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Abstract: Historically, the constitutional guarantee against double jeopardy has been triggered primarily in criminal prosecutions. It has not encompassed civil monetary penalties. In United States v. Halper, the Supreme Court expanded double jeopardy protection. The Court held that government imposition of a civil monetary penalty on a defendant who has been criminally convicted for the same offense is punishment to the extent that the penalty clearly exceeds compensation. The punitive portion of the civil penalty, according to the Court, is multiple punishment prohibited by the Double Jeopardy Clause. This Note examines Halper and its effect on legislatures, prosecutors, and courts. The Author concludes that the Court’s application of double jeopardy protection effectively protects convicted defendants, but should be extended to protect acquitted defendants from punitive civil penalties.

In United States v. Halper the Supreme Court unanimously held that government imposition of a civil sanction clearly in excess of compensation is punishment entitling a criminally convicted defendant to the constitutional protection against double jeopardy. Under Halper, when the government seeks a civil penalty after a defendant has been criminally convicted for the same offense, courts must look beyond the civil nature of the proceeding and determine whether the proposed civil sanction is punitive rather than remedial. The government is entitled to compensation, but government imposition of a punitive civil sanction on a criminally convicted defendant is, the Court held, multiple punishment prohibited by the Double Jeopardy Clause.

United States v. Halper is a landmark case in the interpretation and application of the Double Jeopardy Clause. Protection against multiple punishments before Halper was confined to criminal prosecutions in which the court determined that the legislature had not clearly authorized cumulative imposition of the multiple punishments sought for the offense. Halper is the Supreme Court’s first application of the

2. Id. at 1902. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
4. Id. at 1900–02.
double jeopardy protection against multiple punishments in a civil proceeding. The decision expands the courts' role in double jeopardy analysis. Courts must determine whether a civil sanction that the government seeks to impose on a criminally convicted defendant is remedial or punitive rather than deferring, as in the past, to the legislature's civil label.

The Court's unprecedented application of double jeopardy protection raises new issues for legislatures, prosecutors, and courts. Legislatures must decide whether the Halper restriction on civil sanctions requires the restructuring of parallel criminal and civil sanctions to counter any weakening of their effect. Prosecutors must now consider double jeopardy implications when parallel civil and criminal actions are pursued. Also, when the civil action follows criminal conviction for the same offense, prosecutors must be prepared to account for the government's costs of investigation and prosecution.

Trial courts also are faced with additional issues after Halper. First, courts must determine where to draw the line between rough remedial justice and punishment. Second, they must consider whether other constitutional protections that have been limited to criminal prosecutions should now apply, like double jeopardy, to punitive civil sanctions. Third, courts must decide whether a qui tam action\(^5\) triggers double jeopardy protection. Finally, courts must prescribe procedures for combining civil and criminal prosecutions in a single proceeding.

Although Halper raises but fails to resolve many new issues, it is an important expansion of double jeopardy protection. By recognizing that civil penalties in excess of compensation constitute punishment subject to double jeopardy protection, Halper prevents the injustice of imposing additional punishment on a convicted defendant in a subsequent civil proceeding by the government. The decision, however, does not go far enough because it fails to protect an acquitted criminal defendant from being punished through government civil sanctions. Double jeopardy principles demand that all defendants be protected from multiple attempts by the government to impose punishment. The Court recognized in Halper that a civil sanction sought by the government becomes punishment when it clearly exceeds compensation.\(^6\) The Court should further recognize that imposing punishment

\(^5\) A qui tam action is "[a]n 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).

\(^6\) Halper, 109 S. Ct. at 1901–02.
on an acquitted defendant also violates the double jeopardy protection against multiple prosecutions. The Court should therefore limit government recovery in civil proceedings against acquitted defendants to a remedial level, just as Halper limits civil recovery from convicted defendants.

I. THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

The Double Jeopardy Clause of the fifth amendment guarantees that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."7 The principle of double jeopardy is one of the oldest legal ideas in western civilization8 and is embodied in all legal systems that claim respect for the individual.9 The rationale underlying the protection is that the state, with all its power and resources, should not be allowed to subject a defendant to embarrassment, expense, and ordeal by repeated attempts to convict for an alleged offense.10

Despite the long history and widespread acceptance of the principle of double jeopardy,11 the scope and content of the Double Jeopardy Clause remain unclear. The principle of double jeopardy is merely a general concept without definite content until courts or legislatures supply specific policies.12 Case law supplies these double jeopardy policies, but even the Supreme Court concedes that its decisions interpreting the Double Jeopardy Clause "can hardly be characterized as models of consistency and clarity."13 Indeed, the Court has described double jeopardy law as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."14

Despite the general lack of consistency and clarity in double jeopardy analysis, the Court offers clear guidance on some issues. The Court does not limit double jeopardy protection to sanctions that liter-

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7. U.S. CONST. amend. V.
11. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168 (1874) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense.").
12. J. SIGLER, supra note 9, at 36.
ally threaten life or limb, but instead extends the protection to all criminal penalties. In addition, the Court holds that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after conviction, a second prosecution for the same offense after acquittal, and multiple punishments for the same offense.

