10-1-1993

Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy

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PRECEDENTS IN A VACUUM: THE SUPREME COURT CONTINUES TO TINKER WITH DOUBLE JEOPARDY

Peter J. Henning*

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I. INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment has an immensely appealing simplicity: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."1 While on its face the clause seems unambiguous, its scope has become the subject of an intensifying debate. The Supreme Court has held that double jeopardy protects defendants from both successive criminal prosecutions and from unauthorized multiple punishments for the same act.2 In 1989 and 1990, the Supreme Court issued two decisions, *Grady v. Corbin*3 and *United States v. Halper*,4 that appeared to extend significantly the reach of those two protections under the Double Jeopardy Clause. Enunciating a broader test for determining when a separately charged crime is actually part of the "same offence," the 5-4 *Grady* court held that the government cannot establish an essential element of the newly charged offense by proving the same conduct used in a prior criminal proceeding.5 Along the same lines, the *Halper* court held that sanctions imposed in a civil proceeding could constitute an impermissible criminal punishment in violation of the Double Jeopardy Clause's protection from multiple punishments.6

Only three years after announcing the new rule in *Grady*, however, the Court overruled that decision in *United States v. Dixon*,7 another 5-4 decision that fragmented the Justices.8 On the same day it announced *Dixon*, the Court relied on *Halper* to extend the protections of the Eighth Amendment's Excessive Fines Clause to civil forfeiture proceedings, holding that the proceedings constitute punishment of the property owner.9 The Court thus raised the question of whether the Double Jeopardy Clause will prohibit successive criminal prosecutions and civil forfeitures. The Court did not, however, acknowledge that its reliance on *Halper* could raise troubling double jeopardy issues that might affect future criminal actions in which property was forfeited before the institution of criminal charges.

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1. U.S. Const. amend. V.
5. 495 U.S. at 523.
6. 490 U.S. at 448-449.
8. Id. at 2860. The Court stated that "*Grady* lacks constitutional roots." Id.
By repeatedly tinkering with the scope of the Double Jeopardy Clause, the Supreme Court has generated greater confusion than clarity in determining when the government can subject a defendant to multiple legal actions arising out of the same general conduct or series of transactions. The Court's failure to agree on a cogent analysis of double jeopardy means that its decisions provide only minimal guidance to lower courts, which must rely on conjecture about what the Court meant by its often cryptic pronouncements. Before it reversed Grady, the Supreme Court itself acknowledged that its analysis was difficult to understand.¹⁰

One reason for this inconsistency is that the expansion of the double jeopardy protections announced in Grady and Halper appear to be based more on a visceral reaction to apparent misuse of prosecutorial power than a principled analysis of the limits of a defendant's constitutional rights.¹¹ Grady involved a complete breakdown in communication between different prosecutors within a local district attorney's office when one prosecutor permitted the defendant to plead guilty to minor traffic offenses without knowing that the traffic accident caused two deaths for which the defendant was subsequently indicted.¹² In Halper, the government sought a $130,000 civil penalty for filing false Medicare claims, valued at $585, for which the defendant had previously pleaded guilty and received a two-year prison sentence and a $5,000 fine.¹³ The factual scenarios in Grady and Halper prompted the Court to question the fairness of the government's prosecution in the later proceeding; these concerns in turn resulted in decisions that expanded the double jeopardy protection without considering the impact of the new principles. The Court created unnecessary complexity by moving the Double Jeopardy Clause away from its roots as a narrow but categorical constitutional protection.

Dixon rejected the broad approach of Grady by emphasizing that there is a single test for applying the Double Jeopardy Clause: a comparison of the elements of the different statutes under which a defendant has been charged to determine if they constitute the "same offence." One of the Court's

¹⁰ See United States v. Felix, 112 S. Ct. 1377, 1384 (1992) (reads language of Grady more narrowly because of "difficulties which have already arisen in its interpretation"), reh'g denied, 113 S. Ct. 13 (1992).


¹² 495 U.S. at 511-14.

¹³ 490 U.S. at 439.
rationales for overruling Grady was that the same conduct test had produced substantial "confusion." Much like the Double Jeopardy Clause itself, however, the Dixon Court's "same elements" test, first enunciated in Blockburger v. United States in 1932, is easier to state than to apply. Indeed, the majority in Dixon splintered as to how strictly to apply Blockburger. As a result, the decision does not provide much meaningful guidance on how to judge whether a successive prosecution involves the same elements as the prior action.

Clarifying the scope of the Double Jeopardy Clause becomes more important as governments, both federal and state, increasingly use civil remedies in tandem with criminal actions. Parallel civil and criminal actions are becoming more the rule than the exception in prosecutions for economic crimes. Narcotics prosecutions frequently involve asset forfeiture actions, and white collar fraud cases often trigger civil remedies that may result in money penalties and debarment from an industry or from continuing involvement in government programs in addition to asset forfeiture. Moreover, the increased focus on combating criminal enterprises and repeat offenders has led to greater use of complex criminal statutes, such as the Racketeering Influenced and Corrupt Organizations Act (RICO), the Continuing Crimi-
nal Enterprise (CCE) provision of the drug law, and Money Laundering, that may include previously prosecuted offenses as predicates in subsequent prosecutions. These trends implicate the successive prosecution and multiple punishment prongs of the Double Jeopardy Clause, and the government must decide how a prior prosecution or civil action by one office will affect a later case by another office or agency before it commits its scarce prosecutorial resources.

This Article examines the application of the Double Jeopardy Clause in the expanding area of successive governmental actions. *Halper* has obscured the distinction between multiple penalty cases and successive prosecutions because the question of whether a civil sanction constitutes a criminal penalty can arise whenever the government brings a succeeding action, either criminal or civil. While *Dixon* and *Halper* address seemingly distinct aspects of double jeopardy, the issues are beginning to merge. Prosecutors and defense attorneys faced with successive actions must determine at the outset whether there is a valid double jeopardy claim, because it may bar the subsequent action from going forward, thereby sparing the defendant from a second action and the government the expense of undertaking an unnecessary case. The status of the case in the investigative and prosecutorial process, therefore, provides a structure to analyze how double jeopardy issues affect criminal and civil actions, and how the government can avoid wasting its resources in pursuing actions that may run afoul of the Double Jeopardy Clause.

Part II of the Article briefly examines the scope of the Double Jeopardy Clause and the basic values the provision seeks to vindicate. Part III examines the development of *Grady*’s same conduct test, and how the weakness of that approach led the Court to overrule that precedent in *Dixon*. The Article then examines uncertainty in *Dixon*’s application of the *Blockburger* test, and discusses how double jeopardy will continue to challenge the courts in criminal prosecutions that seek to incorporate into a subsequent case conduct for which a defendant has already been prosecuted. The Article will focus on two areas: whether multiple charges arising from a course of conduct may still constitute a double jeopardy violation, despite the overruling of *Grady*; and, whether it is constitutional to bring new prosecutions based on conduct that was already used to enhance a sentence under the Federal Sentencing Guidelines.

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22. 21 U.S.C. § 848 (1988). A continuing criminal enterprise involves drug violations undertaken by a group of five or more persons over whom the defendant occupies a supervisory or managerial position, and who derive substantial income or resources from the enterprise.

23. 18 U.S.C. §§ 1956-57 (1988). Proof of money laundering requires, among other things, that the defendant engaged in “specified unlawful activity” that involves the receipt or transfer of funds arising from violations of a long list of criminal statutes.
Part IV focuses on the flaws in the Supreme Court's analysis in *Halper* that forced it to treat a successive prosecution case as a multiple punishment case because any other approach would have brought a revolutionary expansion in criminal constitutional rights to the civil arena. *Halper* requires a court to analyze the civil sanction only in relation to the underlying harm, and not in comparison with the criminal sanction imposed in another prosecution. The issue, therefore, is ascertaining whether the severity of the sanction rises to the level of a criminal punishment, which requires courts to engage in a proportionality analysis that is foreign to the underlying values of the Double Jeopardy Clause. The Court's concern in *Halper*, as in *Grady*, was to correct perceived prosecutorial misconduct which, inadvertently or otherwise, sought an unfair penalty through a second action. Policing the government's power to seek potentially unjust punishment in successive actions is not, however, best achieved through the Double Jeopardy Clause. It is the Eighth Amendment that prohibits both cruel and unusual punishments and excessive fines, and the Supreme Court has held this amendment to mean that criminal punishments must be proportional to the underlying conduct. The Excessive Fines Clause is especially appropriate for analyzing civil monetary sanctions because, unlike *Halper*, that approach does not raise the question of whether other constitutional criminal protections should be applied to civil actions.

The Article then reviews the Court's recent decisions in *Austin v. United States* and *Alexander v. United States*, which establish that the Excessive Fines Clause applies to both civil and criminal asset forfeitures. *Austin* relies on *Halper* to establish that a civil forfeiture constitutes punishment under the Eighth Amendment, which raises the question of whether forfeitures constitute sufficient punishment to invoke the protections of the Double Jeopardy Clause in a second proceeding. If the true injustice in *Halper* is that the second civil penalty was too severe, then the Eighth Amendment is the proper vehicle for correcting the constitutional violation. The Eighth Amendment is much better suited to a case-by-case analysis than the Double Jeopardy Clause because both prosecutors and defendants need straightforward rules in determining the degree of criminal and civil exposure arising from a course of conduct. *Halper* undermines the need for clarity in double sanctions.

24. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
27. 113 S. Ct. 2766 (1993).
28. 113 S. Ct. at 2812 (citing *Halper* to support proposition that forfeitures serve both remedial and punitive purposes).
jeopardy analysis by creating a fact-intensive test in a case that simply does not fit the functional structure of the Double Jeopardy Clause.

II. THE SARGASSO SEA OF DOUBLE JEOPARDY

The roots of the prohibition on double jeopardy extend back as far as Ancient Greece, and they were firmly established in English common law long before the American Revolution. Sir William Blackstone noted the "universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence." The Fifth Amendment's prohibition against double jeopardy resulted from a change in the wording of the clause. James Madison's original proposal stated that "no person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence." In order to avoid confusion over whether a defendant could seek to set aside an erroneous conviction and be tried a second time, the phraseology was changed to "twice put in jeopardy" for the same offense. There was no clear understanding of what "same offence" meant under either the common law or in Congress at the time Madison proposed the Fifth Amendment, and the Supreme Court has since struggled to find an acceptable principle.

The Double Jeopardy Clause embodies three values that help explain the scope of its protection, depending on the context in which the issue arises. Where the defendant has been tried before, the primary value is protecting the defendant’s interest in the finality of the verdict. A second value,
applicable in the multiple punishment situation, prevents the court from imposing a punishment greater than that authorized by the legislature, although the Double Jeopardy Clause does not directly limit the legislature's discretion to define an act as criminal or to set the sanction to be applied upon a finding of guilt. A third value implicated by the Double Jeopardy Clause is to check prosecutorial overreaching while maintaining society's interest in prosecuting those who violate the law. If the government has not manipulated the process to give itself an opportunity to rehearse the case or seek a conviction through repeated trials, then society's interest in punishing criminals may outweigh a defendant's interest in preventing a second prosecution. The Supreme Court has struggled to apply these different values in analyzing the scope of the "same offence" for double jeopardy. In North Carolina v. Pearce, the Supreme Court sketched its classic definition of double jeopardy’s threefold protections to vindicate the clause’s underlying values: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Although most cases cite this thumbnail description, Dixon and Grady demonstrate that the constitutional right is not subject to any simplistic analysis. The first two protections described in Pearce are concerned with successive criminal actions, while the third focuses on the degree of punishment authorized for a single course of criminal conduct. In considering the scope of double jeopardy's protection, the procedural posture of the case, whether it constitutes a successive prosecution or a multiple punishment, provides a serviceable means of determining the scope of finality is the only value that the Double Jeopardy Clause protects. Thomas, Elegant Theory, supra note 29, at 839.

35. See Thomas, Elegant Theory, supra note 29, at 839 ("Because the legislature could constitutionally create, in a single conviction, the consequences of two convictions, no coherent rationale justifies a double jeopardy limit on the number of convictions a legislature may authorize in a single trial.").

36. Justice O'Connor has argued that double jeopardy would not bar a second prosecution where the government had not used unduly oppressive tactics in bringing the later case. Garrett v. United States, 471 U.S. 773, 796 (1985) (O'Connor, J., concurring); see Thomas, Elegant Theory, supra note 29, at 871 (criticizing focus on government oppression as a value underlying double jeopardy). It has also been suggested that double jeopardy protects the interest in jury nullification by not permitting retrial of acquitted crimes. Peter Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 MICH. L. REV. 1001, 1012 (1980).

37. Chief Justice Rehnquist noted with apparent exasperation that precedents in this area are "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981). That lament came approximately a decade before Grady and Halper, and Dixon's fragmented analysis shows that the Supreme Court has done little to relieve the confusion since then.


39. Id. at 717 (footnotes omitted).

double jeopardy's protection. If the government seeks to try the defendant a second time, then the question is whether the “same offence” will be tried in the subsequent proceeding; if the question is multiple punishments, then the defendant is subject to a sanction, and the issue is whether any additional sanction can be imposed in the same case.

The bifurcation of the Double Jeopardy Clause makes it important for both prosecutors and defense counsel to view double jeopardy as a functional issue affecting their analysis of a defendant's exposure to additional sanctions. Their initial concern is ascertaining what stage the government has reached in pursuing a defendant. If the government has not taken any public action and the matter is still in the pre-indictment phase, double jeopardy is not an issue for the defendant. For the prosecutor, however, any charging decisions will include double jeopardy considerations because each count must pass muster as not imposing an impermissible multiple punishment. Once the government files an action against a defendant and that matter reaches a final conclusion, double jeopardy becomes an issue of paramount importance because the government may bring additional actions that relate in some way to the conduct in the first action. Even before an action reaches its conclusion, the government faces coordination problems if it brings both civil and criminal cases arising from the same underlying conduct.

A. Blockburger v. United States: The Same Elements Test of Double Jeopardy

In Blockburger v. United States, the Court held that double jeopardy does not affect prosecutions where at least one of the elements of an offense is different from the elements of any other crimes charged. Blockburger requires a straightforward comparison of the elements of each offense, without reference to the actual proof that will be introduced at trial, to determine whether there is any difference between the crimes. The question that has perplexed the Court since Blockburger is whether that test is the sole means of determining when a defendant has been prosecuted for the “same offence.”

In Brown v. Ohio, the Supreme Court applied the Blockburger test to determine that a subsequent prosecution for a greater offense violated double jeopardy after a conviction for a lesser-included offense because they were the same statutory offenses. In Harris v. Oklahoma the Court issued a terse per curiam decision holding that “the Double Jeopardy Clause bars

41. 284 U.S. 299 (1932).
42. Id. at 304.
44. Id. at 166.
prosecution for the lesser crime after conviction of the greater one. These opinions focus on the legislature's authority to define crimes as the primary means to analyze the double jeopardy claims. Both Brown and Harris involved simple criminal conduct, which allowed the Court to avoid any detailed analysis of whether the legislature's intent in passing different statutes defines the entire scope of the Double Jeopardy Clause. Nevertheless, Harris came to stand for the proposition that Blockburger requires a court to go beyond a rote comparison of the elements of the different statutes by requiring consideration of whether the proof of one violation is incorporated in the proof of the elements of the other offense.

Two years after Harris, in Whalen v. United States, the Court stated that where two statutes "proscribe the 'same offence,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." Whalen apparently requires the legislature to articulate its intent to create separate punishments to overcome a finding that two statutes outlaw the same criminal conduct. After Whalen, Blockburger appeared to be a constitutional rule prohibiting multiple punishments or successive prosecutions under different statutes that define the same crime unless the legislature declares its intent otherwise by requiring proof of different elements under the statutes.

The next term, however, the Court rejected such a construction of the Blockburger test in Albernaz v. United States. The Court held that Blockburger is a test of statutory construction only, and it does not apply where Congress clearly intended to impose separate punishments for criminal activity. Under Albernaz's formulation of the Blockburger test, the only constitutional limit implicated by the Double Jeopardy Clause on multiple punishments is the legislature's intent.

The Court took the reasoning in Albernaz one step further in Missouri v. Hunter. In that case, the defendant had been convicted of robbery and

46. Id.
47. See Dixon, 113 S. Ct. at 2857 (Harris stands for proposition that crime cannot be abstracted from the elements of the offense); Grady, 495 U.S. at 519-20 (Harris stands for proposition that "strict application of Blockburger test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause").
48. 495 U.S. at 692. The defendant was convicted of rape and felony-murder for killing the victim of the rape, and received consecutive prison terms for the two convictions. The defendant argued that the rape conviction merged with the felony-murder conviction, and therefore barred consecutive sentences. Id. at 685-86.
49. 450 U.S. 333.
50. Id. at 340. The defendant was convicted of conspiracy to import marijuana and conspiracy to distribute marijuana, and was sentenced to consecutive terms of imprisonment. He argued that there was only one conspiracy, and therefore his dual convictions violated the multiple punishment prong of the Double Jeopardy Clause. Id. at 336.
51. Id. at 344.
armed criminal action, which imposed an additional sentence for using a deadly weapon in the commission of a crime. The Court held that, even though the two state statutes defined the same crime, and therefore would fail the Blockburger test, double jeopardy does not automatically preclude imposition of multiple punishments. Where the legislature “specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under Blockburger, a court’s task of statutory construction is at an end . . . .”54 Thus, the Court concluded that there is no limitation on the legislature’s power under the Double Jeopardy Clause to impose as great or as many punishments as it wishes. The Court pulled away completely from any implication in Whalen that there might be a constitutional constraint on the legislature.

B. Struggling to Define Same Offense in Successive Prosecutions

While the Court refined the Blockburger analysis, it also began to question whether that approach adequately defined the constitutional protection in successive prosecution cases in Illinois v. Vitale,55 a case with a factual scenario startlingly similar to Grady. In Vitale, the defendant killed two small children in an automobile accident and was convicted of a minor traffic violation for failing to reduce speed; the next day, the state charged him with involuntary manslaughter.56 The Court found that the traffic offense was not necessarily a lesser-included offense of the manslaughter charge, and therefore Blockburger did not preclude the second prosecution.57

The more important aspect of Vitale was the Court’s statement, in dicta, that if the state had to rely on the conduct previously prosecuted to prove the manslaughter charge, then the “claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma . . . .”58 The Court apparently expanded the scope of the Double Jeopardy Clause in Vitale by asserting that the state cannot rely on such conduct for proof in the later prosecution, but it did not explain the reason why this new analysis was needed to supplement Blockburger. The reference to Brown and Harris shows that the Court did not view the lesser-included offense analysis as limited solely to crimes that necessarily entail a complete overlap between the

53. Id. at 362 (quoting Mo. Rev. Stat. § 559.225 (Supp. 1976)).
54. Id. at 368-69.
56. Id. at 411-13.
57. Id. at 419 ("The mere possibility that the state will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the later prosecution.").
58. Id. at 420.
elements of the offenses. Instead, Vitale gives a clue that the Court was not entirely comfortable with permitting the statutory definition of an offense, without reference to the actual conduct being prosecuted, to govern the meaning of "same offence."

The Court's failure to reach a consensus on when a defendant had been prosecuted in a second proceeding for the same offense led to a continuing fragmentation in its decisions. Justice Brennan argued repeatedly that the Court should adopt a same conduct test for determining the same offense that would require the government, in most instances, to bring all charges from a single transaction against a defendant in one proceeding. The Court, however, refused to move in that direction. Instead, in Garrett v. United States, it adopted yet another approach to the double jeopardy issue in successive prosecution cases involving complex, ongoing criminal activity.

The defendant in Garrett pleaded guilty to a marijuana importation charge in Washington state, and was then indicted two months later in Florida under the CCE provision of the drug statute for marijuana importation. At trial on the CCE count, which required the government to prove three or more successive criminal narcotics violations, the government introduced evidence of the marijuana importation charged in the Washington case. Applying the Hunter analysis, the Court noted that while Blockburger would prohibit successive prosecution of the underlying predicate offense and CCE, Congress clearly intended that the CCE provision be separately punishable in addition to any sanction imposed for the predicate offenses. Upon dispensing with the congressional intent analysis, the Court turned to whether CCE is the "same offence" as the predicate offense if they are charged in successive prosecutions. The Court rejected any "ready transposition" of the lesser-included offense analysis of Brown and Harris, which involved only a single course of conduct, "to the multilayered conduct, both as to time and to place, involved in this case." Even assuming the underlying predicate offense is a lesser-included offense of the CCE, the Court held that was


61. Id. at 776. Garrett was sentenced to five years in prison and a $15,000 fine on the Washington state charge, and 40 years in prison and a $100,000 fine on the later CCE count, to be served consecutively. Id. at 775, 777.

