybrid discovery model works to the disadvantage of the defendant by granting the government wider discovery opportunities and placing pressure on defendants to compromise their rights under the fifth amendment.

These problems—burden of proof and discovery—demonstrate how difficult it would be to combine civil and criminal proceedings. One could add to the list of problems the following items: determining the size of the jury and whether the verdict must be unanimous; applying the Speedy Trial Act[200] to the joint proceeding; deciding the number of peremptory challenges to allow;[201] and handling the problems of prejudice to a defendant in a criminal case caused by joinder of another claim.[202]

The number and significance of these problems suggest that a court will not likely order a joint civil and criminal proceeding without some significant showing of need. The government would base its request for a hybrid trial on the need to avoid the application of *Halper*. This, however, is not an especially powerful argument because it appears to be a plea to permit the government to obtain double punishment for the same behavior. While the Supreme Court has constitutionally approved double punishment so long as it is part of one proceeding,[203] a trial court would not consider double punishment an especially pressing govern-

(1978) (discussing the problems created for defendants when the government uses parallel investigations to circumvent the limited discovery afforded under criminal rules).

199. See *infra* notes 223-26 and accompanying text for a discussion of how the privilege against self-incrimination is applied to civil suits and the difficulty this creates for an individual trying to protect this privilege and prevail in the civil case.

200. A criminal trial must begin 70 days from the filing date of the indictment or information, or from the date the defendant appeared before a judicial officer of the court in which the charge is pending, whichever date is last. 18 U.S.C. § 3161(c)(1) (1985).

201. For example, in federal criminal procedure the government is entitled to six peremptory challenges in a felony case while the defense is entitled to 10 challenges. FED. R. CRIM. P. 24(b). On the other hand, in a federal civil case each side is entitled to only three peremptory challenges. 28 U.S.C. § 1870 (1985).

202. See United States v. Halper, 590 F.2d 422 (2d Cir. 1978), which ten years earlier reversed the same Irwin Halper's conviction for Medicare fraud and tax evasion because of the prejudicial joinder of the two crimes. For a discussion of Halper's prior criminal conviction and repeated acts of Medicare fraud, see *supra* note 56 and accompanying text. Courts are vigilant in protecting criminal defendants from prejudicial joinder of crimes, counts, or other defendants. *See* FED. R. CRIM. P. 13, 14.

203. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

mental need and certainly is not sufficiently appealing to provoke a court to adopt a radically new procedure.

The defendant would have a more pressing need for a hybrid trial, claiming an interest in finality and the desire to have all matters resolved in one proceeding. Yet a defendant's request for such a hybrid proceeding seems highly improbable. First, if the defendant believes that the government's position with regard to the civil penalty will result in the application of *Halper*, then a wise defendant might wait to claim this in the subsequent penalty proceeding, thereby obtaining a reduction in the penalties. Such a reduction could not occur in a joint hybrid proceeding, especially if the penalty is a fixed one.[204]

Second, it is unlikely that a defendant would risk prejudicing the trier of fact in its decision on the criminal charges by joining civil penalty matters. Prejudice could result in many ways, such as if the government is entitled to prove acts not charged in the indictment in order to establish the penalty.[205] Thus, the joint proceeding alternative suggested by the Court in *Halper* is procedurally problematic, difficult for the government to persuade a court to use, and not in the interest of the defendant.

C. *Use of Parallel Investigations*

As stated previously,[206] it is not uncommon for governments to con-

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204. *Id.* This is true because of the Court's decision in Missouri v. Hunter, which permitted two punishments so long as the punishments were meted out in a single proceeding. Moreover, if the civil penalty is fixed by statute, the court would have no discretion to alter the amount of penalty. United States v. Halper, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 109 S. Ct. 1892 (1989).

205. The government is not entitled to prove that a defendant acted in conformity with her character by proving other similar acts that indicate this character. *See* FED. R. EVID. 404. In criminal prosecutions the government usually attempts to introduce these acts under the provisions of Federal Rule of Evidence 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Courts, however, may reject the admission of such evidence of plan, motive or the like in their discretion. Huddleston v. United States, 485 U.S. 681 (1988). In rejecting evidence of similar acts to prove one of the matters listed in the rule, courts, especially in criminal cases, look to the prejudice caused by the admission of such evidence and the danger that the evidence will be considered by the jury as proof of character. *See* United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987).

However, if the civil and criminal cases were joined, then proof of the civil fraud would not be offered under 404(b), but rather would be offered as proof of the government's claim, itself. Consequently, the defendant could not prevent the admission of such evidence as being impermissible evidence of character.

