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PARALLEL PROCEEDINGS AND THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE

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Parallel proceedings are simultaneous or concurrent criminal, civil, or administrative enforcement actions against the same parties for the same violation. Most federal and state environmental statutes authorize the government to conduct both civil and criminal investigations and to seek both civil and criminal sanctions.¹ There are two general areas of concern which arise when there are parallel criminal and civil enforcement actions.

The first area of concern involves the manner in which parallel civil and criminal investigations are conducted. For example, in a criminal investigation, grand jury secrecy must always be maintained. Therefore, a prosecutor may not share grand jury materials with civil enforcement authorities absent a court order. The second area of concern involves the imposition of civil and criminal sanctions against the same party for the same conduct. This raises Fifth Amendment Double Jeopardy issues.

This Article will focus on the issues that arise under the Double Jeopardy Clause when civil and criminal enforcement agencies bring parallel actions. Part I will introduce the criminal/civil Double Jeopardy doctrine as enunciated in *United States v. Halper*.² Part II will define "same conduct" and "punishment" in the context of the Double Jeopardy Clause. In addition, Part II will analyze how

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1. See, e.g., Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6916(e); RCRA § 2007 (e) (1994).

2. 490 U.S. 435 (1989).

courts have applied *Halper* to situations in which the government has sought civil monetary penalties and criminal sanctions for the same conduct. Part III will review how courts have applied *Halper* when the government, in parallel proceedings, has sought civil non-monetary sanctions, such as forfeiture and debarment, as well as criminal sanctions. This Article will conclude that the nature of the civil action in parallel criminal and civil environmental enforcement proceedings determines whether *Halper*-type Double Jeopardy concerns are raised.

PART I

A. *Introduction*

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, which guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb,"³ is applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁴ The Double Jeopardy Clause bars retrial of criminal charges after acquittal,⁵ and bars a second trial for the same offense.⁶ It precludes retrial after prosecutorial misconduct causes a mistrial,⁷ and prevents the imposition of a harsher sentence on a defendant after a successful appeal.⁸ Thus, the Fifth Amendment Double Jeopardy Clause bars succeeding criminal trials after acquittal or conviction and multiple punishments for the same conduct.

Prior to the Supreme Court's decision in *Halper*,⁹ however, the Court had never addressed the Double Jeopardy implications of

3. U.S. CONST. amend. V.

4. *Benton v. Maryland*, 395 U.S. 784, 796-97 (1969) (holding that petitioner acquitted of larceny but convicted of burglary in first trial did not have to suffer retrial on larceny count on appeal of burglary charge).

5. *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986) (rejecting the state's attempt to seek review of trial court's grant of demurrer to criminal defendants).

6. *Blockburger v. United States*, 284 U.S. 299 (1932).

7. *United States v. Dinitz*, 424 U.S. 600, 611 (1976).

8. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (holding that Fifth Amendment guarantees are violated when punishment already exacted for an offense is not fully credited towards sentencing upon a new conviction for the same offense).

9. 490 U.S. 435 (1989).

parallel proceedings in which a party faces concurrent, but separate, enforcement actions. An example of when a party is subject to concurrent enforcement actions is when the party faces criminal prosecution and civil or administrative action for the same conduct.

B. *United States v. Halper*

The parallel proceedings double jeopardy issue was brought to the fore when the Court decided *United States v. Halper*. In *Halper*, the defendant was indicted on 65 counts of violating the federal criminal false claims statute,¹⁰ and 16 counts of mail fraud.¹¹ The total amount of false claims made by the defendant was \$585.¹² He was convicted on all counts, sentenced to imprisonment for two years, and fined \$5,000.¹³ Subsequently, the Government sought statutory civil fines under the False Claims Act of \$2,000 for each of the defendant's 65 violations.¹⁴ This totalled \$130,000.¹⁵ The district court refused to impose this \$2,000 per count statutory penalty because it constituted a second punishment, and was thus barred by the Double Jeopardy Clause. The Government took a direct appeal to the Supreme Court.¹⁶

The Supreme Court held that "a civil, as well as a criminal sanction, can constitute punishment when the sanction, as applied to the individual case, serves the goal of punishment."¹⁷ Thus, the Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."¹⁸ The Court noted that, for example, the process of "affixing a sanction that compensates the Govern-

10. 18 U.S.C. § 287 (1994).