62. Id. at 779.

63. Id. at 789.
irrelevant where the defendant’s crimes continued beyond the period of the offense in the earlier indictment.\textsuperscript{64} Garrett takes the double jeopardy analysis in a fundamentally different direction from that hinted at in Vitale. With the Blockburger test limited to an analysis of legislative intent, the “same offence” issue shifted in Garrett to whether the Court would find that the Double Jeopardy Clause imposed a second layer of protection, at least in the successive prosecution instance. The Court indicated that there is no greater protection available because it allows prosecutors to use explicitly a previously charged offense in a later prosecution, going so far as to permit the government to employ the same evidence in a second prosecution. While Garrett distinguishes multilayered conduct from a single transaction or event, it does not explain why double jeopardy permits in one set of circumstances what it prohibits in another. The Double Jeopardy Clause does not, on its face, apply differently depending on the complexity of the underlying offenses or applicable statutes. Nevertheless, Garrett makes the Blockburger test the controlling form of double jeopardy analysis for multilayered activity. To the extent that any greater protection may exist, the Court would impose restrictions only on subsequent prosecutions arising out of simple events or transactions. Garrett did little, however, to relieve the tension over how to define the “same offence” by refusing to give anything more than a cryptic reference to the scope of the Double Jeopardy Clause.\textsuperscript{65}

\textbf{C. Reuse of Acquitted Conduct in a Second Prosecution: Collateral Estoppel as a Component of Double Jeopardy}

In addition to the struggle over successive prosecutions based on the same underlying conduct, the Court considered the collateral estoppel effect of a prior acquittal on a second prosecution in which the government sought to introduce evidence of conduct for which the defendant had already been tried.\textsuperscript{66} In Ashe v. Swenson,\textsuperscript{67} the defendant was acquitted of robbing one of

\begin{itemize}
\item \textsuperscript{64} \textit{Id.} at 792. The Court found that the CCE charge included acts after the guilty plea to the Washington state charge.
\item \textsuperscript{65} The Court stated at one point in the opinion, “[o]ne who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting,” \textit{Id.} at 790. Although the Court made repeated reference to the continuing nature of the defendant’s conduct, that cannot be the basis for holding that double jeopardy does not bar the CCE prosecution because the Washington state charge had already been completed at the time of the indictment on the CCE charges. See Thomas, \textit{Elegant Theory}, \textit{supra} note 29, at 877 (opinion never explains why subsequent conduct forfeits double jeopardy protection of earlier conviction). Professor Thomas criticizes the majority opinion by Justice Rehnquist for misstating the record to imply that the defendant continued his criminal conduct beyond the time of the Washington state charge. \textit{Id.} at 877 n.289.
\item \textsuperscript{66} The collateral estoppel component of the double jeopardy protection arises in cases in which the defendant has been acquitted and the government brings a second charge that raises issues
\end{itemize}
six poker players, after which the state sought to try him for robbing one of the other players. The Court held that double jeopardy includes the doctrine of collateral estoppel, such that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Although the second prosecution in Ashe would pass muster under Blockburger because it necessarily involved a different element, i.e., robbery of a different victim, the state could not use the first trial as a "dry run," forcing the defendant to face repeated attempts to convict him for essentially the same criminal act.

While Ashe prevents relitigation of an ultimate fact decided in the defendant's favor, the Court held in Dowling v. United States that collateral estoppel does not bar all uses of acquitted conduct in a subsequent prosecution. The defendant in Dowling was convicted of committing a bank robbery during which he wore a ski mask and carried a small pistol. The government introduced testimony at trial implicating the defendant in a home robbery in which the perpetrator wore a mask and carried a small handgun, but for which he had previously been acquitted. The evidence went to the jury pursuant to Federal Rule of Evidence 404(b), which permits a trial court to admit evidence of other crimes, wrongs or acts for any purpose other than to prove the defendant's bad character. The government need only show that

litigated in the first prosecution. The second prosecution must meet the requirements of Blockburger; otherwise, the proceeding is a straightforward violation of the Double Jeopardy Clause's prohibition on retrying a defendant for the same offense. Professor Thomas argues that nothing prevents a defendant from raising collateral estoppel even if the prior prosecution did not end in an acquittal. See Thomas, Elegant Theory, supra note 29, at 867-68. If the defendant is convicted in the first trial, however, there can be no collateral estoppel effect because the issue was not decided in the defendant's favor. The only other possible circumstance in which such a claim could arise, is where the prior trial ended in a hung jury on some counts and an acquittal on other counts. If the government seeks to retry a defendant on the hung counts, the defendant could argue that the government is precluded from raising any issues related to those acquitted counts. That is not technically collateral estoppel, which requires that there be a separate action, but direct estoppel arising from a prior determination in the same case. The retrial is not a separate proceeding, but a continuation of the earlier trial. See United States v. Bailin, 977 F.2d 270, 276 (7th Cir. 1992) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4418 (1991)).

68. Id. at 438-40. The Court noted that, in the second trial, the testimony of eyewitnesses was "substantially stronger" through enhanced recollections of the robbers. Id. at 440.
69. Id. at 443.
70. Id. at 447. "[The question] is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." Id. at 446.
72. Id. at 344-45.
73. (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,
it is more likely than not that the prior acts occurred, a much lower standard of proof than beyond a reasonable doubt. The Court held that *Ashe* does not exclude use of evidence of prior acquitted conduct unless the defendant can prove that the acquittal in the first trial forecloses the possibility that the defendant committed the act. 74

*Ashe* and *Dowling* further demonstrate the continuing tension in defining the scope of what constitutes the “same offence” for double jeopardy purposes by presenting two different ways to determine whether an acquittal governs an ultimate issue in a successive prosecution. *Ashe* takes a broader approach, putting a limit on the government’s ability to subdivide a criminal prosecution into a series of discrete cases, thereby denying the government the chance to rehearse its presentation and seek a conviction through repeated trials. That approach upholds the value of giving fair weight to the jury’s decision and the defendant’s interest in the finality of a verdict. But *Dowling* takes a restrictive view that gives a verdict only the immediate effect of preventing a retrial of the particular crime for which the government prosecuted the defendant. An acquittal does not mean that the alleged criminal conduct is forever erased, because the government can make a limited use of it as proof in a second proceeding to show the defendant’s knowledge, motive, intent, or lack of mistake. *Dowling* places the burden on the defendant to demonstrate that the prior acquittal determined an ultimate issue that precludes the government from reintroducing evidence of the conduct in a later proceeding. 75

The Supreme Court did not, however, determine just how distinct the second prosecution must be from the first so that the acquittal does not affect an ultimate issue in the later proceeding, and introduction of acquitted conduct through Rule 404(b) is appropriate. *Ashe* and *Dowling* set up the polar extremes in which an acquittal may decide an ultimate issue. In *Dowling*, the conduct involved two distinct crimes two weeks apart, while *Ashe* involved one robbery with multiple victims. The prosecutor in *Dowling*, unlike *Ashe*, did not use the home robbery trial as a rehearsal for the bank robbery, and the acquitted conduct did not specifically prove any of the elements of the second crime that the government was required to establish. 76 It is unclear, however, what the collateral estoppel effect would be of

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opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

FED. R. EVID. 404(b).


75. Id.

76. Although evidence admitted under Rule 404(b) can be used to prove intent, an element of all crimes, evidence of other crimes, standing alone, cannot prove the intent to commit the specific crime charged because the evidence relates to other acts that are not the subject of the prosecution. FED. R. EVID. 404.
an acquittal on one charge in a case involving a complex criminal act, such as a securities fraud scheme over a period of time that includes potential charges of wire fraud and interstate transportation of stolen securities, that could be divided into separate indictments. The question goes back to determining what the “same offence” is in the Double Jeopardy Clause.

The two sets of cases, Garrett/ Vitale and Ashe/ Dowling, present competing approaches for determining the scope of the double jeopardy protection in successive prosecution cases. Without a clear analysis of double jeopardy’s protection, the Court sowed greater confusion because it could not decide on a rationale that a majority could adopt and apply consistently. Moreover, the Court had not clearly distinguished between successive prosecution and multiple punishment cases because it had not squarely considered whether the Double Jeopardy Clause required any analysis beyond the Blockburger test, as refined in Albernaz and Hunter.

III. ONCE MORE INTO THE BREACH: GRADY, DIXON, AND THE SHORT LIFE OF THE SAME CONDUCT TEST

A. Grady v. Corbin: Attempting to Define Same Offense as Same Conduct

In Grady v. Corbin,77 the Court finally confronted the issue of determining the scope of the Double Jeopardy Clause’s protection in successive prosecution cases, and whether Blockburger furnished the sole governing principle. In one of his final opinions for the Court, Justice Brennan delivered a majority opinion giving an expansive reading of “same offence” that was the culmination of a process he began almost twenty years earlier in Ashe, when he argued for a “same transaction” test for double jeopardy.78

The defendant, Thomas Corbin, was in an automobile accident and received traffic citations for failing to keep to the right and driving while intoxicated. He pled guilty before the Town Justice Court, and a few weeks later, he was sentenced to a $360 fine and a six-month license suspension. At neither proceeding did Corbin or the prosecutors mention that the accident killed a young couple. Shortly after the accident, but before his appearance on the tickets, an assistant district attorney began investigating the deaths and, three months later, a grand jury indicted Corbin for manslaughter. In a bill of particulars, the district attorney indicated that the reckless acts that

78. Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring) (“In my view, the Double Jeopardy Clause requires the prosecution, except in the most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.”). See Diane M. Resch, Note, “High Comedy but Inferior Justice”: The Aftermath of Grady v. Corbin, 75 MARQ. L. REV. 265, 273 (1991) (Grady appears to be culmination of Justice Brennan’s attempts over the years to modify the Blockburger test); Barton, supra note 59, at 155 (Justice Brennan succeeded in enticing Court away from Blockburger “same evidence” test).
the office would prove were operating a vehicle while intoxicated, failing to keep to the right of the median, and driving at a speed in excess of what the weather and road conditions permitted.\textsuperscript{79}

The majority began by relying on the dicta in \textit{Vitale} to create a two-prong double jeopardy analysis. First, it applied the \textit{Blockburger} test to determine whether the government charged the same offense. That test alone was insufficient, however, because multiple prosecutions give the government an unfair advantage over a defendant by allowing "an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged."\textsuperscript{80} The Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."\textsuperscript{81} The second step, then, is to determine what conduct the government will prove, to ascertain whether the defendant has already been prosecuted for that conduct. The state's admission in its bill of particulars made clear that it would use two instances of previously prosecuted conduct, failing to keep right of the median and driving while intoxicated, to prove the manslaughter charges.

The majority opinion denied that it had adopted the "same transaction" test that Justice Brennan first proposed in \textit{Ashe}. The hallmark of the same transaction test is that the government must bring all charges against a defendant in a single proceeding. The same conduct test, on the other hand, may permit a second prosecution of the defendant because the government can introduce evidence of different conduct, such as driving with excessive speed, to prosecute the defendant.\textsuperscript{82} Although not as broad as the same transaction approach, the same conduct test was a much more expansive understanding of "same offence" than \textit{Blockburger} because the Court looked beyond the statutory language and legislative history of the crimes charged. The same conduct test forced a court to immerse itself in the government's theory of the case and the facts of the prior criminal proceeding.

While \textit{Grady} gave a broader meaning to "same offence" than the Court had offered previously, the opinion was almost bereft of guidelines for determining whether a second prosecution sought to use previously prosecuted conduct. The failure of the district attorney's office to exercise due diligence permitted the Court to look at the underlying facts without considering the defendant's culpability for the crime because the institutional blame for the result falls solely on the individual prosecutors. Moreover,

\textsuperscript{79} \textit{Grady}, 495 U.S. at 511-14.
\textsuperscript{80} \textit{Id.} at 518.
\textsuperscript{81} \textit{Id.} at 521.
\textsuperscript{82} \textit{Id.} at 523. The Court had already rejected the same transaction test in \textit{Garrett}, 471 U.S. at 790.
Grady was an easy case under the same conduct test because the state specifically admitted that it would use the two acts for which Corbin was punished.

Absent such an admission, a court that takes an expansive view of the same conduct test could essentially convert the test into Justice Brennen's twenty-year-old same transaction test, because the court would likely presume that the government introduced evidence of all possible theories of a defendant's guilt to secure a conviction in the first prosecution. Because the second trial has not yet commenced, a reviewing court does not have the benefit of the record of the second proceeding to compare what conduct the government sought to prove with what was previously prosecuted. If the government does not prosecute all possible offenses in the first proceeding, then an expansive view of Grady may foreclose it from bringing any other charges because the government will have already proved the conduct that will be the basis for a later prosecution. That, of course, is at the center of the same transaction test advocated by Justice Brennan, although Grady denied that it adopted such an approach.

Justice O'Connor criticized Grady as being inconsistent with Dowling, which the Court had decided only a few months earlier. Any perceived inconsistency, however, was a function of viewing the Court's double jeopardy decisions as establishing clear rules that could be consistently applied. The applicability of the collateral estoppel component of double jeopardy requires courts to make fine distinctions between whether the government is prosecuting conduct that was the subject of a prior prosecution or merely introducing evidence that may be probative of guilt for a different crime. Grady did not necessarily eviscerate Dowling because its same conduct test was so amorphous. Grady was similar to Ashe in that when a second prosecution closely tracks the evidence and theory of the prior prosecution, it raises an obvious question of whether the government is unfairly seeking to achieve its goal of punishing the defendant by creating a second opportunity to permit imposition of a criminal sentence. Grady epitomized the circumstance in which the government's own inability to coordinate its prosecutorial resources should not serve as the basis for a second criminal prosecution. Viewed in that light, Grady was directed more toward policing prosecutorial misconduct than advancing a principled expansion of the scope of double jeopardy or a conscious effort to limit the holding in Dowling.

A more difficult question that Grady failed to address was whether Garrett's multilayered conduct approach to using prior offenses in subsequent prosecutions retained any viability. Garrett approached the question of

83. Grady, 495 U.S. at 527 (Scalia, J., dissenting).
84. Id. at 524-25 (O'Connor, J., dissenting). Justice O'Connor charged that Grady "effectively renders our holding in Dowling a nullity in many circumstances." Id. at 525.
whether a CCE prosecution could incorporate prior prosecuted conduct essentially as a Blockburger question, determining that double jeopardy does not prohibit using the earlier offenses as predicates for the later conviction because Congress intended to create a separate offense in the CCE provision.85 Adopting a similar approach in Grady, Justice Scalia dissented on the ground that Blockburger was the established test for ascertaining whether successive prosecutions violated the Double Jeopardy Clause.86 Justice Scalia argued that the elements test “best gives effect to the language of the Clause, which protects individuals from being twice put in jeopardy ‘for the same offence,’ not for the same conduct or actions.”87

The majority opinion in Grady criticized Justice Scalia’s argument in favor of applying Blockburger as the exclusive test of double jeopardy violations because all of the cases that he cited involved multiple punishments, not successive prosecutions.88 Although that is superficially true, before Grady the Court had never fully distinguished between the two forms of double jeopardy protection, and had never held that they required different forms of analysis. Grady overlooked Garrett’s entire application of Blockburger to a successive prosecution case, and made no attempt to reconcile the same conduct test with Garrett’s analysis.

B. The Lower Courts Constrict Grady

As Justice Scalia proposed in his Grady dissent and exemplified in Garrett, Grady was irreconcilable with the application of the Blockburger test for successive prosecutions unless its rationale was limited to a narrow range of cases. After Grady, one possible approach to Garrett would be to limit the use of prior prosecuted conduct to situations in which the second proceeding involved transactions occurring after the first prosecution. In Diaz v. United States,89 the Court suggested such an approach by recognizing an exception to double jeopardy where the crime prosecuted in the second prosecution had not been ripe for prosecution at the time of the first criminal trial.90 Such an approach would require the government to present affirmative evidence of continuing criminal activity after the first prosecution, or newly discovered evidence not previously available upon the exercise of due diligence. This approach would likely prevent subsequent prosecutions when the government’s evidence concerns activity occurring only before the first trial.

85. 471 U.S. at 779. Grady almost completely ignored Garrett, citing it only once for the proposition that Blockburger “was developed ‘in the context of multiple punishments imposed in a single prosecution.’ ” 495 U.S. at 516.
86. Grady, 495 U.S. at 528 (Scalia, J., dissenting).
87. Id. at 529 (Scalia, J., dissenting).
88. Id. at 517 n.8.
89. 223 U.S. 442 (1912).
90. Id. at 448-49. The defendant was prosecuted for assault and battery, and when the victim died after the first trial, the government brought murder charges.
Most lower courts, however, rejected such an approach to reconciling Grady and Garrett. They opted instead to read Grady narrowly.\textsuperscript{91} In United States v. Esposito,\textsuperscript{92} the Court of Appeals for the Third Circuit considered whether double jeopardy barred a second prosecution for the underlying substantive offenses after the defendant was acquitted on a RICO charge based on those underlying offenses.\textsuperscript{93} While the lower courts had unanimously held that RICO is a separate offense from any predicate offenses, Esposito presented a different scenario in two respects: first, the defendant was tried for the RICO violations before the substantive offenses, making this a "reverse" RICO prosecution; second, none of the crimes charged in the second indictment occurred after the first trial, and all could have been brought together in the first indictment.

The Third Circuit found the order of prosecution to be unimportant because the Congressional intent in enacting RICO makes it abundantly clear that the statutes create different crimes that may be prosecuted separately without violating double jeopardy.\textsuperscript{94} The circuit court then held that Garrett remained as controlling law, and found that the same conduct test did not "derogate from the Garrett holding."\textsuperscript{95}

The Third Circuit never considered how Esposito differed from Garrett factually, especially that Esposito's second prosecution did not involve continuing criminal conduct after the first trial. Instead, the circuit court merely asserted that Grady did not affect the Garrett analysis of criminal prosecutions involving complex statutes without attempting to reconcile Grady and Garrett.\textsuperscript{96} The Esposito court tried to rationalize its conclusion by noting that

\textsuperscript{91} See United States v. O'Connor, 953 F.2d 338, 342-43 (7th Cir.) (Grady did not affect the holding in Garrett), cert. denied, 112 S. Ct. 1979 (1992); United States v. Evans, 951 F.2d 729, 737 (6th Cir. 1991) (case more nearly resembles Garrett than Grady), cert. denied, 112 S. Ct. 1966 (1992); United States v. Arnoldt, 947 F.2d 1120, 1126 (4th Cir. 1991) (Grady governs the paradigmatic single course of conduct case, not RICO or CCE prosecutions), cert. denied, 112 S. Ct. 1666 (1992); United States v. Gonzalez, 921 F.2d 1530, 1537-38 (11th Cir.) (Grady does not overrule Garrett, but in fact cites it), cert. denied, 112 S. Ct. 178 (1991); United States v. Esposito, 912 F.2d 60, 65 (3d Cir. 1990) (Grady and Garrett are reconcilable), cert. dismissed, 111 S. Ct. 806 (1991); United States v. Pungitore, 910 F.2d 1084, 1109 (3d Cir. 1990) (Grady logically extends only to offenses arising from a single discrete event).

\textsuperscript{92} 912 F.2d 60, cert. dismissed, 111 S. Ct. 806 (1991).

\textsuperscript{93} Id. at 61. The first indictment charged the defendant with conspiracy to violate RICO and participation in a racketeering enterprise involving drug distribution. The second indictment charged drug distribution involving the same transactions as alleged in the first indictment. Id.

\textsuperscript{94} Id. at 63 ("[]Nothing in the legislative history suggests that Congress intended RICO to be a substitute for the predicate offense; instead, that history unequivocally demonstrates Congress saw RICO as a new and additional enforcement tool.").

\textsuperscript{95} Id. at 65.