A. Second Prosecution After Conviction

Double jeopardy protection against multiple prosecutions protects a convicted criminal defendant from being prosecuted more than once for the same offense, by the same sovereign, in criminal proceedings. This protection, however, does not guarantee that a defendant will never be subjected to a second trial for the same offense. A second trial for the same offense may be allowed if one trial is civil or if the proceedings are brought by different sovereigns. Courts consistently decline to apply the Double Jeopardy Clause to prohibit subsequent civil proceedings against criminally convicted defendants where the civil action is to recover a statutory penalty for the same conduct. Courts reason that government pursuit of both criminal and civil sanctions for the same offense does not constitute multiple prosecution because the government, like a private party, is entitled to a remedy for its losses even if punishment has been imposed.

The Supreme Court has warned, however, that a civil label is not in itself conclusive in deciding whether or not the multiple prosecution protection is triggered. Even where Congress has clearly intended to establish a civil proceeding, courts have inquired further to determine "whether the statutory scheme was so punitive either in purpose or effect as to negate [Congress'] intention." Despite this caveat, however, the Court has not found a statutory scheme imposing only mone-

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21. See *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956) (civil remedy could be considered a criminal penalty if "the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty").
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tary penalties to be "criminal" if the legislature labeled the proceeding "civil." 23

B. Second Prosecution After Acquittal

The Double Jeopardy Clause also protects acquitted defendants from a second criminal prosecution for the same offense by the same sovereign. Indeed, an acquittal is accorded special weight. 24 "The constitutional protection against double jeopardy unequivocally prohibits a second criminal trial following an acquittal." 25 The special weight accorded acquittals has not, however, protected acquitted defendants from subsequent civil proceedings 26 or from prosecution by another sovereign. 27

C. Multiple Punishments

In addition to protecting against multiple prosecutions of both convicted and acquitted defendants, the Double Jeopardy Clause also bars multiple punishments for the same offense. 28 Until Halper, multiple punishments protection guaranteed only that multiple punishments could not be imposed for an offense in a single criminal proceeding unless the legislature had clearly declared its intent to cumulatively impose the penalties sought for that offense. 29 The availability of the protection hinged upon statutory construction. Thus the multiple punishments protection prior to Halper operated as a limit on courts and prosecutors, but not on legislatures.

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23. The Court stated that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." Flemming v. Nestor, 363 U.S. 603, 617 (1960). The Halper decision did not find the statutory scheme to be criminal. It held that the penalty as applied to Halper constituted punishment. United States v. Halper, 109 S. Ct. 1892, 1904 (1989).


25. Id. "An acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' " Id. (quoting Fong Foo v. United States, 369 U.S. 142, 143 (1962)).

26. Helvering v. Mitchell, 303 U.S. 391, 397 (1938) ("That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.").

27. See supra note 18 (discussing Bartkus v. Illinois, 359 U.S. 121 (1959)).

28. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Although the Double Jeopardy Clause does not specifically prohibit multiple punishments, the Court has held that "[i]t is very clearly the spirit of the [Constitution] to prevent a second punishment under judicial proceedings for the same crime. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 170 (1874). "The Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." Id. at 173.

In *United States v. Halper*, the Supreme Court expanded multiple punishments protection by applying it, for the first time, in a civil proceeding. In doing so, the Court analyzed the effect of the penalty in an individual case rather than determining whether the legislature authorized multiple punishments for the offense.

II. *UNITED STATES V. HALPER*

A. Facts and Lower Court Disposition

Irwin Halper was the manager of a medical laboratory that served patients eligible for federal Medicare benefits. In 1982 and 1983, Halper inflated sixty-five claims for reimbursement to increase receipts nine dollars per claim. His fraud netted the laboratory a total of $585. Halper was convicted under the federal criminal false claims statute. He was sentenced to two years in prison and fined $5,000.

