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*United States v. Halper*: Making Double Jeopardy Available in Civil Actions

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United States v. Halper: Making Double Jeopardy Available in Civil Actions

In May of 1989 the Supreme Court published its unanimous decision, United States v. Halper, in which the Court expanded the Double Jeopardy doctrine to apply to civil as well as criminal cases. The decision went largely unnoticed; however it did create a small stir in the legal community. Since that time several legal scholars have discussed Halper: some of them have applauded Halper because it expanded the constitutional safeguard of Double Jeopardy, others have criticized Halper because it created additional issues of constitutional concern. Regardless of the position these scholars have taken, they have all focused on the expansionary aspects of the Halper opinion. As this note will demonstrate, this focus is misplaced.

Part I of this note will review the history of Double Jeopardy, part II will review the Halper decision, and Part III will then review the subsequent decisions by lower courts interpreting Halper. This note will conclude that the lower courts have refused to apply Halper expansively, but instead have used it only in “rare cases” to prevent gross injustice.

I. DOUBLE JEOPARDY: THE HISTORY

The Fifth Amendment of the United States Constitution adopts the doctrine of Double Jeopardy. It reads in part, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” The doctrine of Double Jeopardy was not new at the time of the Constitution,
traces of Double Jeopardy are found as early as 355 B.C.\textsuperscript{5} However, it did not begin to develop in English common law until the thirteenth century.\textsuperscript{6} Over the next five hundred years, the doctrine of Double Jeopardy continued to evolve in English common law, but by modern standards remained very limited.\textsuperscript{7}

Because of its muddled beginnings in common law, Double Jeopardy is not easily defined. In the United States, Double Jeopardy got a slow start,\textsuperscript{8} and early Supreme Court cases did not treat Double Jeopardy in any consistent manner.\textsuperscript{9}

By 1873 the Supreme Court held that the words “life or limb” should be read broadly to include all felonies and misdemeanors, and that Double Jeopardy protection attaches equally after both a previous conviction and a previous acquittal.\textsuperscript{10} The Supreme Court had not yet decided whether Double Jeopardy would apply to civil cases.\textsuperscript{11}

During the 1930’s the Supreme Court further refined the Double Jeopardy doctrine. In \textit{Blockburger v. United States},\textsuperscript{12} the Court defined “the same offense”\textsuperscript{13} language of the Constitution when it said, “where the same act or

\textsuperscript{5} MARTIN L. FRIEDLAND, \textit{DOUBLE JEOPARDY} vii (1969).

\textsuperscript{6} The first mention of a Double Jeopardy type plea can be found in No. 76, Select Pleas of the Crown, Shropshire Eyre (1203), \textit{cited in} Jill Hunter, \textit{The Development of the Rule Against Double Jeopardy}, 5 J.L. \& Hist. 1, 1 n.3 (1984).

Scholars differ on the precise origins of Double Jeopardy in English common law. Three prevailing views exist: (1) it was borrowed from ecclesiastical law, (2) it was transplanted from Roman law, and (3) Double Jeopardy was developed independently as a part of Anglo-Saxon criminal procedure. JAY A. SIGLER, \textit{DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY} 2-8 (1969); FRIEDLAND, \textit{supra} note 5, at 5-8. Perhaps the Oklahoma Supreme Court summed it up best when it said Double Jeopardy “seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and instead of having a specific origin, it simply always existed.” \textit{Stout v. State}, 130 P. 553, 558 (Okla. 1913), \textit{quoted in} SIGLER, \textit{supra} at 1.

\textsuperscript{7} SIGLER, \textit{supra} note 6, at 16-21.

\textsuperscript{8} Sigler suggests that this was due to the fact that federal criminal statutes were not as prevalent in the early days of the nation as they are now. SIGLER, \textit{supra} note 6, at 35.


\textsuperscript{10} \textit{Ex parte Lange}, 85 U.S. (18 Wall.) 163 (1874).

\textsuperscript{11} United States v. Chouteau, 102 U.S. 603 (1881); see Clark, \textit{supra} note 9, at 392-93, for a more detailed discussion of the Court’s opinions during this historical period.

\textsuperscript{12} 284 U.S. 299 (1932).

\textsuperscript{13} U.S. CONST. amend. V.
transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."14 In Helvering v. Mitchell,15 the Court decided that Double Jeopardy did not apply to civil cases, and that it was within Congress' power to determine which causes of action are civil and which are criminal.

Thus, by the end of the 1930's, Double Jeopardy was fairly well defined in the United States. It applied in all criminal cases that had been previously adjudicated and which relied on proving the same factual issues. Double Jeopardy was not, however, available in civil proceedings.