\textsuperscript{96} See Scott Taylor Sheffer, "Reverse RICO" Double Jeopardy Protection under United States v. Esposito: Someone's in the Kitchen with Grady, but It's Not the Third Circuit, 1991 B.Y.U. L. REV. 1107, 1120 ("The Third Circuit's application of Grady was flawed and its outcome is insupportable.").
any other double jeopardy analysis would effectively require the government to bring all charges in a single prosecution, resulting in unwieldy trials involving multiple defendants and charges.\textsuperscript{97} Esposito made it clear that \textit{Grady} would not have an immediate impact on successive prosecutions using complex criminal statutes that involve multilayered conduct.

While the Supreme Court might ignore Garrett in \textit{Grady}, the lower courts, in accordance with the Third Circuit's approach in \textit{Esposito}, generally refused to accord \textit{Grady} a broad impact on the scope of the Double Jeopardy Clause by relying on Garrett's analysis. In United States v. Gonzalez,\textsuperscript{98} the Court of Appeals for the Eleventh Circuit held that \textit{Grady} applies only to cases involving "single act crimes," while Garrett permits the use of previously prosecuted conduct in prosecutions for complex crimes, such as RICO.\textsuperscript{99} In United States v. Arnold,\textsuperscript{100} the Court of Appeals for the Fourth Circuit confined \textit{Grady} to a limited range of cases, reasoning that "[w]hen grappling with a complex, multilayered-conduct statute such as RICO, the government must be given reasonable discretion in setting and pursuing its strategy."\textsuperscript{101} The circuit court did not want to adopt a rule that could require the government to forego prosecuting predicate acts while it waited to determine whether or not to bring charges under one of the complex criminal statutes.\textsuperscript{102} The Fourth Circuit even recognized that "\textit{Grady} does not limit itself to a specific class of crimes,"\textsuperscript{103} yet the court was unwilling to apply the same conduct test beyond the narrow range of cases involving a single transaction to prosecutions that use conduct for which a person has already been tried and convicted. The Court of Appeals for the Second Circuit was the only court to go against the tide of restrictive interpretation of \textit{Grady}. In United States v. Calderone,\textsuperscript{104} that court held that "the 'same conduct' test announced in \textit{Grady} applies to all double jeopardy claims arising in the context of successive prosecutions."\textsuperscript{105}

\textsuperscript{97} 912 F.2d at 67. It is not clear from the opinion why considerations of judicial economy and practicality should determine whether a defendant can assert a constitutional right. See United States v. Calderone, 917 F.2d 717, 723 (2d Cir. 1990), rev'd, 112 S. Ct. 1657 (1992) (Newman, J., concurring) ("I doubt if the double jeopardy analysis should become less rigorous simply because Congress has defined more complicated crimes.").

\textsuperscript{98} 921 F.2d 1350.

\textsuperscript{99} Id. at 1537-38.

\textsuperscript{100} 947 F.2d 1120.

\textsuperscript{101} Id. at 1127.

\textsuperscript{102} Id.; see O'Connor, 953 F.2d at 344 (legitimate requirements of law enforcement make a compelling case for permitting deferral of prosecutorial decisions under RICO). O'Connor reached a conclusion similar to Esposito, holding that Garrett is not limited to cases in which the criminal conduct continues beyond the first trial. Id.

\textsuperscript{103} Arnold, 947 F.2d at 1127.

\textsuperscript{104} 917 F.2d 717 (2d Cir. 1990), rev'd, 112 S. Ct. 1657 (1992).

\textsuperscript{105} Id. at 721.
C. Grady Skates on Thin Ice: United States v. Felix

The Supreme Court rejected a broad application of Grady two terms later in United States v. Felix.\(^{106}\) The defendant was convicted of attempted manufacture of methamphetamine in August, 1987, in a federal district court in Missouri. Thereafter, he was convicted in a federal district court in Oklahoma of conspiracy and substantive charges of possessing and manufacturing methamphetamine between May and August, 1987, in Oklahoma. In the Missouri trial, the government introduced evidence under Federal Rule of Evidence 404(b) of the defendant's involvement in manufacturing methamphetamine in Oklahoma in order to establish intent.\(^{107}\) In the Oklahoma indictment, two of the nine overt acts alleged were conduct for which the defendant had been prosecuted in Missouri.\(^{108}\) The Court of Appeals for the Tenth Circuit reversed certain counts of the Oklahoma conviction because "the significant duplication of conduct proved in each trial" meant that the defendant's conviction violated the same conduct test articulated in Grady.\(^{109}\)

The Supreme Court first considered the issue of whether use of the Oklahoma conduct in the Missouri trial bars a subsequent prosecution for that conduct. It found that the defendant was not prosecuted in Missouri for the Oklahoma conduct because "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct."\(^{110}\) The Court then turned to the harder question of whether conduct for which a defendant has already been convicted can be alleged as an overt act to prove a separate conspiracy charge. The Court noted that, "[t]aken out of context, and read literally," Grady's same conduct test would likely prohibit the second prosecution.\(^{111}\)

Yet the Court "decline[d] to read the language so expansively, because of the context in which Grady arose and because of difficulties which have already arisen in its interpretation."\(^{112}\) Instead, the Court distinguished

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107. The defense in the Missouri trial was that the defendant had acted "'under the mistaken belief that he was working in a covert DEA operation.'" Id. at 1380 (quoting United States v. Felix, 867 F.2d 1068, 1074 (8th Cir. 1989)). The government raided the methamphetamine lab on July 13, 1987, but the defendant avoided arrest by hiding in nearby woods. Id.
108. The two overt acts involved providing money to purchase chemicals and equipment for manufacturing methamphetamine, and possession of the chemicals and equipment. Id.
109. Id. at 1381.
110. Id. at 1383. The Court noted that the principle adopted in Dowling v. United States, 493 U.S. 342 (1990), controls the question of whether introduction of evidence of other crimes constitutes a double jeopardy violation. Felix, 112 S. Ct. at 1383 n.3. Dowling specifically dealt with the collateral estoppel effect of introducing evidence of previously acquitted conduct under Rule 404(b), which is not an issue in Felix because the defendant had not yet been prosecuted for the Oklahoma conduct at the time of the Missouri trial. Id.
111. Felix, 112 S. Ct. at 1383-84.
112. Id. at 1384.
between the simple factual context of *Grady* and its predecessors, and precedents that uphold the rule permitting separate prosecutions for conspiracy and the underlying substantive offense.\textsuperscript{113} The primary precedent the Court relied on to support the distinction between cases arising out of a single course of conduct and prosecutions for engaging in multilayered conduct was *Garrett*. The Court found that *Grady* was "less helpful" once the circumstances proceed beyond the lesser included offense analysis endorsed in that decision.\textsuperscript{114}

The Court never explained why *Grady* should be limited to prosecutions arising out of a single course of conduct, beyond its desire to maintain what it saw as a long-standing rule permitting separate prosecutions of a conspiracy and its underlying offense. Moreover, the Court refused to give any guidance as to how *Grady* should be understood even when it was applicable, stating only that it was difficult to discern the difference between the same transaction test that it had rejected and the same conduct test adopted in *Grady*.\textsuperscript{115} Although the Court sought to limit its holding in *Felix* to the straightforward case of successive prosecutions for conspiracy and a substantive offense,\textsuperscript{116} its refusal to read *Grady* expansively sent a clear signal that the same conduct test was an aberration that should not be given weight beyond a restricted range of cases.

While the initial question had been whether *Garrett* survived *Grady*, the issue shifted to whether *Grady* had any precedential value after *Felix*. Justice Scalia, who would later write the majority opinion sending the same conduct test to its repose, displayed considerable prescience about *Grady*'s viability in his dissent in that case, stating that an opinion "so unsupported in reason and so absurd in application is unlikely to survive."\textsuperscript{117}

**D. Blockburger's Ascendancy: United States v. Dixon**

*Grady* survived its first attack in *Felix* bloodied and somewhat bowed. The Court had established a two-tier analysis for double jeopardy claims raised in successive prosecution cases, assuming that the prosecution passes the initial

\begin{itemize}
  \item \textsuperscript{113} *Id.* ("But long antedating any of these cases, and not questioned in any of them, is the rule that a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes."). *See* Pinkerton v. United States, 328 U.S. 640, 643 (1946) (classic understanding of conspiracy charge is that defendant is prosecuted for the agreement to commit the crime, which is distinct from the crime itself).
  \item \textsuperscript{114} *Felix*, 112 S. Ct. at 1385.
  \item \textsuperscript{115} *Id.*
  \item \textsuperscript{116} *Id.* ("We think it best not to enmesh in such subtleties the established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself.").
  \item \textsuperscript{117} *Grady*, 495 U.S. at 543 (Scalia, J., dissenting).
\end{itemize}
Blockburger analysis. If the prosecution arose from a single course of events, then the question was whether the succeeding case violated Grady's proscription on prosecuting the same conduct in a second proceeding. If the case involved multilayered conduct, then Felix and Garrett would permit a second prosecution if the crimes are different under the Blockburger test. The question, therefore, was assessing the nature of the criminal conduct at issue in the prosecutions to determine which analytic model to apply. Felix did not provide any guidance in distinguishing between these two forms of conduct, and the issue was whether there was any reliable means to determine whether a second prosecution must meet the broader same conduct test.

Rather than grapple with reconciling the two forms of analysis, the Court opted to overrule Grady in United States v. Dixon. Dixon adopts the Blockburger test as the exclusive guide to the double jeopardy analysis, but the majority could not even agree on how that seemingly straightforward test should be applied. Instead of bringing lucidity to the double jeopardy inquiry, however, the Court continued its tradition of adopting a shifting analysis that defies consistent application.

1. Factual Background

The Court considered two companion cases arising out of criminal contempt prosecutions for violating judicial orders, and subsequent prosecutions for violating the underlying substantive provisions that were the subject of the contempt proceedings. In the first case, Alvin Dixon was arrested for murder and released on bail; he was then indicted for drug distribution while out on bail. A condition of his release on the murder charge was that he not commit any criminal offense, and violation of the release order would

118. Felix did not question Grady's analysis of Blockburger's role as the initial step in the double jeopardy analysis. Justice Scalia's dissent in Grady, which was joined by Chief Justice Rehnquist, had argued that Blockburger should be the sole test of whether a double jeopardy violation exists. The Chief Justice's opinion in Felix, however, makes no mention of that position. That may be explained by the fact that Felix's limitation of Grady permits courts to apply the Garrett analysis, which is essentially an application of Blockburger, to determine whether the complex criminal statute creates a different offense from the underlying predicate offenses. See supra text accompanying note 65 (reviewing Garrett double jeopardy analysis).

119. See United States v. Maza, 983 F.2d 1004, 1011 (11th Cir. 1993) (for successive prosecutions, question of whether defendant is being prosecuted for the same offense requires a "determination that the underlying facts that gave rise to the first prosecution are, or are not the sole basis for the second"); McIntyre v. Trickey, 975 F.2d 437, 442 (8th Cir. 1992) (Grady applies "where criminal activity limited to a 'single course of conduct' rather than certain types of 'multilayered conduct'"); Sharpton v. Turner, 964 F.2d 1284, 1289 (2d Cir.) ("Nothing in Grady, as illuminated by Felix, would prevent proof of offense A by evidence of conduct that is a lesser-included offense B within a previously prosecuted greater offense C.").

120. 113 S. Ct. 2849 (1993).

121. Id. at 2853.
subject him to prosecution for contempt of court.\textsuperscript{122} Dixon was convicted of violating the release order by engaging in the drug violation contained in the later indictment and sentenced to 180 days in jail.\textsuperscript{123} He then moved to dismiss the drug indictment on double jeopardy grounds.\textsuperscript{124}

The second defendant, Michael Foster, was subject to a civil protection order (CPO) issued at the request of his estranged wife.\textsuperscript{125} The order required that Foster not “molest, assault, or in any manner threaten or physically abuse” his wife.\textsuperscript{126} The superior court held a contempt hearing to consider whether three alleged threats and two alleged assaults violated the CPO,\textsuperscript{127} and the wife’s attorney prosecuted the matter.\textsuperscript{128} Although the government did not participate in the prosecution, it was aware of the alleged violations because a grand jury was investigating some of the same conduct.\textsuperscript{129} The court acquitted Foster of violating the CPO for the three threats, and found him guilty on the two assaults.\textsuperscript{130} The government then procured a five-count indictment against Foster, charging him with simple assault, threatening to injure or kidnap, and assault with intent to kill, with each count based on one of the five incidents considered in the CPO contempt proceedings.\textsuperscript{131} The trial court refused to dismiss the subsequent indictment on double jeopardy grounds.\textsuperscript{132}

2. \textit{The Blockburger Analysis}

The Court first held that the Double Jeopardy Clause applies to nonsummary criminal contempt proceedings in the same manner as it does to any other criminal prosecution.\textsuperscript{133} That leads to the \textit{Blockburger} analysis, in which

\begin{itemize}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} at 2853-54.
\item \textsuperscript{126} \textit{Id.} at 2854.
\item \textsuperscript{127} The alleged threats took place on November 12, 1987, and March 26 and May 17, 1988, while the alleged assaults took place on November 6, 1987 and May 21, 1988. \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.} at 2855. The Court had to consider the question of the application of double jeopardy to criminal contempt because courts traditionally had not issued injunctions or orders prohibiting violations of other legal provisions. Nevertheless, the application of the constitutional protection was easily decided: “We think it obvious, and today hold, that the protection of the Double Jeopardy Clause likewise attaches” to contempt proceedings. \textit{Id.} Although judicial injunctions directing a person to obey the law are a recent phenomenon, they are widely used in the securities context, in which the Securities and Exchange Commission will usually settle cases with the issuance of an administrative or judicial injunction prohibiting the defendant from committing future violations of specific provisions of the securities laws. See William R. McLucas et al., \textit{Settlement of Insider Trading}
the Court compared the elements of the contempt violation with those of the underlying substantive criminal provisions to find that double jeopardy prohibited the subsequent prosecution of Dixon and one count of Foster's indictment. On this point, the Court splintered over the proper application of the same elements test. Only Justice Kennedy joined Justice Scalia's opinion on the application of the Blockburger test, while Justices White, Blackmun, Stevens, and Souter concurred in finding a double jeopardy violation while rejecting the decision to overrule Grady. Chief Justice Rehnquist and Justices O'Connor and Thomas dissented from Justice Scalia's opinion on this point, arguing for a stricter application of Blockburger.

In Dixon's case, the entire criminal code was incorporated into the release order, a situation found comparable to the lesser included offense analysis adopted by the Court in Harris. Similarly, the first count of Foster's indictment, charging simple assault, was identical to one of the counts of conviction in the CPO contempt proceeding, which also found him guilty of a simple assault in violation of the order. By incorporating the underlying substantive criminal offenses, the contempt proceedings contain all of the elements of the subsequent proceedings. Therefore, according to Justice Scalia, the later prosecutions fail the Blockburger test because there is no new element that must be proved in the second proceeding that has not already been incorporated in the original contempt prosecution.

The other counts of Foster's indictment, however, survive the Blockburger test because they involve elements other than those at issue in the contempt proceeding. Foster was indicted for assault with intent to kill, which entails the added element of specific intent to kill which was not proved in the earlier prosecution for simple assault. Similarly, the three counts charging threats to injure or kidnap involve specific aggravating factual elements while the CPO prohibited Foster only from "in any manner threaten[ing]" his wife. On this point, Chief Justice Rehnquist and Justices O'Connor and Thomas concurred in Justice Scalia's analysis, while the other four Justices dis-

Cases with the SEC, 48 Bus. Law. 79, 86 (1992) (discussing SEC remedies, including injunctions for future violations).
135. Id. at 2853.
136. Id. at 2868. (White, J., concurring in part and dissenting in part).
137. Id. at 2879 (Blackmun, J., concurring in part and dissenting in part).
138. Id. at 2881 (Souter, J., concurring in part and dissenting in part).
139. Id. at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).
140. Id. at 2858 ("Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause.").
141. Id. at 2858-59.
142. Id. at 2859.
143. Id. at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).
presented from this application of *Blockburger* that permitted the successive prosecution of Foster.\textsuperscript{144}

Justice Scalia's application of the elements test to the different sets of charges is not entirely consistent. He ignores the fact that a required element of both Dixon's and Foster's contempt convictions is knowledge of the order prohibiting the alleged violation, which is not an element of the underlying substantive crimes.\textsuperscript{145} Using *Harris* as authority, he asserts that Dixon's drug violation "is 'a species of lesser-included offense,' "\textsuperscript{146} without explaining why the disparity in the elements that must be proved in the different prosecutions does not otherwise pass muster under *Blockburger*. Moreover, Justice Scalia then cites that very element as a reason for finding that four counts of Foster's indictment do not violate the Double Jeopardy Clause under the *Blockburger* analysis.\textsuperscript{147}

He argues that all of the elements of the substantive crimes that the government may not prosecute were included in the contempt convictions, and therefore they violate the double jeopardy protection.\textsuperscript{148} That would not be true, however, if the sequence of the prosecutions were reversed by having the substantive criminal trials before the contempt proceedings. When prosecuted in that order, then it appears that all of the elements of the first case would not be included in the second because there is no need to prove knowledge (or even the existence) of the CPO or release order, which should result in the contempt prosecution surviving a double jeopardy challenge under *Blockburger*. It is odd, however, that the temporal relationship of the proceedings should govern the application of the constitutional protection, rather than any stronger underlying principle of law.

Chief Justice Rehnquist argues that "Justice Scalia's double-jeopardy analysis bears a striking resemblance to that found in *Grady*—not what one would expect in an opinion that overrules *Grady*."\textsuperscript{149} The *Blockburger* analysis of those counts against Dixon and Foster that were reversed looks beyond just the elements of the different violations to determine whether the first prosecution incorporates the entirety of the second set of charges, engaging in a factual review of the scope of the first proceeding. In his dissent in *Grady*, Justice Scalia argued that the lesser-included offense analysis of *Harris* "occurs where a statutory offense expressly incorporates another statutory offense without specifying the latter's elements."\textsuperscript{150} That is not, however, the type of analysis undertaken in *Dixon*. Instead, Justice Scalia analyzes whether

\textsuperscript{144} Id. at 2868, 2880, 2891.
\textsuperscript{145} Id. at 2891 (Souter, J., concurring in part and dissenting in part).
\textsuperscript{146} Id. at 2857.
\textsuperscript{147} Id. at 2858-59.
\textsuperscript{148} Id. at 2858.
\textsuperscript{149} Id. at 2867 (Rehnquist, C.J., concurring in part and dissenting in part).
\textsuperscript{150} 495 U.S. at 508, 528 (1990) (Scalia, J., dissenting).
the prior contempt proceeding subsumes the elements of the later charges without simply comparing the elements of the different provisions. While that approach to the Blockburger test is not as broad as the Grady same conduct test, as Chief Justice Rehnquist alleges, it shows a greater flexibility in looking past just the elements of the two prosecutions to determine whether the Double Jeopardy Clause has been violated.

What makes Justice Scalia’s analysis even more confusing is the treatment of the other four counts in Foster’s indictment. This approach is much closer to the strict application of Blockburger advocated by Chief Justice Rehnquist. Justice Scalia finds arguably irrelevant differences between the elements of the different prosecutions of Foster to support the conclusion that the second prosecution does not violate the Double Jeopardy Clause. On the assault with intent to kill count, Justice Scalia asserts that the specific intent element differentiates it from simple assault. As Justice White points out, however, simple assault is a lesser-included offense of assault with intent to kill, so if the jury were to convict on the lesser-included offense, then the court would be barred by double jeopardy from entering a conviction on that count. The different types of intent required for the two crimes are closely related, and it is unclear why prosecution for the lesser-included offense, simple assault, is prohibited but not for the greater offense, assault with intent to kill, that incorporates it. Similarly, Justice Scalia argues that the CPO provision ordering that Foster not “in any manner threaten” is much broader than the substantive criminal provision covering threats to harm or kidnap. The alleged differences in coverage between the prohibitions on threatening between the CPO and the criminal provisions are superficial because a threat to harm or kidnap likely falls within the meaning of “in any manner threaten,” constituting a species of lesser-included offense. Nevertheless, that forms the basis for finding the requisite variation between the elements of the offenses.