206. See *supra* notes 197-99 and accompanying text for a discussion of parallel investigations.

duct both civil penalty and criminal investigations simultaneously. Consequently, the machinery arguably is already in place for governments to make an informed decision on whether the application of *Halper* is a real possibility in a particular case. A government could first conduct a parallel investigation, discover evidence needed for both the civil and criminal actions, and then rationally calculate the likelihood that it will not obtain the full civil penalty if a criminal conviction precedes it. Under this scenario, the government in certain cases will decide to seek only one remedy, basing its decision on the amount of the penalty, the strength of each case, the risk of losing the full civil penalty if the criminal case occurs first, and other similar trial and strategic considerations.

For a number of reasons, however, the parallel investigation solution is not available to a government in all cases.[207] First, and perhaps most important, branches of government performing the criminal and civil investigations often are precluded from pooling all information and consulting each other on the best course to take in parallel investigations. In the federal system, this follows from the Supreme Court decision in *United States v. Sells Engineering, Inc.*,[208] which held that Civil Division attorneys for the United States Department of Justice could not automatically obtain disclosure of grand jury material for use in a civil suit related to the grand jury investigation. Rather, according to *Sells*, these attorneys had to obtain a court order for such disclosure after showing a "particularized need" for the grand jury materials.[209]

The *Sells* decision concerned a case of conspiracy to defraud the government involving military contracts. The case was investigated by a grand jury and resulted in pleas of guilty. Following the guilty pleas, the Justice Department's Civil Division sought access to the grand jury material in order to bring an action against the defendants under the False Claims Act[210]—the same act involved in *Halper*. The Supreme Court found that these Civil Division attorneys could gain access to the grand jury information only upon a showing of a particularized need. Further, the Court suggested that in determining a particularized need, the trial

207. Even if it were available, however, arguments remain as to why the *Halper* decision is unwise. These arguments include: (1) the general condemnation of judicial opinions that replace the will of the legislature with that of the judiciary; (2) the disagreement with classifying civil penalties as punishment because of the constitutional implications of such classification; and (3) the rejection of the idea that deterrence is an inappropriate objective for a civil statute.

208. 463 U.S. 418 (1983).

209. *Id.* at 445.

210. *Id.* at 421-22.

court should consider the finality of the criminal case and the government's ability to obtain the material in other ways, such as resorting to civil discovery.[211]

Sells implies that the government's burden of showing a particularized need is a heavy one and that saving time or money is not a sufficient reason for disclosure of grand jury material. The Court recently softened this suggestion in *United States v. John Doe, Inc. I*,[212] by holding that the district court did not abuse its discretion in making a determination of need based, in part, on the time and effort saved by granting the government attorney access to grand jury material.

Doe, however, did not change the fact that grand jury material cannot be disclosed to government attorneys involved in a related civil case without a court order. Consequently, while attorneys handling the grand jury investigation could obtain the civil investigative files, civil attorneys could not see grand jury material without a court order. Thus, only the attorney handling the criminal investigation would have all the facts, but she would be denied a full and informed consultation with her civil counterpart.[213] This limitation on consultation almost certainly will increase the risk that the government will err in calculating the risks *Halper* poses to any particular civil penalty case.

The government, of course, could seek a court order for disclosure of grand jury material in order to obtain the full and informed participation of the civil case lawyer. But the government may not always succeed in

211. *Id.* at 445.

212. 481 U.S. 102 (1987).

213. The *Sells* decision poses many questions relevant to the issue of consultation. For example, is disclosure of grand jury material permitted to a government supervisor who has responsibility for related civil and criminal matters, such as the Assistant Attorney General of the Tax Division, and who may not be able to forget the grand jury material when she decides issues related to the civil case? The *Sells* Court made clear its position that FED. R. CRIM. P. 6(e) is explicit in stating Congress' intent that grand jury material be available only to prosecutors acting specifically in that role and on a particular case. United States v. Sells Eng'g, Inc., 463 U.S. at 431. If so, then *Sells* stands for the proposition that the supervisor cannot have access to grand jury material without a court order if that material is to be used in a civil case.

