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## Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject Healy?

Debra Marie Ingraham

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# Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject *Healy*?

Debra Marie Ingraham\*

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What the commentators do agree on is that double jeopardy is a realm of law so confusing, so replete with contradictions, corrections, and exceptions to the rules, that after 120 years no sensible meaning or policy has evolved.<sup>1</sup>

### I. Introduction

Prior to 1989, courts could easily resolve a Double Jeopardy Clause<sup>2</sup> defense to a civil proceeding brought by the Government — the Clause simply did not apply to civil proceedings.<sup>3</sup> Then, the Supreme Court held in *United States v. Halper*<sup>4</sup> that a civil proceeding brought by the Government following a criminal conviction based on the same conduct violated the Double Jeopardy Clause to the extent that the civil sanction was punitive.<sup>5</sup>

1. Barbara A. Mack, *Double Jeopardy — Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime*, 19 SEATTLE U. L. REV. 217, 218 (1996).

2. U.S. CONST. amend. V.

3. See Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 44 (1993) (stating that Supreme Court did not find Double Jeopardy Clause applicable to civil proceedings prior to 1989 *Halper* decision).

4. 490 U.S. 435 (1989).

5. *United States v. Halper*, 490 U.S. 435, 448-49 (1989) (holding that, to extent civil sanction was punitive, Double Jeopardy Clause barred Government from seeking civil sanction against criminally convicted defendant for same conduct). In *Halper*, the Supreme Court considered the constitutionality of civil proceedings brought by the Government against a defendant previously convicted of the same offense in a criminal trial. *Id.* at 439-40. Halper filed 65 false Medicare claims and received overpayments from the Government in the amount of \$585. *Id.* at 437. A trial court convicted Halper of criminal violations of the False Claims Act. *Id.* The court sentenced Halper to two years in prison and fined him \$5,000. *Id.* The Government then brought a civil proceeding, also under the False Claims Act, seeking statutory civil sanctions in excess of \$130,000. *Id.* at 438. Analyzing Halper's claim as arising under the multiple punishments protection of the Double Jeopardy Clause, the Court considered whether the civil sanction imposed on Halper constituted an unconstitutional second punishment. *Id.* at 441. Rejecting labels of civil and criminal as dispositive, the Court determined that even sanctions labeled civil were punitive when they had punitive purposes. *Id.* at 447-48. The Court held that when a sanction cannot "fairly" be described as remedial but

The decision enabled defendants to raise a double jeopardy defense whenever faced with successive criminal and civil proceedings brought by the Government<sup>6</sup> and instructed lower courts to apply the standards announced in *Halper*.<sup>7</sup> Recently, the United States Court of Appeals for the Seventh Circuit held in *S.A. Healy Co. v. Occupational Safety & Health Review Commission*<sup>8</sup> that an administrative sanction following a criminal conviction violated the Double Jeopardy Clause even though the sanction did not exceed the Government's costs of investigation and prosecution.<sup>9</sup> The Seventh Circuit recognized the split that *Healy* caused with the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Hudson*,<sup>10</sup>

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only as punitive, the sanction is punishment and barred by double jeopardy to the extent that it is punitive. *Id.* at 448-49. Because Halper's civil sanction greatly exceeded the actual damages to the Government as found by the trial court, the Court held that the sanction was punishment, but it remanded for further proceedings with regard to the actual amount of the Government's damages. *Id.* at 452.

6. See Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. 1235, 1251 (1995) (noting different situations in which defendant can raise double jeopardy defense based on *Halper*); Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 956-58 (1990) (observing that *Halper* allowed courts to review civil sanctions by Government and predicting rise in double jeopardy defense in various types of cases).

7. See *Halper*, 490 U.S. at 450 (giving discretion to trial courts to decide at what amount civil sanction becomes punitive).

8. 96 F.3d 906 (7th Cir. 1996).

9. *S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 96 F.3d 906, 910-11 (7th Cir. 1996) (holding that administrative fine by OSHRC was punitive as applied even though it was less than Government's costs of investigation and prosecution), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299). In *Healy*, the United States Court of Appeals for the Seventh Circuit considered whether a sanction assessed by OSHRC subsequent to the defendant's criminal conviction on the same Occupational Safety and Health Act (OSHA) violations constituted a second punishment barred by double jeopardy. *Id.* at 907-08. *Healy*, a corporation, committed over 60 violations of OSHA that resulted in the deaths of three employees. *Id.* at 907. Finding the violations to be "wilful," a trial court criminally convicted *Healy* and fined it \$750,000. *Id.* at 907-08. Subsequently, OSHRC continued administrative proceedings and imposed a civil sanction of \$249,900 for the same violations. *Id.* at 908. The Government's costs of investigating and prosecuting *Healy* exceeded \$490,000. *Id.* *Healy* appealed and claimed that the civil proceeding was a second punishment in violation of double jeopardy. *Id.* The court noted that OSHA did not provide for the consideration of the Government's costs of investigation and prosecution in assessing the sanction. *Id.* at 909. Further, the court observed that the Government was not the victim in this case and therefore had no actual remediable damages. *Id.* at 909-10. Having made these findings, the court held that double jeopardy barred the OSHRC sanction as a second punishment even though it did not exceed the Government's costs of investigation and prosecution. *Id.* at 910-12.

10. 92 F.3d 1026 (10th Cir. 1996).

which held that a sanction not exceeding the Government's costs of investigation and prosecution was not punishment.<sup>11</sup> Moreover, the decision also raised issues regarding whether a sanction is punitive if the regulatory statute lacks consideration of the Government's expenses<sup>12</sup> and whether a sanction is punitive when the Government is not the victim.<sup>13</sup> Presumably to resolve the split between *Hudson* and *Healy*, the United States Supreme Court granted certiorari in the *Hudson* case.<sup>14</sup> Although the *Hudson* and *Healy* decisions created a split among the Tenth and Seventh Circuits,<sup>15</sup> it is the *Healy* decision that provided an in-depth discussion of the issues regarding statutory allowance of the consideration of the Government's expenses and the relevance of the Government's status as a victim.<sup>16</sup> Thus, this Note focuses on the reasoning in *Healy*.

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11. *United States v. Hudson*, 92 F.3d 1026, 1030 (10th Cir. 1996) (holding that sanctions not exceeding government's damages were not punishment), *cert. granted*, 117 S. Ct. 1425 (1997). In *Hudson*, the court considered whether a sanction could be punishment when it did not exceed the Government's costs, but the assessment of the sanction had punitive purposes. *Id.* at 1028-29. The Office of the Comptroller of the Currency (OCC) assessed civil money sanctions against Hudson and his codefendants for engaging in banking violations that resulted in \$900,000 in losses to the Federal Deposit Insurance Corporation. *Id.* at 1027-28. The defendants made agreements with the OCC resulting in the payment of \$16,600 by Hudson and \$15,000 by each of his codefendants. *Id.* at 1028. Subsequently, the three defendants were indicted based on the same banking violations, and they moved to dismiss the indictment based on a claim that double jeopardy barred a criminal proceeding on the banking violations. *Id.* The court noted that *Halper* required the application of an objective test to determine whether a sanction "bears a rational relation to the goal of compensating the Government for its loss" and is therefore remedial. *Id.* In this case, the court observed that the Government's costs were \$72,000, but the money sanctions assessed were only \$44,000. *Id.* at 1029. Further, the court stated that while a consideration of the subjective intent of the OCC may have been punitive, *Halper* requires only an objective analysis of the civil money sanction and its relation to the Government's losses. *Id.* at 1029-30. Because the sanctions in this case were "rationally related to the government's damages," the court held that the civil money sanctions did not constitute punishment. *Id.* at 1030.

12. *See Healy*, 96 F.3d at 909 (discussing lack of consideration of Government's costs in OSHA).

13. *See id.* at 910 (developing distinction between remedial sanctions and compensatory sanctions).

14. *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), *cert. granted*, 117 S. Ct. 1425 (1997).

15. *See Summary of Orders*, 65 U.S.L.W. 3684 (Apr. 15, 1997) (listing split between *Hudson* and *Healy* as one of questions for Supreme Court to address in *Hudson*).

16. *See S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 909-11 (7th Cir. 1996) (discussing OSHA's lack of provision for consideration of government's expenses and distinction between remedial and compensatory sanctions), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

This Note analyzes the issues raised by *Healy* with regard to the *Halper* decision and the holdings of other courts. Part II gives an overview of the use of civil money sanctions by agencies and the increased allowance of both civil and criminal sanctions in regulatory legislation.<sup>17</sup> A review of the basic doctrines that have developed regarding the Double Jeopardy Clause and its protections follows in Part III.A.<sup>18</sup> After discussing *Halper*,<sup>19</sup> Part III.B examines the views of several commentators regarding the *Halper* decision and discusses the impact of *Halper* on the use of civil money sanctions.<sup>20</sup> Part IV analyzes the three issues raised in *Healy*: (1) whether lack of statutory consideration of the Government's expenses makes a sanction punitive;<sup>21</sup> (2) whether a sanction is punitive when the Government is not the victim;<sup>22</sup> and (3) whether a sanction that does not exceed the Government's costs can be punitive.<sup>23</sup> This Note concludes that a lack of statutory consideration of the Government's costs does not make a sanction punitive<sup>24</sup> and that a sanction may be remedial even if the Government is not a victim.<sup>25</sup> Finally, this Note addresses the explicit split between *Hudson* and *Healy* and argues that although in some cases a sanction that does not exceed the Government's costs may be punitive, courts should generally follow the rule of *Hudson*.<sup>26</sup>

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17. See *infra* Part II (discussing use of civil money sanctions in regulatory legislation).

18. See *infra* Part III.A (providing overview of basic tenets of double jeopardy protection).

19. See *infra* Part III.B.1 (discussing *Halper* decision).

20. See *infra* Part III.B.2-4 (surveying commentaries on *Halper*, discussing impact of *Halper*, and summarizing Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) and United States v. Ursery, 116 S. Ct. 2135 (1996)).

21. See *infra* notes 177-254 and accompanying text (analyzing application of *Halper* with respect to statutes providing no consideration of Government's costs).

22. See *infra* Part IV.B (scrutinizing *Healy* remedial/compensatory distinction).

23. See *infra* Part IV.C (examining Seventh Circuit's finding that sanction can be punitive even when below Government's costs).

24. See *infra* Part IV.A.3-5 (arguing that statutes with no provision for Government's costs can be remedial).

25. See *infra* Part IV.B (concluding that distinction between remedial and compensatory sanctions is incorrect interpretation of *Halper*).

26. See *infra* notes 273-301 and accompanying text (discussing relationship between Government's costs and amount of sanction and concluding Seventh Circuit should have applied *Hudson* rule).

## II. The Use of Civil Money Sanctions and Criminal Sanctions in Agency Enforcement

In recent years, the number of civil sanctions authorized in regulatory legislation has grown.<sup>27</sup> Many regulatory statutes now contain both criminal and civil sanctions for the same conduct and create a mixture of enforcement remedies.<sup>28</sup> This combination of civil and criminal sanctions has many implications. Agencies now must choose whether to pursue either civil or criminal sanctions or both,<sup>29</sup> and courts must struggle to decide what type of protection to grant to defendants in each situation.<sup>30</sup>

### A. Agency Use of Civil Money Sanctions

Early regulatory statutes generally required agencies to rely on the Department of Justice (DOJ) to institute civil proceedings.<sup>31</sup> Usually, these

27. See PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 687 (1995) (noting that Congress has authorized more agency enforcement and that "the 1990s have seen reenergized enforcement activity at an unprecedented level"); Carolyn J. Buck & Dwight C. Smith III, *Enforcement of Net Worth Maintenance Agreements and the Imposition of Civil Money Penalties*, 24 CAP. U. L. REV. 135, 148 (1995) (noting that "most . . . federal agencies . . . have authority to impose civil money penalties for violations of law or regulations"); Harvey J. Goldschmidt, *Report in Support of Recommendation 72-6: An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 896 (1973) (noting "increased use of civil money penalties" by agencies); Laura J. Kerrigan et al., *Project: The Decriminalization of Administrative Law Penalties: Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 ADMIN. L. REV. 367, 387 (1993) (stating that "[v]irtually every major administrative regulatory program authorized today contains some type of civil monetary penalty sanction"); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1801, 1844 (1992) (noting increase in agency ability to impose civil sanctions and increase in civil sanctions included in agency legislation); Gary P. Naftalis et al., *Private Civil Actions and Concurrent or Subsequent Regulatory or Criminal Proceedings May 1993 Revision*, C837 A.L.I.-A.B.A. 461, 463 (1993) (noting federal government's increased use of civil sanctions).

28. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1332 (1991) (discussing use of both civil and criminal penalties in agency legislation and stating that this has resulted in "systematic blending of criminal and civil remedies as part of a single law enforcement strategy").

29. See *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (stating that although double jeopardy bars multiple punishments, Government can sanction defendant for single offense in both criminal and civil proceeding); Goldschmidt, *supra* note 27, at 898 (stating that agencies must decide what type(s) of sanctions to seek in each case).

30. See Kerrigan et al., *supra* note 27, at 397-417 (discussing difficulty of determining what protections to afford defendants in civil proceedings and in parallel proceedings).

31. See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by*

statutes contained penalties of a fixed amount.<sup>32</sup> In recent years, however, agency imposition of civil money sanctions has increased in scope.<sup>33</sup> By 1979, more regulatory statutes included "variable-penalty" provisions that gave agencies increased discretion to determine the amount of the sanction in a particular case.<sup>34</sup> Moreover, the statutes increasingly permitted administrative assessment and imposition of the sanction, "subject only to limited review of [the] action."<sup>35</sup> This trend continued, and Congress persisted in broadening the scope of agency power to impose civil sanctions against violators of regulatory legislation.<sup>36</sup>

A pivotal case in civil money sanction jurisprudence, *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*,<sup>37</sup> addressed the issue of whether the Seventh Amendment barred the administrative adjudication of Occupational Safety and Health Act (OSHA) violations.<sup>38</sup> The Court held that an administrative forum could impose civil sanctions without violating the Seventh Amendment right to a jury trial in some civil cases.<sup>39</sup> However,

*Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1440 (1979) (discussing limited role of agency in prosecuting civil money penalty provisions in early agency statutes).

32. See *id.* at 1438-39 (observing that most older agency statutes contained "fixed monetary penalt[ies]").

33. See *id.* at 1439-40 (discussing increase in agency ability to pursue and assess civil money penalties).

34. See *id.* at 1439 (noting increase in "variable-penalty statutes").

35. *Id.* at 1440.