As reflected by the fragmented voting in Dixon, Justice Scalia’s analysis of Blockburger applies both a more flexible approach to the same elements test that looks to whether a provision is a “species of lesser-included offense,”

151. Dixon, 113 S. Ct. at 2857.
152. Id. at 2867.
153. Id. at 2865.
154. Id. at 2858-59.
155. Id. at 2858.
156. Id. at 2877-78 (White, J., concurring in part and dissenting in part). Justice Scalia responds that this merely points out that one offense may be a lesser included offense of more than one other crime. Id. at 2859 n.7. That does not, however, address the point that preventing the government from placing a defendant at risk of being convicted a second time for the same offense is one of the underlying values the Double Jeopardy Clause seeks to protect. Id. at 2878 (White, J., concurring in part and dissenting in part).
157. Id. at 2857-58.
and the strict *Blockburger* analysis advocated by Chief Justice Rehnqust. It is unclear how much guidance lower courts can take from the decision because Justice Scalia's opinion appears to support either approach to a double jeopardy challenge.

3. *The Demise of Grady*

Upon concluding its *Blockburger* analysis, the Court then turned to the same conduct test. The Court noted that *Grady* would "undoubtedly" prohibit the subsequent prosecution of Foster on the four counts of the indictment that passed the same elements test because the government can prove only the exact same conduct in the second proceeding.\(^{158}\) Rather than considering additional limitations on *Grady*, the majority instead overruled the case. The court stated that unlike the *Blockburger* test, which "has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots."\(^{159}\) The Court expressly criticized *Grady* on the ground that none of its prior precedents supported *Grady's* expansion of the double jeopardy protection through the same conduct test.\(^{160}\)

As a justification for overruling a precedent, the Court stated that *Grady* "has already proved unstable in application," noting that the substantial exception to the same conduct test recognized in *Felix* "gave cause for concern that the rule was not an accurate expression of the law."\(^{161}\) Rather than embark on crafting yet another exception, "we think it time to acknowledge what is now, three years after *Grady*, compellingly clear: the case was a mistake."\(^{162}\) The Court asserted that *Grady* had produced "confusion" in the lower courts, which provides an additional reason to overrule the case beyond any intrinsic analytical problems in the opinion.\(^{163}\)

Although lower courts expressed frustration with the ambiguous language used for the same conduct test,\(^{164}\) even before *Felix* they had generally

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158. *Id.* at 2860.

159. *Id.*

160. *Id.* The only opinion that specifically raised the possibility that double jeopardy might bar a second prosecution for the same conduct was Illinois v. Vitale, 447 U.S. 410, 420 (1980), but the Court in *Dixon* noted that *Vitale* stated only that a second prosecution based on the same conduct would raise a substantial question under the Double Jeopardy Clause. The Court stated that it had never construed that statement "as answering, rather than simply raising, the question on which we later granted certiorari in *Grady.*" *Dixon*, 113 S. Ct. at 2862.

161. *Id.* at 2863. It is interesting to note that the majority opinion in *Felix* did not express such discomfiture with the limited reading of *Grady*, and none of the justices in the majority wrote separately to explain their unease with *Grady*.

162. *Id.* at 2864.

163. *Id.*

164. See, e.g., *Sharpton*, 964 F.2d at 1287 (*quoted in Dixon*, 113 S. Ct. at 2864) (*Grady* is "difficult to apply," and *Felix* has not made analysis easier).
limited *Grady* to cases arising from a single course of conduct. After *Felix*, the lower courts had a clear indication from the Supreme Court that *Grady* was confined to a narrow range of cases that did not prevent later proceedings which incorporated conduct considered in a prior prosecution. *Dixon* overstates the problem of confusion purportedly caused by *Grady*. Justice Scalia, even acknowledges that the same conduct test would produce an uncontestable decision under the Double Jeopardy Clause to bar the successive prosecution of *Foster*. In dissent, Justice Souter raises a more troublesome issue with the exclusive reliance on the *Blockburger* test engendered by overruling *Grady*. He argues that applying the same elements test as the sole determinant of the constitutional protection works "an unprecedented truncation of the protection afforded by the Double Jeopardy Clause against successive prosecutions, by transferring the government's leeway in determining how many offenses to create to the assessment of how many times a person may be prosecuted for the same conduct." The *Blockburger* test arose in the context of multiple punishment cases, not successive prosecutions, and the Court made clear in *Whalen v. United States* that it is only a rule of statutory construction in that context. *Dixon* elevates the same elements test to the governing constitutional principle for successive prosecutions, but to the extent the rule is applied strictly, as advocated by Chief Justice Rehnquist, it depends on the legislature's definition of the elements of a crime for the substantive protections afforded by the Double Jeopardy Clause.

**E. Applying Dixon's Broader Lesser-Included Offense Analysis to Comprehensive Criminal Statutes**

In the broader application of the lesser-included offense analysis in *Dixon*, the Court examined whether the elements of one offense are incorporated into another, rather than a strict comparison of the elements of the two provisions. That approach may permit courts to engage in a broader inquiry when double jeopardy claims are raised concerning whether comprehensive statutory schemes incorporate more narrowly drawn provisions. Statutes that require the government to prove separate underlying offenses that have

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165. See *supra* text accompanying note 119 (reviewing cases permitting subsequent prosecutions for multilayered conduct).
166. See, e.g., *McIntyre*, 975 F.2d at 442 (*Grady* only applies to crimes involving single course of conduct rather than multilayered conduct); *Dixon*, 113 S. Ct. at 2889 (Souter, J., concurring in part and dissenting in part) (overruling *Grady* "is not justified by the fact that two Courts of Appeals decisions have described it as difficult to apply").
168. *Id.* at 2890 (Souter, J., concurring in part and dissenting in part).
different elements from the charged offense have generally survived double jeopardy challenges, even before the Court overruled Grady. Lower courts have found that CCE,\textsuperscript{170} RICO,\textsuperscript{171} and Money Laundering\textsuperscript{172} offenses are separate from the substantive offenses on which the statutes are built.

For statutes that do not explicitly incorporate other crimes as an element of the offense, the question after Dixon is how broad is the unit of conduct encompassed by the statutes at issue. Previously, under Grady, if two statutes reached a single execution of criminal conduct through a discrete act, then it was unlikely that the same conduct could be used in a successive prosecution. The issue under the Double Jeopardy Clause is now primarily one of statutory interpretation through the Blockburger analysis: how broadly does the statute in the successive prosecution incorporate the elements that may be proved in a previous criminal action, without subsuming the statute at issue in the prior case? That analysis is similar to the double jeopardy protection against multiplicitous indictments.\textsuperscript{173} The court must establish the unit of conduct proscribed by the statute to determine whether the second prosecution has been the subject of the previous criminal action. If the statutes cover the same unit of conduct, then under Dixon they may be a species of lesser included offense that would bar the second prosecution under the Double Jeopardy Clause.

The multiplicity issue arises in two contexts: multiple charges under the same statute, and charges under separate provisions. In both instances, the question is whether the indictment seeks to punish the same unit of conduct. If an indictment is multiplicitous, then the government cannot seek any greater punishment in successive prosecutions than a court could impose in a single proceeding. The Supreme Court noted that, "Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in

\textsuperscript{170} See United States v. McHan, 966 F.2d 134 (4th Cir. 1992) (guilty plea to conspiracy to possess marijuana does not bar subsequent CCE indictment in which conspiracy is one of the predicate acts); United States v. Evans, 951 F.2d 729, 732 (6th Cir. 1991) (Grady does not disturb holding in Garrett that CCE charge not barred when underlying conduct subject of prior prosecution), cert. denied, 112 S. Ct. 1966 (1992); United States v. Erwin, 793 F.2d 656, 669 (5th Cir.) (prior RICO prosecution does not bar CCE indictment involving same underlying offenses), cert. denied, 479 U.S. 991 (1986).

\textsuperscript{171} See O'Connor, 953 F.2d at 343 (conviction under RICO for acts already prosecuted not barred by double jeopardy); Arnoldt, 947 F.2d at 1126 (RICO prosecutions target multilayered conduct and not barred by double jeopardy).

\textsuperscript{172} See United States v. Edgmon, 952 F.2d 1206, 1213 (10th Cir. 1991) (under Garrett analysis, Money Laundering is separate crime from the specified unlawful activity charged in indictment), cert. denied, 112 S. Ct. 3037 (1992).

\textsuperscript{173} See United States v. Lemons, 941 F.2d 309, 317 (5th Cir. 1991) ('Multiplicity' is charging a single offense in more than one count of an indictment.""); Project, Twenty-Second Annual Review of Criminal Procedure, 81 GEO. L.J. 853, 1084 (1993) [hereinafter 22nd Criminal Procedure Project] ("Indictments charging a single offense in different counts are multiplicitous.")
successive proceedings.” When there are multiple charges under the same statute, the question is how far the provision will permit the conduct at issue to be divided into separate criminal charges. When different statutes are charged, the Blockburger test furnishes the basic approach to determining whether proof of a violation of both statutes requires evidence of different elements. Multiplicity occurs only in a single prosecution because the defendant is challenging the government’s power to seek multiple punishments in a single proceeding.

Dixon may add a new layer to the Blockburger analysis of both multiplicity and successive prosecutions by requiring courts to go beyond simply analyzing the elements of the statutes to determine the unit of conduct covered by the provision. Ascertaining the unit of conduct in conspiracy cases is a paradigm of the continued need to consider the underlying conduct in connection with the double jeopardy analysis. If the government first charges a defendant with a substantive crime, and then conspiracy to commit that crime, Felix permits the subsequent prosecution. If, however, the government brings successive conspiracy prosecutions, the issue is whether there is more than one agreement.

In United States v. Gambino, the Court of Appeals for the Second Circuit held that,

[t]he relevant inquiry for double jeopardy purposes in the context of successive conspiracy prosecutions is whether the second prosecution is for a conspiracy distinct from that previously prosecuted. If the second prosecution is for a distinct conspiracy, there is no double jeopardy problem regardless of an overt act or other evidentiary overlap. Courts look to various factors to determine whether the conspiracies charged are truly distinct, including the overlap of time, place, participants, and overt

175. See Anne Bowen Poulin, Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model, 25 CONN. L. REV. 95, 124 (1992) (arguing for supplementing Grady by adopting the totality of the circumstances test used to determine whether there is more than one conspiracy).
176. See United States v. Thornton, 972 F.2d 764, 766 (7th Cir. 1992) (“the double jeopardy clause prohibits multiple prosecutions for the same offense, and because the agreement is the sine qua non of conspiracy, if the government twice prosecutes an individual under the same statute for what essentially constitutes one agreement, this must constitute prosecution for the same offense in violation of double jeopardy.”).
177. 968 F.2d 227 (2d Cir. 1992).
178. Id. at 231. The Second Circuit had initially reversed the convictions on certain counts on the ground that Grady prohibited a second prosecution that used previously prosecuted conduct as proof of an overt act in furtherance of the conspiracy. 920 F.2d 1108, 1112 (2d Cir. 1990). The circuit court had earlier read Grady’s same conduct test expansively in United States v. Calderone, 917 F.2d 717, 720-21 (2d Cir. 1990). The Supreme Court reversed both cases for reconsideration in light of Felix. 112 S. Ct. 1657 (1992).
acts charged in the two cases, and the underlying criminal offenses. If there is only one agreement, then there can only be one conspiracy, so any successive prosecution or attempt to charge two conspiracies would contravene Blockburger because the elements of the offense cover the entire course of conduct, no matter how multilayered it might be.

The harder case is where the charge in the second prosecution requires the government to prove as an element of the case an agreement which was the subject of a prior prosecution. The Supreme Court noted the “conceptual closeness” of the drug conspiracy statute with the CCE provision, which requires proof that a defendant acted “in concert” with five or more persons. If the agreement is the same in both prosecutions, and if the agreement is the primary element of both prosecutions, then even after Dixon a second prosecution should be barred because the elements are incorporated in the prior proceeding. In United States v. Reed, the Court of Appeals for the Eleventh Circuit held that double jeopardy barred a CCE prosecution when the defendant had previously been convicted of conspiracy to import drugs. A number of statutes, especially in the white collar criminal area, can reach

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180. This scenario is especially relevant when the government prosecutes a leader of a large criminal organization who in most cases will not have been directly involved in the actual criminal activity. Conspiracy charges are appropriate in that circumstance because they permit the government to attribute the foreseeable acts of all co-conspirators to the leadership of the conspiracy.

181. Jeffers v. United States, 432 U.S. 137, 145 n.1 (1977) (plurality opinion). Although the Court suggested that the drug conspiracy provision, 21 U.S.C. § 846, is a lesser included offense of CCE, the Court did not squarely decide that prosecution under both provisions is a double jeopardy violation. Id. at 149. The Court held that there was no constitutional violation because the defendant had asked to be tried separately on each count. The dissent in Jeffers agreed that § 846 is a lesser included offense of CCE, and would have found a double jeopardy violation. Id. at 158 (Stevens, J., dissenting).


183. Id. at 1575-76. The government charged the defendant under 21 U.S.C. § 963 in the second prosecution, which is similar to 21 U.S.C. § 846, the statute at issue in Jeffers. The Eleventh Circuit found that the prosecution under § 963, rather than § 846, was only a minor difference that did not affect the double jeopardy analysis. Id. at 1576 n.3. The Court of Appeals for the Fifth Circuit has also held that a conspiracy under § 846 is a lesser-included offense of CCE for the double jeopardy analysis. United States v. Stricklin, 591 F.2d 1112, 1123 (5th Cir.), cert. denied, 444 U.S. 963 (1979).

In United States v. Deshaw, 974 F.2d 667 (5th Cir. 1992), a case decided after Felix but before Dixon, the Court of Appeals for the Fifth Circuit held that the Double Jeopardy Clause does not prohibit a subsequent prosecution for a RICO conspiracy even when the same conduct formed the basis for prior drug importation and distribution conspiracy charges on which the defendant was acquitted. Id. at 671. The circuit court noted that the previous conspiracy prosecutions involved conduct “sufficiently distinct from the conduct needed to support a RICO charge.” Id. at 673. The initial prosecution was for violations of 21 U.S.C. §§ 846 and 963, while the second case involved 18 U.S.C. § 1962(d), the RICO conspiracy provision. Congress recently added a Money Laundering conspiracy
broad, ongoing conduct that does not explicitly subsume other criminal conduct. For example, the Major Fraud statute reaches conduct by any person who knowingly executes a scheme to defraud the United States, or obtain money or property by false pretenses, as a contractor or subcontractor with the federal government in which the property or services at issue are worth one million dollars or more.\textsuperscript{184} Similarly, the bank fraud, mail fraud, and wire fraud statutes prohibit schemes to defraud, or obtaining money by false pretenses, that are committed against banks and through various jurisdictional means.\textsuperscript{185} False statements to the government and to financial institutions are also punishable separately,\textsuperscript{186} and a fraudulent scheme may involve interstate transportation of stolen property or securities.\textsuperscript{187}

Any fraudulent scheme may entail a number of separate acts designed to create and consummate the plan to obtain the money or benefits sought, which could take place over a number of months or years. The different acts that are part of continuing criminal conduct can be the subject of separate criminal charges. For example, a scheme to use stolen securities as collateral for a bank loan issued to fund a construction project could result in a variety of charges reaching each step in the transaction, multiple charges for the same acts, and charges under the complex criminal statutes.\textsuperscript{188} Moreover, small variations on the basic scenario, such as the source of the funds or the involvement of insiders in regulated industries, will expand the potential criminal charges exponentially.\textsuperscript{189}

\textsuperscript{184} The new Money Laundering provision is similar to the RICO conspiracy section.


\textsuperscript{188} Possible charges in this simple example include interstate transportation of stolen securities, 18 U.S.C. § 2314; bank fraud, 18 U.S.C. § 1344; false statement to a financial institution, 18 U.S.C. § 1014; Money Laundering, 18 U.S.C. § 1956; RICO, 18 U.S.C. § 1962; and, given the likelihood that telephone calls, wire transfers, and letters were used, the mail fraud and wire fraud statutes apply, 18 U.S.C. §§ 1341, 1343.

\textsuperscript{189} For example, if the source of any funds relates to illegal drug transactions, then the CCE provision may apply. If an officer or director of a bank is involved as a coconspirator in approving the loan, then additional charges can be brought under the provisions relating to bank bribery, 18 U.S.C. § 215 (1988 & Supp. II 1990); misapplication of bank funds, 18 U.S.C. § 656 (1988 & Supp. II 1990); and false entries in the books and records of a financial institution, 18 U.S.C. § 1005 (1988 & Supp. II 1990). Under federal law, a person who aids and abets a crime may be punished as a principal, so that other participants in the illegal conduct can also be charged with the insider's crimes. 18 U.S.C. § 2 (1988).
The question is whether the government could bring successive actions charging part of the scheme in one prosecution and the overall violation in a separate action. The fraud statutes can be analogized to the complex criminal statutes that cover continuing activity, yet the provisions do not require the government to prove the more elaborate criminal structure underlying a RICO, CCE, or Money Laundering violation. Those provisions require proof of separate criminal activity and, for CCE, involvement of five or more persons in the enterprise, while the fraud statutes can be proven through a single execution of the scheme to defraud, without proof of violation of any other statute. Whether a statute permits successive prosecutions is of greatest importance at the charging stage, where the government is determining when to bring its indictment and how broad its charges against a defendant should be. The government must be concerned with whether lower courts will interpret Dixon broadly to preclude bringing a second prosecution, and what unit of conduct the statutes encompass in charging a criminal violation.

The circuit courts have recently interpreted the bank fraud statute to prohibit multiple counts when the conduct is related to a single execution of a fraudulent scheme. In United States v. Lemons, the Court of Appeals for the Fifth Circuit held that although a scheme to fraudulently obtain a loan involved a number of different steps, there was “but one performance, one completion, one execution of that scheme.” The circuit court defined the unit of conduct proscribed by the statute broadly to include various acts related to the illegal transaction. The court did not, however, define what constitutes the “execution” of the fraudulent scheme. For example, successive prosecutions for bank fraud are permissible when different banks are involved, even though both banks participated in the same underlying

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190. Congress recently adopted a Financial Crime Kingpin provision, 18 U.S.C. § 225 (Supp. II 1990), as part of The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, § 2510(a), 104 Stat. 4789, 4863, which is directed against leaders of large scale criminal enterprises involving gross receipts of $5 million or more. The statute is patterned after RICO and Money Laundering by requiring proof of a series of violations of other criminal statutes as an element of the crime. The continuing criminal violations must be committed by at least four persons acting in concert, which is similar to the CCE requirement.

191. 18 U.S.C. § 1344 provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice—
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

192. 941 F.2d 309 (5th Cir. 1991).

193. Id. at 318. The scheme involved a multi-million dollar real estate loan, and the defendant was convicted of eight separate counts of bank fraud involving various transactions leading up to the disbursement of the loan proceeds. Id. at 312-13.
transaction.\textsuperscript{194} Similarly, separate checks deposited at a bank as part of a checkkiting scheme are distinct executions of the fraudulent scheme permitting multiple counts.\textsuperscript{195} When only one bank was involved in a single real estate transaction funded by a single loan, the Court of Appeals for the First Circuit held in United States v. Lilly\textsuperscript{196} that 29 separate bank fraud counts could not be brought even though there were 29 different properties involved in the transaction.\textsuperscript{197}

If the unit of conduct covered by a statute is broadly defined, then after Dixon it is more likely that other related provisions will be considered a species of lesser included offenses to the more comprehensive statute. For example, in United States v. Seda,\textsuperscript{198} the Court of Appeals for the Second Circuit held that the statute prohibiting false statements to financial institutions\textsuperscript{199} was "simply a species of bank fraud," and therefore the government could not bring separate charges under the two statutes. The defendant in Seda, a bank officer, was charged with four counts each of bank fraud and

\textsuperscript{194} See United States v. Hollis, 971 F.2d 1441, 1450 (10th Cir. 1992) (same material misrepresentation to different banks permits separate counts under § 1344), cert. denied, 113 S. Ct. 1580 (1993); United States v. Farmigoni, 934 F.2d 63, 65 (5th Cir. 1991) (separate indictments in Louisiana and Mississippi involving different banks in same transaction does not violate double jeopardy), cert. denied, 112 S. Ct. 1160 (1992).