Since Halper turns directly on the issue in Mitchell, whether Double Jeopardy is available in civil proceedings, this case note will review Mitchell in more detail. In 1937 Mitchell was acquitted of filing a fraudulent tax return.16 In a subsequent civil proceeding, based on the same tax return, the Commissioner of Internal Revenue found that Mitchell had fraudulently failed to report income which led to an underpayment of taxes amounting to $728,709.84. Because fraud was involved, the Commissioner imposed a 50% fine of $364,354.92. Mitchell appealed, eventually reaching the Supreme Court. In his appeal Mitchell argued that the civil fine of $364,354.92 was barred on Double Jeopardy grounds since it was based on the same conduct for which he had been acquitted in a previous criminal prosecution.

The Supreme Court held that "unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the Double Jeopardy clause provided for the defendant in criminal prosecutions is not applicable."17 In deciding if the action was "intended as punishment," the court said "that question is one of statutory construction."18

15. 303 U.S. 391 (1938).
18. Id. at 399.
In other words, Congress had full power to determine whether a proceeding was civil or criminal. If Congress labeled a proceeding criminal, it would be subject to Double Jeopardy protections. However, if Congress labeled a proceeding civil, it would not receive any Double Jeopardy protections. To determine the label Congress had placed on a statute, the court examined congressional intent.

In Mitchell the Court applied a three-part test to determine Congressional intent: first, whether the sanction being imposed and other similar sanctions had previously been treated as civil; second, whether Congress expressly provided civil procedures for the action at bar; and third, whether the Revenue Act provided two distinct remedies, one civil and one criminal. In applying these three factors the Mitchell Court held that Congress intended to make the action civil.

In 1943 the Supreme Court heard another case in which it was asked to apply Double Jeopardy in the civil context. In United States ex. rel. Marcus v. Hess, Marcus brought a qui tam suit on behalf of the United States

19. In justifying the sanction at bar, the Court states that the fine is remedial in that it makes up for lost revenue to the United States, the cost of investigation, and the cost of taxpayer fraud in general. The Court recognized these actions as civil "in spite of their comparative severity." Id. at 399-401.
20. The criminal remedy, for which Mitchell was acquitted required a "willful attempt to evade and defeat the tax" and provided for up to $10,000 in fines and up to five years in prison. 26 U.S.C. § 145(b) (1928) (current version at 26 U.S.C. §§ 7291-7293, 7343 (1988 & Supp. II 1990)). The civil remedy, for which Mitchell was found liable, required a fraud against the government with the intent to evade a tax, and provided a fixed fine of 50% of the deficiency in the tax paid. 26 U.S.C. § 293 (current version at 26 U.S.C. §§ 6653, 6659 (Supp. II 1990)).
22. A qui tam action is an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution. BLACK'S LAW DICTIONARY 1126 (5th ed. 1979).

The Supreme Court has stated that the rational behind qui tam actions is that "[i]n such situations society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation." Priebe & Sons, Inc. v. United States, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting).

In Helvering v. Mitchell, 303 U.S. 391 (1938), the qui tam action was authorized by 31 U.S.C. § 3730(b)(1988), which allowed a private party to bring a suit on behalf of the United States. If the plaintiff prevailed the district court could award the private party up to 25% of the proceeds. See United States v. Halper,
against Hess and several other electrical contractors in the Pittsburgh area. Marcus charged, and the lower court agreed, that the respondents had colluded in their bidding on Public Works Administration projects, defrauding the United States government. The lower court found the respondents civilly liable for $2,000 on each of fifty-six violations plus $203,000 for double the actual damages the government sustained. Unlike Mitchell however, which dealt with a previous acquittal, the respondents in Hess had been previously convicted in a criminal trial based on the same conduct. The respondents appealed, arguing that since they had pled nolo contendere to a previous criminal indictment and were fined $54,000, the previous criminal action barred this subsequent civil suit on Double Jeopardy grounds.

The Court, relying on Mitchell, stated that Double Jeopardy would only bar a subsequent suit if it was criminal, and that the determination of whether the action was criminal was one of statutory construction. In determining the issue of statutory construction the Court looked at two key facts: first, Congress had created both a criminal and a civil remedy for the conduct involved; and second, the purpose of the statute, as shown in congressional debates, was primarily remedial. The Court said, "This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered." Of particular importance in Hess is the concurring opinion by Justice Frankfurter. Justice Frankfurter proposed that instead of using a statutory construction test, the Court should use a total penalty test. He stated that Congress may use either one or two proceedings to carry out its remedies against the respondent. As long as the total remedies envisioned by Congress are not exceeded, the Double Jeopardy clause will not be violated.