The government subsequently brought action under the civil False Claims Act (Act) for the same frauds. The district court granted the government’s motion for summary judgment, holding that on the basis of his criminal conviction Halper was collaterally estopped from denying liability in the civil action.

Under the strict terms of the remedial provision of the Act, it appeared that Halper would be liable for a civil penalty of double the government’s $585 loss, the costs of the action, and $130,000 ($2,000 for each of the sixty-five false claims). The district court, however, declined to impose the full civil penalty, declaring that “the total amount necessary to make the Government whole bears no rational relation to the $130,000 penalty the Government seeks.” The court concluded that because Halper had been punished criminally and the penalty exceeded a remedial level, the civil penalty qualified as multi-

31. *Id.* at 1896.
34. 31 U.S.C.A. §§ 3729–31 (West 1969). From 1863 until 1986, the civil False Claims Act provided that for each offense a violator was “liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustained because of the act of that person and costs of the civil action.” 31 U.S.C.A. § 3729 (West 1983). Congress increased the civil penalty in 1986 to between $5,000 and $10,000 for each offense, plus triple damages and costs. 31 U.S.C.A. § 3729 (West Supp. 1989).
37. U.S.C.A. § 3729 (West 1983); see *supra* note 34.
ple punishment in violation of the Double Jeopardy Clause. The
government appealed directly to the Supreme Court.

B. Supreme Court Ruling and Rationale

The Supreme Court unanimously agreed with the district court that
the Double Jeopardy Clause prohibits subjecting a defendant who has
been punished in a criminal prosecution to an additional government
civil sanction to the extent that the second sanction is punitive. The
Court held that to the degree Halper's statutory penalty exceeded rea-
sonable compensation for the government's losses, the penalty was
punishment and violated the double jeopardy protection against multi-
ple punishments.

The Court acknowledged that previous cases established the civil
nature of proceedings and penalties under the Act. The Court also
acknowledged that a civil remedy does not constitute multiple punish-
ment merely because Congress provided for civil recovery in excess of
the government's actual damages. According to the Court, however,
the cases that settled those issues neither considered nor "foreclose[d]
the possibility that in a particular case a civil penalty authorized by
the Act [could] be so extreme and so divorced from the Government's
damages and expenses as to constitute punishment." Halper, the
Court concluded, was such a case.

The Halper Court recognized that statutory construction is required
to decide whether a proceeding is civil or criminal and to determine
the corresponding constitutional safeguards that are appropriate. The
Court found, however, that the statutory construction approach is
"not well suited to the context of the 'humane interests' safeguarded
by the Double Jeopardy Clause's proscription of multiple punish-

39. Id. The district court interpreted the Act to mean that the $2000 penalty for each offense
was discretionary, not mandatory, and limited the civil sanction to $16,000. The court estimated
that $16,000 would "reasonably compensate the Government for actual damages as well as
expenses incurred in investigating and prosecuting [the] action." Id. at 534. On motion of the
government, the district court reconsidered its decision and confessed error in ruling that the
$2,000 penalty was not mandatory. United States v. Halper, 664 F. Supp. 852, 853-54,
the court refused to impose the $130,000 penalty. The court reaffirmed its earlier holding that
the penalty would violate the Double Jeopardy Clause and was unconstitutional as applied to
Halper. Id. at 854–855.
41. Id. at 1904.
42. Id. at 1898.
43. Id.
44. Id. at 1901.
The Court stated that the constitutional protection against double jeopardy is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state. The purpose and effect of the sanction must be evaluated rather than the underlying nature of the proceeding. Therefore, whether a penalty is civil or criminal is not dispositive in assessing whether double jeopardy protection arises.

The Court held in Halper that double jeopardy protection is triggered when a criminal penalty has been imposed and a subsequent civil penalty for the same offense exceeds what could reasonably be regarded as compensation for the government’s loss. When the trial court finds that a civil penalty sought by the government after criminal conviction appears to bear no rational relation to the goal of compensating the government for its losses, the defendant is entitled to an accounting of the government’s damages and costs. Based on this accounting, the trial court must determine if the penalty exceeds compensation and therefore constitutes a second punishment. A criminally convicted defendant can be held liable only for a roughly compensatory civil penalty. Any additional penalty is punishment prohibited by the Double Jeopardy Clause. The Court limited this rule to “the rare case, the case . . . where a fixed-penalty provision subjects a prolific but small-gauge [previously convicted] offender to a sanction overwhelmingly disproportionate to the damages he has caused.”