11. *Halper*, 490 U.S. at 437.

12. *Id.*

13. *Id.*

14. *Id.* at 438. The False Claims Act is codified at 31 U.S.C. §§ 3729-3731 (1994).

15. *Halper*, 490 U.S. at 438.

16. *Id.* at 439-40.

17. *Id.* at 448.

18. *Id.* at 448-49.

ment for all of its costs inevitably involves an element of rough justice.”¹⁹ The Court held:

The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as “punishment” in the plain meaning of the word, then the defendant is entitled to an accounting of the Government’s damages and costs to determine if the penalty sought in fact constitutes a second punishment.²⁰

The Court stated that this rule is for the “rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific, but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.”²¹

The Supreme Court agreed with the district court that the disparity between the Government’s costs and the defendant’s civil liability was so disproportionate as to constitute a second punishment and a violation of the Double Jeopardy Clause.²² However, the matter was remanded to provide the government an opportunity to present an accounting of its actual costs arising from the defendant’s fraud.²³ Therefore, under *Halper*, the Government would have been entitled to receive a judgement that was rationally related to the goal of making the Government whole.

Since *Halper*, courts have been forced to resolve constitutional parallel proceedings issues in an increasing number of situations, including environmental cases.

19. *Id.* at 449.

20. *Id.* at 449-50.

21. *Id.* at 449. In *Merin v. Maglacki*, the New Jersey Supreme Court recognized that, while civil penalties can rise to the level of punishment, they will survive constitutional scrutiny except “in the ‘stark situation’ in which the State’s recovery is ‘exponentially greater than the amount of the fraud’ and ‘many times the amount of the Government’s total loss.’” 126 N.J. 430, 443 (1992) (quoting *Halper*, 490 U.S. at 445).

22. *Halper*, 490 U.S. at 452.

23. *Id.*

PART II

A. *What is Same Conduct?*

The Double Jeopardy Clause bars a second punishment for the same conduct.²⁴ The first issue under *Halper* is whether a subsequent civil penalty addresses the same conduct as a criminal penalty.²⁵ If the civil penalty addresses the same conduct as the criminal penalty, and constitutes punishment, the Double Jeopardy Clause may bar the imposition of the civil penalty.²⁶ However, if the civil penalty does not address the same conduct as the criminal penalty, the issue of whether the civil penalty rises to a level of punishment is not raised and, therefore, it need not be decided.²⁷ In order to hold that both penalties do not address the same conduct, the court must find that the civil and criminal statutes under which the defendant is being tried each require proof of different facts.²⁸

The "same conduct" requirement does not bar the government from obtaining judgements against different defendants involved in the same case. It is well established that the protection of the Double Jeopardy Clause is intrinsically personal.²⁹ Thus, if a corporation incurs a criminal punishment, the later imposition of a criminal punishment against corporate officers or shareholders would not be barred.³⁰ In *United States v. Louisville Edible Oil Products, Inc.*, the court held that even if the civil penalty assessed against Louisville Edible, a subchapter S corporation, proved to be punitive under *Halper*, that determination would not bar criminal prosecution of two corporate employees.³¹

Additionally, the Double Jeopardy Clause does not "prevent the Government from seeking and obtaining both the full civil penal-

24. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

25. *See Halper*, 490 U.S. at 441.

26. *Id.* at 442.

27. *United States v. Mayers*, 957 F.2d 858, 860 (11th Cir. 1992).

28. *See United States v. Dixon*, 509 U.S. 688, 710-12 (1993); *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

29. *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 586 (6th Cir. 1991) (quoting *Halper*, 490 U.S. at 447).