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24. Id. at 550.
25. Id. at 553.
26. Justice Frankfurter's concurring opinion is of particular importance, because the Halper Court may have been guided by his reasoning. Frankfurter's words are, [w]here two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate
The Court again visited the issue of Double Jeopardy in the civil context in *Rex Trailer Co. v. United States.*\(^27\) *Rex Trailer* arose out of a fraud perpetrated on the United States government during the purchase of surplus war goods. The Rex Trailer Company pled nolo contendere to a criminal indictment based on the fraud. Subsequent to that plea, the government instigated a civil suit seeking $10,000 in fines.

In defending the civil action, Rex Trailer Company argued that Double Jeopardy barred this civil action since it followed an earlier criminal conviction based on the same conduct. Again, the Court relied upon a statutory construction test. Applying the test, the Court said that the remedy was equivalent to liquidated damages in civil contract law and was thus civil.\(^28\) Further, the Court found that the fine approximated the actual damages incurred by the government.\(^29\)

Thus, by the 1980's, the use of Double Jeopardy in criminal proceedings only was well established. To determine whether an action was civil or criminal, the Court consistently followed a statutory construction test.\(^30\) In 1984 however, the Court dealt a serious blow to the use of the statutory construction test in the Double Jeopardy context.

In *United States v. One Assortment of 89 Firearms,*\(^31\) the Court said that in determining whether an action is civil or criminal, a court must go through a two-part test:\(^32\)

1. first, determine whether Congress either expressly or im-

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\(^28\) Id. at 150 U.S. 148 (1956).

\(^29\) The Court found influential the fact that the remedy was found in the same statute that allowed the government to contract with private parties to dispose of surplus war goods. *Rex Trailer Co. v. United States*, 350 U.S. 148, 150 (1956).

\(^30\) Id. at 153-54.


\(^32\) Id. at 362-63. The court relied on *United States v. Ward*, 448 U.S. 242 (1980), which used the same two-part test to determine if Fifth Amendment self incrimination protection applied.
pliedly intended one label over another; second, if Congress intended to create a civil remedy, then examine whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention." Applying the second part of the test, the 89 Firearms Court stated that, "[o]nly the clearest proof that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." The 89 Firearms Court did not find "the clearest proof," and did not allow the Double Jeopardy defense to stand. However, the reasoning of the opinion implies that in some situations, the Court may override Congressional designation of an action as civil.

II. UNITED STATES V. HALPER: A REVIEW OF THE CASE
A. Procedural Background

Irwin Halper managed a medical laboratory in New York City. During 1982 and 1983 Halper submitted sixty-five false Medicare claims to the government defrauding it of $585. Halper was convicted, fined $5,000, and sentenced to two years in prison. Subsequent to Halper's conviction, the government brought a civil suit against him seeking $130,000.

The district court granted summary judgment on the issue of liability in favor of the government based on the facts established in Halper's criminal conviction. However,

34. 89 Firearms, 465 U.S. at 366 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960) (deciding whether an action should be treated as civil or criminal for purposes of the Sixth Amendment)).
35. 89 Firearms, 465 U.S. at 366.
36. Halper submitted numerous claims using code 9018, which paid either $10 or $12. Halper should have only used code 9018 for the first patient treated each day at a private facility. After treating the first patient, Halper should have submitted the claims using code 9019, which paid $3. The 65 false claims amounted to an overpayment by the Government of $585.
38. The government sought $2,000 per false claim under 31 U.S.C. §§ 3729-3731 (1988) (The act also allowed the government to seek double the damages it actually sustained, plus the cost of litigation). The act was amended in 1986 to provide a fine of $5,000 to $10,000 for each false claim, plus three times the actual damages suffered by the government.
on the issue of the remedy, the district court ran into problems. It found that imposition of the civil remedy was not rationally related to the damages the government had sustained, and amounted to punishment. Thus, awarding the government the full $130,000 would violate Halper's Double Jeopardy rights. The court said that imposition of the fine was discretionary under these circumstances and thus reduced the fine to $16,000.39

The government moved to have the district court reconsider the case, which it did.40 Upon reconsideration, the district court admitted that it was wrong in holding that the remedy was discretionary. However, the court still felt that Halper's Double Jeopardy rights were violated, and thus ruled that part of the statute unconstitutional. The district court ruled that the government could only seek double its actual damages ($1,170), plus the cost of the litigation. The United States appealed directly to the Supreme Court, and certiorari was granted.41

B. The Supreme Court

The Supreme Court agreed with the district court. In reaching its decision, the Supreme Court had to overcome contradictory precedent. The Court set up the issue by stating that "[t]his Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."42 As the Court distinguished opposing precedent, it continually referred back to these three principles. One important issue the Court saw in these three principals that isn't immediately apparent is that the first two principles apply only to criminal cases, while the third principle may apply to both criminal and civil cases in certain circumstances.43

43. The Court relied on language in Mitchell to make this point. "The Double Jeopardy Clause, . . . 'prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.'" Halper, 490 U.S. at 442 (quoting
The government argued that Helvering v. Mitchell, United States ex rel. Marcus v. Hess, and Rex Trailer Co. v. United States barred a Double Jeopardy defense. The Court, however, distinguished the facts of each case from the case at bar.