However, even if one were to ignore the strong statements in *Sells* and allow the supervisor access to grand jury information that could be used in deciding a related civil case, this does not solve the government's problems created by *Halper*. The supervisor is not the trial attorney and thus will make a decision without having all the facts obtained during the investigation known to the civil and criminal trial attorneys but not necessarily memorialized. Thus, even this solution does not give the government the benefit of full and informed consultation between attorneys with actual knowledge of the case.

obtaining this order,[214] and no matter what the result, filing such a motion will signal to the defendant the government's strategy and its possible investigative timetable.[215] To avoid revealing this strategy or timetable, the government may opt not to seek such an order, risking that it will correctly analyze the danger to the civil penalty posed by *Halper* without having the benefit of consultation with the civil attorney.

The problem of disclosure of grand jury material has two possible solutions. First, the government could stop using grand juries to investigate such cases. Second, one government attorney could handle both the civil and the criminal aspects of the matter. Under *John Doe, Inc. I*, the Justice Department attorney who handled the grand jury investigation does not need to obtain a court order for disclosure of grand jury material for her use in a civil case.[216]

The first solution would require the government to abstain from using one of its most effective investigative tools—the grand jury. On the federal level, grand jury subpoenas, unlike civil subpoenas, are effective throughout the United States without geographic limitations.[217] It is especially valuable in complicated fraud cases, such as securities violations or tax evasion in which proof of fraud often occurs in different states.

In addition, witnesses before the grand jury are not entitled to have counsel present[218] or to have a transcript of their grand jury testimony.[219] These items are very important to the government because they prevent grand jury targets either from hearing witness testimony or from obtaining these transcripts, which in turn reduces the ability of a target to coordinate and orchestrate the facts presented to the grand jury. Such orchestration would particularly hinder the government's complicated, investigative task when the matters under scrutiny are economic or fraudulent malfeasance having complex facts that must be unraveled piece by piece.

Because the grand jury is so valuable an investigative tool, the govern-

214. United States v. Baggot, 463 U.S. 476 (1983).

215. For example, the defendant may not be aware of the parallel grand jury investigation or may not be aware that the government intends to pursue both remedies. An application for an order under Federal Rule of Criminal Procedure 6(e) and the requirement that the government make a showing of a "particularized" need for such information may give the defendant data not only about the parallel investigation, but also about the status of the government's civil case.

216. United States v. John Doe, Inc. I, 481 U.S. at 111.

217. FED. R. CRIM. P. 17(e); City of Los Angeles v. Williams, 438 F.2d 522 (9th Cir. 1971).

218. United States v. Mandujano, 425 U.S. 564, 581 (1976).

219. FED. R. CRIM. P. 6(e)(1); *In re* Long Visitor, 523 F.2d 443, 447 (8th Cir. 1975).

ment is unlikely to forego its use to foster the ability of the civil and criminal attorneys to communicate for the purpose of avoiding any possible *Halper* problem. At present, the benefits from consultation—currently necessary only to examine possible double jeopardy problems when the civil penalty is large—are small, and the loss from foregoing use of the grand jury is too great to justify this benefit. This may change, however, if the concepts and arguments employed by the Court in *Halper* are used to extend other constitutional protections to civil proceedings. If this extension occurs, then many civil penalty proceedings will become so expensive and slow that a government will continually have to choose between the criminal sanction and the civil penalty on the basis of cost and resource allocation. The government then might opt for full consultation between all government attorneys in order to devise the best remedy.

The second possible solution to the disclosure problem is for a government attorney to handle both the civil and the criminal investigation. This approach, however, would prevent the government from taking full advantage of specialization. Just as in private law practice, it is necessary for government attorneys to specialize in order to keep current in a particular field and thus give the government their full value. For this reason, a government is not likely to adopt this solution unless it is forced to choose between unattractive alternatives.

Even if a government was to abstain from using the grand jury or to opt to combine the civil and criminal investigations under the authority of one government attorney, one additional significant impediment to the use of parallel investigations exists: the judiciary's equitable power to stay a civil investigation pending the outcome of a related criminal case.

Although the law is well settled that parallel government investigations do not violate the Constitution, courts have recognized that a stay of the civil action pending completion of the criminal case is sometimes appropriate.[220] Imposing a stay on the civil proceeding is within the judge's discretion and will be overturned only if the discretion is abused.[221]

220. Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936); United States v. Armada Petroleum, 700 F.2d 706, 709 (Temp. Emer. Ct. App. 1983); Wehling v. CBS, 608 F.2d 1084, 1089 (5th Cir. 1979); Gordon v. FDIC, 427 F.2d 578, 580 (D.C. Cir. 1970); Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 55-56 (E.D. Pa. 1980); Dienstag v. Bronsen, 49 F.R.D. 327, 329 (S.D.N.Y. 1970).