30. *See id.* at 586.

31. *Id.*

ty and the full range of statutorily authorized criminal penalties in the same proceeding."³² If both penalties are sought in a single proceeding, the issue is only whether the total punishment exceeds that which is authorized by law.³³

B. *What is Punishment?*

In *Halper*, the civil penalty followed a criminal conviction.³⁴ It is axiomatic that a criminal penalty always embodies a punitive purpose. Since *Halper*, courts have held that *Halper's* analysis should apply whether the civil penalty precedes or follows the criminal proceeding.³⁵ *Halper* does not require the government to prosecute a criminal action first in order to avoid the possibility that the relief obtained in a civil or administrative proceeding might be deemed punitive and thereby foreclose resort to the wider array of penalties available in a criminal case.³⁶ However, a civil or administrative penalty that fails to meet *Halper's* "rough justice" test³⁷ may serve to preclude any subsequent criminal prosecution or the imposition of criminal punishment.³⁸

32. *Halper*, 490 U.S. at 450.

33. *Id.* See also *United States v. Torres*, 28 F.3d 1463, 1464 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 669 (1994); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994), *rev'd sub nom.* *United States v. Ursery*, 116 S. Ct. 2135 (1996).

34. See *Halper*, 490 U.S. at 441.

35. *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, 506 U.S. 841 (1992). See also *United States v. Morgan*, 51 F.3d 1105, 1113 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 171 (1995); *United States v. Austin*, 54 F.3d 394, 399 (7th Cir. 1995); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.), *cert. denied*, 498 U.S. 865 (1990); *New Jersey v. Darby*, 587 A.2d 1309, 1315-16, *cert. denied*, 598 A.2d 898 (1991).

36. See *United States v. Furlett*, 781 F. Supp. 536, 542 (N.D. Ill. 1991), *aff'd* 974 F.2d 839 (7th Cir. 1992).

37. *Halper's* "rough justice" test requires a court to determine whether a prior civil or administrative penalty goes beyond the remedial purpose of compensating the Government for its costs, and takes on the quality of punishment. *Halper*, 490 U.S. at 449.

38. *Furlett*, 781 F. Supp. at 542.

C. *Can A Civil Monetary Sanction Constitute Punishment?*

As stated previously, the Double Jeopardy Clause bars a second punishment for the same conduct. In *Halper*, the Court held that a civil sanction that does not solely serve a remedial purpose, but rather only serves retributive or deterrent purposes, is punishment under the Double Jeopardy Clause.³⁹ This suggests that a sanction should not be examined to see if there is some incidental punitive impact that is an inevitable consequence of its remedial function, but rather to see if punishment is the purpose the sanction may be said to serve.⁴⁰ Therefore, the labels "civil" and "criminal" are not of "paramount importance" in deciding whether a civil sanction constitutes punishment.⁴¹ The importance is the remedial or compensatory purpose of the civil sanction.

The *Halper* Court held that the determination of whether a given civil sanction constitutes "punishment" requires a particularized, individualized assessment of the penalty imposed and the purposes that the penalty may serve.⁴² One question in each case is whether the civil sanction does more than merely compensate the Government for its damages and costs.⁴³ In *Halper*, the Court acknowledged that such a determination would not be an exact pursuit.⁴⁴ The Court noted that it will be difficult, if not impossible, in most cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purposes.⁴⁵ The following cases illustrate how courts have applied the "rough justice" analysis set forth in *Halper*.

In *United States v. WRW Corp.*,⁴⁶ the court held that civil penalties totalling over \$90,000 against the defendant corporation for

39. *Halper*, 490 U.S. at 448-49.

40. *Doe v. Porlitz*, 662 A.2d 367, 394 (N.J. 1995).

41. *Halper*, 490 U.S. at 447; *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994); see *United States v. Morgan*, 51 F.3d 1105, 1114 (2d Cir. 1995).