First, the Court argued that Mitchell differed from Halper since Mitchell's criminal proceeding ended in acquittal. Thus, the Mitchell Court was not concerned with the third prong, double punishment, but only with the first two prongs. On the other hand, since Halper was convicted during his criminal proceeding, the Court needed to focus only on the third prong. The Court also noted that the Mitchell Court found "that the deficiency sanction was in fact remedial, providing reimbursement to the Government for investigatory and other costs of the taxpayer's fraud." So, even if the Mitchell Court had been dealing with the third prong, it wouldn't have had to deal with the situation faced in Halper, since the civil penalty was remedial.

The Court had more difficulty distinguishing Hess since Hess had been previously convicted under the False Claims Act. However, the Court found that Hess did not apply to Halper "since the actual costs to the Government roughly equaled the damages recovered, ... the Court simply did not face the stark situation presently before" it.

Similarly, the Court distinguished Rex Trailer since that Court found that the civil remedy sought was roughly equivalent to the damages sustained by the government.

C. Creating a New Rule

Both legal scholars and courts had previously focused on the statutory construction analyses of Hess and Rex Trailer.

44. The Government argued that those cases stood for the following three propositions: "first, that the Double Jeopardy Clause's prohibition against multiple punishments protects against only a second criminal penalty; second, that criminal penalties are imposed only in criminal proceedings; and, third, that proceedings under, and penalties authorized by, the False Claims Act are civil in nature." Halper, 490 U.S. at 441.
45. Id. at 442-43.
47. Halper, 490 U.S. at 445.
49. Halper, 490 U.S. at 445-46.
III. APPLYING UNITED STATES V. HALPER

Since the Halper Court did not overrule earlier cases, one must determine how this new rule interacts with them. The first step in one's approach to a Double Jeopardy problem today should be to determine which prong of Double Jeopardy as outlined in Halper applies to the particular fact situation. As mentioned earlier, the three prongs of Double Jeopardy outlined in Halper are: (1) a second criminal prosecution for the same offense after a criminal acquittal; (2) a second criminal prosecution for the same offense after a criminal conviction; and (3) multiple punishments (either criminal or civil) for the same offense. If the first two prongs of Double Jeopardy apply to a particular fact situation, traditional Double Jeopardy analysis should be used. However, when the third prong applies to a particular fact situation, one must then apply the two-part test of United States v. One Assortment of 89 Firearms: (1) statutory construction (i.e. did Congress intend to make the remedy civil?), and (2) if the answer to the first question is yes, then should the remedy be classified as criminal despite Congress' intentions (one should apply the reasoning of Halper to answer this question).

A. Is the Remedy Civil or Criminal?

Since 1989, lower courts have had numerous occasions to apply Halper. However, only two courts since then have expressed a willingness to halt a civil proceeding due to Double Jeopardy. A brief analyses of the cases applying Halper follows.

In United States v. Mayers, the court faced a set of facts similar to Halper. Mayers, a chiropractor, had been civilly convicted of submitting 307 false Medicare claims, defrauding the government of $24,697.73. A civil penalty of $1,791,100 was assessed against Mayers in 1986 (amounting to seventy-two times the government's medicare overpayment). Subsequently, Mayers was convicted criminally for

56. Id. at 440 (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).
58. 897 F.2d 1126 (11th Cir. 1990).
the same conduct. Mayers raised the Double Jeopardy defense on appeal.

The circuit court held that Mayers' Double Jeopardy rights may have been violated. It instructed the district court to rule on issues of fact to determine whether the criminal convictions and sentences violated Double Jeopardy, and, if so, either to set the convictions and sentences aside, or to modify them accordingly. Before the district court could rule on the issue, the parties settled.

The second case, *United States v. Hall,* arose out of the illegal exportation of $1,035,000 in bearer negotiable instruments from the United States to the Bahamas. Through a plea bargain agreement Hall pled guilty and was sentenced to one year in prison, two years special probation, a $10,000 fine, and 400 hours of community service. Subsequently, the government brought a civil suit against Hall for $1,035,000. The court held that the subsequent civil suit was a violation of the plea agreement and dismissed the case.

Despite the dismissal, the court discussed Hall's Double Jeopardy claim. The court stated that the government had not established that its actual losses were anything near the $1,035,000. For this reason, the court stated that Halper would forbid the case from proceeding. The court said that if it had not already dismissed the case on other grounds, it would have required the government to submit an approximation of its losses before proceeding.

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2986).