221. FED. R. CIV. P. 30(b); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

Courts addressing the issue of staying civil proceedings during the pendency of a parallel criminal investigation have considered the effect of the stay on the public interest. When the civil case at issue involved an injunction or some other action that would quickly halt harm to the public, courts have tended to refuse stays of the civil action because delay would endanger the public. On the other hand, courts have been more willing to grant a stay when the civil case involved merely the collection of money.[222]

Additionally, in the context of parallel proceedings, courts have balanced the government's need for a civil remedy against the defendant's interest in protecting her right against self-incrimination.[223] In this regard, the fifth amendment does apply to civil proceedings if the disclosure of information might incriminate an individual in a criminal proceeding.[224] Therefore, a defendant may assert her fifth amendment privilege in a civil case. However, a civil defendant may invoke the self-incrimination privilege only in response to specific questions, in contrast to a criminal defendant's ability to assert the privilege generally.[225] Further, in a civil proceeding it is permissible to draw adverse inferences from the defendant's refusal to testify.[226] Thus, a defendant's silence has severe consequences in the civil case, but her testimony in the civil proceeding risks self-incrimination in the criminal matter.

The risk of self-incrimination, combined with the absence in most penalty cases of a pressing need to complete the civil trial, makes it likely that defendants subject to parallel investigations in *Halper*-type cases will frequently prevail in obtaining a stay of the civil proceeding until the completion of the criminal case.[227] If this is true, and defendants obtain

222. *Compare* United States v. Kordel, 397 U.S. at 1 *with* Gordon v. FDIC, 427 F.2d at 580; the latter case stated that "the Government's need for civil relief, which involves merely the collection of money, is not as strong as that in *Kordel*, which involved a libel brought by the FDA against certain drugs."

223. Wehling v. CBS, 608 F.2d 1084, 1088 (1979).

224. Marchetti v. United States, 390 U.S. 39, 53 (1968).

225. General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 225 (D. Kan. 1979). *See also* Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1025 (1985).

226. Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976); Arthurs v. Stern, 560 F.2d 477 (1st Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

227. If this is not true and courts do not stay these actions, then in many more cases defendants will face the consequences described in the text—remaining silent and prejudicing the civil case or testifying and possibly hurting their chances of acquittal in the criminal case. If this is the result, then *Halper* will result in greater peril for more defendants. This increased peril is the result of

stays, then a government will not have completed its civil investigation in time to decide whether to go forward with the criminal matter. Thus, a government often will not have developed its civil case to the point at which it can make an informed decision on whether: (1) the amount of penalty is so large that *Halper* might be applied; (2) the amount of the penalty is so large that it will result in as much deterrence as the criminal sanction; or (3) strategic or proof problems make the penalty case problematic. If known to the government, these proof problems might suggest that the penalty will not be as large as it appeared initially. Moreover, problems in proving the civil case, if known, might indicate that the government should risk a *Halper* defense to the penalty in order to gain the benefit of collateral estoppel from a preceding criminal conviction.[228] Simply put, if the civil action is stayed at an early point, then the government's choice of pursuing, in light of *Halper*, either criminal sanctions, civil sanctions, or both is uninformed.

Thus, parallel investigations will solve the problems created for the government by *Halper* only if the grand jury is not used as a means of investigation, and only if trial courts refuse to stay the civil side of the parallel investigations. This combination seems unlikely to occur, and thus the parallel investigation solution also is not a viable one for the government.

D. Consequences to Law Enforcement

Given the above analysis, a government has little alternative to the problems created by *Halper* except to conduct business as usual; proceeding with the criminal case first,[229] and then deciding without all the perti-

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Halper forcing government into more parallel investigations so as to gather enough information to protect its remedies, but offering no promise to defendants that the concurrent civil proceedings will be stayed.

228. Possible problems of proof in a civil case might include difficulty in authenticating documents or access to witnesses. In the criminal case, these matters are easier to control because in the federal realm, criminal subpoena power is nationwide. FED. R. CRIM. P. 17(e). This is in contrast to federal civil subpoena power, which is limited to a range of 100 miles from the place of the hearing or trial. FED. R. CIV. P. 45(e)(1).

229. See *supra* note 21 and accompanying text for a discussion of the reasons why the Internal Revenue Service usually chooses to proceed first with the criminal case. These reasons include the possible risk to the criminal case if a court were to suppress evidence because it was gathered under the "guise" of a civil investigation. These considerations apply to enforcement matters other than tax.