42. *Halper*, 490 U.S. at 448; see also *United States v. Walker*, 940 F.2d 442, 444 (9th Cir. 1991) (holding that a civil sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment).

43. *Morgan*, 51 F.3d at 1114.

44. *Halper*, 490 U.S. at 449.

45. *Id.*

46. 986 F.2d 138, 142 (6th Cir. 1993).

violations of the Federal Mine Safety and Health Act did not constitute punishment under *Halper*.⁴⁷ In *WRW Corp.*, three individual defendants, who were the sole shareholders, officers, and directors of the corporation, had been convicted of willful violations of mandatory health and safety standards under the Federal Mine Safety and Health Act⁴⁸ after the fines against the corporation were levied.⁴⁹ After the defendants were released from prison, the Government sought to recover the \$90,000 of civil penalties which had been assessed against the corporation. The Court of Appeals found that the civil penalty assessment in this case was not so extreme and divorced from the Government's expenses incurred in the investigation and prosecution to constitute punishment.⁵⁰ The court further noted that the failure to consider the Government's expenses when assessing the amount of the penalty did not alter the trial court's ruling that the penalty was rationally related to the goal of making the government whole.⁵¹

In *United States v. Furlett*,⁵² an administrative law judge for the Commodity Futures Trading Commission ("CFTC") found that the defendants had violated provisions of the Commodity Exchange Act ("CEA")⁵³ and regulations of the CFTC. The judge imposed a civil fine of \$75,000 on each defendant. In addition, the judge revoked the defendants' registrations with the CFTC, ordered them to cease further CEA violations, and prohibited the defendants from trading in any contract market.⁵⁴

Shortly thereafter, a federal grand jury returned an indictment charging the defendants with crimes based upon the same underlying facts. The defendants moved to dismiss the grand jury indictment.⁵⁵ The Seventh Circuit found that the civil penalties imposed by the administrative law judge did not constitute punish-

47. *Id.*

48. Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. § 801 et seq. (1986 & Supp. 1996).

49. *WRW*, 986 F.2d at 140.

50. *Id.* at 142.

51. *Id.*

52. 974 F.2d 839 (7th Cir. 1992).

53. 7 U.S.C. §§ 1-51 (1994).

54. *Furlett*, 974 F.2d at 841.

55. *Id.*

ment under *Halper*.⁵⁶ The court held that the district court's failure to consider the Government's loss when imposing the \$75,000 civil penalty did not imply that the fine was unrelated to the Government's loss.⁵⁷ The Seventh Circuit further held that the Government's affidavits in response to defendants' motion provided sufficient facts for the district court to conclude that the civil fine was commensurate with the Government's losses.⁵⁸ The affidavit did not specify the exact costs of investigating the defendants' activities but rather only provided a rough approximation of the hours spent investigating the case.⁵⁹ The court, citing *Halper*, noted that the trial court's assessment of the Government's costs "will not be an exact pursuit."⁶⁰ The court also held that the administrative law judge's order prohibiting the defendants from trading on any contract market was remedial.⁶¹ The court found that this prohibition can be seen as an action to ensure the integrity of markets and protect them from individuals like the defendants.⁶²

In *United States v. Sanchez-Escareno*,⁶³ U.S. Customs officials arrested the defendant and assessed a large civil fine for possessing marijuana and attempting to import it into the United States. The defendant executed promissory notes in which he agreed to pay the fine. The Government did not seek to collect on these notes. Sometime thereafter, the Government obtained an indictment against the defendant based on the same conduct underlying the civil fine. The Fifth Circuit held that the defendant's execution of promissory notes, in the absence of a judgment or payment by the defendant, did not constitute "punishment" under the Double Jeopardy Clause.⁶⁴ The Fifth Circuit found that the notes

56. *Id.* at 843-45.

57. *Id.* at 843-44.

58. *Id.* at 844.

59. *Id.*; see also *United States v. Walker*, 940 F.2d at 444; *New Jersey v. Darby*, 587 A.2d 1309, *cert. denied*, 126 N.J. 342 (1991).