60. United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990).


62. The government relied on 31 U.S.C. § 5321(a)(2) which reads in part:

    The Secretary of the Treasury may impose an additional civil penalty on
    a person not filing a Report . . . A civil penalty under this paragraph
    may not be more than the amount of the monetary instrument for which
    the Report was required. A civil penalty under this paragraph is reduced
    by an amount forfeited under Section 5317(b) of this Title.


63. The court stated:

    Even if the court were not to grant Hall summary judgement due to the
    Government's breach of the plea agreement, the Government's attempt to
    assess this civil penalty could still be challenged as violative of the Double
    Jeopardy clause. Thus, the court finds it necessary to put forth a
    brief discussion of the parties' arguments on that point.


64. Id. at 655.
Since the court had dismissed the government's suit, the court's reasoning is simply dicta. However, it does show that this district court might have been willing to bar the government's suit under _Halper_.

Thus, at least two courts appear willing to bar civil litigation under the _Halper_ approach, however, more numerous are the cases in which courts have found that _Halper_ will not stand as a bar to a subsequent suit. Some of those cases never reached the issue of whether the civil sanction is punishment for purposes of Double Jeopardy. Instead, they distinguish _Halper_ since the subsequent suit is brought by a private party or by a different sovereign.

The cases that squarely face the issue in _Halper_ have all refused to find a situation in which _Halper_ will stop subsequent litigation. Since no court has overturned a civil penalty on Double Jeopardy grounds, it is difficult, if not impossible, to determine at what point they will be willing to do so. However, some insight can be gained by reviewing the arguments the lower courts have found persuasive in refusing to apply Double Jeopardy to a civil fine.

1. Immeasurable Government Losses

Many courts face situations in which the government's losses cannot be easily defined. Some courts dispense with those cases by distinguishing the facts of the case from the facts of _Halper_, while others set up rules to determine when damages become punishment. Finally, some courts simply try to aim for "rough justice."


66. The following courts held that _Halper_ only applied when the same sovereign brought both suits: United States v. Louisville Edible Oil Prods., Inc., 926 F.2d 584 (6th Cir. 1991); United States v. 40 Moon Hill Rd., 884 F.2d 41 (1st Cir. 1989); United States v. Anthony, 727 F. Supp. 792 (E.D.N.Y. 1989) (false medicaid claims).

a. Distinguishing Halper on the facts. Some courts have chosen to rely on the "prolific but small gauge offender" language of Halper.68 One example of those courts is United States v. Pani.69 The facts of Pani were almost identical to the facts of Halper. Pani was a surgeon who made numerous false Medicaid claims. He was convicted on three of those claims (amounting to $1,380), ordered to pay $5,567 restitution, $30,000 in fines, and complete 400 hours of community service. The government subsequently brought a civil suit against Pani for 157 fraudulent claims. Since Pani had only been convicted on three claims, the court restricted its holding to those three. The civil damages relating to those claims totalled $32,46070 (about twenty-five times the amount of the false claims).

The court didn't address the issue of whether the $32,460 bore a rational relation to the government's loss. Instead, it simply relied on the "prolific but small gauge offender" language of Halper. Since only three counts were involved, the court held that Pani was not a prolific offender, and thus Halper did not apply.71 This focus on the "prolific but small gauge offender" language seems to be based on the rationale put forth in Halper that part of the harm is that the defendant is being punished more than the statute contemplated.72 If courts followed this rationale strictly, as did the Pani court, Halper would be very limited.

b. Using rules to define punishment.

(1) Seizure of profits is not punishment. In United States v. Moore,73 a Navy employee received payments from a private company amounting to about $100,000.

70. The statute had changed since Halper. Instead of limiting damages to $2,000 per claim, the statute now allowed the government to seek from $5,000 to $10,000 per false claim. False Claims Act, 31 U.S.C. §§ 3729-3731 (1988).
The employee entered a plea agreement to which he pled guilty to violating federal law. Subsequently the government brought a civil suit to recover the $100,000. The court held that Halper did not bar the civil suit for two reasons: first, the court focused on the "prolific but small gauge offender" language discussed above; second, even though the government had not accounted for its losses, by definition, a private payment to a government employee damages the government to the extent of the payment.

The second reason the court gave for denying Moore's Double Jeopardy claim goes to the heart of Halper. When do damages reach the point that they become punishment for Double Jeopardy purposes? The Moore court made a clear rule to dispense with the matter: whenever a defendant profits from illegal activity, a civil suit by the government to take those profits will not rise to the level of punishment.