In addition, the criminal case has a collateral estoppel effect that the civil case does not. Montana v. United States, 440 U.S. 147, 153 (1979); United States v. Thomas, 709 F.2d 968 (5th Cir. 1983). Therefore, if the government proceeds first with the criminal case and wins, it will reduce its costs in

nent facts whether the related civil penalty case is a likely candidate for a *Halper* defense. At times, a government will reject some criminal cases because the *Halper* defense is sufficiently potent and the penalty amount sufficiently high that a government would rather not risk the loss of the penalty. At other times, a government will dismiss the viability of the *Halper* defense, thus concluding that it is safe to proceed with the criminal case first followed by the civil penalty matter. Some of these decisions, either to proceed with or forego the criminal case, will be wrong. Consequently, *Halper* injects more risk into a government's business of enforcing the laws by pushing a government to hasty and uninformed decisions.

This effect is especially troublesome in certain areas of law enforcement and regulation. Criminal and civil penalties governing the same conduct often are adopted to protect benefit programs from greed and bankruptcy as well as to check corruption and ensure that feeding at the public trough is not standard procedure. They often are adopted to regulate commerce, banking, drugs, and to protect the environment. These are all important and necessary tasks if public benefit programs, such as Medicare, and regulatory schemes, such as environmental protection, are to endure. Yet it is precisely those penalty statutes passed to protect benefit programs and regulatory schemes that are most threatened by *Halper*.

First, the harm to a government caused by fraud or violation of regulatory provisions does not always fit into the compensation model devised in *Halper*. Second, fraud and regulatory violations are difficult to prove because they involve proof of state of mind for fraud and complicated economic and scientific data for regulatory violations. Hence, a government is more likely to make a wrong decision in these areas if it has insufficient facts or has to make the decision too early. As discussed, the most immediate *Halper*-created problem for a government is the need to choose, without sufficient data or time for reflection, the civil penalty, the criminal sanction, or both in tandem. This problem is the one most likely to affect a government's pursuit of fraud and regulatory violations. One must ask whether protecting Halper from the perceived unfairness

later pursuing the civil case because of the application of collateral estoppel to the civil case. The same is not true if the government seeks and obtains the civil penalty before the criminal sanction. Because the civil case has a lower burden of proof, the doctrine of collateral estoppel would not apply, and the government would have to litigate fully the criminal case.

of a large penalty justifies the impact on a government's ability to effectively enforce and protect vital public matters.

V. OTHER CHOICES

While the ramifications of the *Halper* holding are clear, one could argue that the facts left the Court with no other choice. It either had to rework the concept of double jeopardy, or it had to permit the government to keep a grossly unfair and disproportionate penalty. The Court, however, had other alternatives to correct any gross unfairness. One such alternative is the due process clause of the fourteenth amendment.

Case law strongly suggests that the due process clause forbids damage awards to the government that are grossly excessive or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[230] Application of the fourteenth amendment to the situation in *Halper* has some disadvantages. First, the case law in this area is not well-developed, and new law would be made by any decision based on the due-process rationale. Second, the issue was neither briefed nor argued in the *Halper* case, so a decision based on that rationale would have been inappropriate. Third, application of the fourteenth amendment would involve as much judicial discretion and involvement in legislative matters as does the double jeopardy test devised in *Halper*.

While all these reasons have force, none justify the use of the double jeopardy clause as an alternative solution to the fourteenth amendment. First, just as the case law on using the fourteenth amendment to prevent grossly unfair government damages is not well established, use of the double jeopardy clause in the context of a civil penalty action is even more novel and, indeed, against established precedent.[231] Second, the fact that the fourteenth amendment argument was not briefed is no reason to reject its possible use in a future case. The Court may always note in dicta the possible application of another constitutional principle to an issue, regret that it cannot decide the case on that principle because it was not properly presented, and at the same time reject the constitutional

230. St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919). *See also* Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909).

231. See *supra* notes 83-99 and accompanying text for a discussion of why the Court's approach in *Halper* is so novel. See also *supra* notes 18-52 and accompanying text for a discussion of how the Court's decision in *Halper* runs contrary to established precedent.

force of the issue that was briefed.[232] Third, while the fourteenth amendment also involves judicial interference with the legislative prerogative, this interference would be no greater than that caused by the *Halper* decision. Moreover, unlike *Halper*'s double jeopardy analysis, a solution under the fourteenth amendment would not create substantial confusion in other significant areas involving the concepts of punishment and deterrence.