36. See Mann, *supra* note 27, at 1801 (discussing congressional enlargement of agency power to impose civil sanctions).

37. 430 U.S. 442 (1977).

38. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449-50 (1977) (holding that Seventh Amendment did not prohibit administrative adjudication of OSHA violations without jury). In *Atlas Roofing*, the Supreme Court considered the constitutionality of administrative adjudication of OSHA violations in light of the Seventh Amendment requirement of jury trials in some civil cases. *Id.* at 449. The Occupational Safety and Health Agency (Agency) cited *Atlas Roofing* for violation of OSHA and held a hearing before a panel of administrative judges. *Id.* at 447-48. The panel found that *Atlas Roofing* violated OSHA and assessed a civil monetary penalty. *Id.* at 448. *Atlas Roofing* appealed and claimed that OSHA enforcement procedures violated its Seventh Amendment right to a jury trial. *Id.* The Supreme Court noted that this case involved "public rights," which the Court defined as "rights created by statutes within the power of Congress to enact." *Id.* at 450. The Court found that Congress could allow administrative finding of facts and adjudication of such cases. *Id.* Further, the Court examined the history of the Seventh Amendment and found that the Amendment did not require a jury to act as the factfinder in all civil cases. *Id.* at 459-61. Thus, the Court held that Congress could create additional rights to be enforced in administrative forums without violating the Seventh Amendment. *Id.* at 461.

39. *Id.* at 450.



the implications of *Atlas Roofing* extended beyond the Seventh Amendment issue decided in the case. The Court upheld the use of civil money sanctions designed to deter rather than just to compensate.<sup>40</sup> Most notably, the decision allowed agencies to bypass the courtroom by administratively assessing sanctions, thereby expanding agency enforcement power<sup>41</sup> and broadening congressional ability to delegate civil sanction assessment authority to agencies.<sup>42</sup> As a result, agencies now administratively impose many civil sanctions.<sup>43</sup>

In addition to the ease of imposing civil sanctions through administrative proceedings,<sup>44</sup> civil sanctions offer several advantages over criminal sanctions.<sup>45</sup> First, civil law offers numerous remedies in addition to monetary fines, including "specific performance, injunctive relief, constructive trusts, abatement of nuisances, and forfeitures."<sup>46</sup> Agencies can seek these remedies in the criminal trial, in a separate civil proceeding, or in addition to criminal sanctions for the same behavior.<sup>47</sup>

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40. See Mann, *supra* note 27, at 1834-35 (stating that *Atlas Roofing* upheld use of deterrent civil money sanctions).

41. See *id.* at 1830 (noting that body of cases, including *Atlas Roofing*, increased role of agencies in enforcing laws by allowing administrative assessment of sanctions).

42. See *id.* at 1850 (stating that *Atlas Roofing* "left Congress free to extend the enforcement powers of administrative agencies by granting them further penalty power"); see also Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 288-90 (1982) (discussing nondelegation doctrine as it applies to delegation of judicial powers to agencies).

43. See Mann, *supra* note 27, at 1871 (stating that agencies may now impose civil sanctions "through purely administrative assessment"); Adam G. Garson, Note, *Administrative Law — Consumer Product Safety Commission Lacks Authority to Administratively Assess Civil Penalties Under Section 303(b) of the Consumer Product Safety Act — Athlone Industries, Inc. v. Consumer Product Safety Commission*, 707 F.2d 1485 (D.C. Cir. 1983), 57 TEMP. L.Q. 653, 653 (1984) (stating that congressional ability to delegate power to assess administratively civil penalties "is beyond challenge"); see also Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 398-99 (1982) (observing that Article III courts serve "supervisory role" in overseeing administrative dispositions).

44. See *supra* notes 37-43 and accompanying text (discussing agency ability to impose civil sanctions administratively).

45. See Kerrigan et al., *supra* note 27, at 374-79 (discussing advantages of imposing sanction in civil proceeding rather than criminal trial). See generally Goldschmidt, *supra* note 27 (recommending increased agency use of civil sanctions and discussing advantages of agency use of civil sanctions).

46. See Cheh, *supra* note 28, at 1333 (discussing civil remedies offered by civil law); Kerrigan et al., *supra* note 27, at 369 (discussing "vast array of penalties" civil law contains).

47. See Cheh, *supra* note 28, at 1333, 1336-37 (discussing three alternative uses of civil sanctions in conjunction with criminal sanctions).

Moreover, civil sanctions are easier and cheaper for the Government to pursue.<sup>48</sup> The broad discovery permitted in civil trials tends to make them more efficient than criminal trials.<sup>49</sup> Although a party in a criminal trial confronts "highly restricted" discovery rules, a party to a civil proceeding may discover all relevant nonprivileged information.<sup>50</sup> Furthermore, the procedural protections afforded the defendant in a civil trial are fewer than those granted the criminal defendant.<sup>51</sup> The avoidance of these procedural and constitutional protections makes the resolution of a civil proceeding quicker and easier.<sup>52</sup> Finally, the lower burden of proof in a civil trial<sup>53</sup>

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48. See *id.* at 1336 (discussing ease and efficiency of civil remedies as reasons for their increased use); Kerrigan et al., *supra* note 27, at 369 (noting that efficiency is one reason to choose civil sanctions rather than criminal sanctions); Mann, *supra* note 27, at 1798 (stating that civil sanctions are "cheaper and more efficient than . . . criminal sanctions"); Note, *A Proposal to Restructure Sanctions Under the Occupational Safety and Health Act: The Limitations of Punishment and Culpability*, 91 YALE L.J. 1446, 1450 (1982) (stating that "criminal convictions of corporations [under OSHA] are slow, costly, and difficult to obtain").

49. See Kerrigan et al., *supra* note 27, at 374 (discussing discovery in civil actions).

50. See Pankaj Sinha, *Parallel Civil and Criminal Proceedings*, 26 AM. CRIM. L. REV. 1217, 1218 (1989) (discussing differences in discovery between criminal and civil proceedings).

51. See *Helvering v. Mitchell*, 303 U.S. 391, 402-04 (1938) (stating that civil proceedings, unlike criminal proceedings, do not require jury as factfinder, allow directed verdicts against defendant, have lower burden of proof than "beyond a reasonable doubt," allow government appeals of verdicts, provide no right to confront witnesses, and require no protection for defendant from testifying); Goldschmidt, *supra* note 27, at 916 (stating that higher procedural requirements of criminal proceedings require "agencies [to] assume substantial (often unconsidered) additional burdens when they decide to sanction solely under the criminal law"); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2445 (1995) (stating that procedural protections exist in criminal trials to protect defendant and to "preclude consideration of unduly prejudicial information"); Mann *supra* note 27, at 1799 (observing that defendants have fewer procedural protections in civil rather than criminal proceedings).

52. See Cheh, *supra* note 28, at 1351 (noting that constitutional criminal protections "are extremely costly and time consuming"); Kerrigan et al., *supra* note 27, at 374-75 (stating that lower procedural protections in civil trials lead to quicker resolutions); see also Goldschmidt, *supra* note 27, at 913 (observing common charge that sanctions are labeled "civil" in order to avoid constitutional protections afforded to defendant in criminal trial); Mann, *supra* note 27, at 1801 (stating that "[i]n many instances, the very motivation for the creation of civil punitive sanctions was to avoid criminal procedural protection").

53. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 284-85 (1966) (observing that burden of proof in criminal trials is proof of "essential facts beyond a reasonable doubt" and that burden in civil trials is "mere preponderance of the evidence"); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 493 (1950) (observing that "lesser degree of proof [is] required in a civil

enhances the Government's ability to prove wrongdoing and impose a sanction.<sup>54</sup>

### B. Agency Use of Criminal Sanctions

Criminal law proposes "to deter and punish socially deviant or harmful behavior."<sup>55</sup> To achieve these purposes, criminal law imposes a stigma on defendants.<sup>56</sup> In particular, a criminal conviction labels the defendant a criminal<sup>57</sup> and a "transgressor" against society.<sup>58</sup> In the effort to punish crime, criminal law also imposes imprisonment and even death as sanctions.<sup>59</sup> However, these remedies are available only in the case of individual defendants because no one can imprison<sup>60</sup> or kill<sup>61</sup> corporations.

case"); *Helvering*, 303 U.S. at 403 (stating that Government does not have to "prove its case beyond a reasonable doubt" in civil trials).

54. See Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 487-88 (1974) (stating that criminal trials require proof "beyond a reasonable doubt," while civil proceedings require that Government prove its case by "a preponderance of the evidence"); Kerrigan et al., *supra* note 27, at 375 (listing "beyond a reasonable doubt" standard required in criminal trials as one of hurdles that civil proceeding avoids); Mann, *supra* note 27, at 1813 (depicting in chart format differences between civil and criminal proceedings, including differences in burdens of proof).

55. Cheh, *supra* note 28, at 1352-54 (discussing stigma of criminal sanctions).

56. See *id.* at 1352 (discussing stigma associated with criminal conviction and effects on stigmatized individual); Kerrigan et al., *supra* note 27, at 379 (stating that stigma of criminal conviction has deterrent effect); Lazarus, *supra* note 51, at 2442 (stating that criminal conviction imposes "moral stigma"); Mann, *supra* note 27, at 1809 (stating that stigma is one of remedies of criminal law).

57. See Kerrigan et al., *supra* note 27, at 379 (discussing labeling of defendant as criminal and describing such labeling as "societal branding of an individual as a criminal").

58. Cheh, *supra* note 28, at 1352 (discussing stigma of criminal sanctions); see Goldschmidt, *supra* note 27, at 898 (observing that criminal conviction "disgrace[s]" defendant); Mann, *supra* note 27, at 1809 (noting that criminal convictions carry stigma).

59. See Cheh, *supra* note 28, at 1355 (stating that "criminal law alone has the retributive characteristics associated with lengthy incarceration or execution"); Lazarus, *supra* note 51, at 2442 (stating that imprisonment and death penalty are "society's harshest sanctions" and are penalties used in criminal law); Mann, *supra* note 27, at 1809 (calling imprisonment "distinctive remedy of the criminal law").

60. See *S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 96 F.3d 906, 908 (7th Cir. 1996) (stating that "[c]orporations cannot be imprisoned"), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299); Note, *supra* note 48, at 1453 (noting that remedy of imprisonment is not available in case of corporations); see also Lazarus, *supra* note 51, at 2442 (stating that because "corporate entities . . . cannot be incarcerated, stigma can be the only meaningful justification for the choice of criminal prosecution rather than the less socially burdensome option of civil enforcement").

61. See *Healy*, 96 F.3d at 908 (observing that nearest equivalent of execution of corporation is dissolution but noting that even dissolution "does not diminish the investors'

Although legislatures originally inserted civil sanctions into regulatory statutes as an alternative to criminal remedies,<sup>62</sup> more agencies now resort to civil sanctions rather than to criminal sanctions to punish violators.<sup>63</sup> One reason for the increasing shift toward civil sanctions is the failure of criminal sanctions to deter illegal activity.<sup>64</sup> For example, some commentators describe the criminal sanctions of OSHA as limited and ineffective.<sup>65</sup> They observe that the economic benefits of violating Occupational Safety and Health Agency (Agency) regulations outweigh the low risk of criminal conviction for such a violation.<sup>66</sup> Additionally, many OSHA violators are corporations that the Agency cannot imprison<sup>67</sup> and that are unlikely to suffer anything more than economic stigma.<sup>68</sup> Furthermore, it is difficult to obtain a criminal conviction against a corporation or its officers.<sup>69</sup> However, the

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ability to carry on the business; another corporation can be created at minimal cost").

62. See Mann, *supra* note 27, at 1853 (noting that civil penalties were originally intended as alternative to criminal penalties in regulatory statutes).

63. See Kerrigan et al., *supra* note 27, at 432 (stating that "[d]uring recent years, there has been a rapidly accelerating tendency for administrative and regulatory agencies to employ civil remedies as a means of enforcement"); *supra* notes 45-54 and accompanying text (discussing advantages of initiating civil proceeding rather than criminal proceeding); see also Goldschmidt, *supra* note 27, at 917 (recommending increased agency resort to civil sanctions and stating that "[c]riminal enforcement of agency regulations has often proven costly and ineffective, created undesirably wide areas of discretion, unnecessarily stigmatized defendants who were in no sense morally reprehensible, and generally, interfered with the operation of the criminal law").

64. See Kerrigan et al., *supra* note 27, at 377-78 (concluding that criminal sanctions have often been ineffective).

65. See *id.* (discussing OSHA's criminal sanctions); Xavier K. McDonnell, Note, *Criminal Liability for Workplace Accidents*, 24 NEW ENG. L. REV. 293, 317-20 (1989) (discussing problems with criminal sanctions of OSHA). See generally Note, *supra* note 48.

66. See Kerrigan et al., *supra* note 27, at 377 (stating that economic benefits of violating law may outweigh risk of criminal conviction).

67. See *id.* at 387 (noting that courts cannot imprison corporations).

68. See Note, *supra* note 48, at 1450-53 (discussing difficulty of obtaining criminal conviction against corporation, problem of punishing corporation, and lack of stigma except as it affects corporation's profits). Although not discussing corporations in particular, the Administrative Conference noted that "criminal cases which invariably end in a fine (and not imprisonment) are an expensive and inefficient exercise in futility, and needlessly debase what should be the law's most potent sanctioning tool." Goldschmidt, *supra* note 27, at 918.

69. See Kerrigan et al., *supra* note 27, at 381-82 (discussing disinclination of juries to convict officers of corporations and even stronger hesitancy to incarcerate convicted officers in environmental enforcement area); McDonnell, *supra* note 65, at 318 (noting that criminal sanctions of OSHA are not used often and imprisonment is rarely imposed on violators); Note, *supra* note 48, at 1451-57 (discussing reluctance of juries to convict either corporations or their officers for criminal OSHA violations).

probability of Government success in a civil proceeding is higher,<sup>70</sup> and the threat of significant economic loss could have a greater deterrent effect than the slight chance of criminal conviction.<sup>71</sup>

Despite the disadvantages of enforcing regulatory legislation through criminal sanctions, reasons to impose criminal sanctions exist. For example, the public increasingly encourages criminal prosecution of those who violate environmental laws.<sup>72</sup> Commentators also acknowledge the following advantages to criminal prosecution: (1) the perceived ineffectiveness of civil money sanctions,<sup>73</sup> (2) the deterrent effect of the threat of incarceration,<sup>74</sup> and (3) the larger fines associated with criminal prosecutions.<sup>75</sup>

### III. Double Jeopardy and Civil Money Sanctions

#### A. History and Overview of the Double Jeopardy Clause

The Double Jeopardy Clause states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."<sup>76</sup> Although its authors originally perhaps intended the Double Jeopardy Clause to apply only to successive criminal prosecutions,<sup>77</sup> a series of court decisions soon

70. See Charney, *supra* note 54, at 499 (stating that Government is more likely to prevail in civil proceeding due not only to lower burden of proof, but also to fact that Government is both plaintiff and author of statute being enforced); *supra* notes 48-54 and accompanying text (describing lighter burden on Government in civil proceeding).