(2) Forfeiture is not punishment. The First Circuit ruled that forfeiture cases will never amount to punishment, and thus a Double Jeopardy will never stand. The court's reasoning was dubious however. It reasoned that forfeiture was civil since the Supreme Court held that it was in United States v. One Assortment of 89 Firearms. The First Circuit failed to recognize that 89

75. The court's reasoning behind this policy is not clear. The court simply held that the damage caused to the Government when employees receive payments from third parties "is the appearance of a conflict of interest. Consequently, any payment received in violation of the statute, no matter how large, is by definition not disproportionate to the harm caused." United States v. Moore, 765 F. Supp. 1251, 1257 (E.D. Va. 1991). Even though the court did not explain its reasoning, its ruling is in agreement with the law of restitution in contract cases, which has traditionally been characterized as civil, and was likely influenced by that law.
76. The same argument was used in United States v. Cunningham, 757 F. Supp. 840, 846 (S.D. Ohio 1991) ("Money taken from society through illegal activity then subsequently forfeited is merely maintaining the status quo and cannot be labeled punitive in nature.").
Firearms is antithetical to that view point. In 89 Firearms, the Court did not dispose of the case by simply stating that forfeiture is civil. Instead, the Court investigated the harshness of the forfeiture to see if it was punitive for Double Jeopardy purposes. 79

Other courts have rejected the forfeiture rule put forth by the First Circuit. In United States v. 38 Whalers Cove Drive, 80 a district court in the Second Circuit was willing to investigate the harshness of the forfeiture. The court held that forfeiture of a $70,000 home did not fall within the scope of Halper since the $70,000 compensated the government for the illicit profits and "collateral consequences of facilitating drug traffic." 81

In United States v. United States Fishing Vessel Maylin, 82 and in United States v. Cunningham, 83 district courts in the Eleventh and Sixth Circuits, respectively, were also willing to investigate the harshness of a forfeiture to see if it qualified as punishment under Halper. Both courts held that the forfeitures were not extreme enough to amount to punishment.

c. Aiming for rough justice. Many courts either cannot dispose of the Double Jeopardy claim without evaluating the magnitude of the civil penalty, or they feel that doing so is necessary after disposing of Halper on other grounds. These courts show a clear pattern in weighing an amorphous government loss against a specific dollar penalty. They are all very reluctant to find that the damages do anything more than compensate the government.

United States v. United States Fishing Vessel Maylin 84 is illustrative of the process that many courts go through when they must weigh an indeterminate government loss against a specific dollar penalty imposed against the defendant. In that case, the owner of the fishing vessel had previously been convicted of fish and game violations. 85 Sub-

81. Id. at 180.
85. The conviction relied upon the Lacey Act, 16 U.S.C. §§ 3372(a)(3)(A),
sequent to those convictions, the government brought a forfeiture proceeding against the vessel involved in the criminal conduct. The owner argued that Double Jeopardy applied to the case, and thus the civil proceeding was barred.

The court found the value of the claimant’s boat to be $55,000. However the court had more difficulty establishing the losses the government had incurred. In determining those losses, the court listed the areas in which the government was harmed. The court found that the government suffered losses due to the cost of investigation, the cost of enforcement, and the cost of the damage to the wildlife. While the court could not put a dollar amount on those costs, it held that it could not find that the amount of the forfeiture was not “rationally related” to those enumerated yet indeterminate losses. For that reason, it held that the forfeiture was civil in nature. 86

This court took a “rough justice” approach. It simply looked at the dollar amount the claimant suffered, and the areas in which the government suffered. Based on that, it made a rough estimate as to how they compared. This approach carries with it the danger that courts may vary widely in how they apply Halper. A review of the cases that do so shows that courts unanimously come down in favor of the government. 87 A few of those cases are discussed in

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86 The court said, “the court cannot say that that figure represents an amount not rationally related to the injury caused to the Government.” United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222, 1223 (S.D. Fla. 1989). This statement implies that this court places a high burden on the defendant. Compare this court’s statement to the proposition that a court will apply Halper if it cannot say that the government's losses are rationally related to the civil penalty.

87 United States v. Reed, 937 F.2d 575 (11th Cir. 1991) (a 30 day suspension of a postal worker did not amount to punishment for Double Jeopardy purposes, because the purpose of the suspension was to protect the Government); Greene v. Sullivan, 731 F. Supp. 838, 840 (E.D. Tenn. 1990) (a pharmacist's five year exclusion from participating in the Medicare program was not punishment. The court likened the exclusion to “professional license revocations for lawyers, physicians, and real estate brokers which have the function of protecting the public and have routinely been held not to violate the doubly jeopardy clause.”); United States v. Marcus Schloss & Co., 724 F. Supp. 1128 (S.D.N.Y. 1989) ($20,000 penalty for insider trading compensated the Government for losses incurred including those of investigation and prosecution. Also held that a prior civil punishment could potentially bar a subsequent civil proceeding); United States v. WRW Corp., 731 F.
more detail below.

In Bernstein v. Sullivan, the court held that $51,942 in civil fines based on $2,000 in false Medicaid claims (about twenty-five times the amount of false claims), did not amount to punishment.