In addition to a possible solution under the fourteenth amendment, the disparity between the amount of fraud and the penalty in *Halper* may have violated the excessive fines clause of the eighth amendment.[233] As the Supreme Court's decision last Term in *Browning-Ferris Industries v. Kelco Disposal* states, the Court has never had occasion to construe the application of the excessive fines clause.[234] In *Browning-Ferris*, however, the Court strongly suggested that the entire eighth amendment "clearly was adopted with the particular intent of placing limits on the powers of the new government,"[235] and that it "places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments."[236]

While the Court in *Browning-Ferris* recognized that prior cases understood the eighth amendment to apply perhaps exclusively to criminal punishments,[237] it refused to go so far as to hold explicitly that the amendment only applies to criminal cases.[238] It even suggested that its decision in *Halper* implied that "punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns . . . ."[239]

The *Browning-Ferris* opinion seems to indicate that the Court is not adverse to considering the application of the excessive fines clause to government damage awards. If this is true, then the penalty in *Halper* would

232. The Court used this approach only one month after it decided *Halper* when it issued its ruling in Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989). In *Browning-Ferris*, the Court rejected the application of the eighth amendment to private civil cases involving punitive damages, but explicitly held open for consideration the application of the fourteenth amendment to the issue in the appropriate case.

233. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

234. Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. at 2913.

235. *Id.* at 2915.

236. *Id.* at 2920.

237. *Id.* at 2914.

238. *Id.*

239. *Id.* at 2920 n.21.

be a prime candidate for "excessive," if excessive is to be measured on a pure compensation model. Using the excessive fines clause in this way raises the same objections as applying the fourteenth amendment to the facts in *Halper*: it would create new law; the eighth amendment was not argued in *Halper*; and such use of the eighth amendment would replace judicial discretion for the legislative decision on what constitutes "excessive."

Each of the above arguments has force, but none justify using the double jeopardy clause in place of the excessive fines clause, especially considering how broadly the Court had to define punishment and how completely it had to eliminate the remedial purpose of deterrence in order to reach its result in *Halper*. As noted above, it is *Halper*'s reasoning, as much as its holding, which will cause future problems. Both the fourteenth and eighth amendments may provide better grounds for protecting individuals from grossly unfair civil penalties without creating the same theoretical and practical difficulties seen in *Halper*.

Lastly, the Constitution simply may not provide relief for cases like *Halper*, and perhaps neither the fourteenth, eighth, nor fifth amendments are pertinent. Relief may come only if, under the *Mitchell* doctrine, the underlying statute is construed as criminal in nature. Short of this, perhaps the Constitution provides no comfort. Such a conclusion would not be unfamiliar to or uncomfortable for the Rehnquist Court, and one must puzzle over its unwillingness to accept this, especially in a case involving a recidivist perpetrator of Medicare fraud.

VI. THE FUTURE

This Article has argued that in order to reach its result in *Halper*, the Supreme Court created a rule of law that will disrupt the government's ability to pursue fraud as well as regulatory violations; that the decision will result in a general extension of double jeopardy law into civil penalty proceedings; and that it will result in the extension of other constitutional guarantees to civil proceedings given the Court's attempt to separate the concept of punishment from the concept of crime. At the same time, *Halper* confused the proper role of deterrence in a civil remedy scheme. It appears that a civil penalty will be judged against a pure compensation model in order to determine whether deterrence is a goal of the penalty, thus making it punishment. Moreover, it is likely that a government will spend much time calculating hours spent on penalty cases and ignoring other intangible costs associated with the harm because such intangibles

cannot be reconciled easily with compensation. Further, legislative bodies will have to be very careful in creating legislative history so as not to justify a civil penalty statute by reference to deterrence and thereby open the statute to judicial scrutiny on the issue of punishment. In addition, practical problems will plague the executive branch in attempting to follow the will of the legislature by seeking both criminal and civil sanctions.

Given the broad-based doctrine created by the *Halper* court, lower courts will use *Halper* to justify rulings that may have little similarity to the *Halper* facts, and the Supreme Court may then reverse some of these in an effort to limit *Halper* to its facts. Nevertheless, without a specific overruling of *Halper* and its rationale, *Halper* will remain the beginning of a new doctrine leading to an unknown destination in which the line between civil and criminal law is forever blurred, and in which there is no certainty that enforcement of any civil penalty enacted by a legislature is possible without a proceeding in which a defendant is offered the full panoply of constitutional protections with all the attendant costs and inefficiencies.