71. See Kerrigan et al., *supra* note 27, at 378 (stating that threat of economic loss in civil proceeding may be greater deterrent than threat of criminal conviction); Note, *supra* note 48, at 1457 (arguing that large civil money fines may have strong deterrent effect).

72. See Kerrigan et al., *supra* note 27, at 380 (observing increased public support of criminal prosecutions for those who violate environmental laws and predicting that this support will continue).

73. See *id.* (stating that "[a]gency officials also feel that the mere imposition of fines is largely ineffective"); Lazarus, *supra* note 51, at 2452 (stating that fines raise "cost of lawful activity, giving those who violate the law a competitive advantage over those who comply"); McDonnell, *supra* note 65, at 319-20 (observing problems with civil fines under OSHA, including lack of deterrence).

74. See Kerrigan et al., *supra* note 27, at 381 (discussing attempt by environmental agencies to deter violators with threat of imprisonment); Lazarus, *supra* note 51, at 2512 (stating that some "monetary incentives otherwise favor[] noncompliance," thus necessitating use of criminal deterrents).

75. See Kerrigan et al., *supra* note 27, at 384 (explaining that fines in criminal trial may be larger than in civil proceeding).

76. U.S. CONST. amend. V. The Fourteenth Amendment applies the protections of the Double Jeopardy Clause to the States. See *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding Double Jeopardy Clause applicable to states). Double jeopardy also applies to corporate entities. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 574-76 (1977) (applying double jeopardy protection to corporate defendant).

77. See Mack, *supra* note 1, at 221 (arguing that "historical development of the Double

created a complicated body of law regarding the precise protections of the Clause.<sup>78</sup> Courts have noted that the Double Jeopardy Clause protects defendants from three abuses: (1) successive prosecution following acquittal, (2) successive prosecution following conviction, and (3) multiple punishments for one act.<sup>79</sup>

For double jeopardy to bar a second prosecution, jeopardy must attach in the first proceeding.<sup>80</sup> In criminal cases, attachment occurs either upon the impaneling and swearing in of the jury or at the start of the presentation of evidence to the judge in a bench trial.<sup>81</sup> The point at which jeopardy attaches in a civil proceeding is less clear.<sup>82</sup> Support exists for the proposition that jeopardy attaches upon the assessment of the civil penalty<sup>83</sup> and for the argument that jeopardy does not attach until the Government collects the penalty.<sup>84</sup>

However, certain exceptions exist to the rule that double jeopardy precludes a second prosecution after jeopardy attaches in the first prosecution.<sup>85</sup> For example, double jeopardy does not preclude subsequent prosecution after the judge properly declares a mistrial,<sup>86</sup> after the defendant success-

Jeopardy Clause also supports the thesis that double jeopardy applies only in the criminal context and only to multiple prosecutions, not multiple punishments"). *But cf.* JAY A. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 32 (1969) (observing that Framers "hastily adopted" Double Jeopardy Clause after little discussion of what they intended it to mean).

78. See William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 414-17 (1993) (discussing addition of Double Jeopardy Clause into Bill of Rights and contemporary understandings of Clause at time of its adoption); Mack, *supra* note 1, at 221-35 (discussing history of Double Jeopardy Clause and subsequent relevant judicial interpretations).

79. *United States v. Halper*, 490 U.S. 435, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (listing protections of Double Jeopardy Clause).

80. See James A. Bell, IV & Todd Richman, *Twenty-Fifth Annual Review of Criminal Procedure: Double Jeopardy*, 84 GEO. L.J. 1076, 1079-80 (1996) (discussing attachment requirement).

81. See *id.* at 1079 (describing points at which attachment occurs).

82. See Brief for the Nuclear Regulatory Comm'n in Opposition to Plaintiff's Motions for Stay and Preliminary Injunction at 34 n.15, *Thermal Science, Inc. v. United States Nuclear Regulatory Comm'n*, No. 4:96CVO2282-CAS (E.D. Mo. filed Nov. 20, 1996) [hereinafter NRC Brief] (stating that "it is not clear at what precise point 'jeopardy' attaches in a civil proceeding").

83. *Bryant v. State*, 660 N.E.2d 290, 298-99 (Ind. 1995) (finding that jeopardy attached upon assessment of civil sanction), *cert. denied*, 115 S. Ct. 293 (1996).

84. See Bell & Richman, *supra* note 80, at 1079-80 (stating that attachment occurs when Government collects civil sanction).

85. See *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980) (stating that "Court's cases show that even the protection against retrial is not absolute").

86. See *Richardson v. United States*, 468 U.S. 317, 323 (1984) (finding that Double

fully appeals the verdict and the court grants a new trial,<sup>87</sup> or when the second prosecution is by a different sovereign.<sup>88</sup>

The Double Jeopardy Clause protects defendants against successive prosecutions<sup>89</sup> for a single offense.<sup>90</sup> The Supreme Court held in *Blockburger v. United States*<sup>91</sup> that in the same proceeding the Government could punish a defendant for a single act under more than one statute provided each statute contained at least one element different from the other.<sup>92</sup> The

Jeopardy did not bar retrial following proper declaration of mistrial); Bell & Richman, *supra* note 80, at 1080-81 (discussing allowance of second prosecution when mistrial is declared due to "trial judge's finding that the jury is deadlocked, biased, or unduly influenced").

87. See *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988) (stating that "[i]t has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction"); NEIL P. COHEN & DONALD J. HALL, *CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS* 673-74 (1995) (discussing appropriateness of retrial following reversal of conviction due to trial error). *But see* *Burks v. United States*, 437 U.S. 1, 18 (1978) (holding that reversal based on insufficiency of evidence bars retrial of defendant).

88. See *Heath v. Alabama*, 474 U.S. 82, 87-89 (1995) (discussing dual sovereignty doctrine, which allows for prosecution of same act by two sovereigns when act breaks law of both); Bell & Richman, *supra* note 80, at 1100-03 (discussing "dual sovereignty doctrine," which allows separate prosecutions by both state and federal governments); McAninch, *supra* note 78, at 424-27 (describing dual sovereignty doctrine, when the doctrine applies, and some government policies dealing with the doctrine).

89. Many commentators use the expression "multiple prosecutions" when referring to the double jeopardy protection against two consecutive prosecutions for the same offense. Because in a single trial a defendant may be prosecuted on multiple charges involving the same offense, the author believes that the term "successive prosecutions" more accurately describes the protection, and thus that term is used in this Note. However, when commentators used the term "multiple prosecutions," the original text has been preserved.

90. See Eric Loeb et al., *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994: Double Jeopardy*, 83 GEO. L.J. 1037, 1052 (1995) (discussing double jeopardy bar on multiple prosecutions).

91. 284 U.S. 299 (1932).

92. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that Double Jeopardy Clause did not bar conviction under two sections of Narcotics Act for one offense where each section required proof of unique element). In *Blockburger*, the Supreme Court considered whether the conviction of a defendant based on two sales of illegal drugs that resulted in three convictions under the Harrison Narcotic Act violated double jeopardy. *Id.* at 300-01. The defendant claimed that double jeopardy barred convicting him separately for each sale because the two sales were part of a continuous act. *Id.* at 301. In addition, the defendant claimed that his separate convictions for violations of two sections of the Narcotics Act constituted multiple punishment. *Id.* As to the first claim, the Court found that the two sales did not constitute a continuous act because the Narcotics Act punished each sale of illegal drugs, the first sale was completed before the second sale occurred, and the second sale was

Court also uses this test to determine if a second prosecution aims at punishing the same offense as the first and, therefore, constitutes a successive prosecution in violation of the Double Jeopardy Clause.<sup>93</sup> Likewise, after prosecution to verdict for a crime (e.g., felony murder) that includes a lesser offense (e.g., robbery), jeopardy bars a subsequent prosecution for the lesser offense.<sup>94</sup>

The Double Jeopardy Clause also prohibits the imposition of multiple punishments for the same offense.<sup>95</sup> This situation arises when the Government attempts to impose multiple punishments for a single offense in one criminal trial.<sup>96</sup> In this instance, double jeopardy precludes the multiple punishments unless the legislature expressed the intent to provide more than one punishment for the offense.<sup>97</sup> Multiple punishment questions also arise in the context of consecutive criminal and civil proceedings.<sup>98</sup> The resolu-

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motivated by a new impulse. *Id.* at 301-03. The Court held that in addition to looking at the nature of the acts to determine whether to treat multiple acts as a continuing offense, courts should also look to the intent of the legislature. *Id.* at 303. Where, as here, the legislature intended to punish each act separately, the court should uphold multiple convictions. *Id.* As to the defendant's second claim, the Court noted that each section of the Narcotics Act at issue constituted a separate offense requiring proof of different elements. *Id.* at 303-04. The Court announced that the test to determine whether a single act is punishable under more than one statutory provision is whether each statute requires proof of a different element. *Id.* at 304. Because the statutory provisions in the Narcotics Act met this test, the Court held that double jeopardy did not bar Blockburger's convictions for the same offense under two separate provisions of the Narcotics Act. *Id.*

93. See Loeb et al., *supra* note 90, at 1052 (discussing use of *Blockburger* to prohibit successive prosecution for same offense).

94. *Harris v. Oklahoma*, 433 U.S. 682, 682 (1977) (holding that when defendant had been convicted of felony murder committed during robbery with firearms, second prosecution for robbery with firearms was jeopardy barred). The Court stated: "When . . . conviction of a greater crime . . . cannot be had without conviction of the lesser crime . . . the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Id.*; see also Loeb et al., *supra* note 90, at 1053-54 (discussing bar of second prosecution for lesser included offenses).

95. See Loeb et al., *supra* note 90, at 1056-57 (describing multiple punishment protection).

96. See COHEN & HALL, *supra* note 87, at 660 (discussing more than one punishment in same trial and *Missouri v. Hunter*, 459 U.S. 359 (1983)); Loeb et al., *supra* note 90, at 1056-57 (discussing imposition of multiple punishments in one criminal proceeding).

97. See *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) (finding that if two statutes authorized punishments for same offense, court may impose cumulative punishment regardless of fact that statutes prohibit same conduct as described in *Blockburger*); Loeb et al., *supra* note 90, at 1056-57 (stating that "[m]ultiple charges and punishments in a single prosecution will not violate double jeopardy if the legislature intended to impose cumulative punishments").

98. See COHEN & HALL, *supra* note 87, at 664-66 (discussing multiple punishment issue



tion of these situations depends on the definition of "punishment"<sup>99</sup> and is the focus of Part II.B and Part IV of this Note.

Courts and commentators articulate several policy reasons for double jeopardy protection. These justifications include keeping verdicts final, serving justice, and providing closure for defendants.<sup>100</sup> In addition, double jeopardy protections constrain the ability of prosecutors to abuse their power.<sup>101</sup> Finally, the Supreme Court discussed "psychological security" as a reason justifying double jeopardy protections.<sup>102</sup> The Court stated that successive prosecutions subject the defendant to "embarrassment, expense and ordeal and compel[ ] him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."<sup>103</sup>

## B. *Complicating the Complicated: Civil Sanctions as Punishment Barred by Double Jeopardy*

### 1. *United States v. Halper*

Originally, most courts and commentators did not interpret the Double Jeopardy Clause as a bar to civil sanctions following criminal punishment for the same offense.<sup>104</sup> As cases arose involving civil money sanctions and forfeiture actions by the Government following criminal convictions for the same offense, the Supreme Court analyzed the claims by examining whether or not the civil sanction constituted a criminal punishment.<sup>105</sup> In

arising in context of subsequent civil proceedings).

99. *See id.* at 664-65 (asking "what is punishment?" and discussing *United States v. Halper*, 490 U.S. 435 (1989) and *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), discussed at *infra* Part III.B.4.a).

100. *See* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 842-43 (1996) (discussing reasons for existence of double jeopardy protections); David S. Rudstein, *Civil Penalties and Multiple Punishments Under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587, 588-89 (1993) (discussing policies behind double jeopardy protections).

101. *See* Henning, *supra* note 100, at 843 (stating that double jeopardy prevents prosecutorial abuse by barring "repeated trials and excessive punishments").

102. SIGLER, *supra* note 77, at 156 (discussing purposes of double jeopardy protections).

103. *Benton v. Maryland*, 395 U.S. 784, 796 (1969).

104. *See* Henning, *supra* note 3, at 44 (stating that double jeopardy did not apply to civil proceedings before *Halper*); Mack, *supra* note 1, at 232 (quoting Justice Brandeis in *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938), who stated that "double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense").

105. *See* Mack, *supra* note 1, at 228-35 (discussing Court's analysis of early cases

making such determinations, the Court generally deferred to legislative intent.<sup>106</sup>

The Supreme Court altered the analysis of these cases<sup>107</sup> in *United States v. Halper*. In *Halper*, the Court examined the issue of whether the Double Jeopardy Clause precluded a civil money sanction that far exceeded the costs to the government when imposed after a criminal conviction and punishment.<sup>108</sup> Halper submitted sixty-five false Medicare reimbursement claims to the Government totaling \$585.<sup>109</sup> The Government criminally tried and convicted Halper under the criminal provision of the False Claims Act, and he received a two-year prison sentence and a \$5,000 fine.<sup>110</sup> Subsequently, the Government brought a claim against Halper under the civil provisions of the False Claims Act,<sup>111</sup> which authorized a penalty of \$2,000 for each false claim filed plus double the amount of the Government's losses.<sup>112</sup> The issue before the Court was whether the civil penalties authorized in the False Claims Act constituted punishment and, therefore, were barred by double jeopardy.<sup>113</sup>

Departing from prior holdings that deferred to the legislature and the language of the statute in making such determinations,<sup>114</sup> the Court answered in the affirmative.<sup>115</sup> Rejecting statutory labels of "criminal" or "civil" as

involving claims that double jeopardy barred civil actions by government). For an overview of the Supreme Court's holding regarding the rights afforded defendants in cases involving punitive civil sanctions, see Gregory Y. Porter, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Sanctions*, 70 S. CAL. L. REV. 517 (1997).