The Court found that Halper’s $130,000 liability for false claims netting $585 appeared to be such a rare case of overwhelming disproportionality. The penalty appeared to bear no rational relation to the sum of the government’s actual loss plus its costs. The Court concluded that the portion of Halper’s penalty exceeding reasonable com-

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pensation would be an unconstitutional second punishment and could not be imposed.54

C. Double Jeopardy Theory Under Halper

The Halper Court's application of multiple punishments protection to a civil penalty was unprecedented in two respects. First, the Court had never before found a civil penalty imposed after criminal conviction for the same offense to constitute multiple punishment violative of the Double Jeopardy Clause. Second, the Court held that legislative intent (the standard used in all previous multiple punishment inquiries) was not the appropriate standard by which to decide whether a civil penalty constitutes punishment of a defendant criminally convicted for the same offense.55 The Court did not preclude multiple punishments if they are authorized by the legislature and imposed in a single proceeding.56 Nor did the Court preclude multiple proceedings if one is punitive and the other remedial. But the Halper Court drew the line at imposing multiple punishments in multiple proceedings.

Halper requires the government to choose between consolidated and divided criminal and civil prosecutions. The government must seek and obtain all authorized criminal and civil penalties in one consolidated proceeding or pursue separate civil and criminal actions in which the civil sanctions cannot exceed reasonable compensation. Full civil sanctions, even if they are punitive, remain available after criminal acquittal and when the government chooses not to criminally prosecute.57

III. MULTIPLE PUNISHMENTS PROTECTION AFTER HALPER

The Court significantly expanded its application of the Double Jeopardy Clause in United States v. Halper. The Halper Court recognized the injustice of imposing punitive civil penalties on a defendant without considering the criminal penalties already assessed for the same offense. In response, the Court applied the double jeopardy protection against multiple punishments for the first time to parallel criminal and civil penalties. This unprecedented application of double jeopardy the-

54. Id. at 1903–1904. The Court vacated the district court's decision not to impose any part of the penalty and remanded the case to permit the government to present an accounting of its actual costs and to recover those demonstrated costs. Id.
55. Id. at 1901.
56. Id. at 1903 n.10.
57. See id. at 1903. Multiple punishments protection is not implicated because there has been no previous punishment. See id.
ory affects not only defendants, but legislatures, prosecutors, and courts.

A. Impact on Legislatures

*Halper* affects legislatures by restricting their power to determine civil sanctions unilaterally. Prior to *Halper*, courts consistently deferred to legislative intent and did not impose any constitutional limits on the application of legislatively authorized civil monetary sanctions. *Halper* requires that courts limit the imposition of civil sanctions prescribed by the legislature when the defendant in a government civil action has been criminally convicted and the legislatively authorized civil sanction is disproportionate to the government's losses.

Congress now must consider whether to respond by restructuring the criminal and civil fraud sanctions to counter any judicial weakening of the sanctions' effect. Congress, in its anticrime effort, has increased penalties and courts have begun imposing civil fines exceeding one million dollars. In 1986 and 1987, Congress significantly increased penalties in both the criminal and civil false claims statutes. Congress amended the statutes after determining that more severe sanctions were needed in order to combat rampant fraud against the government. It is ironic, or perhaps instructive, that the Court's restriction on civil recovery in *Halper* followed closely behind these amendments. Congress may respond to *Halper* by increasing the monetary sanctions recoverable in a criminal proceeding. This would compensate the government for the loss of civil sanctions in excess of "rough remedial justice." Increased criminal sanctions, however,

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58. Congress increased the civil false claims sanctions in 1986 and the criminal sanctions in 1987. The criminal sanctions for each offense now include up to five years in prison and a fine of up to $250,000, for an individual, $500,000 for an organization, and $1,000,000 if a defense contract is involved. 18 U.S.C.A. §§ 287, 3571 (West Supp. 1989); see supra note 34 (1986 civil amendments).


60. See supra notes 34, 58. Halper's fixed penalty under the new civil statute would have been $325,000 to $650,000 plus treble damages and costs. 31 U.S.C.A. § 3729 (West Supp. 1989). His criminal penalty would have been up to five years and $250,000 per offense. 18 U.S.C.A. §§ 287, 3571 (West Supp. 1989). Federal prosecutors obtained ten times the amount in civil fraud judgments and settlements in fiscal year 1989 as in fiscal year 1985. Wall St. J., Nov. 8, 1989, at B8, col. 6.

would be subject to the protection of the Excessive Fines Clause of the eighth amendment, which has not been applied to civil sanctions.