As mentioned earlier, in United States v. Moon Hill Rd., the court disposed of the case simply because it was a forfeiture. However, the court then went on to add that a forfeiture of a 17.9 acre tract of land used in the drug trade did not constitute punishment since it simply remedied the government for the "ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention.

In United States v. Cunningham, Cunningham had civilly forfeited $423,850 which he had used to purchase thirty kilograms of cocaine. The government then brought criminal actions against Cunningham. Cunningham argued that the $423,850 civil forfeiture constituted punishment and thus Double Jeopardy barred the criminal prosecution. The court held that the "$423,850 and a lengthy prison sentence would not be overwhelmingly disproportionate to the damage he has caused.

These cases illustrate that courts are unwilling to find that penalties are so severe that they amount to punishment. In so finding, the courts are frequently willing to look at more than just the amount taken from the government. They are also often willing to consider the costs of enforcement, litigation, and the costs to the public in general. The courts do not seem to clearly distinguish between the extra

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88. 914 F.2d 1395 (10th Cir. 1990).
89. 884 F.2d 41 (1st Cir. 1989).
90. Id. The court concurrently disposed of the case on two other grounds. First, civil forfeiture suits are never criminal no matter how harsh; second, Double Jeopardy does not apply to dual sovereigns.
92. Cunningham and nine others had been indicted by a grand jury on 28 counts of violating 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii).
costs created by the defendant, and the costs created by all wrongdoers similarly situated to the defendant. Clearly, the more costs a court is willing to consider, the less likely it will be to find that a penalty is disproportionate to those costs, and thus apply Double Jeopardy.

2. *Measurable Government Losses*

When courts have been able to assess the government's damages in dollar terms, they have also refused to invoke Double Jeopardy protections.

In *United States v. Fliegler*, the court granted summary judgment in favor of the government for $115,000 after the government submitted affidavits showing their costs of litigation in both the criminal and civil proceedings was $110,564.90.

*United States v. Bizzell* arose out of violations of Housing and Urban Development (HUD) regulations. As a result of those violations, the potential loss to HUD was very large. In a civil proceeding, Bizzell and HUD agreed that Bizzell would either refrain from dealing in HUD programs or would pay HUD $30,000. After the settlement, HUD negotiated with a third party, mitigating the government's losses to $2,000. Subsequently, the United States indicted Bizzell for committing fraud against HUD. Bizzell raised the defense of Double Jeopardy.

The trial court held that the $30,000 fine was so removed from the government's loss of $2,000 that it constituted punishment. The appellate court disagreed. It held: first, that debarment from participation in HUD was remedial, since its purpose was to protect the government against further loss, second, the $30,000 fine was not punishment, since at the time the settlement was entered into, the government's losses exceeded $30,000, and thus the purpose of the fine was remedial.

*Bizzell* thus implies that at least this court will look at the government's losses at the time the civil suit is finalized, regardless of any subsequent mitigation.

95. 921 F.2d 263 (10th Cir. 1990).
96. The government's losses were reduced to the cost of investigation and litigation. *Id.* at 265-66.
97. *Id.* at 267.
B. Using Halper to Invoke Other Constitutional Protections

Just as courts have been reluctant to apply the Halper Double Jeopardy defenses in civil suits; they have likewise refused to use Halper to extend other constitutional protections.98

In a tax case, the Fourth Circuit did leave open the possibility that Halper may have created other constitutional protections in some instances.99 The court faced the issue of whether ex post facto protection extended to a statute that imposed a twenty-five percent penalty on a tax underpayment while the old law imposed only a ten percent penalty. The court held that if the penalty was punishment, as defined by Halper, the ex post facto protection would attach.

Since the amount of underpayment was $10,933.07, the new law imposed a penalty of $2,733.27, in addition to the payment of the deficiency plus interest.100 The court, using the analysis of Halper, ruled that the penalty was civil, and thus Karpa was not protected by the ex post facto protections of the Constitution.101

In Bernstein v. Sullivan,102 Bernstein claimed that Halper forbade the government from pursuing a civil claim against him because the original statute of limitations had lapsed. After its lapse, the government passed a new statute of limitations that allowed it to proceed against Bernstein. Bernstein claimed that this violated his due process rights under the Fifth and Fourteenth Amendments. After citing a number of cases that held that extending the period of the statute of limitations does not violate due process rights, the court dismissed the argument stating, “Halper does not involve a statute of limitations.”103

In re Grand Jury Proceedings,104 the court admitted that the reasoning in Halper was in some tension with existing civil contempt law. However, the court refused to

100. Id. at 785.
101. Id. at 788.
102. 914 F.2d 1395 (10th Cir. 1990).
103. Id. at 1403.
104. 894 F.2d 881 (7th Cir. 1989).
use *Halper* to extend additional constitutional protections to civil contempt since *Halper* "was not a [civil] contempt case." 105

IV. IMPLICATIONS OF *UNITED STATES V. HALPER*

These cases show an extreme reluctance by lower courts to bar or overturn subsequent proceedings on Double Jeopardy grounds. In fact, no court has overturned a civil penalty on Double Jeopardy grounds.