106. See Mack, *supra* note 1, at 235-37 (stating that even though Justices did not always agree on result in specific case, they usually agreed that question was one of legislative intent). Mack also states: "Until 1989, the case law held clearly and almost without exception that double jeopardy did not restrict the power of the Legislature to determine what punishments to impose and even to impose cumulative punishments if it so chose. The job of the courts was to determine what the Legislature intended." *Id.* at 235; see also Eads, *supra* note 6, at 930-31 (stating that for half century before *Halper*, Court used "statutory construction test" to decide if sanction was criminal or civil and noting that Court had previously deferred greatly to legislative intent).

107. See Eads, *supra* note 6, at 930 (stating that "[i]n *Halper*, however, the Court altered its form of analysis and discarded the statutory construction approach").

108. *United States v. Halper*, 490 U.S. 435, 446 (1989).

109. *Id.* at 437.

110. *Id.*

111. 31 U.S.C. § 3729(a) (1994).

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

113. See Mack, *supra* note 1, at 240 (discussing *Halper* and issue before Court).

114. See *supra* notes 105-06 and accompanying text (describing Court's deferral to legislative intent to determine nature of sanction prior to *Halper*).

115. See Nancy J. King, *Proportioning Punishment: Constitutional Limits on Successive*

determinative, 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."<sup>116</sup> The Court stated that it would look at each case to determine whether the goals being served were remedial or punitive.<sup>117</sup> When the goals of a statute in a particular case were punitive, the Court would consider the sanction as punishment barred by double jeopardy.<sup>118</sup> Because the statute in this case authorized punishment of \$130,000 and the Government only suffered actual losses of \$585 and expenses of \$16,000,<sup>119</sup> the Court held that the gross disparity between the costs to the Government and the fine was sufficient to characterize the fine as a second punishment prohibited by the Double Jeopardy Clause.<sup>120</sup>

The Court clarified the new standard by stating that a civil penalty was remedial if it bore a "rational relation to the goal of compensating the Government for its loss."<sup>121</sup> However, the Court allowed the Government a fair margin to demonstrate its losses.<sup>122</sup> The Court concluded its opinion by emphasizing that the new rule was "for the rare case" and deferred to trial courts to make future determinations as to when the sanction went beyond remedial reimbursement to punishment.<sup>123</sup> Finally, the Court noted that the Government could still seek both civil and criminal penalties in one proceeding and that the ruling did not affect civil actions brought by private parties.<sup>124</sup>

## 2. Analyzing Halper

Considerable analysis of *Halper's* reasoning followed the decision. Commentators criticized the Court's reliance on the multiple punishments

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*and Excessive Penalties*, 144 U. PA. L. REV. 101, 121-22 (stating that *Halper* decision "flout[s] legislative will"); Thomas W. Robertson, Note, *Two Views of Austin v. United States: Is a Civil Forfeiture Action to Collect "Proceeds," Pursuant to Title 21 U.S.C. § 881(A)(6) Still Exempt From the Protections of the Double Jeopardy Clause?*, 23 AM. J. CRIM. L. 431, 439-40 (1996) (observing that "*Halper* decision disturbed a seemingly stable jurisprudence by greatly reducing deference to Congressional labels").

116. *United States v. Halper*, 490 U.S. 435, 447-49 (1989).

117. *Id.* at 448.

118. *Id.* at 448-49.

119. *Id.* at 439.

120. *Id.* at 452.

121. *Id.* at 449.

122. *See id.* (noting that determining Government's losses "inevitably involves an element of rough justice").

123. *Id.* at 449-50.

124. *Id.* at 450-51.

prong of the Double Jeopardy Clause rather than the successive prosecutions prong.<sup>125</sup> Because of this, some commentators noted the potential application of *Halper* to bar a criminal prosecution following the imposition of a civil penalty,<sup>126</sup> and some lower courts faced such "reverse-*Halper*" claims.<sup>127</sup> Although the Supreme Court has not yet addressed this

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125. See Cox, *supra* note 6, at 1254, 1266-67 (discussing flaw in *Halper*'s "exclusive focus upon the multiple punishments prong of double jeopardy"); Eads, *supra* note 6, at 932, 953 (stating that *Halper* focused on multiple punishment prong and that it is that prong that applies in context of civil sanctions sought by government); Robert S. Pasley, *Double Jeopardy and Civil Money Penalties*, 114 BANKING L.J. 4, 4 (1997) (stating that Supreme Court focused on multiple punishment protection); Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843, 867 (1993) (arguing that Court should have based *Halper* on multiple prosecutions prong rather than multiple punishments prong). But see Elizabeth S. Jahncke, Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 134 (1991) (agreeing with *Halper* Court that appropriate analysis in case was multiple punishment).

126. See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1958 (1994) (Scalia, J., dissenting) (stating that same constitutional reasoning that precludes civil punishment following criminal punishment would preclude criminal punishment following civil punishment); Cox, *supra* note 6, at 1250 (discussing possibility of using *Halper* decision to bar criminal proceeding that follows civil proceeding); Rudstein, *supra* note 100, at 601-16 (stating that under multiple punishment analysis of *Halper*, double jeopardy bars criminal punishment following civil "punishment"). Professor Rudstein discusses some possibilities for avoiding this result, which he views as "inconsistent with *Halper*" because it denies the Government the ability to seek the full civil and criminal penalties authorized. *Id.* at 602-03. However, even if the tactics to avoid a multiple punishment bar fail, Rudstein argues that there would not be a bar on the criminal prosecution because the civil proceeding would not have subjected the defendant to jeopardy. *Id.* at 614-15. Thus, if the criminal trial results in acquittal, there is no double jeopardy issue because there is no additional punishment. *Id.* If the trial ends in conviction, the *Halper* holding would bar a second punishment, but the defendant would still suffer the consequences attendant a criminal conviction (i.e., loss of right to vote), thereby making the prosecution worthwhile to the Government. *Id.* at 615-16. But see Kirgis, *supra* note 125, at 867 (discussing problems in constitutional analysis in *Halper* that could lead to criminal prosecution being barred due to prior civil punishment). Mr. Kirgis, writing before the *Kurth Ranch* decision, argues that it would be an "absurd" result if, for example, the imposition of a tax penalty were to bar a subsequent criminal prosecution, and urges the Court to treat *Halper* cases as successive prosecution cases rather than as multiple punishment cases in order to avoid such a result. *Id.*

127. See, e.g., *United States v. Newby*, 11 F.3d 1143, 1145 (3d Cir. 1993) (addressing claim that civil sanction by prison officials barred subsequent criminal trial); King, *supra* note 115, at 123-24, 123 n.70 (discussing popularity of "reverse-*Halper*" claim and lower court cases in which courts used *Halper* to bar criminal prosecution after civil penalty); Edward F. Novak, *Parallel Proceedings and Double Jeopardy Implications*, 28 ARIZ. ATT'Y 21, 22 (1991) (discussing use of double jeopardy defense to avoid criminal prosecution subsequent to civil penalties). Mr. Novak argues that if double jeopardy applies to subsequent civil proceedings, it should also apply to subsequent criminal proceedings. *Id.* Further, he notes that most courts facing this issue have agreed with this analysis. *Id.*; see also Andrew Z. Glick-

issue,<sup>128</sup> many defendants have raised this defense and some lower courts have ruled in their favor.<sup>129</sup>

Commentators also claim that the Court's focus on the multiple punishments prong allows punitive civil sanctions following a criminal acquittal.<sup>130</sup> In *Thermal Science, Inc. v. United States Nuclear Regulatory Commission*,<sup>131</sup> a case pending in a federal district court, the Nuclear Regulatory Commission (NRC) argued that *Halper* only barred punishment in a civil proceeding when it followed conviction and punishment in a criminal trial.<sup>132</sup> Thus, NRC contended that *Halper* allowed civil punishment of a defendant if the prior criminal trial ended in acquittal because the civil punishment would be the only punishment imposed.<sup>133</sup> Likewise, one commentator argued that

man, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper*, 76 VA. L. REV. 1251, 1251 (1990) (noting that defendants "rarely" used double jeopardy as defense to criminal trial following civil sanction before *Halper*).

128. See Cox, *supra* note 6, at 1249-50 (stating that Court has never decided case with reverse facts of *Halper*).

129. See King, *supra* note 115, at 123-24, 123 n.70 (discussing popularity of "reverse-*Halper*" claims and lower court cases in which courts used *Halper* to bar criminal prosecution after civil penalty).

130. See James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 PUB. CONT. L.J. 56, 78-79 (1990) (noting that Government often pursues strategy of seeking criminal conviction first and then seeking civil sanctions if criminal proceeding results in acquittal). This discussion seems to lend support for the contention that it is the belief that even civil punitive sanctions following an acquittal would not raise any double jeopardy concerns. *Id.*

131. *Thermal Science, Inc. v. United States Nuclear Regulatory Comm'n*, No. 4:96CVO2282-CAS (E.D. Mo. filed Nov. 20, 1996).

132. See NRC Brief, *supra* note 82, at 3 (arguing that *Halper* bars subsequent civil punishments when prior criminal proceeding also punished defendant).

133. See *id.*; see also *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 493-94 (1950) (stating that "[i]t has been repeatedly held that though the civil suit is bottomed on the same facts, it is not barred by the prior judgment of acquittal in the criminal case"). While lending support to the NRC's argument, the *Real Estate Boards* Court did not address the issue of punitive civil sanctions following criminal acquittal. *But see* David T. Buente Jr. et al., *The "Civil" Implications of Environmental Crimes*, 23 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,589, 10,595-96 (1993) (discussing effect of *Halper* on civil sanctions following criminal acquittal); Cox, *supra* note 6, at 1301 (stating that "any punishment sought in a fast track civil action will foreclose further criminal prosecution for the same offense"). Buente et al. contend that while

an acquittal typically has not been held to bar the government from bringing a subsequent civil case for the same conduct, the logic of *Halper* may be employed to prevent the government at least from pursuing penalties in the civil case that might have been obtained in the criminal case — i.e., a second "prosecution" following an acquittal.

*Halper*, while barring civil punishment following criminal conviction, did not preclude civil punishment following criminal acquittal.<sup>134</sup> Moreover, if the Government sought both the civil and criminal sanctions in one proceeding, *Halper* would not apply at all, and the court would instead examine legislative intent.<sup>135</sup> Thus, some commentators argue that the defendant acquitted in the criminal trial and then subject to civil sanctions<sup>136</sup> and the defendant that receives both types of sanctions in one proceeding both receive less protection than the defendant convicted in the criminal trial.<sup>137</sup>

Despite the confusion over the Court's explicit use of the multiple punishments prong in the *Halper* analysis, it is clear that the Court necessarily considered both the multiple punishments and successive prosecution prongs.<sup>138</sup> The *Halper* Court acknowledged that the *Halper* case would have no double jeopardy problem if multiple punishments was the only issue when it stated that the imposition of both the civil and criminal punishments in a single proceeding would avoid a double jeopardy problem.<sup>139</sup> The Supreme Court previously held that double jeopardy did not bar multiple punishment

Buente et al., *supra*, at 10,596. However, although Buente et al. argue that *Halper* may prevent civil punishment following a criminal acquittal, it is notable that they characterize the problem as one of successive prosecution, which is not how the *Halper* Court characterized the double jeopardy issue. See *supra* Part III.B.2 (noting *Halper's* basis in multiple punishments prong).

134. See Henning, *supra* note 3, at 51 (stating that *Halper's* reasoning leads to conclusion that double jeopardy does not bar civil punishment following criminal acquittal).

135. See *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) (authorizing multiple punishments in single proceeding when intended by legislature); Jahncke, *supra* note 125, at 142-43 (observing that because *Hunter* applies to cases of multiple punishments imposed in one proceeding, courts should analyze double jeopardy claims following imposition of both civil and criminal sanctions in one proceeding under legislative intent analysis of *Hunter* rather than *Halper*).

136. See Henning, *supra* note 3, at 51 (stating that "*Halper* has been criticized for giving greater protection to convicted criminals than to those found not guilty of a criminal violation").

137. See Jahncke, *supra* note 125, at 140-41 (describing better protections afforded to defendants facing two proceedings than those facing multiple punishments in one proceeding).

138. See Lynn C. Hall, Note, *Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper*, 109 S. Ct. 1892 (1989), 65 WASH. L. REV. 437, 453 (1990) (stating that "real concern in *Halper* was not multiple punishments: it was multiple prosecutions"). Hall also argues that the reason the Court chose to ground the language of the decision in the multiple punishments prong rather than in the successive prosecutions prong was because it "probably preferred multiple punishments analysis over multiple prosecutions analysis because of the 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." *Id.* at 453-54.

139. See *id.* at 453 (supporting argument that Court was really concerned with multiple prosecutions through Court's authorization of both criminal and civil penalties in one proceeding).

of a defendant for a single act in one proceeding when the legislature intended imposition of both punishments.<sup>140</sup> If the only issue in *Halper* was multiple punishments, then no problem would exist with the civil proceeding because Congress clearly intended for multiple punishments.<sup>141</sup> *Halper* only makes sense when successive prosecution considerations become part of the analysis. Because the Government sought to punish Halper in successive proceedings rather than in a single trial, a double jeopardy issue emerged.<sup>142</sup> Thus, an interpretation of the Court's holding as prohibiting multiple punishments in successive prosecutions presents a more plausible and logical understanding of the decision than an interpretation grounded solely in the multiple punishments prong.<sup>143</sup> Under the former reading, a civil proceeding following a criminal proceeding, ending either with conviction or acquittal, constitutes a prosecution to the extent that it seeks to punish the defendant.<sup>144</sup> Thus, a punitive civil proceeding bars a subsequent criminal proceeding, while a remedial civil proceeding does not.<sup>145</sup> Also, a criminal acquittal bars a subsequent civil proceeding to the extent that the civil proceeding seeks to punish the defendant.<sup>146</sup>

140. See *Hunter*, 459 U.S. at 368-69 (holding that double jeopardy bars imposition of multiple punishments in single proceeding unless legislature provided for multiple punishments).

141. See *United States v. Halper*, 490 U.S. 435, 437-38 (1989) (noting existence of both criminal and civil sanctions for same conduct in False Claims Act).

142. See Henning, *supra* note 3, at 5 (stating that "question of whether a civil sanction constitutes a criminal penalty can arise whenever the government brings a succeeding action, either criminal or civil").