B. Impact on Prosecutors

The Halper decision also raises new issues for prosecutors. The government now must decide, in cases with parallel criminal and civil actions, which of three options to pursue. First, the government could continue to seek criminal and civil sanctions separately (recognizing that a criminal conviction would limit the civil sanction to compensation). Second, it could prosecute the criminal and civil claims in the same proceeding. Third, it could forego criminal prosecution in order to seek full statutory civil penalties.

Under the first option, prosecutors must coordinate civil and criminal actions to prevent the civil action from barring the criminal case. Prosecutors could seek to stay the civil case pending the criminal outcome or could seek a civil penalty limited to compensation and damages in order to avoid barring the criminal action. Either solution requires coordination between civil and criminal prosecutions that was unnecessary prior to Halper.

Further, under Halper, both the first and second options require the government to account for its costs of detection, investigation, and prosecution if the relation between those costs and the legislatively authorized civil sanction is challenged. While the extent of this burden is not yet clear, government agents and prosecutors would be well advised to keep records of time and costs for each action in case the court requires an accounting to determine compensation. No guidelines have been established to indicate whether compensable government costs must be tied directly to the defendant and the offense in the instant case or if the government can offer proof of its expenses for combatting fraud generally and assign a share to the defendant. The government might avoid the necessity of a cost accounting by seeking

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62. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII; see, e.g., Solem v. Helm, 463 U.S. 277 (1983) (the eighth amendment forbids the legislature from authorizing a penalty that is disproportionate to the offense).


64. For maximum deterrent effect, the government could reserve the third option primarily for corporate offenders.

65. The Halper rationale implies that the Double Jeopardy Clause would bar a criminal action if a punitive civil penalty had been imposed for the same offense.
less than the full statutory penalty in cases where that penalty seems disproportionate to costs.67

C. Impact on Courts

1. Courts Must Apply the Halper Rule on a Case-by-Case Basis

In addition to its impact on legislatures and prosecutors, Halper impacts the courts in several significant respects. Because Halper offers courts no clear guidelines for determining at what point “rough remedial justice” becomes “clear injustice” and renders a penalty unconstitutional as applied, courts will have to make this determination on a case-by-case basis.

The Supreme Court has acknowledged that ascertaining the government’s actual loss due to fraud may be difficult if not impossible.68 Even when a false claim nets the defendant little or no gain, investigating and prosecuting the fraudulent activity may prove extremely costly. Recognizing the difficulty of proving government losses and costs, the Court has long accepted double and triple damages, as well as civil penalty provisions that effectively operate as liquidated damages clauses, without requiring a strict accounting.69 Similarly, the Halper Court rejected a strict accounting requirement for penalties imposed for one or two offenses. The Court declared in dictum that the rational-relation test, which requires the penalty to be proportional to the government’s costs and losses, is automatically met if there are only one or two offenses.70 Loss accounting is necessary, according to Halper, only when the sanction is overwhelmingly disproportionate to the losses.71

The Court did not, however, offer guidance on how to determine at what point the penalty becomes disproportionate. The Court referred to Halper’s statutorily authorized penalty as a “stark situation . . . where the recovery is exponentially greater than the amount of the fraud.”72 But the Court went on to state that the rational-relationship requirement would be met if only one or two false claims were

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67. Courts may be less inclined to find that the proposed penalty bears no rational relation to the government’s costs in such a case and thus less likely to require cost accounting.
69. Rex Trailer, 350 U.S. at 151–53.
70. Halper, 109 S. Ct. at 1903 n.12 (“It hardly seems necessary to state that a suit under the Act alleging one or two false claims would satisfy the rational-relationship requirement.”).
involved. The ratio of actual loss to statutory penalty, however, is the same for one or two offenses as it is for Halper's sixty-five false claims. A simple ratio test, therefore, is not adequate.

The Court also stated that "it is only when a sizable number of false claims is present that the issue of double jeopardy may arise." The number of offenses for which a person is penalized, however, should not be the issue upon which double jeopardy protection hinges. It is more appropriate to consider the total amount of the penalty in relation to the damage suffered by the government as determinative of the difference between compensation and punishment. The Court's dictum that "a suit under the Act alleging one or two false claims would satisfy the rational-relation requirement" would not necessarily be followed if Congress raised the civil penalty for each offense to $100,000 and, as in Halper, the government's loss was nine dollars per offense plus costs. Thus, Halper fails to provide courts with a bright line test to determine the difference between permissible compensation and prohibited punishment. The line will have to be drawn on a case-by-case basis whenever, regardless of the number of offenses, the defendant has been criminally punished and the question is raised whether the statutorily prescribed civil penalty exceeds the amount that can reasonably be considered compensation for the government's loss.