\textsuperscript{195} See United States v. Schwartz, 899 F.2d 243, 248 (3d Cir.) (separate sentences upheld for each deposit of worthless check since each constituted separate violation of § 1344), cert. denied, 498 U.S. 901 (1990); United States v. Poliak, 823 F.2d 371, 372 (9th Cir. 1987) (affirming conviction on ten counts of bank fraud for ten fraudulent checks), cert. denied, 485 U.S. 1029 (1988). The Fifth Circuit distinguished Poliak on the grounds that a check-kiting scheme was different from the fraudulent loan transactions because each check represented a separate execution while Lemons' scheme involved only one fraud conducted through a variety of steps. Lemons, 941 F.2d at 317-18. The weakness in that analysis, however, is that execution of a check-kiting scheme requires at least two checks being drawn on different accounts, so that charging each check as a violation is a broad reading of the scope of § 1344. See Brian P. Perry, Note, "Execution" of a Scheme to Defraud, An Indictment of The Bank Fraud Statute: United States v. Lemon, 61 U. CINN. L. REV. 745, 765 (1992) (discussing lack of uniformity among circuits in applying "execution" language of bank fraud statute).

\textsuperscript{196} 983 F.2d 300 (1st Cir. 1992).

\textsuperscript{197} Id. at 304. The government brought the multiple charges based on the submission of false financial statements in connection with the assignment of 29 different mortgages on condominiums to a bank to fund a loan on the development. Id. at 302. In United States v. Heath, 970 F.2d 1397 (5th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993), the Court of Appeals for the Fifth Circuit held that even though two loans were involved from one bank, they were "integrially related," and therefore involved only a single execution of a bank fraud. Id. at 1402.

\textsuperscript{198} 978 F.2d 779, 782 (2d Cir. 1992).

\textsuperscript{199} 18 U.S.C. § 1014 provides:

Whoever knowingly makes any false statements or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of [any financial institution], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.
false statements in connection with the submission of fraudulent loan applications and approval of the loans. The circuit court stated that while the different statutes passed the *Blockburger* test because they contain different elements, strict adherence to that test "is inappropriate . . . where one of the statutes covers a broad range of conduct." 200 The court found that there was no realistic likelihood of violating the more narrow provision, the false statement statute, without also violating the broader bank fraud statute, and that the legislative history did not reveal an intent to punish distinct evils in the different statutes. 201 Although *Seda* was decided before *Dixon*, it shows how the broader approach to *Blockburger* can look beyond a mechanistic comparison of the elements to determine whether a statute incorporates the elements of another provision to find a double jeopardy violation.

*Seda* essentially applies *Grady*’s same conduct test to determine if the two statutes proscribe the same unit of conduct, although the circuit court never cites *Grady*. The Second Circuit’s conclusion that the false statement provision is a lesser included offense of bank fraud is based solely on the breadth of the latter provision. *Seda* raises the question of whether other broad criminal fraud statutes, such as the Major Fraud statute, 202 subsume more narrow provisions, thereby preventing prosecutors from seeking multiple counts or bringing successive prosecutions based on the same course of conduct. 203 The analysis of the bank fraud provisions is quite different from that applied to RICO, CCE, and Money Laundering. By spelling out various offenses that are distinct elements, the complex criminal provisions avoid any problems under *Blockburger* because their elements are distinct from the underlying substantive offense. The bank fraud statute, on the other hand, is susceptible to a restrictive analysis after *Dixon* because the courts have found that it covers a broad unit of conduct that will permit only one prosecution.


201. Id. at 781-82. Oddly, the Second Circuit relied on *Whalen* as support for its decision, without ever referring to *Garrett* or *Hunter*. Those cases altered the approach in *Whalen* by finding that when statutes meet the *Blockburger* test, there is a presumption in favor of permitting prosecutions under both provisions. See supra text accompanying note 64.


203. The Major Fraud statute, 18 U.S.C. § 1031, is patterned after the bank fraud statute, 18 U.S.C. § 1344, so the courts may interpret them similarly in construing the meaning of execution of a scheme to defraud. See H.R. REP. No. 610, 100th Cong., 2d Sess. 6 (1988). The legislative history of § 1031, however, indicates that Congress limited the maximum fine for violations to $10 million to "address a concern that the government may charge in a single judicial proceeding that a large number of related incidents are separate violations . . . . This limitation does not prevent multiple proceedings, for example, where several independent schemes or artifices have been perpetrated by the same defendant." S. REP. No. 503, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5976. This statement may permit a court to find that multiple charges for each act in execution of the scheme is permissible.
F. The Confines of Dixon: Sentencing and Successive Prosecutions for the Same Conduct

The introduction of the defendant's conduct in a second proceeding is not limited solely to successive criminal prosecutions. In the federal system, the sentencing of defendants is now governed by the Sentencing Guidelines, which require courts to consider all of the defendant's "relevant conduct" and "criminal history" in arriving at the mandated sentence.\(^\text{204}\) Moreover, courts can enhance a defendant's sentence for obstructing justice in the investigation or prosecution of the offense, and mitigate a sentence for accepting responsibility for committing a crime.\(^\text{205}\) The relevant conduct provision permits a court to include crimes that are not specifically charged if they are part of the same course of conduct, or a common scheme or plan.\(^\text{206}\)

The question then arises whether a defendant can be prosecuted in a different proceeding for conduct that was incorporated into the determination of relevant conduct in a prior criminal proceeding, especially where the additional conduct increases the sentence in the prior proceeding. For example, if a defendant pleads guilty to one count of theft of property in interstate commerce, he may have his sentence increased for other thefts that were not charged by the government but were part of the same scheme.\(^\text{207}\) If the thefts occurred in another district, the government could seek a second indictment charging the other crimes that were considered as relevant conduct.

The lower courts have split over the issue of whether the use of conduct outside the offense of conviction under the Sentencing Guidelines constitutes punishment under the Double Jeopardy Clause sufficient to invoke its

\(^{204}\) UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL, §§ 1B1.3, 4 (Nov. 1992) [hereinafter SENTENCING GUIDELINES]. The relevant conduct provision requires the court to consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and . . . in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . ." Id. at § 1B1.3(a)(1)(A)-(B). The Sentencing Guidelines prescribe greater punishment for defendants with prior criminal records because they are considered more culpable. Id. at § 4, intro. comment.

\(^{205}\) Id. at §§ 3B1.2, 3C1.1.

\(^{206}\) Id. at § 1B1.3(a)(2).

\(^{207}\) See United States v. Galloway, 976 F.2d 414 (8th Cir. 1992) (en banc) (upholding statutory and constitutional authority to consider uncharged conduct in determining sentence under Guidelines), cert. denied, 113 S. Ct. 1420 (1993). A sentencing court may also consider as relevant conduct any charges on which a defendant was acquitted. See United States v. Olderbak, 961 F.2d 756, 764-65 (8th Cir.) (holding that facts underlying acquittal may be considered for sentencing purposes when facts appear reliable), cert. denied, 113 S. Ct. 422 (1992); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181 (2d Cir.) (reaffirming validity of sentence enhancement on the basis of acquitted conduct), cert. denied, 498 U.S. 844 (1990); United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989)(noting that the court considered multiple drug counts in imposing sentence, even though Count I had been dismissed).
DOUBLE JEOPARDY

protections. In United States v. Carey,208 the Court of Appeals for the Eleventh Circuit held that enhancing a defendant’s sentence for failure to appear at sentencing “did not constitute punishment for her failure to appear,” and therefore a subsequent prosecution for willfully failing to appear did not violate the Double Jeopardy Clause.209 Similarly, in United States v. Mack,210 the Court of Appeals for the Sixth Circuit permitted a subsequent failure-to-appear prosecution to proceed, stating that “[a]n enhanced sentence because of a prior conviction is no more double jeopardy than is a consideration of other relevant conduct, including the likelihood of a subsequent conviction.211 The rationale for permitting a second prosecution for conduct considered at sentencing is that the conduct is used as a consideration in evaluating the character of the defendant and the crime, but is not a separate punishment.212

The Court of Appeals for the Tenth Circuit, relying on the Grady same conduct test, took the opposite approach in United States v. Koonce,213 a case decided before Dixon. The defendant was convicted in South Dakota for distributing 443 grams of methamphetamine, and at sentencing the district judge added 963 grams that had been seized from the defendant’s Utah home to the calculation of the amount for the Guidelines sentence, effectively increasing the sentencing range by 48-58 months. The defendant was then convicted in Utah of possession with intent to distribute the 963 grams and possession of a firearm. Prior to the Utah trial, he filed a challenge to the prosecution on double jeopardy grounds, which the Tenth Circuit rejected as not ripe for review because there had not been a successive prosecution for the same conduct at that point.214 Upon conviction, the Tenth Circuit reversed the drug conviction as violative of the Double Jeopardy Clause. The court first held that the South Dakota sentencing constituted punishment, which brought that phase of prosecution under the multiple punishments prong of the Double Jeopardy Clause. Next, the Tenth Circuit found that

209. Id. at 46.
210. 938 F.2d 678 (6th Cir. 1991).
211. Id. at 681. The circuit court rejected the defendant’s argument that Grady prohibited the second prosecution because “[i]f Appellant is correct, then any consideration is a second punishment and therefore violative of the Double Jeopardy Clause.” Id. It is not clear why the circuit court even reached the double jeopardy issue because the sentence imposed was within the Guidelines range for the offense of conviction without regard to any other conduct. The sentence in the original prosecution was not enhanced because of the failure to appear, so the defendant had not been punished or subjected to any additional jeopardy.
213. 945 F.2d 1145 (10th Cir. 1992) cert. denied, 112 S. Ct. 1705 (1992) [hereinafter Koonce II].
214. United States v. Koonce, 885 F.2d 720 (10th Cir. 1989) [hereinafter Koonce I].
there was no congressional intent to permit double punishment by using the conduct in determining the sentence under the Guidelines and then in a successive prosecution.\(^{215}\) The enhancement of a defendant's sentence constituted punishment for the conduct, and therefore any subsequent prosecution for that conduct would violate \textit{Grady}.

Even though \textit{Grady} has been overruled, the analysis is arguably the same under the lesser-included offense analysis adopted in \textit{Dixon}. The trial court's consideration of the defendant's conduct in increasing the sentence is similar to introducing a separate underlying criminal violation to prove a violation of a judicial order in a contempt proceeding. In each instance, the elements of the separate substantive offense may be fully incorporated into the proceeding, and a subsequent prosecution would involve proving the same elements, thereby resembling a successive prosecution for a lesser-included offense.

Cases permitting the court to increase a sentence under the Guidelines and then allowing a subsequent prosecution on the exact same conduct on the rationale that an "enhancement" is distinct from "punishment" for double jeopardy purposes elevate form over substance. The Sentencing Guidelines require courts to impose sentences within a very specific range, and an enhancement will generally increase the sentence. Asserting that an increased term of imprisonment is only an enhancement but not punishment for the conduct is fallacious because the Guidelines do not give a court discretion to depart from the sentence outside of the prescribed range.\(^{216}\)

It is questionable whether the second prosecution should even be permitted to proceed when a defendant has been punished for conduct outside the offense of conviction under the Sentencing Guidelines, as the Tenth Circuit permitted in \textit{Koonce I}. The circuit court was technically correct that, under a strict application of \textit{Blockburger}, the Utah prosecution did not involve the same elements as that prosecuted in South Dakota. A conviction in the second case, however, could not result in the imposition of any sentence under the Double Jeopardy Clause because the defendant had already been

\(^{215}\) \textit{Koonce II}, 945 F.2d at 1151. The circuit court relied heavily on the Guidelines provision providing for grouping of closely related counts, which requires that "[a]ll counts involving substantially the same harm shall be grouped together into a single group." \textit{Sentencing Guidelines}, supra note 204, at § 3D1.2. When counts are grouped together, the Guidelines provide for aggregating the total amount of loss or illegal substance involved, and applying the appropriate sentence level based on that amount. \textit{Id.} at § 3D1.3(b). The circuit court found it illogical that a greater punishment could be imposed by bringing separate prosecutions in which the government could aggregate the amount of drugs twice while the grouping provision would provide a shorter sentence if there were only one prosecution. "The protections against prosecutorial charge manipulation strongly suggests that Congress did not intend such a result." \textit{Koonce II}, 945 F.2d at 1152.

\(^{216}\) \textit{See United States v. McCormick}, 798 F. Supp. 203, 209 (D. Vt. 1992), aff'd, 992 F.2d 437 (2d Cir. 1993) (rejecting government's argument that 13-level increase under the Guidelines was "enhancement" instead of "punishment").
punished. In *United States v. McCormick*, 217 the Court of Appeals for the Second Circuit prohibited a second prosecution on certain counts from proceeding, rather than considering the double jeopardy question after a second conviction, when the conduct at issue had been considered by another court in determining the amount of loss under the Guidelines for fixing the applicable offense level. 218 It is counterintuitive to force a defendant to defend against a second prosecution when a court is constitutionally barred from imposing a second sentence for the conduct. 219

The problem with finding a double jeopardy violation where conduct is used to increase a sentence that is later the subject of a separate prosecution is that the Sentencing Guidelines require the court to also consider a defendant’s prior criminal history in determining the appropriate offense level, with increased sentences for defendants who are repeat offenders. 220 The Supreme Court stated in *Gryger v. Burke* 221 that an increased sentence as a habitual criminal “is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes.” 222 The Guidelines also increase the punishment for defendants who are “organizer[s] or leader[s]” of criminal activity involving five or more people, 223 which is similar to the CCE provision requiring proof that five or more persons were involved in the illegal drug activity. If a sentence is increased under the Guidelines because of the defendant’s leadership role, could that preclude a subsequent criminal prosecution for CCE?

A better approach to understanding the double jeopardy implications of

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217. 992 F.2d 437 (2d Cir. 1993).

218. *Id.* at 439. The defendant was convicted of bank fraud in Connecticut, and the district court considered $4 million of losses charged in a bank fraud indictment in Vermont. The circuit court held that “Congress did not intend to allow additional punishment for conduct that was used to enhance a defendant’s offense level.” *Id.* at 440.

219. In *McCormick*, Judge Mahoney argued in dissent that the second prosecution should be permitted to proceed because the government may want to seek restitution from the defendant for the transactions that were considered by the federal district court in Connecticut in sentencing. *Id.* at 444 (Mahoney, J., dissenting). The problem with that analysis is that the restitution statute, 18 U.S.C. § 3663(a), requires that an order of restitution be “in addition to” any other penalty, if the conviction is for a felony. If double jeopardy prohibits the imposition of a sentence for conduct considered in enhancing a sentence in a prior proceeding, then there is no criminal penalty on which the restitution order could be based. Moreover, for violations of the federal securities laws for insider trading, the Securities and Exchange Commission regularly seeks disgorgement of profits in insider trading actions. See McLucas et al., *supra* note 134, at 92 (remedial tools available to Commission include disgorgement with pre-judgment interest, which is sought “in the vast majority of cases”).

220. See *Sentencing Guidelines*, *supra* note 204, at § 4A1.1-.2 (criminal history category determined by each prior sentence; prior sentences in unrelated cases are counted separately); § 3B1.1 (increasing offense level depending on defendant’s role in criminal activity).

221. 334 U.S. 728 (1948).

222. *Id.* at 732; see *United States v. Thomas*, 930 F.2d 12, 13-14 (8th Cir. 1991) (circuit courts approve enhanced sentence based on higher criminal history category as not violating double jeopardy).

using conduct to increase a sentence under the Sentencing Guidelines is to focus on Dixon's lesser-included offense analysis to determine whether the government is proving the same elements that were introduced in the sentencing to convict the defendant in the subsequent prosecution. This requires courts to distinguish between conduct that relates to the quality of the first offense, and conduct that is outside the offense of conviction but is considered to be related to the sentenced criminal activity. If the conduct concerns the quality of the offense, then its use in sentencing does not raise double jeopardy concerns because it will not involve proof of the elements that constitutes a separate offense. For example, the defendant's prior convictions affect the culpability determination that a person who is a repeat or habitual offender is guilty of a greater offense because of his knowledge of the conduct's criminality and abuse of societal norms through repeated violations. Similarly, one's managerial role in the offense should result in a greater or lesser punishment because it demonstrates the degree of harm intended in the criminal activity.

An enhanced sentence for a leadership role should not affect a subsequent prosecution involving proof of that managerial role because the sentencing court did not consider all of the elements of the second offense of conviction, only the magnitude of the defendant's blameworthiness. If the subsequent prosecution is permissible under Dixon as a separate offense, then it should involve proof of other elements beyond that introduced in the prior sentencing of the defendant based on the position as a "leader or organizer." This approach is also consistent with the Court's analysis in Dowling, which permits the use of evidence introduced in a prior prosecution that was not proof of an element of the crime charged.

If the court enhances the defendant's sentence for conduct external to the criminal activity that is the subject of the charges used in sentencing, then the unit of conduct in the prosecution has been expanded to include the elements of those additional acts. For example, the defendant's sentence must be increased two levels when the court finds that the defendant's testimony at trial constituted perjury. That enhancement should prohibit a separate prosecution for perjury based on the trial testimony because the elements that would be proved in a second prosecution were incorporated in the sentencing for which an additional punishment has been imposed. This approach to determining the unit of conduct means that there is no distinction between the successive prosecution and multiple punishment protec-

224. Id. at § 3C1.1.
225. This analysis should also prevent a second trial for the conduct used to enhance the sentence, an approach sanctioned by the Court of Appeals for the Tenth Circuit in Koonce I. See supra, note 214 and accompanying text (discussing Koonce I).
tions of the Double Jeopardy Clause because the increased sentence is the equivalent of a separate prosecution.

When the government is intent on punishing conduct that is extrinsic to the criminal acts for which sentencing is pending, then this approach suggests that under double jeopardy, prosecutors should choose between seeking an enhanced sentence or bringing a separate indictment. A new criminal action will require the government to prove the charges beyond a reasonable doubt, a higher burden than the preponderance of evidence standard required under the Sentencing Guidelines for the court to enhance a sentence. A distinct conviction, however, will generally result in greater punishment than a sentence enhancement, especially because the prior conviction will affect the determination of the criminal history under the Sentencing Guidelines. Under *Dixon*, either an enhancement or separate prosecution is permissible, but this analysis shows that seeking both would violate the protections of the Double Jeopardy Clause.

IV. *UNITED STATES V. HALPER*: THE ILLOGIC OF STRETCHING DOUBLE JEOPARDY TO CIVIL SANCTIONS

The issue of whether the imposition of multiple punishments is constitutionally permissible was generally considered of lesser importance than determining the scope of the protection from successive prosecutions because the principle value vindicated by the Double Jeopardy Clause was presumed to be protecting the finality of verdicts from being reopened in a second prosecution. The multiple punishment question usually arose only in a single prosecution, and the *Blockburger* test, as refined by the Supreme Court, was considered sufficient to protect a defendant from a double jeopardy violation. *Grady* and *Dixon*, however, show that the distinction between the successive prosecution and multiple punishment prongs is blurred because the double jeopardy analysis frequently turns on the underlying facts rather than which label is attached to the procedural posture of the case. The origin of the same elements test is in cases raising the multiple punishment


228. See Burton, *supra* note 59, at 806 (multiple punishment prong limited to whether court can impose cumulative punishment in one proceeding).
issue, but it has now superseded the broader same conduct test for analyzing successive prosecutions.

In *United States v. Halper*, the Supreme Court altered the analysis of the multiple punishment prong by holding that a civil penalty assessed in a separate proceeding after a criminal conviction violated the Double Jeopardy Clause. A constitutional protection for which courts employed a form of analysis that had been the sole province of statutory construction under *Blockburger* was transformed by *Halper* into a broader, case-by-case approach when the government brings successive criminal and civil actions. The multiple punishment prong of the Double Jeopardy Clause, which had once been a poor stepchild of double jeopardy jurisprudence, may have the greatest effect on altering the relationship between the government and defendants as the government expands the use of multiple statutory provisions in parallel civil and criminal actions to seek both remedial and punitive sanctions.

The Double Jeopardy Clause did not reach beyond criminal cases until *Halper*. The Court disrupted the simple regime in multiple punishment cases when it held that a penalty in a civil action amounted to a criminal punishment in violation of the Double Jeopardy Clause when the defendant had already been convicted for the same conduct. Although the Court tried to limit its holding by asserting that its decision applied only to the rare case, the decision effectively requires lower courts to make a particularized assessment of whether a civil penalty reaches such a degree of severity that it crosses the threshold of criminal punishment in every case in which the government brings successive actions. Yet *Halper* provides no guidance on how to determine when the limit has been breached such that a defendant can invoke the protections of double jeopardy.