60. *Furlett*, 974 F.2d at 844 (*quoting United States v. Halper*, 490 U.S. 435, 449 (1989)).

61. *Id.*

62. *Id.*

63. 950 F.2d 193, 194-96 (5th Cir. 1991), *cert. denied*, 506 U.S. 841 (1992).

64. *Id.* at 201.

were not an actual payment or actual satisfaction of the imposed civil penalty.⁶⁵

In *United States v. Hall*,⁶⁶ the Government obtained a guilty plea to a charge of transporting negotiable instruments out of the United States without filing required currency reports. The defendant was sentenced to a prison term, fined, and ordered to perform community service.⁶⁷ Thereafter, the U.S. Treasury Department assessed a \$1,035,000 civil penalty upon the defendant for the same conduct.⁶⁸ Both parties moved for summary judgment in the district court.⁶⁹ The Government stated that it had suffered "immeasurable damages as a result of Hall's misconduct, including the 'heavy burden' of investigation and prosecution, the 'vast sums expended to monitor the borders of the United States, and to maintain liaison with other countries in order to discover such criminal conduct.'"⁷⁰ The court found that the Government put forth "only the most minimal effort in establishing a rational relationship between the \$1,035,000 civil penalty and the goal of making the Government whole."⁷¹ Additionally, the Government made no attempt to quantify the actual losses it had suffered from the defendant's conduct.⁷² In this case, the court held that the fine was not rationally related to the goal of making the Government whole.⁷³ The court reasoned that in the absence of quantification of actual losses, the disproportionate relationship between the amount of the fine, and the damages caused by the defendant was the justification for its conclusion.⁷⁴

While the *Hall* court placed far greater demands on the Government than most other courts deciding the issue, *Hall's* holding stands for the proposition that the prosecuting agency cannot cavalierly paint its losses with a broad brush. *Halper* requires the

65. *Id.* at 202.

66. 730 F. Supp. 646, 647 (M.D. Pa. 1990).

67. *Id.* at 647.

68. *Id.*

69. *Id.* at 647-48.

70. *Id.* at 654.

71. *Id.* at 655.

72. *Id.*

73. *Id.*

74. *Id.*

Government to establish that the penalty it is seeking is rationally related to the goal of making the Government whole.⁷⁵ Therefore, the Government needs to present some accounting of the costs of investigation and prosecution, as well as its losses.

PART III

Can Non-Monetary Sanctions Constitute Punishment?

Courts have held that debarments and suspensions are remedial rather than punitive under the Double Jeopardy Clause.⁷⁶ In *United States v. Bizzell*,⁷⁷ the U.S. Department of Housing and Urban Development ("HUD") filed administrative complaints against two defendants alleging various violations of HUD regulations, reaching settlement agreements with both.⁷⁸ One defendant agreed to accept a voluntary exclusion from HUD programs for two years conditioned upon his payment to HUD of \$30,000.⁷⁹ The other defendant agreed not to participate in HUD programs for eighteen months.⁸⁰ Thereafter, both defendants were indicted for various crimes arising from essentially the same transactions and violations set forth in HUD's administrative complaints.⁸¹ The court held that the penalty of debarment in this case was "strictly remedial."⁸² The court stated, "[i]t is the clear intent of debarment to purge government programs of cor-

75. See *supra* part I.B.

76. See *United States v. Furrett*, 974 F.2d 839, 845 (7th Cir. 1992); *Manocchio v. Kusserow*, 961 F.2d 1539, 1542-43 (11th Cir. 1992); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990). In *Doe v. Poritz*, 142 N.J. 1 (1995), the New Jersey Supreme Court upheld "Megan's Law" which requires convicted sex offenders to register with local law enforcement agencies and provide for community notification of the name and address of the sex offender under certain circumstances. *Id.* at 14. The court ruled that both the registration and the notification requirements have a solely regulatory purpose. *Id.* at 75. Therefore, as the provisions "do not constitute punishment, they do not violate any constitutional prohibition against punishment." *Id.* at 76.