Although Halper does not establish a bright line between compensation and punishment, it is still a valuable addition to the Court's application of the Double Jeopardy Clause. Halper extends multiple punishments protection beyond criminal trials to also protect criminally convicted defendants in civil trials.

2. Courts Must Determine Whether Other Constitutional Safeguards Are Triggered when Punitive Sanctions Are Imposed in Civil Proceedings

The Court's unprecedented recognition of a civil monetary penalty as punishment invoking double jeopardy protection also raises the question whether other constitutional protections should be available when punitive sanctions are imposed by the government in civil pro-

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73. See supra note 70.
74. $9/$2,000 = $18/$4,000 = $585/$130,000.
75. Halper, 109 S. Ct. at 1903 n.12.
76. Id.
77. The Court is probably referring to the penalties in the Act before and/or after 1986 and is recognizing penalties from $2,000 to $20,000 to be reasonable "liquidated damages" for the cost of investigating and prosecuting one or two offenses.
ceedings. By recognizing the proposed sanction in *Halper* as punishment that triggers double jeopardy protection, but allowing its application when a criminal conviction for the same offense is not involved, the Court implicitly conceded that civil courts can and do impose punishment. This recognition of excessive civil monetary penalties as punishment will undoubtedly lead defendants to argue that courts should apply other constitutional safeguards previously applied only in criminal proceedings to punitive government civil actions. The Court, for example, has not applied the protection of the Excessive Fines Clause of the eighth amendment\(^78\) in civil proceedings. Until *Halper*, both double jeopardy and excessive fines protections were limited to criminal prosecutions.\(^79\) Extension of the *Halper* rationale to excessive fines analysis would require that the effect of the fine be examined to determine if it is solely remedial. The *Halper* Court wrote that “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment.”\(^80\) Any government civil sanction exceeding “rough remedial justice,” therefore, is punishment and may qualify for the constitutional protection of the Excessive Fines Clause.\(^81\)

The decision to consider civil sanctions in excess of compensation as punishment for purposes of analysis under the Double Jeopardy Clause may open the door to application of other constitutional safeguards in government civil proceedings when the penalty is punitive rather than remedial.

3. **Courts Must Decide Whether Qui Tam Actions Are Within the Halper Rule**

Another question raised and left unanswered by the *Halper* Court is whether a *qui tam* action is a government action subject to double

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78. See *supra* note 62.

79. Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2913 (1989) (“our cases long have understood [the eighth amendment] to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments”); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 548-49 (1943) (“the Court . . . emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to ‘jeopardy’ within the constitutional meaning.”).


81. The Court recognized that its rationale in *Halper* “implies that punitive damages awarded to the government in a civil action may raise Eighth Amendment concerns.” *Browning-Ferris*, 109 S. Ct. at 2920 n.21. Application of eighth amendment protection to government civil penalties could protect defendants not covered under *Halper* because they have not been criminally convicted.
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jeopardy protection or a private action to which double jeopardy protections do not apply. The Court in United States ex rel. Marcus v. Hess assumed, but did not decide, that a qui tam action could give rise to double jeopardy protection if the government's share of the judgment did "more than afford the government complete indemnity for the injuries done it." The Halper Court, noting that Hess had not decided the issue, also declined to resolve it.

Qui tam actions should be considered government actions subject to double jeopardy scrutiny. There are several indications that qui tam actions are government rather than private actions. First, an informer who sues under a qui tam provision is suing for a wrong done to the government, not to any private party. Second, qui tam actions are intended by the legislature to expand the government's ability to prosecute wrongdoing directed at the government by rewarding informers. They are not primarily for the benefit of the informer. Finally, most of the recovery goes to the government with the qui tam informer receiving only a portion of the recovery as a reward for initiating the suit. Thus a qui tam action should be considered a government action in which the government pays an informer for aiding the prosecution. The Court should consider the informer's portion of the penalty to be one of the government's costs of detecting, investigating, and prosecuting the action. The government would then be allowed full indemnity (including reimbursement for the informer's share of the recovery) before the civil sanction could be considered to have crossed the line between remedy and punishment.

If qui tam actions are held to be government actions subject to double jeopardy protection, restrictions may be necessary to avoid allowing qui tam actions to bar criminal prosecutions. The possibility of a qui tam action barring criminal prosecution might encourage sweetheart actions in which a potential defendant could get a straw man to sue him or her to avoid criminal prosecution. One solution would be to require that a qui tam action filed for an offense that has not been criminally prosecuted be allowed to proceed only if the government certifies that no criminal action is intended against the defendant for the offense.