The procedural posture of *Halper* is similar to the successive prosecution scenario, but the Court found that the only double jeopardy protection available was under the multiple punishment prong. Where the government seeks a penalty in a succeeding action, it has to guess whether it may traverse the limit of *Halper* if the court imposes a civil sanction that amounts to an impermissible criminal penalty. This is especially true after *Austin v. United States*, when the Court held that for Eighth Amendment purposes a civil asset forfeiture always constitutes punishment.

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230. 490 U.S. at 448-449 ("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.").
231. *Id.*
232. *See* Eads, supra note 11, at 931 (*Halper* injects judicial activism into the process of distinguishing civil remedies from criminal sanctions).
Because the Halper analysis depends on reaching a vague conclusion of when a sanction passes from civil to criminal, Blockburger plays no significant role in this area, which means that whatever simplicity the multiple punishment protection of double jeopardy may have had is lost. Moreover, ignoring the status of the second action led the Court to adopt a rule in Halper that, if taken to its logical conclusion, could severely disrupt government enforcement efforts and radically alter the foundations of the judicial system by completely blurring the line between civil and criminal actions when the government is a party. Halper’s analysis could require the government to forego seeking civil sanctions in separate actions, and raises the question of whether other constitutional criminal protections beyond the Double Jeopardy Clause apply to actions in which quantitatively severe penalties can be assessed against defendants.

The vagueness of Halper’s double jeopardy analysis, and the potential breadth of its rationale, shows that the Court sought to reach a just result without adequately assessing the effect its decision would have on future cases. A better understanding of Halper results if, in much the same way the Court used Felix to limit its holding in Grady, Halper is not read expansively, but instead is understood to apply to a narrow range of cases involving fixed-penalites for each violation without regard to the severity of the conduct. Although lower courts have generally taken a restrictive approach to Halper, the decision provides defendants with a means to raise the double jeopardy issue at a pretrial stage to delay the proceedings.  

A. The Civil-Criminal Distinction for Applying Double Jeopardy Before Halper

The designation of a case as criminal or civil can be crucial to determining the process by which the government introduces evidence and the jury reaches a verdict. Some of the most familiar constitutional safeguards, such as the right to counsel, confrontation of witnesses, and the privilege not

234. See, e.g., United States v. Cullen, 979 F.2d 992, 994 (4th Cir. 1992) (in rem forfeitures are civil actions because they remove harmful instrumentalities from defendants); United States v. Furllett, 974 F.2d 839, 844 (7th Cir. 1992) (Commodities Futures Trading Commission civil penalty and bar from trading are civil); Manocchio v. Kusserow, 961 F.2d 1539, 1541 (11th Cir. 1992) (exclusion from Medicare program for five years is civil sanction); see infra, text accompanying notes 292-316 (reviewing interpretations of scope of Halper).

235. See United States v. Cunningham, 757 F. Supp. 840, 848 (S.D. Ohio) (double jeopardy claim under Halper is frivolous and trial ordered to commence immediately), aff’d, 943 F.2d 53 (6th Cir. 1991).

236. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel.” U.S. CONST. amend VI.

237. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Id.
to testify, are applicable only in criminal cases. More importantly, the burden of proof in a criminal case rests entirely on the government, which must prove the criminal violations beyond a reasonable doubt. In a civil action, the plaintiff need only prove the case by a preponderance of the evidence, and the broader discovery rules permit wide-ranging requests for information that the government could not seek from a criminal defendant, including depositions and interrogatories directed to the opposing parties. Moreover, the Supreme Court has held that an assertion of the Fifth Amendment Privilege against self-incrimination may be used against the party asserting it in a civil action.

Prior to Halper, the Supreme Court had consistently rejected double jeopardy claims in civil actions brought by the government that sought sanctions for violations that were the subject of prior criminal proceedings. In Helvering v. Mitchell, the government brought a civil action to collect a tax deficiency plus a fifty percent statutory penalty after the defendant’s acquittal for tax evasion. The Court stated, “that acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.”

The key to the Court’s analysis was whether Congress intended the proceeding to be criminal, because “unless this sanction was intended as punishment, so that the proceeding was essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.”

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238. “No person ... shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend V.

239. See Cheh, supra note 20, at 1329 (certain protections are expressly limited to criminal cases, and others have been interpreted by the Supreme Court to apply only to criminal prosecutions). The Supreme Court has recognized that the privilege against self-incrimination and the exclusionary rule apply in civil forfeiture proceedings. See United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971) (self-incrimination privilege attaches in some forfeiture proceedings); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (exclusionary rule applies in civil forfeiture case).


241. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (“The Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify in response to probative evidence offered against them.”).

242. In the nineteenth century, the Court had held that double jeopardy precluded a forfeiture action after an acquittal, Coffey v. United States, 116 U.S. 436 (1886), but that decision was overruled in United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984). See Glickman, supra note 11, at 1256 (for 50 years prior to Halper, Court refused to find a sanction sought in a civil proceeding to violate double jeopardy).


244. Id. at 397. The defendant challenged the penalty on double jeopardy grounds, but the Court found that the sanctions were remedial in nature, and therefore the action was civil. Id. at 401-02.

245. Id. at 399. The Court stated that the question whether a sanction is criminal is “one of statutory construction.” Id.
In *United States ex rel. Marcus v. Hess*, the Court held that a qui tam action seeking a recovery from contractors that engaged in bid rigging for which the defendants had been criminally convicted did not violate the Double Jeopardy Clause. A qui tam action is a civil action brought by a private plaintiff on behalf of the government that seeks damages for violations involving, inter alia, fraud against the government; if successful, the plaintiff receives a portion of any award to the government. The Court followed the statutory construction approach of *Mitchell* to determine whether the statute was criminal or civil, and found that the "remedy [did] not lose the quality of a civil action because more than the precise amount" of damages was awarded. Even though the effect of the award constituted punishment, the Court did not find that the underlying statute was converted into a criminal provision that required double jeopardy protection. Similarly, the Court held in *Rex Trailer Co., Inc. v. United States* that a statutory penalty can be analogized to a liquidated damages clause, and therefore the action is civil even though the damages from the violation "may be difficult or impossible to ascertain . . . ."

The Court adopted a two-part test for determining whether a statute imposes a civil or criminal penalty in *United States v. Ward*. The first part of the test is "whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Second, if Congress denotes a penalty as civil, there must be "the clearest proof" that the statutory scheme is so punitive in purpose or effect that it negates the designation as civil.

The Court applied the *Ward* test, which concerned application of the Fifth Amendment privilege against self-incrimination, to a civil forfeiture provision in *United States v. One Assortment of 89 Firearms* to determine whether

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246. 317 U.S. 537 (1943).
247. 31 U.S.C. § 3730 (1988). The False Claims Act requires that the citizen notify the Department of Justice of the suit, and the government can take over prosecution of the action. *Id.* at § 3730(b)(2)-(4). See Cheh, supra note 20, at 1347 (qui tam statutes make citizens into bounty hunters who are handsomely paid out of the offender's pocket).
248. *Hess*, 317 U.S. at 550. The judgment was for $315,000, which included $203,000 in double damages and a statutory penalty of $112,000, based on $2,000 for each of 56 separate violations. *Id.*
249. *Id.* at 551-52.
251. *Id.* at 153. The statute at issue was almost identical to that in *Hess*, and the Court followed the statutory construction analysis suggested in *Mitchell* in considering whether the underlying statute was civil or criminal.
253. *Id.* at 248. The issue was whether a defendant in a civil money penalty case had the Fifth Amendment Privilege against self-incrimination.
254. *Id.* at 248-49. The Court held that the nature of the penalties did not overcome the Congressional designation of the statute as civil.
double jeopardy precluded forfeiture of the property after the defendant was acquitted of criminal charges related to possession of the weapons without a license. The Court succinctly stated the guiding principle, that “[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable.”

The Court found that Congress intended the forfeiture actions to be civil, and the provision is not so punitive as to overcome the Congressional intent because the forfeiture permitted by the statute is not coextensive with the criminal penalty.257

The thrust of the Supreme Court’s analysis of the double jeopardy implications of civil sanctions was twofold: First, the question was one of statutory analysis. Second, the Court had not found a civil penalty to constitute a criminal proceeding, despite the fact that fixed penalties were assessed, such as Mitchell’s fifty percent assessment or Hess’s statutory penalty for each violation, or when the government could not identify the value of the damage suffered from the defendant’s violations, as in Rex Trailer.258

The form of the analysis was consistent with the Blockburger test. Mitchell is complementary to Blockburger because both tests require a court to ascertain the underlying purpose of the statute at issue, in one instance to determine whether Congress intended to create a civil remedy and in the other whether Congress authorized separate criminal punishments. If a court determined that a sanction was criminal rather than civil, it may also have to determine whether the statutes passed the Blockburger test if the government could argue that Congress authorized multiple punishments.

B. Halper Pushes a Civil Peg in a Criminal Hole

In what should have been an easy case, the Supreme Court ignored precedents stretching back over fifty years, including a decision directly on point that considered the same statutory sanction, to hold that a penalty imposed in a civil action after a criminal conviction constituted a violation of the Double Jeopardy Clause.259 In Halper, the defendant was convicted of filing false claims and mail fraud in connection with submitting sixty-five

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256. *Id.* at 362. The defendant also argued that collateral estoppel precluded the government from bringing the forfeiture action, but the Court held “that the difference in the relative burdens of proof in the criminal and civil actions precludes application of the doctrine of collateral estoppel.” *Id.*

257. *Id.* at 365-66; *see also* One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972) (forfeiture actions are civil in nature despite “their comparative severity”).

258. *See* Eads, *supra* note 11, at 943 (until Halper, severity of penalty did not transform action from civil to criminal); Glickman, *supra* note 11, at 1261 (“Court’s decisions implied . . . that a civil penalty could not be held to be criminal without first holding that the statute itself was criminal in purpose or effect.”).

259. *See* Eads, *supra* note 11, at 951 (Halper ignored past precedents); Glickman, *supra* note 11, at 1251 (Halper departs “from fifty years of double jeopardy jurisprudence”).
fraudulent reimbursement claims under the Medicare program, resulting in a total overpayment of $585. Halper was sentenced to two years in prison and a $5,000 fine. Following the conviction, the government brought a civil False Claims Act action against Halper based on the same sixty-five claims, seeking the statutory penalty of $130,000 ($2,000 per false claim) plus double damages for the loss sustained.

The district court found that assessing the full civil penalty would violate the double jeopardy prohibition, and entered a judgment on behalf of the government for $1,170 (the double damages) and the costs of the civil action. The Supreme Court agreed that the double jeopardy protection may apply to civil actions. Although the statute at issue was the same that Hess held was civil and not criminal for double jeopardy purposes, the Supreme Court in Halper adopted a new form of analysis for civil penalties that appear to be “so extreme and so divorced from the Government’s damages and expenses as to constitute punishment.”

As an initial matter, the Court rejected the argument that the sole inquiry in determining whether a civil sanction rises to the level of criminal punishment is a matter of statutory construction. The Court then distinguished the precedents applying the statutory construction test, although its analysis of those decisions is highly questionable. Halper rejected Mitchell as controlling, labelling that decision’s significance as “tangential” on the ground that since the defendant had been acquitted, the Court had not determined whether a civil sanction could be “punishment” for double jeopardy purposes. Mitchell’s analysis, however, did not depend on the defendant’s prior acquittal, and that opinion categorically supports the proposition that the nature of the underlying statute determines the applicability of the Double Jeopardy Clause.

Halper then distinguished Hess and Rex Trailer on the basis that the civil sanction in those cases approximated the loss caused by the violation, a situation markedly different from “the stark situation presently before us where the recovery is exponentially greater than the amount of the fraud, and . . . is also many times the amount of the Government’s total loss.”

260. Halper, 490 U.S. at 437. The defendant submitted bills for medical services that paid $12 per claim, when in fact he was entitled only to $3 per claim for the services actually rendered. Id. at 437 n.2.
261. Id. at 439-40.
262. Id. at 442.
263. Id. at 441.
264. Id. at 442-43.
265. Eads, supra note 11, at 948-49. Professor Eads argues that the Court’s attempt to distinguish the precedents is “unpersuasive.” Id. at 948.
266. 490 U.S. at 445. The Court noted that in Hess the “actual costs to the government roughly equaled the damages recovered . . . .” Id.; see also Eads, supra note 11, at 950-51 (criticizing Court’s analysis of Hess and Rex Trailer).
The Court further rejected the two-part test enunciated in *Ward* for differentiating civil and criminal statutes as ill-suited to addressing the "humane interests" safeguarded by the Double Jeopardy Clause.267

Once the Court had shelved the line of precedent that had evolved into a fairly straightforward bright-line test for determining the application of double jeopardy to civil sanctions, it pronounced its new formula: "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."268 According to the Court, punishment serves the goals of retribution and deterrence. Thus, a civil penalty that does not serve solely a remedial purpose must advance either retributive or deterrent purposes, requiring that the sanction be characterized as criminal. Having announced its holding, the Court sought to constrict the potential breadth of its position by noting that the analysis of whether a sanction is remedial or punitive "will not be an exact pursuit," and compensatory sanctions "involve[] an element of rough justice."269

*Halper* immediately recognized specific exceptions to its broad holding, stating that liquidated damages and fixed-penalty-plus-double-damages provisions will generally serve the remedial purpose of making the government whole. Not surprisingly, those two types of civil sanctions were at issue in *Rex Trailer* and *Hess*, respectively, so the Court saved itself from deciding whether those decisions were overruled by *Halper*'s new analysis. It then went a step further to mitigate the effect of the opinion, proclaiming that its rule was for the "rare case," and that the Court did not consider the holding either "far reaching or disruptive of the Government's need to combat fraud."270 What *Halper* gives with one hand, it tries to take with the other.

The Court, whose decision was unanimous, was obviously displeased with the government's attempt to extract an additional penalty from the defendant through the use of the civil remedy. *Halper* is similar to *Grady* in that both decisions announced broad rules that limit the government's power to seek added penalties, and in both the Court is highly critical of the prosecutorial tactics employed in bringing a second action based on the same facts. In *Grady*, the Court emphasized the breakdown in communication among members of the district attorney's office, while *Halper* returned repeatedly to a comparison of the comparatively minuscule gain from the illegal conduct with the imposition of severe criminal and civil penalties.

In both decisions, the Court was able to place the blame on the government for the result because the Court concluded that prosecutors sought

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268. Id. at 448.
269. Id. at 449.
270. Id. at 449-50.
more than they deserved. Moreover, the analysis in *Halper* and *Grady* showed the Court tempering its conclusions by emphasizing the limited nature of its holdings and discussing what its new rules did not encompass, despite the broad language used in the holding. In *Grady*, the Court stated that it eschewed the same transaction test in favor of the more limited same conduct test, although the difference between the two tests was obscure.271 *Halper* asserts that its holding is for the rare case and is only a “rule . . . of reason.”272

*Halper*’s analysis can be attacked on a number of different grounds. The conclusion that a civil sanction rises to the level of punishment under the Double Jeopardy Clause if it involves any deterrent or retributive purpose is unnecessarily restrictive in its interpretation of the legitimate goals of civil remedies.273 Indeed, this position is open to broad interpretation by the lower courts and creates enormous uncertainty about whether any civil sanction may be invalid if it is sought after a criminal conviction.274

The Court also stated that its rule does not apply where the defendant has not been punished in a criminal action. Under this reasoning, if a prior criminal prosecution results in an acquittal then there is no bar to a punitive civil action. Yet, the Double Jeopardy Clause has never been limited to successful criminal prosecutions. *Halper* has been criticized for giving greater protection to convicted criminals than to those found not guilty of a criminal violation.275

*Halper*’s flawed analysis is grounded in the Court’s initial decision to treat the case as raising only the multiple punishment prong of the Double Jeopardy Clause.276 Once the Court limited itself to a multiple punishment analysis, its preferred result of finding a double jeopardy violation required it

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271. Compare *Grady* v. *Corbin*, 495 U.S. 508, 521 (1990) (same conduct test “is not an ‘actual evidence’ or ‘same evidence’ test”) with *id.* at 539 (Scalia, J., dissenting) (principle adopted by majority requires that charges arising from single transaction be tried in single proceeding).

272. 490 U.S. at 449.

273. See *Eads*, *supra* note 11, at 975 (*Halper* is a “dramatic break from precedent and traditional understanding of deterrence,” and it was once considered “axiomatic” that civil sanctions had a legitimate purpose to deter violative conduct). *Eads* criticizes the Court’s use of precedent to support the conclusion that civil sanctions can only serve remedial purposes as a series of “small steps with little thought as to destination.” *Id.* at 976.

274. *See id.* at 977 (consequences of *Halper* may call into question a number of government civil penalty statutes); *Glickman*, *supra* note 11, at 1265-66 (if *Halper* interpreted broadly, decision will “create havoc, potentially disrupting all parallel proceedings”); Philip S. Khinda, Note, Undesired Results Under Halper and Grady: Double Jeopardy Bars on Criminal RICO Actions Against Civilly-Sanctioned Defendants, 25 COLUM. J.L. & SOC. PROBS. 117, 139 (1991) (although holding is qualified, potential effects of *Halper* leave prosecutors on uncertain ground in parallel civil and criminal proceedings).


276. 490 U.S. at 440.
to make dubious distinctions about precedents and adopt a definition of punishment that does violence to the usual understanding of civil regulatory regimes that impose sanctions for violations.

The procedural posture of Halper fits most conveniently into the successive prosecution prong of double jeopardy, and that is in fact what the government sought: a second sanction for the same violations. If the Court treated the False Claims Act action as a second prosecution, it would run afoul of Blockburger because the government sought summary judgment by incorporating the elements of the prior criminal conviction. There is no question that the same underlying substantive provision is the basis for the civil action. Grady's form of analysis would reach the identical result because the government is prosecuting the same conduct in the second proceeding.

Using either successive prosecution analysis would have made irrelevant the Court's broad definition of what constitutes punishment, and the correspondingly narrow interpretation of the constitutionally permissible purposes of civil sanctions. A successive prosecution violation depends on the underlying conduct or comparison of the elements of the violations, neither of which the Court considered in Halper. Moreover, 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.

The successive prosecution analysis, however, presents much greater problems than it could solve because the constitutional protection applies only when the second proceeding is designated as criminal. Under Ward's test, the Court would have to find overwhelming evidence that Congress had created a punitive scheme that is clearly criminal. This would also require overruling the holding in Hess that the False Claims Act is civil. Halper's focus on the severity of the punishment, rather than the underlying nature of the statute as civil or criminal, as the basis for finding a double jeopardy violation would mean that the entire action was criminal. If the application of a particular penalty can make an action criminal, then all of the Constitution's procedural protections for criminal defendants, such as the right to indictment by a grand jury, right to counsel, and right to a speedy trial, would automatically apply to the successive proceeding. Such an approach would revolutionize the structure of civil and criminal law by greatly expanding the potential application of constitutional criminal rights, depending on the severity of the penalty. The civil regulatory mechanism would be affected if the civil action were deemed criminal because certain independent regulatory agencies, such as the Securities and Exchange Commission, are not authorized to pursue criminal actions.277

277. See Glickman, supra note 11, at 1276 (if treble damage insider trading penalties are held to be criminal punishment, SEC would be precluded from seeking criminal sanction, which is outside its jurisdiction).
Such an approach would also severely limit the ease and convenience with which the government seeks civil sanctions, by way of summary judgment or ex parte proceedings, in which the prior criminal conviction or probable cause that a crime has been committed is the key item of proof. Once an action is designated criminal, the government must prove guilt beyond a reasonable doubt, and the prior conviction cannot govern a subsequent criminal proceeding. The viability of parallel actions would be highly questionable if the Court had followed the logic of the procedural posture of *Halper* and applied its analysis of civil sanctions under the successive prosecution prong of the Double Jeopardy Clause.

**C. What the Court Writes with One Hand, It Smudges with the Other**

Once it is apparent that the multiple punishment prong of the Double Jeopardy Clause is the only reasonable alternative available if the Court wants to find a constitutional violation, the rationale for the *Halper* analysis, and its flaws, becomes apparent.