A. Government Prosecutions

In the wake of *Halper*, legal scholars predicted that prosecutors would face pressures to consolidate actions, drop either the criminal or civil proceeding, reduce the amount sought in civil proceedings, create remedial funds, provide more detailed cost accounting, eliminate fixed penalty statutes, or get the defendant to waive his Double Jeopardy defense in settlement agreements. 106 The lower court opinions have demonstrated the opposite. Since the lower courts have refused to overturn civil proceedings on Double Jeopardy grounds, prosecutors would be unwise to resort to such means to avoid the Double Jeopardy defense. Instead, prosecutors should proceed with the knowledge that lower courts will read *Halper* very narrowly.

B. Civil Defendants

Civil defendants should not take much solace in *Halper*. Clearly, the chances of a civil defendant prevailing based on a Double Jeopardy argument are poor. Defendants would be wise to consider the possibility of future civil proceedings when plea bargaining in a criminal suit, and when negotiating settlement of civil suits.

Nevertheless, the Double Jeopardy defense may continue to have some intimidation factor against prosecutors. In fact, there is some evidence that prosecutors are worried about the Double Jeopardy defense created in *Halper*. The Securities and Exchange Commission has begun placing Double Jeopardy waivers in plea bargain agreements in criminal 105. *Id.* at 885.
cases. By raising the defense, defendants may be able to use Double Jeopardy as a bargaining chip in negotiating a more favorable settlement with prosecutors. Even if prosecutors realize that their chances of prevailing over a Double Jeopardy defense are extremely high, they may be more likely to settle when it is raised due to the remote possibility that they might lose.

C. Future Litigation

The lower courts show great disparity in measurements of the government's losses. The Supreme Court created this disparity by its inconsistent treatment of the government's loss in Halper. In Halper, the Supreme Court said that $130,000 was "an amount more than 220 times greater than the Government's measurable loss." This implies that the government's "measurable loss" was $585, or the amount of the fraud. However, the Supreme Court later said that the District Court found the government's measurable loss to be about $16,000 after including the costs of the litigation. If the Court had used the $16,000 as the government's loss, it would have found that the fine was only eight times more than the government's loss. If the Supreme Court had included the cost of litigation, it may have ruled differently. It may have found that a fine only eight times greater than the government's loss was not excessive. Even if the inclusion of the costs of litigation would not have made a difference in Halper, they may in other cases.

The lower courts have usually included the government's costs of litigation before determining whether the fine is rationally related to those costs. Some lower courts have even included government costs arising from enforcement, investigation, and the harm to the public. A few lower courts have included the costs incurred by the government in these areas not simply attributable to the defendant, but attributable to all wrongdoers similarly situated.

109. Id. at 452.
This wide disparity may be used to the advantage of both prosecutors and defenders in attempting to reach the result they desire. Clearly, prosecutors should argue that the government's measurable loss includes things such as the costs of enforcement, investigation, litigation, and harm to the public. Prosecutors should include as much cost data as possible, however when cost data is not available, they should not hesitate to argue that those indeterminate costs should nonetheless be included.

Conversely, defendants should argue that in Halper the Supreme Court only looked at the cost of the actual fraud when deciding if the amount sought was disproportionate to the government loss. The extra costs should only be included at the end of the analyses. Defendants should also argue that the generalized costs of all wrongdoers should not be included in any circumstances, since doing so is contrary to the Supreme Court's reasoning in Halper.

This disparate treatment of government costs must be resolved by the Supreme Court, since failure to resolve this issue will only continue to create confusion and unequal application of the law by the lower courts. Furthermore, the inclusion of additional costs by lower courts may destroy the Double Jeopardy defense the Supreme Court attempted to create.

V. CONCLUSION

United States v. Halper overturned years of precedent by holding that constitutional Double Jeopardy protections apply to civil cases in some instances. Specifically, the Court held that whenever a civil penalty "may not fairly be characterized as remedial," Double Jeopardy prohibits the government from pursuing that remedy. In applying this doctrine however, lower courts have reserved the Halper doctrine for rare cases where the civil penalty sought bears no rational relation to the costs incurred by the government. The lower courts have never ruled that a case meets this criteria.

This narrow reading of Halper by lower courts indicates that Halper will not have far-reaching effects, and will be extremely limited in application. While defendants will sure-

110. Id. at 448.
ly continue to argue that *Halper* applies to their case, pros-
cutors may proceed with confidence, knowing that *Halper* will rarely stand as a bar.

*Nelson T. Abbott*