82. Halper, 109 S. Ct. at 1903 n.11; see supra note 5 (definition of qui tam action).
84. Halper, 109 S. Ct. at 1903 n.11.
86. Such a bar would result if the civil action preceded the criminal action and imposed a sanction greater than that required to indemnify the government.
The designation of *qui tam* actions as government actions for purposes of double jeopardy analysis admittedly would reduce the incentive for *qui tam* informers to aid the government in parallel criminal prosecutions. This disincentive for *qui tam* informers to aid in the criminal prosecution does not, however, preclude government criminal action and should not deter the courts from designating *qui tam* actions as government actions. The government can proceed criminally without the voluntary aid of the *qui tam* informer if its own evidence warrants, or it can seek evidence and testimony from the informer through discovery and subpoenas. If criminal prosecution is not warranted or is unsuccessful, the government can rely on the *qui tam* action for full civil penalties to provide compensation and the enforcement needed to bolster deterrence. Therefore, although the *Halper* Court declined to resolve the issue, *qui tam* actions should fall within the *Halper* rule and trigger double jeopardy protection.

4. **Courts Must Specify How to Combine Criminal and Civil Prosecutions in a Single Proceeding**

The *Halper* Court stated that the government could seek and obtain “both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding,” but the Court did not specify how to combine the civil and criminal actions in one proceeding. It remains unclear how the differences between civil and criminal procedures would be accommodated in a single proceeding.

It is unlikely, in suggesting a single proceeding, that the Court envisioned a new hybrid criminal-civil trial with varying burdens of proof, rules of procedure, and constitutional protections. It is equally unlikely that the Court envisioned imposing criminal punishment in a civil proceeding. It is most likely, therefore, that the Court was encouraging the imposition of all sanctions for an offense, including compensation, in the criminal prosecution.

A combined civil-criminal prosecution could be implemented through court rules allowing the government, after a defendant is convicted, to submit the civil sanctions for that offense to the judge to be considered jointly with the criminal sanctions for sentencing. Because defendants in a civil suit are collaterally estopped from denying liability when they have been criminally convicted for the same offense, this

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87. A criminal conviction could reduce the civil recovery, which the *qui tam* informer would otherwise be entitled to share, because that recovery would be limited under *Halper* to a remedial level.

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rule would not deprive defendants of due process and would be within the double jeopardy requirement that multiple punishments be imposed in a single proceeding. If a defendant were acquitted, the government still could pursue a civil prosecution.90

IV. HALPER: A PARTIAL SOLUTION THAT SHOULD BE EXTENDED TO PROTECT ACQUITTED DEFENDANTS

The Halper Court forged a new and necessary rule when it extended application of the Double Jeopardy Clause to include punishment in a civil proceeding. In so doing, the Court prevented the injustice of imposing punitive civil sanctions when punishment for the same offense previously was exacted in a criminal prosecution. The Court, however, did not go far enough. The Court chose the multiple punishments prong of the Double Jeopardy Clause to protect convicted defendants threatened with punitive civil penalties. While this choice of label offers protection to convicted defendants like Halper, multiple punishments protection does not protect acquitted defendants from being subsequently punished in a government civil proceeding.

Acquitted defendants arguably are more deserving of protection from continuing government prosecution than are those who are found guilty.91 Resting the double jeopardy analysis on the protection against multiple punishments, however, provides more protection for the guilty defendant than for the innocent. It is possible under Halper for an acquitted defendant to be prosecuted twice and to be more heavily punished than a convicted defendant.92

The Court’s real concern in Halper was not multiple punishments: it was multiple prosecutions. This is evident from the fact that the Court authorized imposition of the cumulative civil and criminal penalties prescribed by the legislature as long as they are imposed in a single proceeding. The Court probably preferred multiple punishments analysis over multiple prosecutions analysis because of the

89. The Court held in Tull v. United States, 481 U.S. 412, 427 (1987), that the seventh amendment does not require a jury trial to determine a civil penalty.
90. See supra note 26.
91. See supra notes 24–25 and accompanying text.
92. As the Government pointed out in its reply brief:
   [A] defendant who is convicted in a criminal case, but receives a suspended sentence or a fine smaller than his prospective civil penalties, is better off than a defendant who is acquitted of criminal charges, for the former but not the latter would be able to claim the protection of double jeopardy in a subsequent civil action for “punitive” damages.

courts' long-standing approval of parallel criminal and civil proceedings, and the courts' belief in the right of the government to be compensated for its losses.93 The Court may have believed that the government's right to civil remedies would be better protected by barring an excessive civil penalty as prohibited punishment rather than as prohibited prosecution. This right, however, need not be compromised by recognizing the double jeopardy dilemma in \textit{Halper} as a multiple prosecutions rather than multiple punishments issue.