77. 921 F.2d 263 (10th Cir. 1990).

78. *Id.* at 265.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 267.

rupt influences and to prevent improper dissipation of public funds.”⁸³ The court also found that the \$30,000 one of the defendants agreed to pay was not punitive because it was not “overwhelmingly disproportionate” to the damages caused by the defendant’s actions.⁸⁴

In *Manocchio v. Kusserow*,⁸⁵ the defendant pleaded guilty to filing a fraudulent Medicare claim, received a probationary sentence, and was ordered to pay restitution and a \$1,000 fine.⁸⁶ Shortly thereafter, the U.S. Department of Health and Human Services (“HHS”) notified the defendant that it would exclude him from participating in Medicare programs for at least five years, pursuant to 42 U.S.C. § 1320a-7.⁸⁷ The court held that the legislative intent of the section 1320a-7 exclusionary period was to “protect present and future Medicare beneficiaries from the abusers of these programs.”⁸⁸ Therefore, the court viewed the exclusion as remedial, not punitive, under the Double Jeopardy Clause.⁸⁹

These cases make it clear that one of the remedial purposes a civil or administrative action can achieve, without running afoul of *Halper*, is to protect the integrity of the regulatory system. Until recently, the state of the law was somewhat unclear as to whether a civil forfeiture action constitutes punishment under the Double Jeopardy Clause.

In *United States v. \$405,089.23 U.S. Currency*,⁹⁰ the Ninth Circuit held that the Double Jeopardy Clause will bar the government from pursuing a civil forfeiture action after it has obtained criminal convictions.⁹¹ In *\$405,089.23 U.S. Currency*, the Government instituted a civil forfeiture action five days after the grand jury issued a superseding indictment in a parallel criminal

83. *Id.*

84. *Id.*

85. 961 F.2d 1539 (11th Cir. 1992).

86. *Id.* at 1540.

87. *Id.* at 1540-41.

88. *Id.* at 1542.

89. *Id.*

90. 33 F.3d 1210 (9th Cir. 1994), *rev'd sub nom.* *United States v. Ursery*, 116 S. Ct. 2135 (1996).

91. *Id.* at 1222.

case.⁹² Pursuant to a stipulation between the parties, the criminal case proceeded first and resulted in the conviction and sentencing of the defendant on various counts of conspiracy and money laundering.⁹³ Thereafter, a trial court granted the Government's summary judgment motion in the civil forfeiture proceeding and ordered the property in question to be forfeited to the Government.⁹⁴

In revising this decision, the Ninth Circuit noted that the Government chose to pursue its forfeiture in a separate and parallel proceeding, rather than including criminal forfeiture in the indictment.⁹⁵ The court held that for double jeopardy purposes, criminal prosecutions, such as those in this case, constitute separate proceedings from parallel civil forfeiture actions.⁹⁶ The court further held that the only fair reading of the Court's decision in *United States v. Austin*⁹⁷ was that it resolved the punishment issue for forfeiture cases with respect to both the Excessive Fines

92. *Id.* at 1214. The government claimed the property was subject to forfeiture as proceeds of illegal narcotic transactions under 21 U.S.C. § 881(a)(6) and as property involved in money laundering violations under 18 U.S.C. § 981(a)(1)(A). *Id.* Section 881(a)(6) provides that the government may seize "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange. . . ." 21 U.S.C. § 881(a)(6) (1994). Section 981(a)(1)(A) provides for the forfeiture of "[a]ny property, real or personal, involved in [money laundering activities]." 18 U.S.C. § 981(a)(1)(A) (1994).

93. *\$405,089.23 U.S. Currency*, 33 F.3d at 1214.

94. *Id.* at 1215.

95. *Id.* at 1216.