143. See Hall, *supra* note 138, at 454 (advocating use of successive prosecution analysis to limit civil sanctions against convicted defendant to remedial level); see also *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1955, 1958 (1994) (Scalia, J., dissenting) (arguing that Double Jeopardy Clause does not prohibit multiple punishments). Although Justice Scalia joined in the unanimous *Halper* opinion, he re-examined the issue of whether the Double Jeopardy Clause prohibited multiple punishments in *Kurth Ranch* and concluded that it did not. *Id.* at 1958. He argued instead that the Clause protects against only multiple prosecutions. *Id.* at 1955.

144. See Hall, *supra* note 138, at 454 (arguing that when court subjects convicted defendant to subsequent punitive civil penalty, better analysis is that Government is attempting successive prosecution barred by double jeopardy and stating that Court should recognize that "imposition of a sanction beyond compensation would undermine the civil nature of the proceeding and transform the proceeding into criminal prosecution").

145. See *United States v. Ursery*, 116 S. Ct. 2135, 2161 (1996) (Stevens, J., concurring in part and dissenting in part) (stating that jeopardy bar involving punitive civil proceeding and criminal trial "cannot depend on the order in which they are filed").

146. See *id.* (stating that holdings in *Halper* and *Kurth Ranch* "necessarily rested on the assumption that the civil proceeding in which the second punishment was imposed was a 'jeopardy'"). Thus, Stevens' statement evidences the view that a jeopardy bar becomes an

### 3. Importance and Impact of Halper

*Halper* has many implications for agency imposition of civil money sanctions.<sup>147</sup> First, *Halper* may prevent agencies from enforcing both the criminal and civil sanctions authorized and intended by the legislature.<sup>148</sup> Regardless of legislative intent to create a civil sanction, a court may determine that such a sanction is punishment, and double jeopardy may bar its imposition.<sup>149</sup> Thus, the role of the judiciary in determining the applicability of civil sanctions will increase,<sup>150</sup> and courts may overrule legislative intent.<sup>151</sup>

Addressing the concern that its decision would prevent the Government from seeking the full sanctions allowed by law,<sup>152</sup> the *Halper* Court suggested that the Government seek only a punitive civil sanction and no criminal penalty,<sup>153</sup> seek both criminal and civil sanctions in the same proceeding,<sup>154</sup> or have a private individual bring the civil claim.<sup>155</sup> However,

issue to the extent that a civil proceeding seeks to punish the defendant. Stevens further argues that unless the civil proceeding constitutes jeopardy, "there would have been no basis for concluding that the defendants had been 'twice put in jeopardy' as the text of the Clause forbids." *Id.*; see Henning, *supra* note 3, at 52 (stating that "the successive prosecution protection under the Double Jeopardy Clause applies to cases brought after convictions or acquittals, so a defendant's protection would not depend on the outcome of the prior action").

147. See Cox, *supra* note 6, at 1237-38 (noting that *Halper's* holding may have effects in forfeiture and administrative proceedings and criminal prosecutions, and stating that "*Halper's* implications are far-reaching"); Eads, *supra* note 6, at 958 (stating that *Halper* will affect significant number of cases); Novak, *supra* note 127, at 21 (stating that *Halper* has "far-reaching double jeopardy implications").

148. See Rudstein, *supra* note 100, at 602-16 (discussing difficulties in enforcing both criminal and civil remedies since *Halper*).

149. See Eads, *supra* note 6, at 956 (observing that *Halper* increases ability of courts to review imposition of civil money sanctions and that there is no assurance "that a legislature's desire to create a civil penalty will prevail over a judge's determination that punishment — with constitutional implications — results from the sanction as applied").

150. See Cox, *supra* note 6, at 1299-1300 (stating that courts will need to review proceedings to see if jeopardy has attached and what type of sanctions are allowable); Eads, *supra* note 6, at 964-65 (stating that *Halper* will result in greater appeal and reversal of awards to Government in administrative hearings); Hall, *supra* note 138, at 438 (stating that *Halper* "expands the courts' role in double jeopardy analysis").

151. See Eads, *supra* note 6, at 952, 956 (stating that *Halper* allows for increased judicial review of civil sanctions and provides for judges to override legislative intent to create civil sanction).

152. See Dever, *supra* note 130, at 77-85 (describing three suggestions offered by Court and their application in context of False Claims Act).

153. *United States v. Halper*, 490 U.S. 435, 450 (1989).

154. *Id.*

155. See *id.* at 450-51 (noting that *Halper* decision did not prevent individuals from bringing civil claims); see also Dellorfanio v. Lansing, No. CIV.A. 96-0092, 1996 WL



these tactics may not be useful to the Government.<sup>156</sup> Although choosing to pursue only one type of sanction, criminal or civil, may seem an easy solution, this approach may create problems due to the difficulty in reviewing grand jury materials for a civil trial, the coordination between agencies and the DOJ,<sup>157</sup> and the threat that the court will stay one of the proceedings.<sup>158</sup> Moreover, differences in discovery rules, procedural rules, and burdens of proof in criminal and civil trials make the imposition of both civil and criminal sanctions in a single trial difficult and undesirable.<sup>159</sup>

As a result of the potential double jeopardy problems in the imposition of sanctions, agencies must coordinate their efforts more closely with prosecutors.<sup>160</sup> In many cases, one individual or corporation may be the subject of both a criminal and a civil investigation.<sup>161</sup> Because the second proceeding will likely raise some double jeopardy concerns, the agencies and prose-

278804, at \*2 (E.D. Pa. May 16, 1996) (observing that double jeopardy is issue only when Government brings both actions, not when private individuals bring actions). This Note does not address *qui tam* actions and their attendant analytical difficulties. For a discussion of the impact of *Halper* on *qui tam* actions, see Dever, *supra* note 130, at 79-85; Hall, *supra* note 138, at 450-52.

156. See Dever, *supra* note 130, at 78-79 (discussing difficulties with combining both proceedings).

157. See Glickman, *supra* note 127, at 1280-81 (arguing that Government may not always be able to select easily only one type of sanction).

158. See *id.* (discussing threat of stay); Shahrzad Heyat et al., *Ninth Survey of White Collar Crime: Environmental Crimes*, 31 AM. CRIM. L. REV. 475, 487 (1994) (stating that "[d]ouble jeopardy claims are a popular, albeit unsuccessful, means of staying criminal actions when the government proceeds contemporaneously with civil and criminal actions"). Thus, it seems that a court is more likely to stay the civil proceeding than the criminal proceeding. *Id.* at 487-88.

159. See Dever, *supra* note 130, at 78-79 (arguing that combining both claims in one proceeding would make it more difficult for Government to prove civil claim, due to confusion caused by conflicting procedural rules of criminal and civil proceedings); Eads, *supra* note 6, at 978-83 (discussing problems with seeking both criminal and civil remedies in one trial and concluding that courts will be unlikely to join both claims without exigent circumstances beyond desire to avoid double jeopardy problems); Glickman, *supra* note 127, at 1280 (observing that procedural differences between civil and criminal trials create significant difficulty in combining trials and "greatly reduce the likelihood of their occurrence").

160. See Dever, *supra* note 130, at 86 (noting need for coordination efforts in False Claim Act investigations and prosecutions); Jeffrey M. Geller, Note & Comment, *The Impact of Recent Double Jeopardy Decisions on Federal Agencies*, 10 ADMIN. L.J. AM. U. 327, 349 (1996) (stating that *Halper* necessitated greater coordination between agencies and prosecutors); Glickman, *supra* note 127, at 1285 (stating that minimal change agencies must make in wake of *Halper* is to coordinate effort when seeking both criminal and civil sanctions).

161. See Buente et al., *supra* note 133, at 10,589 (stating that "[m]ost federal environmental statutes allow the federal government to conduct both civil and criminal investigations, initiate both civil and criminal proceedings, and seek both civil and criminal sanctions").

cutors must communicate in order to determine which sanctions are more important and should be sought first.<sup>162</sup>

#### 4. Relevant Supreme Court Cases After Halper: Kurth Ranch and Ursery

##### a. Department of Revenue v. Kurth Ranch

The 1989 *Halper* decision was not the Supreme Court's last word on civil sanctions and double jeopardy. In 1994, the Court decided *Department of Revenue of Montana v. Kurth Ranch*.<sup>163</sup> In *Kurth Ranch*, the Court addressed the constitutionality of a state tax levied on those found in possession of illegal drugs.<sup>164</sup> The Court noted the language in *Halper* that the label given to a statute is not determinative in deciding whether or not it constitutes a punishment and found that taxes can be subject to double jeopardy claims.<sup>165</sup> Notably, the Court stated that taxes can be high and have a deterrent purpose without being considered punishment.<sup>166</sup> However,

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162. See Cox, *supra* note 6, at 1300 (discussing importance of communication between agencies and prosecutors to determine most effective prosecution strategy).

163. 511 U.S. 767 (1994).

164. *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (holding state tax on illegal possession of drugs following criminal drug conviction violative of Double Jeopardy Clause). In *Kurth Ranch*, the Supreme Court considered the constitutionality of a Montana state tax assessment on the possession of illegal drugs subsequent to criminal conviction for the same offense. *Id.* at 769. The Montana Dangerous Drug Tax Act (Act) authorized the Montana Department of Revenue (DOR) to assess a tax for the storage of illegal drugs following the imposition of criminal liability. *Id.* at 770. The Kurth family was arrested for growing and selling marijuana on their farm, and each defendant eventually pled guilty to drug charges and was sentenced. *Id.* at 771-72. The state also commenced and settled a civil forfeiture action against the defendants. *Id.* at 772. Subsequently, the DOR assessed a tax on the illegal drugs. *Id.* at 773. The Kurths challenged this tax assessment in bankruptcy proceedings and claimed that under *Halper*, the tax violated double jeopardy. *Id.* After reviewing its decision in *Halper*, the Court found that a tax could be subject to the requirements of double jeopardy. *Id.* at 779-80. The Court stated that taxes, while generally intended to raise revenue, could have punishment as their primary purpose. *Id.* The Court noted that while the mere existence of deterrence and a high rate did not lead to the conclusion that the tax was a punishment, the DOR assessed the tax only after the taxpayer had been arrested and assessed the tax on property no longer in the possession of the defendants. *Id.* at 780-82. Due to these characteristics of the tax, the Court found that it was punishment. *Id.* at 783. The Court also found the *Halper* analysis of the costs to the government of investigation and prosecution were inapplicable in the case of a tax. *Id.* at 784. Therefore, the Court held that the tax was a second punishment precluded by the Double Jeopardy Clause. *Id.*

165. See *id.* at 779 (stating that Court's past recognition that taxes could be punishment coupled "with *Halper's* unequivocal statement that labels do not control in a double jeopardy inquiry, indicates that a tax is not immune from double jeopardy scrutiny simply because it is a tax").

166. See *id.* at 780-81 (discussing use of high taxes to deter certain activities deemed

because the Montana tax in question imposed a tax on goods no longer in the defendants' possession<sup>167</sup> only after a criminal act,<sup>168</sup> the Court concluded that the tax was a punishment.<sup>169</sup> Because the defendants previously pleaded guilty to criminal charges based on the same conduct,<sup>170</sup> the tax constituted a second punishment precluded by the Double Jeopardy Clause.<sup>171</sup> Thus, *Kurth Ranch* extended the double jeopardy protection to the imposition of taxes.<sup>172</sup>

### b. United States v. Ursery

More recently, the Court further clarified the double jeopardy standards applicable to forfeitures and monetary sanctions in *United States v. Ursery*.<sup>173</sup> In *Ursery*, the Court held that in rem civil forfeiture proceedings were not punishment and, therefore, were not subject to double jeopardy claims.<sup>174</sup>

undesirable and finding that such use of taxes does not constitute punishment). As an example, the Court notes the use of taxes on cigarettes in order to deter smoking. *Id.* The Court distinguishes this type of tax from the tax in this case by pointing to the benefits and legality of the production of cigarettes, which contrasts with the illegality of the production of marijuana. *Id.* at 781-82.

167. *See id.* at 783 (discussing fact that marijuana was out of defendants' possession when taxed).

168. *See id.* at 781-82 (discussing fact that tax followed defendants' illegal activity).

169. *Id.*

170. *See id.* at 772 (stating that all defendants arranged plea agreements).

171. *See id.* at 784 (concluding that tax was "functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence'").

172. *See id.* at 778-79 (stating that Court had not previously applied Double Jeopardy Clause to tax cases).

173. 116 S. Ct. 2135 (1996).

174. *United States v. Ursery*, 116 S. Ct. 2135, 2149 (1996) (holding that "in rem civil forfeitures [in this case] are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause"). In *Ursery*, the Supreme Court of the United States considered double jeopardy claims involving in rem civil forfeiture proceedings following and preceding criminal convictions. *Id.* at 2138-39. The Court considered decisions of the Sixth Circuit, which involved a defendant convicted of production and distribution of marijuana, and the Ninth Circuit, which involved a defendant convicted of money laundering. *Id.* at 2138-39. In the Sixth Circuit, the Government had brought an in rem civil forfeiture proceeding prior to the defendant's criminal conviction and obtained a settlement of \$13,250. *Id.* In the Ninth Circuit, the Government obtained a criminal conviction before securing judgment in their in rem civil forfeiture proceeding. *Id.* The Court noted that these cases raised the issue of what constitutes multiple punishments proscribed by the Double Jeopardy Clause. *Id.* at 2139-40. The Court then discussed the history of the use of in rem civil forfeiture actions and noted that it had "consistent[ly]" ruled that in rem forfeitures were remedial and not punitive. *Id.* at 2140-42. After discussing its holdings in *Halper*, *Austin*, and *Kurth Ranch*, the Court announced that the *Halper* analysis was limited to civil penalties and was not applicable to civil

Importantly, *Ursery* limited the application of *Halper*. In the opinion, the Court referred to *Halper*'s focus on civil penalties as "narrow."<sup>175</sup> The Court drew a bright line in double jeopardy jurisprudence by finding the *Halper* decision to be inapplicable in the case of in rem civil forfeitures.<sup>176</sup>

#### IV. Analysis of Controversy Among the Circuits: When Is a Sanction Punishment?

*Halper* left unresolved the question of when a civil money sanction constitutes punishment.<sup>177</sup> The recent United States Court of Appeals for the Seventh Circuit decision in *S.A. Healy Co. v. Occupational Safety and Health Review Commission*, which found an administrative OSHA sanction to be punishment,<sup>178</sup> raised three significant issues regarding when a civil money sanction constitutes punishment: (1) whether an agency may receive its costs of investigation and prosecution when the regulatory statute does not provide for consideration of the Government's costs in assessing the civil sanction,<sup>179</sup> (2) whether a sanction can be remedial when the Government is

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forfeitures. *Id.* at 2142-45. Thus, the Court returned to the analysis previously used in civil forfeiture cases under the Double Jeopardy Clause and examined the intent of Congress and the punitive nature of the forfeitures in this case. *Id.* at 2147. In doing so, the Court found that Congress intended the forfeitures in these two cases to be civil and that the forfeitures were not "so punitive in form as to render them criminal despite Congress' intent to the contrary." *Id.* at 2147-48. Therefore, the Court held that the forfeitures in question were not punishment and did not violate the Double Jeopardy Clause. *Id.* at 2148.