A prior criminal conviction is the trigger for the double jeopardy protection. Thus, the Court could not provide comparable protection for the acquitted defendant because the multiple punishment prong only reaches those who have been convicted. Any attempt to somehow stretch the protection afforded by double jeopardy would pull the Court into the successive prosecution analysis, which it had to avoid.

While a prior conviction is the precondition for invoking a *Halper* analysis, the severity of the criminal penalty does not affect the analysis of whether the civil sanction rises to the level of punishment under the Double Jeopardy Clause. The sole issue in a *Halper* analysis is whether the civil sanction is “rationally related to the goal of making the government whole.” This standard forces lower courts to perform a case-by-case analysis to determine whether the penalty in the second action exceeds the limit of a remedial purpose and crosses into deterrence and retribution, thus invoking double jeopardy.

The problem with *Halper*’s approach is that it looks solely to the fact of a prior prosecution without giving any guidance on whether differences be-

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278. See United States v. Harnage, 976 F.2d 633, 635 (11th Cir. 1992) (government may not use collateral estoppel in a criminal prosecution to prevent a defendant from relitigating an issue decided by another court).

279. *Halper*, 490 U.S. at 451. The Court noted that the rational relationship requirement would have been met in *Halper* if there were only one or two false claims, and that “[i]t is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise.” *Id.* at 451 n.12.

280. See Glickman, *supra* note 11, at 1264 (Court adopts a “functionalist case-by-case approach” to determine when civil penalty constitutes punishment under double jeopardy).
between the criminal and civil action will alleviate double jeopardy concerns. In successive prosecution cases, Dixon's application of the Blockburger test requires courts to distinguish the elements of the offenses and determine whether the second provision is a species of a lesser-included offense. As a multiple punishment analysis, Halper would seemingly require only an application of Blockburger to determine whether the criminal and civil actions involve the same elements. That approach, however, means that if the criminal prosecution involved a crime that was not a necessary element of the civil case, then the civil sanction could be imposed.

For example, in an insider trading case, it is usually possible to prove wire fraud in connection with the purchase or sale of the securities. Such wire fraud is not an element of a civil insider trading sanctions case. Similarly, the government could seek both a criminal conviction against a bank officer for making false entries in the records of a financial institution and a civil penalty for bank fraud involving the same transactions.

Halper did not have to address the issue of the degree to which the civil and criminal actions must be congruent to trigger the double jeopardy protection because the government sought summary judgment based solely on the prior prosecution. The use of a form of double jeopardy analysis which did not fit the facts presented required the Court to adopt a new rule that gives lower courts the power to determine whether a particular civil sanction rises to the level of a double jeopardy violation, without reference to whether the elements of the two provisions are the same. Halper's analysis is closer to Grady's same conduct test because it relies on the identity of the underlying conduct to find a double jeopardy violation. Upon adopting its rule, however, the Court sought to control the breadth of its holding by announcing that Halper does not affect cases in which there has been no prior criminal conviction, in which the government seeks both criminal and civil penalties in a single proceeding, or in private civil actions.


283. Courts have made it clear that the order of the civil and criminal action does not affect the double jeopardy analysis. See United States v. Furlett, 974 F.2d 839, 843 n.2 (7th Cir. 1992) (although the civil penalty came before the criminal case, no need to limit Halper based on timing of the actions); United States v. Sanchez-Escareno, 950 F.2d 193, 200 (5th Cir. 1991) (order of proceedings does not affect analysis under Halper), cert. denied, 113 S. Ct. 123 (1992). United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) (criminal prosecution not banned by prior civil penalties deemed by court to be remedial in nature).

284. Halper, 490 U.S. at 450-51.
The Court attributes greater significance to what remains unaffected by its decision than in fact exists. The government does not bring civil and criminal actions together because there is no mechanism for doing so, especially where an independent regulatory agency has only civil authority and the Department of Justice is the sole criminal prosecuting authority. Moreover, there are numerous procedural problems to bringing joint actions, principally with regard to the appropriate burden of proof and coordinating the different discovery rules. In addition, the Court noted that it did not decide whether its new rule covers qui tam actions, in which a citizen sues on behalf of the government and receives a portion of the award. If the Halper rule does cover such actions, then its reach expands even further.

The Court's exercise in trying to limit the scope of its holding rings hollow. The case-by-case approach the Court endorses engenders uncertainty in an area of law that works best with bright-line rules. A better approach to double jeopardy would permit the parties to make a reasonably assured determination of whether a second action could be brought in order to protect the Double Jeopardy Clause's principal value of verdict finality, which limits unnecessary expenditures of prosecutorial resources that may inequitably force defendants to attempt to vindicate themselves in successive proceedings.

The case-by-case approach endorsed in Halper also undermines Congress's power to determine whether to adopt parallel civil and criminal mechanisms to enforce the law. In Missouri v. Hunter, a multiple punishment case, the Court stated, "Legislatures, not courts, prescribe the scope of punishments." Yet Halper rejects the deference due to the legislature by permitting a court to find a congressionally authorized penalty to be criminal in nature regard-


286. See Eads, supra note 11, at 978 (no modern authority for combining criminal and civil trials, and "its practical application is fraught with problems"); Glickman, supra note 11, at 1271 (Court offered no advice on how to implement combined trial).

287. See Cheh, supra note 20, at 1380 n.285 (structure of qui tam action under False Claims Act lends support to view that it is a government action subject to double jeopardy protection).

less of the legislative intent to adopt it as a civil remedy. This approach conflicts with the application of the Blockburger test, and shows that Halper's use of the multiple punishment approach, while theoretically justifiable given the alternative of finding that a civil penalty is a criminal prosecution, cannot be squared even with the fundamental precedents in that area.

Halper's new rule that civil penalties may rise to the level of criminal punishments for constitutional purposes is not limited to the "rare case," despite the Supreme Court's protestations otherwise. The breadth of the rule permits defendants to argue that virtually any subsequent action, civil or criminal, violates double jeopardy. Moreover, this issue can be raised at the pretrial stage and is immediately appealable, creating the possibility of delaying the proceeding pending appellate review.

The incentive to raise the double jeopardy issue, and the uncertainty created by Halper, has forced the lower courts to consider the scope of the Double Jeopardy Clause as applied to a variety of different statutory civil provisions. The question the courts have not considered is whether the Halper analysis is even necessary. A different approach under the Eighth Amendment would protect defendants from being subjected to unduly harsh sanctions in successive actions without triggering the problems generated by Halper's extension of double jeopardy protection to civil penalties.

D. The Limits of Halper

While the rule announced in Halper is broad, being potentially applicable to any parallel proceeding in which the government seeks criminal and civil sanctions, the Supreme Court tried to limit the scope of the holding by stating that its conclusion was only for the "rare case," and stressing that it was not working any significant restructuring of double jeopardy jurisprudence. Halper's breadth gives defendants an incentive to raise double jeopardy issues whenever possible because a finding that the sanction in a prior proceeding was criminal can prevent the government from even pursuing the subsequent action. The problem the lower courts face is determining whether to apply Halper's analysis expansively to different types of civil remedies beyond fixed-penalty provisions, or to follow the Supreme Court's admoni-

289. See Cheh, supra note 20 at 1364 (legislature decides which conduct and which proceedings are criminal).

290. See United States v. Abney, 431 U.S. 651, 662-63 (1977) (authorizing appellate jurisdiction to review denial of motion to dismiss based on double jeopardy grounds). Trial is postponed when the court finds the double jeopardy claim is not frivolous. United States v. Leppo, 634 F.2d 101, 105 (3d Cir. 1980). In addition, appellate review of the defendant's motion is de novo. United States v. Furlett, 974 F.2d 839, 842 (7th Cir. 1992).
tion that its ruling was more an exception to the general acknowledgement that civil sanctions do not implicate the Double Jeopardy Clause.291

The initial question is whether Halper even applies to the case, or whether the civil sanction is only remedial. Courts have not limited their analysis to those cases that mimic the procedural posture of Halper, in which the criminal case preceded the civil matter, instead holding that the order of the civil and criminal cases is irrelevant.292 Thus, Halper's analysis is frequently invoked when the civil action takes place first, and defendants have been creative in arguing that civil remedies rise to the level of criminal punishment, trying to stretch Halper's rationale to preclude any successive criminal action after a regulatory sanction. For example, in United States v. Woods,293 the Court of Appeals for the Fifth Circuit held that placing a bank into receivership did not constitute punishment of the bank's sole owner under the Double Jeopardy Clause.294 In United States v. Walker,295 the defendant argued that the government should be required to assess the full amount of a statutorily authorized civil penalty, $5,000, rather than a $500 penalty, for his failure to disclose that he was carrying a small amount of marijuana while entering the country; the defendant was later indicted for possession and importation of marijuana.296 The Court of Appeals for the Ninth Circuit rejected the attempt to increase the civil penalty to create a Halper issue, and held that the $500 civil penalty bore a rational relationship to the government's costs of administering the customs system.297

The lower courts have generally held that sanctions involving exclusion from government programs or from industries subject to pervasive regulation, which do not involve a direct monetary penalty, are remedial penalties that do not rise to the level of punishment under Halper. In United States v. Furlett, the Court of Appeals for the Seventh Circuit held that the Commodities Futures Trading Commission's order excluding the defendant from trading in any futures market was a remedial measure commensurate with his

291. See Glickman, supra note 11, at 1267 (Halper can be read narrowly or expansively, making the scope of its holding uncertain).
292. See Furlett, 974 F.2d at 843 n.2 (civil sanctions imposed by Commodities Futures Trading Commission before criminal indictment); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) (civil sanctions imposed by HUD before criminal indictment).
293. 949 F.2d 175 (5th Cir. 1991), cert. denied, 112 S. Ct. 1562 (1992).
294. Id. at 177. The defendant brought a pretrial motion to dismiss the indictment, and an interlocutory appeal after its denial.
295. 940 F.2d 442 (9th Cir. 1991).
296. Id. at 443. Under 19 U.S.C. § 1459, the Customs Service is authorized to impose a $5,000 civil penalty for failing to disclose the existence and nature of all articles brought through customs. Under Customs Service Directive 4400-11 (October 18, 1989), the penalty is automatically mitigated to $500. Id.
297. Id. at 443-44; see also United States v. Reed, 937 F.2d 575, 577 (11th Cir. 1991) (suspension of postal employee under union arbitration agreement is not punishment under Halper precluding later indictment for same conduct).
In Manocchio v. Kusserow, the Court of Appeals for the Eleventh Circuit held that Halper does not apply to the defendant's exclusion for five years from participating in Medicare programs after pleading guilty to submitting a fraudulent Medicare claim for $62.40. Similarly, courts have characterized recoveries by the government as a form of restitution that is pure recompense for the government's loss, and therefore not a punishment under Halper. In United States v. Moore, the United States District Court for the Eastern District of Virginia rejected the argument that Halper prohibited the government from recovering over $100,000 that the defendant secretly received from a government contractor, for which the defendant had already been criminally convicted. In Brown Construction Trades, Inc. v. United States, the United States Claims Court held that prohibiting a contractor from recovering a claim under a contract won through bribery of a government official was not punitive but only overcame the harm done to the integrity of the procurement process. Along the same line, in SEC v. Bilzerian, the United States District Court for the District of Columbia held that an order sought by the SEC requiring the defendant to disgorge profits of over $33 million realized in violation of the federal securities laws was remedial, not punitive, because its goal was "to prevent the unjust enrichment of the wrongdoer by depriving him of ill-gotten gains."

Only when a civil penalty rises to the level of punishment, that is, when it serves the purposes of deterrence and retribution rather than being remedial, must the court determine whether the assessment is disproportionate to the harm and the government's costs. When the civil sanction involves a direct monetary penalty, the lower courts have generally been flexible in

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298. 974 F.2d at 844. The civil regulatory action and the criminal indictment concerned the illegal allocation of profitable commodities trades to the defendants and placement of unprofitable trades in the accounts of customers. Id. at 841. The CFTC also imposed a $75,000 fine, which the circuit court found to be a rough approximation of the government's costs of investigating and prosecuting the civil action. Id. at 843-44.

299. 961 F.2d 1539 (11th Cir. 1992).

300. Id. at 1542. The circuit court stated that the intent of the exclusionary period was to protect present and future Medicare beneficiaries, and therefore the sanction was remedial, not punitive. Id.; see also Greene v. Sullivan, 731 F. Supp. 838, 840 (E.D. Tenn. 1990) (five year exclusion from Medicare program does not violate Halper because statute remedial to protect integrity of program, beneficiaries, and public confidence in Medicare).


302. Id. at 1542. The circuit court stated that the government action was purely remedial as a forfeiture of the defendant's illicit gain. Id.

303. Id. at 1256-57. The district court stated that the government action was purely remedial as a forfeiture of the defendant's illicit gain. Id.

304. Id. at 216.


306. Id. at 120.
accepting the government's position that the penalty generally equates the loss caused by the defendant's actions and the government's costs of investigating and prosecuting the matter.\footnote{307}{Although there may be an order directing payment of a civil monetary penalty, courts have held that \textit{Halper} does not apply until the penalty has actually been paid. In \textit{United States v. Sanchez-Escareno}, the Court of Appeals for the Fifth Circuit stated that there had not been any punishment that would preclude a subsequent criminal prosecution where the defendants signed promissory notes to pay a civil penalty but the government had not started to collect on the notes. 950 F.2d 193, 202 (5th Cir. 1991), cert. denied, 113 S. Ct. 123 (1992). In \textit{United States v. Park}, the same court held that \textit{Halper} did not apply to a criminal prosecution where the Customs Service retained currency it had seized, but had not instituted forfeiture proceedings to deprive the defendant of the right to the funds. 947 F.2d 130, 135 (5th Cir. 1991). In dicta, the circuit court stated that if the funds were forfeited, then a \textit{Halper} analysis would be appropriate for the criminal prosecution. \textit{Id.}}

\textbf{In \textit{Furlett},} the Seventh Circuit upheld a $75,000 civil penalty as remedial even though the government's evidence did not specify the exact costs of the investigation but only provided a general approximation of the amount of time spent investigating the entire fraudulent scheme.\footnote{308}{974 F.2d at 844.} In \textit{United States v. Walker},\footnote{309}{940 F.2d 442 (9th Cir. 1991).} the Court of Appeals for the Ninth Circuit stretched the "rough justice" concept to the limit when the government did not submit any specific evidence of its costs, but the circuit court took judicial notice of the financial burden of "maintaining check points and administering the customs system."\footnote{310}{940 F.2d at 444. Judge Noonan expressed distaste with the majority's cost analysis, arguing that a pro rata share of the government's overall costs provides "an essentially arbitrary choice as to the system whose expense is shared and a virtual blank check as to the amount it can assess." \textit{Id.} (Noonan, J., dissenting).} Similarly, the Court of Appeals for the Sixth Circuit stated in \textit{United States v. WRW Corp.}\footnote{311}{986 F.2d 138 (6th Cir. 1993).} that the district court's failure to consider the government's expenses "does not alter the objective conclusion . . . that the penalty assessed is rationally related to the goal of making the Government whole."\footnote{312}{\textit{Id.} at 142. The corporate defendant had been assessed a $90,350 fine for violations of the Federal Mine Safety and Health Act, and the company's three sole shareholders had been convicted of criminal violations of the same statute. After the company was liquidated, the government sought to collect the civil penalties from the shareholders, who argued that the penalties violated their double jeopardy rights. \textit{Id.} at 140.} In \textit{United States v. Fliegler},\footnote{313}{756 F. Supp. 688 (E.D.N.Y. 1990).} the United Stated District Court for the Eastern District of New York took a stricter approach, finding that the government's accounting for approximately $110,000 of costs in both civil and criminal prosecutions supported a civil penalty under the False Claims Act, the same statute at issue in \textit{Halper}, of $115,000, even though the statute authorized a penalty up to $230,000.\footnote{314}{\textit{Id.}}} 

\textit{Halper}'s analysis can be misleading because courts may assume that the assessment of any direct civil penalty that has a specific monetary value
automatically requires the government to prove that it is not disproportionate to the harm caused by the violation and the government's costs of investigating and prosecuting the action. For example, in *In re Kurth Ranch*, the Court of Appeals for the Ninth Circuit leaped to the conclusion that assessment of a $208,105 tax by Montana on harvested marijuana constituted double jeopardy when those liable for the tax had been convicted of possession and sale of the illegal drugs. The circuit court held that *Halper* requires a determination of the relationship between the sanction imposed by the state and damages suffered by the government without analyzing whether or not the tax assessment was even a civil penalty, or whether it was remedial. Instead, the court placed the burden on the state to adduce evidence to demonstrate that the tax assessment was proportional to its costs. The court short-circuited the *Halper* analysis by assuming that a tax assessment is a civil sanction, and further, that requiring a person to pay over $200,000 was so grossly disproportionate that it required a finding that the tax was punitive.

*Halper* makes clear that the first step in the analysis is to determine whether the penalty is remedial, and then whether it is so disproportionate that it rises to the level of punishment under the Double Jeopardy Clause. The defendants' convictions were for violation of the drug laws, while the tax related to their decision to harvest and sell the marijuana for a profit. There is a strong argument that even if the tax, as opposed to a penalty related to a violation of the tax laws, can be labelled a civil sanction, under *Blockburger* the tax assessment involves proof of completely different elements than the drug violations for which the defendants were convicted, overcoming any multiple punishment concerns. More importantly, *Kurth Ranch* shows the trap *Halper* creates by permitting courts to assume that the gross amount of a civil sanction necessarily connotes disproportionality and a double jeopardy violation. The Ninth Circuit never considers the purpose of the tax statute but only looks to the effect of a sizeable assessment, apparently adopting the position that ostensibly large monetary sanctions undermine any remedial purpose to a civil sanction.

E. Austin v. United States: Is "Punishment" Always the Same?

A superficial approach to the *Halper* analysis that looks only to the amount of the penalty to determine whether there is a constitutional violation can be mistakenly applied in cases considering whether the Double Jeopardy Clause prohibits successive criminal prosecutions and civil asset forfeiture proceedings. In recent years, asset forfeiture has become one of the primary weapons

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316. *Id.* at 1311.
employed to supplement criminal prosecutions, with cases often involving parallel civil and criminal proceedings arising out of the same underlying transactions. The types of violations that can form the basis of an asset forfeiture action have also expanded, and the principal ones are for drug violations, RICO, Money Laundering, banking violations, and the sexual exploitation of children. Asset forfeiture actions can be brought either civilly or criminally, with the key distinction being that civil actions are in rem proceedings initiated against the property itself, while criminal forfeiture is in personam. The government may seek the forfeiture of the instrumentalities of a crime, contraband, and most importantly the profits from the illegal activity and all assets traceable to the illicit proceeds. Among the items that may be seized for drug violations is all real property used to facilitate the criminal violations, even if only a part of the property was used to commit the offense.

The appeal of civil asset forfeiture is that the government need only show


321. Michael F. Zeldin & Roger G. Weiner, Innocent Third Parties and Their Rights in Forfeiture Proceedings, 28 AM. CRIM. L. REV. 843, 844 (1991). Because the criminal forfeiture is an adjunct of the prosecution and against the defendant individually, the government can seek forfeiture of substituted assets if it cannot trace the proceeds of the criminal violations or they are transferred by the defendant, a remedy that is not available in a civil forfeiture action. See 21 U.S.C. § 853(p) (1988) (forfeiture of substituted property); 18 U.S.C. § 982(b)(1)(B) (Supp. 1992) (adopting 21 U.S.C. § 853(p) for criminal forfeitures). Commentators have criticized the distinction between civil in rem proceedings and criminal in personam proceedings as being based on an outmoded legal fiction that the actual property, divorced from the owner, is the party to the litigation and therefore the claimant is accorded lesser protection than a criminal defendant. See Stahl, supra note 317, at 295 (historical analysis does not explain lesser protection afforded claimants under § 881); Tamara R. Piety, Note, Scorched Earth: How the Expansion of Civil Forfeiture Has Laid Waste to Due Process, 45 U. MIAMI L. REV. 911, 919 (1991) (historical tradition of in rem proceedings is weak justification for proceeding that violates fundamental principle of presumption of innocence).