96. *Id.*

97. 509 U.S. 602 (1993). In *Austin*, the Supreme Court held that a forfeiture of property under 21 U.S.C.A. §§ 881(a)(4) and (a)(7) is a monetary punishment and is thus subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. 21 U.S.C.A. § 881(a) provides: "The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) [controlled dangerous substances]. . . ; (7) all real property. . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter"

Clause and the Double Jeopardy Clause.⁹⁸ The court found that the money laundering statute which provided the basis for the forfeiture in *\$405,089.23 U.S. Currency* had a punitive purpose and thus triggered the Double Jeopardy Clause.⁹⁹

The Third, Fifth, and Sixth Circuits, have held that the forfeiture of proceeds from illegal activities does not constitute punishment under *Halper*.¹⁰⁰ In *United States v. Tilley*,¹⁰¹ the Fifth Circuit held that the forfeiture of illegal drug proceeds under 21 U.S.C. § 881(a)(6) is not punishment under *Halper*.¹⁰² In *Tilley*, the Government filed a civil forfeiture complaint under 21 U.S.C. §§ 881(a)(6) and (a)(7) against certain real and personal property belonging to the defendants.¹⁰³ Shortly thereafter, the Government filed a criminal indictment against the defendants charging them with various drug-related crimes. Following the entry of a final judgement against the defendants with respect to the personal property, the defendants moved to dismiss the indictment on double jeopardy grounds.¹⁰⁴

The court held that under *Halper*, the forfeiture of unlawful proceeds under 21 U.S.C. § 881(a)(6) must be classified as punishment if the amount of the proceeds forfeited is so great that it bears no rational relation to the costs incurred by society and the Government resulting from the defendant's conduct.¹⁰⁵ The court found that the forfeiture of proceeds in this particular case was not grossly disproportionate to societal and governmental costs by citing the costs to the Government for detecting, investigating, and prosecuting drug traffickers and the costs to society for combatting the allure of drugs and caring for victims of the criminal trade when preventive efforts prove unsuccessful.¹⁰⁶

98. *\$405,089.23 U.S. Currency*, 33 F.3d at 1219.

99. *Id.* at 1222.

100. See *United States v. \$184,505.01 U.S. Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995); *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994).

101. 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994).

102. *Id.*

103. *Id.*

104. *Id.* at 297.

105. *Tilley*, 18 F.3d at 298-99.

106. *Id.* at 299.

Therefore, the court held the forfeiture in this case was not punishment and thus did not warrant a double jeopardy bar.¹⁰⁷

The court stated that because *Austin* dealt with the forfeiture of conveyances, rather than proceeds of illegal conduct, it was not applicable to this case.¹⁰⁸ The court noted that “[u]nlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home, or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold.”¹⁰⁹ The court also held that, even without using the *Halper* rational relation test, the forfeiture of illegal proceeds was not punishment because the property taken by the government was derived from unlawful activities.¹¹⁰

In *United States v. \$184,505.01 U.S. Currency*,¹¹¹ the Third Circuit agreed with the Fifth Circuit’s holding in *Tilley* that, under 21 U.S.C. § 881(a)(6), proceeds from illegal drug transactions or proceeds traceable to such transactions do not constitute punishment under *Halper*. The Third Circuit rejected the “contrary reasoning and conclusion of the Ninth Circuit regarding 21 U.S.C. § 881(a)(6).”¹¹² Applying the *Blockburger/Dixon* test,¹¹³ the court also found that the defendant’s forfeiture following his criminal conviction did not constitute double jeopardy because the crimes and forfeitures were not predicated on the same offense.¹¹⁴

In *United States v. Salinas*,¹¹⁵ and *United States v. Ursery*,¹¹⁶ the Sixth Circuit also adopted the view of *Tilley* that

107. *Id.* at 300.

108. *Tilley*, 18 F.3d at 300.

109. *Id.*

110. *Id.*

111. 72 F.3d 1160, 1168 (3d Cir. 1995).

112. *Id.* at 1169.