175. *Id.* at 2144-45 (discussing *Halper*'s development out of cases like *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956), and noting that *Halper*'s holding was limited to civil penalties).

176. *See id.* at 2145-47 (stating that "[i]t is difficult to see how the rule of *Halper* could be applied to a civil forfeiture" and observing that *Halper*, *Kurth Ranch*, and *Austin* did not change earlier rulings regarding civil forfeitures and double jeopardy).

177. *See* *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1958 (1994) (Scalia, J., dissenting) (noting that *Halper* left "it to lower courts to determine at what particular dollar level the civil fine exceeded the Government's 'legitimate nonpunitive governmental objectives' and thus became a penalty"); *see also* *Cox*, *supra* note 6, at 1275 (stating that *Halper* gives "no precise formula" to help courts determine when penalty becomes punishment); *Kerrigan et al.*, *supra* note 27, at 373 (discussing lack of guidance *Halper* gives to lower courts to decide when sanction is remedial or punitive). However, *Cox* argues that although there will be some penalties that "serve only punitive purposes" and that should be barred, the penalties that fall in the "gray areas" should not be considered punishment. *Cox*, *supra* note 6, at 1275.

178. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 911-12 (7th Cir. 1996) (holding that monetary sanction imposed by OSHRC was punishment barred by double jeopardy), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

179. *See id.* at 909 (discussing lack of consideration of Government's expenses in OSHA).

not a victim,<sup>180</sup> and (3) whether a civil sanction that does not exceed the Government's costs of investigation and prosecution can be punishment.<sup>181</sup> This Part analyzes these three issues with regard to the holdings of the Supreme Court and the decisions of various circuits and concludes that the Seventh Circuit interpreted *Halper* too broadly in deciding that the sanction in *Healy* was punishment.

*A. Statutes Without Compensatory Considerations:  
Automatically Punitive?*

*1. Facts of Healy and Findings Regarding OSHA*

In *Healy*, S.A. Healy Company (Healy), the defendant, committed over sixty violations of OSHA standards.<sup>182</sup> These violations caused an explosion that killed three Healy employees.<sup>183</sup> The Agency Secretary investigated the violations, found them to be "wilful," and recommended the maximum sanctions available under the instance-by-instance assessment provisions of OSHA.<sup>184</sup> Following the Agency investigation, the DOJ initiated criminal proceedings.<sup>185</sup> The trial ended in conviction, and the court fined Healy \$750,000.<sup>186</sup> The Occupational Safety and Health Review Commission (OSHRC) resumed administrative proceedings based on the same violations.<sup>187</sup> After rejecting Healy's claim that the second proceeding violated the Double Jeopardy Clause, OSHRC fined Healy \$249,900, or \$5,100 per violation.<sup>188</sup>

Healy appealed, and the Seventh Circuit accepted Healy's argument that the OSHRC proceeding violated the Double Jeopardy Clause because the monetary sanctions imposed amounted to "punishment."<sup>189</sup> To support its holding that double jeopardy precluded the administrative sanction imposed on Healy, the Seventh Circuit relied on the text of OSHA.<sup>190</sup> The court noted that none of the various elements listed in OSHA for consideration

180. *See id.* at 909-10 (discussing relevance of remedial/compensatory distinction).

181. *See id.* at 910-11 (refusing to find sanction remedial just because it does not exceed Government's costs).

182. *Id.* at 907.

183. *Id.*

184. *Id.*

185. *Id.* at 908.

186. *Id.* at 907-08.

187. *Id.* at 908.

188. *Id.*

189. *Id.* at 912.

190. *See id.* at 909 (discussing OSHA). The court did not examine amendments to the OSHA following 1988, the year of the salient events. *Id.*

when assessing sanctions against violators of the Act included the costs incurred by the Government.<sup>191</sup> The court distinguished OSHA from the False Claims Act (at issue in *Halper*) and noted that the False Claims Act provided for consideration of the Government's costs in assessing the fine, but that OSHA did not.<sup>192</sup> Moreover, the Court noted that the fines under OSHA were higher than those authorized by the False Claims Act.<sup>193</sup>

## 2. WRW Corp.: No Consideration of Costs but Still Remedial

The *Healy* court refused to follow the decision of the United States Court of Appeals for the Sixth Circuit in *United States v. WRW Corp.*,<sup>194</sup> which arose under the Federal Mine Safety and Health Act (Mine Safety Act)<sup>195</sup> and addressed a similar set of facts and a similar double jeopardy issue.<sup>196</sup> Two employees died after WRW, the defendant corporation, violated standards of the Mine Safety Act.<sup>197</sup> The Government won a civil

191. *Id.* The relevant portion of OSHA states:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

29 U.S.C. § 666(j) (1994).

192. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 909 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

193. *Id.*

194. 986 F.2d 138 (6th Cir. 1993).

195. 30 U.S.C. § 820 (1994).

196. *United States v. WRW Corp.*, 986 F.2d 138, 142 (6th Cir. 1993) (finding that sanction issued under Federal Mine Safety and Health Act (Mine Safety Act) after criminal conviction was remedial because it related to Government's costs). In *WRW Corp.*, the Sixth Circuit considered the validity of a civil sanction issued after criminal conviction for violations of the Mine Safety Act. *Id.* at 140. WRW Corp. committed violations of the Mine Safety Act. *Id.* Two employees of WRW died as a result, and the Government assessed civil sanctions. *Id.* After obtaining prison sentences against the three sole shareholders of WRW, the Government sought to collect the civil sanctions. *Id.* WRW claimed that the Double Jeopardy Clause precluded the collection proceeding. *Id.* The court examined the Mine Safety Act and found it to have remedial goals and to be remedial as applied to the defendant corporation. *Id.* at 140-41. The court interpreted *Halper* narrowly and stated that it required a clear showing that the sanction was punitive before it would find the sanction to be punishment. *Id.* at 141. In this case, the court found that the Mine Safety Act was remedial because it "promot[ed] mine safety." *Id.* at 141-42. The court also found that the amount of the sanction related to the expenses incurred by the Government. *Id.* at 142. Thus, the court concluded that the sanction was not punishment. *Id.*

197. *Id.* at 140.

assessment against WRW in the amount of \$90,350.<sup>198</sup> Following a criminal conviction for violations of the Mine Safety Act, a trial court fined and sentenced the only three shareholders of WRW to prison.<sup>199</sup> The Government then sought to collect the civil assessment, and the defendants claimed that the Double Jeopardy Clause precluded the collection proceeding.<sup>200</sup> The portion of the Mine Safety Act at issue was similar to the portion of OSHA at issue in *Healy*.<sup>201</sup> Also, the defendants in *WRW Corp.*, like the defendant in *Healy*, claimed that the sanction was punitive because the factors listed for consideration in assessing a penalty under the Mine Safety Act evidenced a deterrent and retributive purpose.<sup>202</sup> The Sixth Circuit rejected this argument.<sup>203</sup> Although recognizing that the factors listed in the Mine Safety Act could be punitive as applied, the court concluded that the remedial purpose of the sanction in this instance was to "promot[e] mine safety."<sup>204</sup> After finding the purpose of the Mine Safety Act to be remedial both in general and as applied to WRW, the court examined the amount of the sanction.<sup>205</sup> The court found that the amount in question was not so high that it lacked a rational relation to the Government's investigation and prosecution costs and constituted a punishment under *Halper*.<sup>206</sup>

The *Healy* court refused to follow the *WRW Corp.* decision and criticized the Sixth Circuit both for relying on a set of pre-*Halper* factors and for failing to give enough consideration to the *Halper* analysis.<sup>207</sup> Although the

198. *Id.*

199. *Id.*

200. *Id.*

201. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 910 (7th Cir. 1996) (stating that "Federal Mine Safety and Health Act is similar in design and purpose to the Occupational Safety and Health Act"), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299). The analogous portion of the Mine Safety Act states:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i) (1994).

202. *United States v. WRW Corp.*, 986 F.2d 138, 141 (6th Cir. 1993).

203. *Id.* at 141-42.

204. *Id.*

205. *Id.*

206. *Id.* at 142.

207. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 910 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-

Sixth Circuit relied on an earlier set of factors to make its determination,<sup>208</sup> these factors were not so divorced from those advocated in *Halper* to render the *WRW Corp.* analysis incorrect. The *WRW Corp.* court carefully considered the issue of whether the sanction served the goals of retribution and deterrence or was remedial,<sup>209</sup> which was the approach advocated in *Halper*.<sup>210</sup> *Halper* prohibits the imposition of a civil sanction on a convicted defendant "to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."<sup>211</sup> Thus, although the *WRW Corp.* court incorrectly labeled its inquiry, it applied the correct analysis under *Halper* by examining the purpose of the statute and finding that the Mine Safety Act could appropriately be described as remedial and then examining the sanction in the particular case to determine that it was also remedial.<sup>212</sup>

### 3. Examining the Purpose of the Sanction in *Healy*

Similarly, an argument exists that the Seventh Circuit could fairly describe the goals of the sanction in *Healy*, both in general and as applied to *Healy*, as remedial. The Supreme Court noted that OSHA has a "remedial orientation"<sup>213</sup> and a "remedial scheme"<sup>214</sup> and commented that "safety legislation is to be liberally construed to effectuate the congressional purpose."<sup>215</sup> Additionally, the Seventh Circuit itself previously found that OSHA is a

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1299). The *Healy* court criticized *WRW Corp.*'s reliance on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), a case involving double jeopardy and civil penalties that preceded *Halper*. *Id.*

208. *United States v. WRW Corp.*, 986 F.2d 138, 141-42 (6th Cir. 1993) (applying *Kennedy-Martinez* factors to Mine Safety Act to determine if purpose of Act was remedial).

209. The *WRW Corp.* court noted *Halper*'s warning that "the same civil penalty provision may be remedial in general but punitive as applied in an individual case." *WRW Corp.*, 986 F.2d at 140. Although using outdated factors in making its determination, the court addressed this *Halper* consideration and concluded "that imposing a civil penalty for health and safety violations which varies in amount based upon the severity of the violation and the operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety." *Id.* at 141-42.

210. *See United States v. Halper*, 490 U.S. 435, 448 (1989) (finding that courts should determine purpose of statute when trying to discern whether sanction is punitive or remedial).

211. *Id.* at 448-49.

212. *See WRW Corp.*, 986 F.2d at 141-42 (finding general and specific purpose of statute to be remedial); *see also* Pasley, *supra* note 125, at 18 (stating that *WRW Corp.* court applied *Halper*'s "balancing test" to determine that sanction was remedial).

213. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980).

214. *Id.* at 13.

215. *Id.*



remedial statute.<sup>216</sup>

The *Healy* court, however, rejected the above argument and found the sanction to be punitive.<sup>217</sup> The court properly concluded that, after determining the purpose of the statute, the court should examine the sanction issued in the specific instance.<sup>218</sup> However, the court improperly concluded that the sanction, as applied in this case, was punitive. The test given in *Halper* to determine if a specific sanction is punitive as applied required examination of whether the sanction bore a "rational relation" to the costs borne by the Government as a result of the illegal activity.<sup>219</sup> The *Healy* court found that the sanction was punitive based on the lack of consideration of the Government's losses in OSHA.<sup>220</sup> However, such a finding contradicts the holdings of other circuits and the language of *Halper*.<sup>221</sup>

#### 4. Sanctions With No Consideration of the Government's Costs

The *Healy* court concluded that the sanction assessed against the defendant served no remedial goals<sup>222</sup> but sought to deter.<sup>223</sup> Thus, the court found in this instance that OSHRC's means of achieving the remedial goals of

216. See *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1324-25 (7th Cir. 1980) (stating that OSHA "is a broad remedial measure designed to ensure that employees are provided with safe workplaces").

217. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 911 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

218. See *United States v. Halper*, 490 U.S. 435, 447-48 (1989) (discussing process to determine whether sanction is punishment). First, the Court acknowledged the validity of examining the legislative intent and purpose of the statute. *Id.* at 447. But the Court then acknowledged that even a civil sanction may be punishment and held that "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Id.* at 448; see also *United States v. Ursery*, 116 S. Ct. 2135, 2156 (1996) (Stevens, J., concurring in part and dissenting in part) (stating that "a fixed penalty that would otherwise serve remedial ends could still punish the defendant if the imposed amount was out of all proportion to the damage done").

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

220. *Healy*, 96 F.3d at 909.

221. See *Pasley*, *supra* note 125, at 14-24 (discussing cases from various United States Courts of Appeals that have interpreted *Halper* narrowly when determining whether sanction is remedial).

222. *Healy*, 96 F.3d at 911. The court noted that the sanction was not remedial because the statute did not provide for a consideration of the Government's costs and it did not serve any other remedial goals but observed that debarring Healy to prevent future violations would serve a remedial goal other than reimbursing the Government. *Id.*

223. *Id.*

OSHA were punitive.<sup>224</sup> However, other circuits have not taken this approach when faced with similar claims and statutes that did not provide for the consideration of the costs to the Government.<sup>225</sup> For example, the *WRW Corp.* court did not consider the lack of a provision in the Mine Safety Act for the Government's costs to be a problem and simply applied the rational relation test.<sup>226</sup> Moreover, in addressing a double jeopardy claim involving a civil money sanction assessed under a banking statute,<sup>227</sup> the *Hudson* court found that the sanction was remedial despite the absence of consideration of the Government's losses in the relevant portion of the legislation.<sup>228</sup> Finally, in *United States v. McClinton*,<sup>229</sup> the United States Court of Appeals for the Ninth Circuit allowed the criminal indictment of a defendant following a civil money sanction under the Tariff Act of 1930<sup>230</sup> that also did not address the Government's damages.<sup>231</sup> Thus, three other circuits have addressed statutes

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224. *Id.*

225. *See generally* *United States v. McClinton*, 98 F.3d 1199 (9th Cir. 1996) (finding that fixed civil sanctions under Tariff Act did not violate double jeopardy); *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996) (upholding consideration of Government's costs in assessing civil sanction under statute that did not mention such considerations), *cert. granted*, 117 S. Ct. 1425 (1997); *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993) (allowing consideration of Government's costs despite Mine Safety Act's omission of these costs as criteria).