The principles of double jeopardy demand that the Court bar government imposition of civil penalties in excess of compensation on acquitted as well as convicted defendants. The \textit{Halper} decision recognizes that when the government seeks a civil penalty in excess of rough remedial justice from a convicted defendant, the government is seeking again to punish the defendant. The Court applies the multiple punishments protection to prevent this injustice. A better solution is to recognize that when the government seeks to punish any criminally prosecuted defendant in a civil proceeding, the government is violating the multiple prosecutions protection of the Double Jeopardy Clause. The line between remedy and punishment also should be the line between civil and criminal prosecution. The double jeopardy protection against multiple prosecutions would therefore require that the government be precluded from imposing any civil penalty beyond compensation on either acquitted or convicted defendants.

In \textit{Halper}, the Court limited, but did not bar, the government's recovery. The Court recognized that the statutory remedy was not in itself criminal punishment, but would constitute punishment as applied to \textit{Halper}. Similarly, the Court should recognize that government pursuit of a civil remedy does not constitute multiple prosecution in violation of the Double Jeopardy Clause, but imposition of a sanction beyond compensation would undermine the civil nature of the proceeding and transform the proceeding into criminal prosecution. Such prosecution would be barred by the multiple prosecutions protection if the defendant had been criminally convicted or acquitted, thus limiting the civil penalty to a remedial level. This proposed approach offers double jeopardy protection to an acquitted defendant equivalent to that offered a convicted defendant under \textit{Halper}. It is therefore more consistent than the \textit{Halper} approach with previous applications of the double jeopardy principle that have accorded acquitted defendants all protections provided to convicted defendants.

\footnote{93. See \textit{supra} notes 19–20 and accompanying text.}
The proposed solution would not preclude civil recovery by the government from any defendant. It would merely limit the civil sanctions imposed on a defendant who has been either convicted or acquitted in a criminal proceeding, as the *Halper* decision does for those convicted, to a level commensurate with the government’s losses and costs.\(^9\)

V. CONCLUSION

The Court recognized in *Halper* that a penalty imposed in a government civil proceeding is punitive if it exceeds reasonable compensation, and that any such punishment is prohibited by the Double Jeopardy Clause if the defendant has been criminally convicted for the same offense. The Court held, however, that all legislatively authorized penalties, both civil and criminal, could be imposed in a single proceeding.

This decision does not prohibit multiple prosecutions as long as one is civil and the other is criminal, and it does not prohibit multiple punishments as long as they are authorized by the legislature and imposed in a single proceeding. It does require that the government choose between pursuing multiple proceedings or multiple punishments.

The effect of the *Halper* decision is to expand the application of double jeopardy protection beyond criminal prosecutions to include punitive civil monetary penalties sought by the government. This expansion raises questions that must be answered by legislatures, prosecutors, and courts as the new rule is applied. Application of the new rule, however, only partially solves the problem of defendants subject to punishment in both civil and criminal proceedings. The *Halper* rule does not go far enough because it does not provide double jeopardy protection for acquitted defendants on whom the government seeks to impose punitive civil sanctions. It is an injustice to guarantee more protection in a subsequent civil proceeding to convicted defendants than to acquitted defendants.

The Court should extend the double jeopardy protection in government civil actions that *Halper* guarantees to criminally convicted defendants to include criminally acquitted defendants as well. The Court could do so by recognizing that a civil proceeding becomes a

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\(^9\) The issue remains, but is outside the scope of this Note, whether the government should be able to punish any defendant in a civil proceeding. A decision to limit civil penalties for all defendants to a remedial level, as is required for convicted defendants under *Halper* and is proposed for acquitted defendants in this Note, would have to be based on a principle other than double jeopardy.
criminal prosecution when the sanction to be imposed on behalf of the government exceeds compensation and becomes punishment. The government would therefore be limited under the multiple prosecutions protection to a compensatory civil sanction, but its right to be made completely whole would be preserved. The double jeopardy guarantee against multiple prosecutions would protect both convicted and acquitted defendants from being punished in a civil proceeding by limiting government civil recoveries against them to a compensatory level.

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