113. The *Blockburger/Dixon* test provides that “where the same act or 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.” *Id.* at 1169 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

114. *Id.* at 1171.

115. 65 F.3d 551, 554 (6th Cir. 1995).

116. 59 F.3d 568 (6th Cir. 1995), *rev’d sub nom.* 116 S. Ct. 2135 (1996).

the forfeiture of drug proceeds is not punishment, but is remedial in nature. In *Tilley*, the court found that the forfeiture of drug proceeds is different from the forfeiture of property used or intended to be used to facilitate a crime.¹¹⁷ The court noted that although drug proceeds are inherently proportional to the damages caused by the illegal activity, one never acquires a property right to such proceeds.¹¹⁸

In June 1996, the Supreme Court resolved the split among the federal circuits.¹¹⁹ The Court held that *in rem* civil forfeitures are neither punishment nor criminal for purposes of the Double Jeopardy Clause.¹²⁰ The Court found that "nothing in *Halper*, *Kurth Ranch*,¹²¹ or *Austin* purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause."¹²² The Court noted that "Congress has long authorized the Government to bring parallel criminal proceedings and civil forfeiture proceedings, and this Court consistently has found civil forfeitures not to constitute punishment under the Double Jeopardy Clause."¹²³ Applying the two part analysis set forth in *United States v. One Assortment of 89 Firearms*,¹²⁴ the Court first found that Congress intended forfeiture proceedings under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. §§ 881(a)(6) and (7) to be civil.¹²⁵ The Court then went on to find that these provisions were not so

117. *Tilley*, 18 F.3d at 300.

118. *Id.* See also *Ursery*, 59 F.3d at 572-73 (holding that the forfeiture of property used to facilitate a crime constitutes punishment).

119. The Court consolidated *Ursery* and *United States v. \$405,089.23 U.S. Currency*, for review into *United States v. Ursery*, 116 S. Ct. 2135 (1996).

120. *Ursery*, 116 S. Ct. at 2149.

121. *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

122. *Ursery*, 116 S. Ct. at 2147.

123. *Id.*

124. 465 U.S. 354 (1984). The two part analysis referred to in *Ursery* requires "asking first, whether Congress intended the particular forfeiture to be a remedial civil sanction or a criminal penalty, and second, whether the forfeiture proceedings were so punitive in fact as to establish that they may not legitimately be viewed as civil in nature, despite any congressional intent to establish a civil remedial mechanism." *Ursery*, 116 S. Ct. at 2140.

125. *Ursery*, 116 S. Ct. at 2147.

punitive in form to somehow render them criminal.¹²⁶ Thus, the Court has taken a categorical view that *in rem* civil forfeitures are not punishment for double jeopardy purposes.¹²⁷ Accordingly, the type of case-by-case analysis discussed in *Halper* is no longer applicable in *in rem* civil forfeitures.

CONCLUSION

Since a criminal penalty will always be viewed as punitive, the real issue in parallel proceedings cases is the nature of the penalty imposed in the civil action and the nature of the civil action itself. Under *Halper*, if that penalty is rationally related to a remedial goal, it is not punitive and double jeopardy protection will not be offended. In cases where the remedial/punitive distinction is unclear, a *Halper*-type hearing may be required. At this hearing, the prosecution has an opportunity to establish the cost of pursuing the action and the damages caused by the action. Since the government is entitled to "rough justice", the necessary proof to demonstrate a remedial, non-punitive purpose is not an exact science. Indeed, *Halper* indicates that treble damages are reasonable liquidated damages.

Environmental enforcement actions that order expenditures for upgrades, clean-ups and even penalties perform a regulatory function and fulfill a remedial purpose. That some deterrent impact results from these actions does not alter their remedial character and turn them into punitive sanctions aimed at punishment. Unless a defendant faces parallel punishment proceedings, double jeopardy protection cannot be used to eliminate one of these prosecutions.

126. *Id.* at 2148.

127. *Id.* at 2149.