226. *See generally* *WRW Corp.*, 986 F.2d 138.

227. *See* National Banks Act, 12 U.S.C. § 93(b) (1994). This section of the statute lists three tiers under which the government may assess sanctions. *Id.* The first tier has the lowest sanctions and provides that violators "forfeit and pay a civil penalty of not more than \$5,000 for each day during which the violation continues." *Id.* § 93(b)(1). The National Banks Act does not consider a set of variables in assessing this fine, but fixes it with apparently no regard to the costs sustained by the Government in prosecuting and investigating the violator. *Id.*

228. *See generally* *Hudson*, 92 F.3d at 1026 (omitting any discussion of double jeopardy issue due to statute's lack of consideration of costs to Government). *But see* Summary of Orders, 65 U.S.L.W. 3684 (Apr. 15, 1997) (listing issues Supreme Court would consider in *Hudson* and including question of whether sanction can be remedial if the statute does not provide for consideration of Government's costs).

229. 98 F.3d 1199 (9th Cir. 1996).

230. Tariff Act of 1930, 19 U.S.C. § 1459 (1994).

231. *United States v. McClinton*, 98 F.3d 1199, 1202 (9th Cir. 1996) (holding that customs sanctions imposed on defendants did not bar subsequent criminal trial). In *McClinton*, the Ninth Circuit considered whether double jeopardy barred a criminal prosecution based on the same violation when the defendants had been assessed civil sanctions under the Tariff Act of 1930. *Id.* at 1200. A search of the defendants upon their entry into the United States revealed that the defendants were in possession of marijuana. *Id.* Because neither defendant had disclosed his possession of the marijuana, customs officials assessed fines under 19 U.S.C. § 1459. *Id.* Subsequently, the Government sought to try defendants criminally for the marijuana possession. *Id.* The defendants claimed that the sanction by the customs offi-

that fail to consider the Government's losses and found that this fact did not preclude sanctions assessed under the statutes from being remedial.<sup>232</sup>

The Supreme Court should adopt the approach of *Hudson*, *WRW Corp.*, and *McClinton* for two reasons. First, the *Halper* Court stated that the rule it announced was for the "rare case."<sup>233</sup> If other courts follow the holding of *Healy*, presumably OSHRC could *never* pursue a civil money sanction following the defendant's criminal conviction.<sup>234</sup> The practical result of this approach would be to limit the Agency to a choice of only one of the remedies available in OSHA.<sup>235</sup> In addition, the three other statutes examined in

entials barred the criminal prosecution. *Id.* The court found that both sanctions, one of \$500 and one of \$1,000, were too small to constitute punishment. *Id.* at 1201. Because of the small amount of the fines, the court found that the sanctions fell within the guidelines of *Halper*. *Id.* The court noted *Halper's* language that its holding only rarely would be used to find a civil sanction to be punishment. *Id.* The court held that the fines imposed on the defendants in this case were not so large as to become punishment that would bar a criminal prosecution on the same charges. *Id.* at 1202. The statute in this case provides for fixed penalties for failure to report and present all possessions for inspection by customs officials but does not address the costs to the government. 19 U.S.C. § 1459(f); *see also* *United States v. Walker*, 940 F.2d 442, 444 (9th Cir. 1991) (finding \$500 sanction under Tariff Act of 1930 to be remedial).

232. *See supra* notes 225-31 and accompanying text (discussing decisions of three circuits finding similar sanctions to be remedial).

233. *United States v. Halper*, 490 U.S. 435, 449 (1989) (stating that "[w]hat we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused").

234. This conclusion is based on *Healy's* findings that the sanction was punishment because OSHA does not provide for the consideration of the Government's expenses, *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 909 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299), and because the Government was not a victim in this case, *id.* at 910. Presumably, these two factors will be present in most of the cases that will arise under the OSHA in the future. *See also* *Eads*, *supra* note 6, at 964-65 (discussing possible impact of *Halper* on civil sanctions imposed under environmental legislation that levies sanctions based on "particular acts" rather than on Government's loss). *Eads*, writing shortly after the *Halper* decision, noted that the impact on the civil enforcement of these types of statutes would be the greatest. *Id.* However, she believed that the impact would be that appellate courts would remand a greater number of cases for an accounting of the Government's losses rather than bar the sanction completely. *Id.*

235. *See United States v. Brown*, 59 F.3d 102, 104 (9th Cir. 1995) (concluding that disciplinary action by prison officials was not punishment that barred subsequent criminal trial for same acts). In support of this conclusion, the court noted that if the court labeled the disciplinary proceeding punishment, then the Government would have to choose only one of its remedies because "[s]eeking disciplinary sanctions and criminal penalties in a single proceeding is not feasible." *Id.* A similar argument can be made here in light of the discussion at *supra* notes 147-62 and accompanying text (describing difficulties in implementing alternatives to concurrent civil and criminal penalties as suggested by *Halper* court) that combining

this Part that do not provide for the consideration of the Government's costs would have the same limitation.<sup>236</sup> Thus, the *Healy* holding would preclude civil money sanctions following a criminal conviction under *at least* these four statutes.<sup>237</sup> Because the *Halper* Court emphasized that its holding was for the rare case, it presumably did not intend the holding to have such a broad and sweeping effect.<sup>238</sup>

Moreover, Justice Kennedy's concurrence in *Halper*, as well as other circuit court cases, suggests that even if the Administrative Law Judge (ALJ) does not consider the Government's costs in assessing the civil money sanction, the sanction is remedial if it relates to the Government's costs of investigation and prosecution.<sup>239</sup> In his *Halper* concurrence, Justice Kennedy stated that the test established in *Halper* was objective and was not dependent on the precise factors that the assessor of the sanction considered.<sup>240</sup> Additionally, lower courts have upheld sanctions related to the Government's expenses even when the ALJ never considered the Government's costs in assessing the sanction.<sup>241</sup> This approach is the more appropriate one for the

a trial for civil and criminal sanctions is not practical. *But see Halper*, 490 U.S. at 450 (noting that *Halper* decision does not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding"); *Healy*, 96 F.3d at 911 (observing that "[i]mposed in a single proceeding, the criminal and administrative fines would not have been problematic").

236. *See supra* notes 225-31 and accompanying text (discussing Federal Mine Safety and Health Act, National Banks Act, and Tariff Act of 1930). These three statutes do not provide for the consideration of the Government's costs.

237. *See Glickman, supra* note 127, at 1278 (noting that "[w]hile some civil penalties are related to the amount of the Government's losses or costs of investigation and prosecution, few penalty provisions are tailored so as to recover only the damages and costs incurred by the federal Government"). This suggests that the impact of following the *Healy* rationale could be even greater than demonstrated in this Note. *See also* NRC Brief, *supra* note 82, at 46 n.18 (stating that *Healy* court posits "unduly restrictive view of the government's right to pursue civil penalties").

238. *See United States v. Halper*, 490 U.S. 435, 450 (1989) (stating that Court did "not consider our ruling far reaching or disruptive of the Government's need to combat fraud"); *Glickman, supra* note 127, at 1268 (arguing that *Halper* Court intended narrow interpretation and that "Court's expansive characterization of what might constitute punishment for purposes of multiple punishment analysis was not intended to profoundly constrain Government prosecutions").

239. *See Halper*, 490 U.S. at 452-53 (Kennedy, J., concurring) (discussing limited nature of *Halper's* holding and objectiveness of standard announced).

240. *Id.* at 453 (stating that *Halper* "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case . . . [and] does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding").

241. *See, e.g., United States v. WRW Corp.*, 986 F.2d 138, 142 (6th Cir. 1993) (noting that ALJ did not consider Government's costs, but finding that it did "not alter the objective

*Healy* case and other cases arising under OSHA. Although OSHA lists four factors that the ALJ must consider in assessing the sanction,<sup>242</sup> it is not an exclusive list that forbids any consideration of the costs to the Government.<sup>243</sup> Because the statute does not preclude consideration of the costs of investigation and prosecution, the ALJ's failure to consider these costs should not be dispositive, and courts should look only at the relationship between the Government's costs and the sanction. The sanction may be "fairly characterized as remedial"<sup>244</sup> and should not be characterized as a punishment.

### 5. Deterrence as Motive in Regulatory Statutes

The *Healy* court also found that the OSHA sanction in this case was punitive because OSHRC imposed it for deterrent purposes.<sup>245</sup> The Third Circuit addressed the problem of how to evaluate statutes that contain some element of deterrence in addition to remedial purposes and developed an approach that reconciles the existence of both purposes in a remedial statute.<sup>246</sup> The Third Circuit clarified the seemingly inconsistent language in *Halper* regarding whether a sanction must have only remedial purposes for a court to consider it remedial.<sup>247</sup> The Third Circuit concluded that a sanc-

conclusion by the trial court that the penalty assessed is rationally related to the goal of making the Government whole"); *United States v. Furllett*, 974 F.2d 839, 844 (7th Cir. 1992) (finding that although ALJ did not take Government's expenses into account, this "does not imply that the fine is not related to the government's loss"). *Healy* distinguished *Furllett*, noting that the defendant in *Furllett* conceded that sanctions rationally related to the Government's expenses would not be punishment, while *Healy* contested this point. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 910 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

242. See Occupational Safety and Health Act, 29 U.S.C. § 666(j) (1994) (listing four factors for OSHRC to consider in assessing sanction).

243. See *id.* (stating that OSHRC should give "due consideration to the appropriateness of the penalty with respect to" four factors listed, but failing to preclude OSHRC from considering any other factors); see also *Department of Revenue v. Kurth Ranch*, 511 U.S. 797, 786 (1994) (Rehnquist, C.J., dissenting) (stating that "compensation for the Government's loss is the avowed purpose of a civil penalty statute").

244. *United States v. Halper*, 490 U.S. 435, 449 (1989).

245. See *Healy*, 96 F.3d at 910 (discussing deterrence as motive for imposition of civil fine in *Healy* case).

246. See *Artway v. Attorney Gen.*, 81 F.3d 1235, 1255 n.16 (3d Cir. 1996) (discussing method of determining when sanction is remedial).

247. *Id.* The following passage in *Halper* created this confusion:

From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand

tion is punishment to the extent that its purpose can only be retribution or deterrence.<sup>248</sup> Under this interpretation, a sanction is not punishment, even if it partially serves to deter, if a court can fairly describe it as remedial.<sup>249</sup> Instead, a sanction is punishment to the extent that it serves *only* punitive purposes (i.e., retribution or deterrence).<sup>250</sup>

This approach to statutes containing some punitive aspect, especially those that contain some deterrent purpose, is the most appropriate. As courts and commentators have noticed, most statutes contain at least some deterrent purpose.<sup>251</sup> Thus, if *Halper* precluded the imposition of civil sanctions with any deterrent purpose, its holding would be extremely far-reaching. However, instead of interpreting *Halper* this broadly, several courts examined statutes with some punitive purpose and found that the sanction, as applied in the case, could be described as remedial.<sup>252</sup> This

the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

United States v. Halper, 490 U.S. 435, 448-49 (1989) (citations omitted) (internal quotations omitted).

248. *Artway*, 81 F.3d at 1255 n.16.

249. *Id.* at 1255. The court explained that "[t]he threshold question is thus whether a remedial purpose can explain the sanction. Only if the remedial purpose is insufficient to justify the measure, and one must resort also to retributive or deterrent justifications, does the measure become punitive." *Id.*

250. *Id.* The court also defines retribution, deterrence, and remedial as follows:

Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing 'justice.' Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem, for instance by removing the likely perpetrators of future corruption instead of threatening them, or compensating the government for costs incurred.

*Id.* (citations omitted).

251. See *Bae v. Shalala*, 44 F.3d 489, 494 (7th Cir. 1995) (stating that "[g]eneral deterrence is the foremost and overriding goal of all laws, both civil and criminal, and transcends the nature of any sanction"); *Pasley*, *supra* note 125, at 11 (stating that "[w]ith regard to civil money penalties . . . it would be difficult, if not impossible, not to find some degree of deterrence, if not retribution as well, in the penalty").

252. See, e.g., *Bae*, 44 F.3d at 494 (finding that purpose of statute was partly to deter future violations, but concluding that provision did not "serve solely punitive goals"); *SEC v. Bilzerian*, 29 F.3d 689, 696 n.11 (D.C. Cir. 1994) (finding that "disgorgement is not a second punishment because it is not exacted solely for deterrence or retribution"); *United States v. Walker*, 940 F.2d 442, 443-44 (9th Cir. 1991) (observing that part of purpose of Tariff Act of 1930 was to punish, but holding that court could describe statute as remedial as applied to defendant).

approach is in accord with that developed in *Halper*, which stated that a sanction was punishment when it could "not fairly be characterized as remedial, but only as a deterrent or retribution."<sup>253</sup> Thus, when a sanction may equitably be described as remedial, the sanction is not punishment, and double jeopardy should not bar the imposition of the sanction. As demonstrated above, the sanction in *Healy* could be described as remedial.<sup>254</sup> Consequently, any retributive or deterrent purposes also found in the sanction should not compel a finding that the sanction is punitive.

### *B. Remedial vs. Compensatory: A Distinction Without a Difference?*

The *Healy* decision also raised the issue of whether a sanction is punishment when the Government is not a victim. In *Healy*, the Seventh Circuit considered it important that the victims of Healy's violations were the families of the dead employees and not the Government.<sup>255</sup> The court distinguished this situation from *Halper*, in which the Government was the victim of Halper's false claims.<sup>256</sup> According to the court, at least part of the sanctions levied in *Halper* remedied the harm the Government suffered as a victim, while none of the sanctions levied against Healy had such a justification due to the fact that the Government was not a victim.<sup>257</sup> The court thus distinguished *remedial* sanctions, which benefit the victims of the wrongful action, from *compensatory* sanctions, which reimburse the Government's expenses.<sup>258</sup> Here, the families of the dead employees received none of the money collected by OSHRC and benefitted only in terms of the deterrent effect that the sanction may have on Healy and other employers.<sup>259</sup>

Thus, *Healy* created a new distinction under *Halper* between remedial and compensatory sanctions and raised the question of whether it should matter that the Government is not the victim when determining the purpose of a sanction. Other courts have addressed situations in which the Government was not a victim and have found the sanctions to be remedial or have not even addressed the issue of whether the Government's status as a victim

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253. United States v. Halper, 490 U.S. 435, 448-49 (1989).

254. See *supra* notes 213-16 and accompanying text (describing remedial nature of OSHA).

255. S.A. Healy Co. v. Occupational Safety & Health Review Comm'n, 96 F.3d 906, 909-10 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (Feb. 13, 1997) (No. 96-1299).

256. *Id.* at 910.

257. *Id.*

258. *Id.*

259. *Id.* at 910-11.

is important.<sup>260</sup> An examination of the language of *Halper* and the holdings of other courts leads to the conclusion that the *Healy* court was mistaken in applying this new distinction.

The most persuasive evidence that *Healy's* distinction between remedial and compensatory sanctions is fallacious is the language in *Halper*. *Halper* indicated that remedial and compensatory sanctions were the same, rather than distinct and separate.<sup>261</sup> In several places in the *Halper* opinion, the Court referred to compensation of the Government as the defining characteristic of a remedial sanction.<sup>262</sup> Moreover, when the Court defined punishment, it did not include in this definition compensation to the Government when the Government was not the victim.<sup>263</sup> Because the Court used the term "compensate" in its definition of remedial sanctions at least four times<sup>264</sup> and did not distinguish cases when the Government was not the victim when defining punishment,<sup>265</sup> the conclusion follows that the Court considered compensation of the Government, even when not a victim, to be remedial. Many lower courts following *Halper*, including *Hudson*, have also taken this approach.<sup>266</sup> Thus, the distinction between remedial and compensatory

260. See *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (finding disgorgement order to be remedial despite fact that Government was not victim of defendant's actions); *United States v. WRW Corp.*, 986 F.2d 138, 140-42 (6th Cir. 1993) (finding sanction under Mine Safety Act remedial even though victims of defendants' violations were relatives of killed employees).

261. See *United States v. Halper*, 490 U.S. 435, 445-450 (1989) (using terms "compensate" and "remedial" interchangeably and failing to distinguish between terms).

262. *United States v. Halper*, 490 U.S. 435, 445 (1989) (stating that "Government . . . may demand compensation"); *id.* at 449 (discussing how to determine if sanction is remedial by referring to "process of affixing a sanction that *compensates* the Government for all its costs" and stating rule that sanction is punishment only when it "bears no rational relation to the goal of *compensating* the Government for its loss"); *id.* at 450 (stating that trial court should determine amount that will "ensur[e] both that the Government is fully *compensated* for the costs of corruption and that . . . the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment" (emphasis added)).

263. *Id.* at 448 (stating that "[w]e have recognized in other contexts that punishment serves the twin aims of retribution and deterrence").

264. See *supra* note 262 and accompanying text (listing four uses of "compensate" in *Halper's* discussion of remedial sanctions).

265. See *supra* note 263 and accompanying text (discussing Court's lack of reference in definition of punitive sanction to compensation of non-victimized Government).

266. See, e.g., *United States v. Hudson*, 92 F.3d 1026, 1028 (10th Cir. 1996) (stating that "[u]nder the objective test outlined in *Halper*, a particular sanction is not punishment when it bears a rational relation to the goals of compensating the government for its loss"), *cert. granted*, 117 S. Ct. 1425 (1997); *United States v. Morgan*, 51 F.3d 1105, 1115 (2nd Cir. 1995) (finding that Government could be compensated although not victim); *United States v. WRW Corp.*, 986 F.2d 138, 142 (6th Cir. 1993) (stating that "the fact that the penalty does



sanctions, with the latter constituting punishment, appears to be a creation of the Seventh Circuit and not a correct interpretation of *Halper*.

Courts should also reject the *Healy* distinction between remedial and compensatory because this distinction would have an enormous impact on Government enforcement of regulatory legislation. For example, the purposes of OSHA include protection of the workforce and insurance of safe working conditions.<sup>267</sup> Government action effectuates these purposes, and, therefore, an injured employee does not have a cause of action under OSHA.<sup>268</sup> In most, if not all, cases arising under OSHA, the victim is an employee who is subjected to a dangerous working environment, injured, or killed.<sup>269</sup> By not allowing the Government to enforce the civil provisions of OSHA on the victim-employee's behalf, a holding distinguishing between remedial and compensatory awards would have the result of taking away from both the Government and the employees the Government seeks to protect the civil remedies available under OSHA. This result would affect the Government's enforcement of OSHA and the enforcement of other regulatory legislation.<sup>270</sup> Once again, the *Halper* Court stressed that its holding was for the "rare case"<sup>271</sup> and not meant to be "far-reaching."<sup>272</sup> Given the limiting language of *Halper*, it is unlikely that the Court intended to bar all civil proceedings subsequent to criminal proceedings when the Government was not the victim.

not compensate the Government for precise actual losses does not preclude it from being remedial in nature"); *United States v. Park*, 947 F.2d 130, 134 (5th Cir. 1991) (finding that rule of *Halper* "focuses on whether the civil sanction sought after the imposition of a criminal penalty bears a rational relationship to the goal of compensating the government for its loss").

267. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-12 (1980) (stating policy of OSHA as protecting nation's labor force); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1168 (3d Cir. 1992) (Nygaard, J., concurring) (stating that "OSHA's overriding purpose is to prevent workplace injuries").

268. See *Ries*, 960 F.2d at 1168 (Nygaard, J., concurring) (noting that OSHA is "enforceable by administrative civil and criminal penalties," but that OSHA "does not provide remedies to injured employees").

269. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 444-46 (1977) (observing that OSHA intended to protect employees from "unsafe or unhealthy working conditions" and intended to provide sanctions when violations resulted in death of employee). Thus, none of these purposes relate to injury to the Government but only to harm to the worker.

270. For example, the Mine Safety Act is similar to OSHA and protects mine workers. See *supra* note 201.

271. *United States v. Halper*, 490 U.S. 435, 449 (1989).

272. *Id.* at 450; see also *supra* note 233 and accompanying text (discussing limiting language in text of *Halper*).

*C. The Explicit Split with Hudson: If the Sanction Does Not Exceed the Government's Costs, Can It Be Punishment?*

The *Healy* court found the \$249,900 administrative sanction to be punishment despite the fact that the costs incurred by the Government in investigating and prosecuting Healy in both proceedings exceeded \$490,000.<sup>273</sup> In so doing, the court stated that it would not follow the decision of the Tenth Circuit in *United States v. Hudson*, which held that a sanction not exceeding the Government's costs of investigation and prosecution was not punishment.<sup>274</sup> In *Hudson*, the Office of the Comptroller of the Currency (OCC) assessed civil money sanctions against the defendants for banking violations resulting in \$900,000 in losses to the Federal Deposit Insurance Corporation (FDIC) and costs to the Government of \$72,000.<sup>275</sup> The OCC assessed civil sanctions against the three defendants totaling \$44,000.<sup>276</sup> Although the ALJ in the OCC proceeding did not consider the Government's costs in assessing the sanctions,<sup>277</sup> the court held that the sanctions were "rationally related to the government's damages" and, therefore, were not punishment.<sup>278</sup> Thus, the *Hudson* court interpreted *Halper* as positing an objective test requiring a study of the relationship between the Government's costs and the sanction imposed,<sup>279</sup> rather than the subjective motives of the sanction assessed.<sup>280</sup> Under the *Hudson* court's analysis, the sanction in *Healy* was not a punishment because it did not exceed the Government's costs of investigation and prosecution and could accordingly be described as rationally related to the Government's losses.<sup>281</sup>

The *Healy* court's conclusion that the sanction was punishment even though it did not exceed the Government's costs necessarily flowed from its

273. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 908 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

274. *United States v. Hudson*, 92 F.3d 1026, 1030 (10th Cir. 1996) (holding that sanctions not exceeding Government's costs were remedial), *cert. granted*, 117 S. Ct. 1425 (1997).

275. *Id.* at 1027-28.

276. *Id.* at 1028.

277. *Id.* at 1029.

278. *Id.* at 1030.

279. *Id.* at 1028.

280. *Id.* at 1029-30.

281. In fact, when Healy argued that jeopardy barred the administrative proceeding, the ALJ found that "the administrative fine was not punishment because it is 'rationally related to the Government's costs of investigation and prosecution.'" *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 908 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

findings that the OSHA sanction, as applied in this case, was punitive because it did not provide for the consideration of the Government's costs<sup>282</sup> and the Government was not a victim in this case.<sup>283</sup> The prior determination that the sanction had punitive purposes compelled the conclusion that the sanction was punitive despite its relation to the Government's costs. However, given the above discussion demonstrating that the Seventh Circuit was incorrect in making its findings regarding the punitive purpose of the sanction,<sup>284</sup> it follows that its final conclusion is likewise incorrect.

Generally, the test formulated in *Halper* and applied by lower courts involves an examination of the sanction to determine if it can be explained as remedial.<sup>285</sup> The *Halper* Court noted that a sanction becomes punishment when a sanction is so high that it no longer is rationally related to the Government's costs.<sup>286</sup> Thus, the test is a simple one — compare the amount of the Government's damages to the amount of the sanction.<sup>287</sup> The *Halper* court simplifies this test further by allowing for "rough justice" in determining the Government's expenses.<sup>288</sup> Likewise, *Halper* allows courts to characterize as remedial a sanction that is somewhat higher than the Government's costs.<sup>289</sup>

The *Healy* court erred in deviating from this simple calculus. The only scenario in which a sanction that is lower than the Government's costs might

282. See *supra* notes 189-93 and accompanying text (discussing court's finding that OSHA was punitive in this case due to lack of consideration of Government's costs in statute).

283. See *supra* notes 255-59 and accompanying text (discussing court's finding that sanction was punitive because Government was not victim in case).

284. See *supra* notes 213-72 and accompanying text (discussing why *Healy* court was incorrect in finding sanction to be punitive).

285. See *United States v. Halper*, 490 U.S. 435, 448 (1989) (stating rule that sanction is punitive if court cannot explain it by remedial purposes and must instead explain it as deterrent or retributive); *United States v. Hudson*, 92 F.3d 1026, 1028 (10th Cir. 1996) (stating *Halper* rule was to see if "rational relation" to Government's losses could be found), *cert. granted*, 117 S. Ct. 1425 (1997); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) (applying *Halper* by examining sanction to see if it could "fairly be said solely to serve remedial goals"); *United States v. Park*, 947 F.2d 130, 134 (5th Cir. 1991) (discussing *Halper* rule and stating that if sanction "bears a rational relationship to the goal of compensating the government for its loss . . . [then] double jeopardy is not violated").

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

287. See *United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir. 1996) (stating that *Halper* creates "balancing test").

288. *Halper*, 490 U.S. at 449 (stating that "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice").

289. See *United States v. McClinton*, 98 F.3d 1199, 1201 (9th Cir. 1996) (stating that even in *Halper*, Court was not concerned about certain amount of excess over Government's actual damages).

be considered punishment would be when the statute can only be described as punitive.<sup>290</sup> That was not the case in *Healy*.<sup>291</sup> Because OSHA is remedial<sup>292</sup> and does not preclude compensating the Government<sup>293</sup> and because distinguishing between remedial and compensatory was mistaken,<sup>294</sup> the Seventh Circuit should have applied the "balancing test" set forth in *Halper*.<sup>295</sup> By applying this test, it is clear that the sanction was rationally related to the Government's damages and was, therefore, remedial.<sup>296</sup> Thus, the *Hudson* approach is generally correct. The only time a court should deviate from a simple comparison of the sanction and the Government's costs is when the court is faced with a statute that the court cannot explain in remedial terms.

### V. Conclusion

The question of when a civil money sanction constitutes punishment remains for the Supreme Court to clarify. In clarifying *Halper*, the Court should reject the reasoning of *Healy*. The dicta in *Halper* and the interpretations of other circuits support the conclusion that courts should read *Halper* narrowly.<sup>297</sup> Courts should not automatically consider sanctions based on

290. See *Halper*, 490 U.S. at 448. The Court stated:

To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil, as well as a criminal, sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

*Id.* This supports the argument that if the regulatory statute cannot generally be described as serving remedial goals, then the sanction applied under that statute cannot be described as remedial.

291. See *supra* notes 213-21 and accompanying text (discussing remedial goals of OSHA sanction applied in *Healy*).

292. See *supra* notes 213-44 and accompanying text (arguing that OSHA and sanction applied in *Healy* are remedial).

293. See *supra* note 242-43 and accompanying text (arguing that list of considerations in OSHA is not exclusive).

294. See *supra* notes 260-72 and accompanying text (arguing that remedial/compensatory distinction applied in *Healy* was not appropriate test to determine if sanction was punitive).

295. *United States v. Borjesson*, 92 F.3d 954, 955 (9th Cir. 1996) (stating that *Halper* created "balancing test").

296. See *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 96 F.3d 906, 908 (7th Cir. 1996) (stating that sanction was \$249,900 while Government's costs of investigation and prosecution were over \$490,000), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299).

297. See *supra* Part IV (discussing narrow interpretations of *Halper* by other courts and arguing for narrow reading of *Halper*).

statutes that do not provide for consideration of the Government's costs to be punitive.<sup>298</sup> If the sanction can otherwise be considered remedial, as was the case with the OSHA sanction in *Healy*, courts should not label it as punishment. Furthermore, the Supreme Court should not apply the distinction between remedial and compensatory sanctions developed in *Healy* in future cases because of its contradiction with the language of *Halper*, the *Hudson* decision, and the understandings of other circuits.<sup>299</sup> The Court should not follow the analysis of the *Healy* court, but rather should follow the narrow interpretations announced by other circuits. *Halper* stated that its holding was for unique cases.<sup>300</sup> The Court should honor that language and avoid broad interpretations that would result in the effective loss of civil remedies under numerous regulatory statutes.<sup>301</sup>

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298. See *supra* Part IV.A (arguing that Government can receive compensation for costs even if statute does not provide for consideration of such matters).

299. See *supra* notes 261-66 and accompanying text (arguing against future applications of distinction between remedial and compensatory applied in *Healy*).

300. See *United States v. Halper*, 490 U.S. 435, 449 (1989) (stating Court's intent that decision apply to narrow range of cases).

301. See *supra* Part IV.A.4 (discussing potential effects of extension of *Healy* holding).