322. See, e.g., 18 U.S.C. § 981(a)(1)(C) (Supp. 1992) (“[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation”).


(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.
probable cause that the property to be forfeited facilitated the commission of the underlying crime.\textsuperscript{324} Once the court finds probable cause, the burden shifts to any claimant to prove by a preponderance of the evidence that the property was not used in a crime, or that the person is an innocent owner.\textsuperscript{325} Moreover, the civil proceeding is not dependent on the institution of criminal charges,\textsuperscript{326} and the criminal adjudication does not preclude the civil forfeiture.

The breadth of the asset forfeiture provisions empower the government to claim highly valuable property—such as cars, boats, and real estate—whose worth may far exceed the amount of loss caused by the underlying illegal activity, or the value of the item that is the subject of such activity. This is especially true in drug cases, in which the classic example is the Supreme Court’s decision in \textit{Calero-Toledo v. Peason Yacht Leasing Co.}\textsuperscript{327} which upheld the forfeiture of a yacht on which a single marijuana cigarette was found.\textsuperscript{328} The value of the property seized, as compared to the underlying criminal violations, makes civil asset forfeiture cases especially susceptible to


\textsuperscript{324}. 21 U.S.C. § 881 (d) (1988), which also furnishes the relevant procedures under 18 U.S.C. § 981 (d) (1988), provides that the procedures under the customs laws can govern the case. The customs provision, 19 U.S.C. § 1615 (1988), provides that in forfeiture actions the burden of proof shifts to the claimant upon a finding of probable cause. \textit{See} Stahl, \textit{supra} note 317, at 284-85 (reviewing burden of proof under § 881). Although the probable cause standard is low, the government does not always succeed in meeting that minimal threshold to seize property prior to the completion of a criminal prosecution. \textit{See} United States v. $31,990 in U.S. Currency, 982 F.2d 851, 856 (2d Cir. 1993) (grounds for seizure must rise above the level of mere suspicion, and possession of sizeable amount of cash is not per se evidence of illegal drug activity).

\textsuperscript{325}. 21 U.S.C. § 881(a)(6) and (7) (1988) provide that the property shall not be forfeited if the criminal acts were committed without the knowledge or consent of the owner. An owner is not limited to bona fide purchasers for value, and includes innocent owners who receive the property through a gift or other transfer. United States v. A Parcel of Land, Building, Appurtenances and Improvements known as 92 Buena Vista Avenue, 113 S. Ct. 1126, 1127 (1993). The innocent owner still bears the burden of proof of lack of knowledge or consent. United States v. Sixty Acres in Etowah County, 930 F.2d 857, 859 (11th Cir. 1991); United States v. One Lot of U.S. Currency, 927 F.2d 30, 32 (1st Cir. 1991).


\textsuperscript{327}. 416 U.S. 663 (1974).

\textsuperscript{328}. \textit{Id.} at 690. The company that owned of the yacht had leased it to the person who carried the marijuana and did not learn of the forfeiture until it tried to recover the vessel when the lessee defaulted on the payments. \textit{Id.} at 668.
Halper challenges when the government brings parallel civil and criminal actions because the amounts involved can be so large.

As is often true with Supreme Court decisions announcing imprecise rules, the circuit courts split on whether civil asset forfeitures are even subject to the Halper analysis. In United States v. Cullen, the Court of Appeals for the Fourth Circuit rejected a defendant's argument that the civil forfeiture of a building worth approximately $300,000 violated double jeopardy when he had already been prosecuted for distributing a controlled substance from the premises. The procedural posture of Cullen is typical of many parallel forfeiture proceedings, in which the government brings an in rem action shortly after an indictment, and after the conviction seeks summary judgment on its complaint to seize the property based on the conviction. The Fourth Circuit contrasted the statute in Halper, which provided for compensation for violations, with asset forfeiture, which serves a remedial purpose by removing a harmful instrumentality from a criminal. The court held, “[t]he Double Jeopardy Clause does not apply to civil forfeitures where the property itself has been an instrument of criminal activity.” Similarly, the Court of Appeals for the Ninth Circuit held in United States v. McCaslin that “Halper has no application to the very ancient practice by which instrumentalties of a crime may be declared forfeit to the government.”

In United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, the Court of Appeals for the Second Circuit reached the opposite conclusion, holding that, “We read Halper to apply to civil forfeitures. Forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes.” The circuit court stated that when the item forfeited is not an instrumentality of the crime, and its value is “overwhelmingly disproportionate” to the value of the drugs involved in the offense, then there is a rebuttable presumption that the forfeiture is punitive under Halper.

329. 979 F.2d 992, 995 (4th Cir. 1992).
330. Id. at 993-94. The defendant, a doctor, pleaded nolo contendere to distributing a controlled substance outside the scope of a legitimate medical practice. Id.
331. Id. at 995. Halper does not apply to a forfeiture of property acquired with the proceeds of illegal activity. United States v. Borromeo, 995 F.2d 23, 27 (4th Cir. 1993).
332. 959 F.2d 786 (9th Cir.), cert. denied, 113 S. Ct. 382 (1992).
333. Id. at 788. The government first succeeded in seizing the property because it was used to grow marijuana, and then indicted the defendant, who moved to dismiss on double jeopardy grounds. Id. at 787; see also United States v. Certain Real Property 566 Hendrickson Blvd., 986 F.2d 990, 998 (6th Cir. 1993) (remedial, nonpunitive purposes of the civil asset forfeiture provision “extremely strong”).
335. Id. at 35.
336. Id. at 36. The property was the defendant’s equity interest in a condominium from which he sold a small amount of cocaine. Id. at 32. The court found that the forfeiture was more than 300 times
In *Austin v. United States*, In rem civil asset forfeiture of real property on which a drug sale took place, but was otherwise unrelated to the violation. Austin had pleaded guilty in state court to possession of cocaine with intent to distribute after selling two grams of cocaine that he had retrieved from his mobile home and sold at the auto body shop that he owned. The federal government then brought an in rem civil action seeking the forfeiture of the mobile home and body shop, and the district court granted summary judgment based on the state court conviction. The government brought its action under 21 U.S.C. § 881(a)(4) and (a)(7), the drug forfeiture provisions, which permit the forfeiture of conveyances and real property used to facilitate a violation of the narcotics laws.

The Court began with the principle that the Eighth Amendment limits "the government's power to punish." It rejected the Government's argument that the Excessive Fines Clause does not reach civil proceedings by noting that the analysis was not governed by the label applied to the action. The Court then quoted its description in *Halper* that civil sanctions which serve more than remedial purposes are punishments in order to support its position that even when a forfeiture serves both remedial and punitive purposes it may violate the Eighth Amendment.

In order to determine whether in rem forfeitures constitute punishment, the Court had to look beyond the legal fiction that only the property (in rem) greater than the value of the drugs involved in the criminal violation, and as a matter of law met the overwhelming disproportionality threshold to create the rebuttable presumption of being punitive. *Id.* at 37.

The odd thing about 38 Whalers Cove Drive is that the circuit court found no constitutional violation because, under the dual sovereignty doctrine, when separate governments prosecute a defendant for the same offense there is no double jeopardy violation. See *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (reaffirming dual sovereignty doctrine). The defendant had pleaded guilty to the drug offense in New York state court, and the federal government brought the asset forfeiture action, so the defendant was not punished twice by the same government. Given that result, the Second Circuit's entire *Halper* analysis was dicta because it was completely unnecessary to application of the dual sovereignty doctrine to the double jeopardy claim.

337. 113 S. Ct. 2801 (1993).
338. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.
339. *Austin*, 113 S. Ct. at 2803.
340. *Id.*
341. *Id.* Because the criminal proceeding was in state court and the forfeiture action in federal court, there was no double jeopardy claim under the dual sovereignty doctrine. *See supra* note 336 (discussing dual sovereignty doctrine).
342. *See supra* note 323 (quoting § 881(a)(7)).
343. *Austin*, 113 S. Ct. at 2805.
344. *Id.* at 2804.
345. *Id.* at 2806 (quoting *Halper*, 490 U.S. at 447).
and not its owner (in personam) is before the court. The traditional reservation of the innocent owner defense in both common law and more modern statutory forfeiture proceedings supports the proposition that asset forfeiture "serves, at least in part, to punish the owner."\textsuperscript{346} The Court then reviewed the conveyance and real property forfeitures authorized by § 881(a)(4) and (a)(7), finding that they are inextricably tied to proof of the owner's culpability as a means to exact punishment through the forfeiture.\textsuperscript{347} It rejected the argument that this type of forfeiture was solely remedial, noting that "the dramatic variations" between the underlying violation and the forfeited properties undercut any claim of compensation or rough justice for the government.\textsuperscript{348} The Court then quoted the same passage from \textit{Halper} that it had cited earlier in the opinion to support the proposition that the deterrent or retributive aspects of the forfeiture raised it to the level of punishment under the Excessive Fines Clause.\textsuperscript{349}

Much as it did in \textit{Halper}, the Court in \textit{Austin} made broad assertions about the punitive aspects of asset forfeiture that are belied by later statements in the opinion. The Court concluded at one point that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."\textsuperscript{350} Standing alone, that would imply that any civil asset forfeiture action is subject to the Eighth Amendment. But the Court then acknowledged its holding in \textit{United States v. One Assortment of 89 Firearms},\textsuperscript{351} that the forfeiture of illegal weapons was remedial.\textsuperscript{352} The provisions at issue in \textit{Austin} go far beyond the forfeiture of illicit materials or contraband to reach items that facilitate the illegal transactions.

It is unlikely that a forfeiture action to reach the proceeds of drug transactions, as permitted under § 881(a)(6),\textsuperscript{353} would be found to be

\textsuperscript{346} \textit{Id.} at 2810. The Court reviewed the history of common law forfeitures to find that the use of the guilty property fiction of in rem jurisdiction had not overcome the claims of a truly innocent owner to resist the government action. Justice Scalia protested the analysis of the culpability of the owner as essential to the conclusion that forfeitures constitute punishment as unnecessarily eliminating the common law distinction between in rem and in personam actions. \textit{Id.} at 2814 (Scalia, J., concurring).

\textsuperscript{347} \textit{Id.} at 2810-11. The legislative history confirmed the punitive nature of the provisions because they were directed toward removing the means of conducting the drug trade and deterring future violations.

\textsuperscript{348} \textit{Id.} at 2812.

\textsuperscript{349} \textit{Id.} "[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 the term." \textit{Halper}, 490 U.S. at 448 (emphasis added).

\textsuperscript{350} 113 S. Ct. at 2810.


\textsuperscript{352} 113 S. Ct. at 2811.

\textsuperscript{353} § 881(a)(6) provides as follows:

\begin{quote}
Forfeitures
\end{quote}

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:
punitive because the money is a substitute for the narcotics, a byproduct of the violation.\textsuperscript{354} That same provision, however, also allows the forfeiture of any funds intended to be used to facilitate an illegal transaction, which is arguably similar to the forfeitures in \textit{Austin}. The Court failed to differentiate between the different types of items that are subject to the forfeiture laws, instead using a broad brush in asserting that in rem forfeitures are historically considered to be punishment.\textsuperscript{355} 

The Court's reliance on \textit{Halper} to support its analysis of what constitutes punishment raises a troubling question as to the future application of \textit{Austin}'s holding outside the Eighth Amendment. Both cases are premised on a determination of whether the penalty reaches the level of punishment, but that analysis is related to two very different constitutional provisions, the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. If every in rem forfeiture constitutes "punishment" for constitutional purposes, then it arguably may preclude the government from bringing separate criminal charges and civil forfeiture proceedings because \textit{Halper} prohibits a second sanction that "may not be fairly be characterized as remedial, but only as a deterrent or retribution."\textsuperscript{356}

What constitutes punishment for determining whether a civil sanction violates double jeopardy is not necessarily punishment under an application of the excessive fines prohibition. In \textit{Halper}, the Court analyzed the purpose of the civil money penalty and its relation to compensating the government for the harm caused by the violation in order to reach the conclusion that the particular sanction reached the level of punishment.\textsuperscript{357} The Court clearly described the issue as whether "a civil penalty may constitute punishment \textit{for the purpose of the Double Jeopardy Clause}."\textsuperscript{358} One of the reasons it undertook such a broad approach was to protect the "humane interests" embodied by the double jeopardy protection.\textsuperscript{359} The Court noted that its conclusion was

\begin{itemize}
  \item \textsuperscript{354} See United States v. Borromeo, 995 F.2d 23, 27 (4th Cir. 1993) (forfeiture of assets acquired through illegal drug-related activity remedial).
  \item \textsuperscript{355} \textit{Austin}, 113 S. Ct. at 2810.
  \item \textsuperscript{356} 490 U.S. at 449.
  \item \textsuperscript{357} \textit{Id.} at 449-50.
  \item \textsuperscript{358} \textit{Id.} at 446 (emphasis added).
  \item \textsuperscript{359} \textit{Id.} at 447.
\end{itemize}
for the “rare case,” which indicates that punishment has a very specific meaning under double jeopardy that embodies unique values.\textsuperscript{360}

The analysis of whether a sanction reaches the level of punishment under the Excessive Fines Clause is just the beginning inquiry, not the conclusion that it was in \textit{Halper}. \textit{Austin} only decided that the Eighth Amendment is triggered by a civil forfeiture proceeding, and remanded the issue to the lower courts of whether or not the actual forfeiture traversed the line of excessiveness.\textsuperscript{361} There is no constitutional prohibition specifically prohibiting certain types of punishments; the Constitution states only that they be properly related to the underlying violation. The Eighth Amendment does not incorporate the same humane interest in protecting people from having to defend themselves a second time in criminal proceedings, as the Double Jeopardy Clause does. \textit{Austin}’s reliance on \textit{Halper} may be misleading because the Court’s goal in \textit{Austin} was to overcome the argument that the civil label attached to the proceeding governed whether the Excessive Fines Clause limited the imposition of the forfeiture. The meaning of punishment under double jeopardy is not coterminous with punishments that are subject to the excessive fines prohibition because, before it triggers the protection of the Double Jeopardy Clause, the sanction must reach a much higher threshold, based on the factual circumstances of the relation of the sanction to the harm caused.

\textbf{F. Halper’s Misuse of Proportionality}

The application of \textit{Halper} to civil forfeiture actions could seriously impede the government’s ability to pursue parallel civil and criminal proceedings, and may force it to choose only one action or make it bring criminal forfeitures when it intends to indict a claimant to the property.\textsuperscript{362} Such a limitation on the government’s power might be acceptable if there is a sound constitutional basis to require a single adjudication of guilt and forfeiture, but the rationale of the Double Jeopardy Clause cannot reach that far. The question of whether double jeopardy can apply to civil asset forfeitures demonstrates the fundamental flaw with the Supreme Court’s analysis in \textit{Halper}. The core issue in that opinion is the overwhelming disproportionality

\begin{itemize}
\item \textsuperscript{360} \textit{Id.} at 449.
\item \textsuperscript{361} \textit{Id.} at 452.
\item \textsuperscript{362} See Cheh, supra note 20, at 1380 (\textit{Halper} will require better coordination between prosecutors and regulatory agencies); Eads, supra note 11, at 988 (\textit{Halper} gives prosecutors little alternative but to proceed with criminal case first); Khinda, supra note 274, at 154 (\textit{Halper} and \textit{Grady} place immense burden on government to coordinate actions); Glickman, supra note 11, at 1279 (\textit{Halper} puts pressure on government to consolidate actions, drop either the civil or criminal action, and avoid double jeopardy problems in parallel proceedings). \textit{But see} United States v. Millan, 2 F.3d 17 (2d Cir. 1993) (civil forfeiture suit and criminal case constitute “a single prosecution,” thereby eliminating any \textit{Halper} problem of multiple punishment).
\end{itemize}
between the defendant’s criminal gain of $585 and the statutorily required penalty of $130,000. By making the question of disproportionality a facet of the constitutional analysis, Halper requires lower courts to make a case-by-case determination of whether double jeopardy has been violated that is entirely dependent on the comparison of the penalty assessed with the harm caused by the violation and the government’s costs of investigation. The question the Court never addressed is whether disproportionality is even a relevant factor in determining whether a multiple punishment is constitutionally permissible. The answer is that it has no role in the analysis, especially when applied to civil asset forfeitures.

If Halper applies to civil asset forfeitures, the problem with considering whether a penalty is so disproportionate as to be punitive is that the same criminal violation, involving identical harms and governmental costs, can lead to opposite results. If two people are stopped for a traffic violation and consent to having their cars searched, and a very small amount of cocaine is discovered in each, with a total value of less than $500, each automobile is subject to an in rem forfeiture action based on each driver’s criminal conviction for possession of illegal drugs. If one car is a broken-down 1973 Chevrolet Vega, with a value of no more than $300, while the other is a Rolls Royce with a value of over $100,000, consideration of the disproportionality of the forfeiture to determine the application of double jeopardy could lead to the conclusion that the civil action constitutes an impermissible punishment of the Rolls Royce driver, but the forfeiture of the Vega cannot be described as involving any degree of unfairness. The Court of Appeals for the Fourth Circuit noted that in the problem with the disproportionality analysis in forfeiture cases, “[t]he Ferrari is at least as harmful an instrumentality as the Chevette.”

The problem with the disproportionality analysis in asset forfeiture cases is different from the one the Supreme Court faced in Halper. The filing of false Medicare claims constitutes both the criminal violation and the basis for the civil action. The False Claims Act imposed an automatic penalty for each violation, so the problem with disproportionality is traceable to the assessment of a fixed penalty that may impose a sizeable sanction on the prolific small-gauge violator. Asset forfeiture, however, reaches the results of the criminal activity and the instrumentalities of the crime, and is not directed specifically against the criminal activity itself. Any disproportionality between the criminal violation and the size of the forfeiture is not a function of the asset forfeiture statute, but rather the factual circumstance of the defendant’s choice to use a valuable item in connection with a criminal offense.

363. United States v. Cullen, 979 F.2d at 995.
Focusing solely on the value of the forfeiture as a rationale for determining whether double jeopardy applies misconstrues the function of the Double Jeopardy Clause, and the underlying values it protects. The principle of verdict finality requires that, when a double jeopardy violation would occur through the imposition of multiple punishments or successive prosecutions, there is a complete bar to the additional punishment or proceeding. Double jeopardy is a categorical prohibition that protects against the misuse of the criminal process to oppress individuals through repeated trials and unauthorized sanctions. The Double Jeopardy Clause differs from the other constitutional criminal protections because it does not permit exceptions to its coverage or allow for a harmless error analysis. The Fourth Amendment is subject to a number of exceptions to its requirement that arrests and searches must be executed pursuant to a warrant, while evidence admitted in violation of a defendant's constitutional rights is subject to a harmless error doctrine. The application of double jeopardy is not a fact-specific exercise that involves balancing whether the defendant's interests are outweighed by society's need to exact punishment. Instead, it is a more abstract analysis to determine the scope of the applicable statutes and the status of prior adjudications, without reference to whether the penalty exceeds some vague threshold that permits a court to correct a perceived imbalance.

The only basis on which to judge whether a sanction is proportional to the underlying violation is under the Excessive Fines Clause. In Austin, Justice Scalia pointed out that “[t]he question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.” The value of the property is not the focus of the inquiry for in rem forfeitures, but its relationship to the underlying criminal activity. While there may not be a strict economic comparison of the crime and the penalty, even the approach suggested by Justice Scalia is not wholly divorced from considering the value of the property. If there is a close

364. See Thomas, Elegant Theory, supra note 29, at 837 (goal of double jeopardy is to prevent oppression through multiple uses of criminal process).

365. See Morris v. Mathews, 475 U.S. 237, 248 (1986) (jeopardy-barred conviction reduced to lesser-included offense not barred by double-jeopardy). The burden is on the defendant to show that there was a reasonable probability that the jury would not have convicted for the lesser-included offense. Id. at 247.

366. See 22nd Criminal Procedure Project, supra note 173, at 877 et seq. (detailing the Supreme Court’s “many exceptions to the general rule that an arrest or search must be based on probable cause and executed pursuant to a warrant to satisfy the Fourth Amendment”).


368. 113 S. Ct. 2801, 2815 (Scalia, J., concurring).
connection between the underlying criminal activity and the property subject to forfeiture, then it is less likely that confiscation of even highly valuable property will rise to the level of excessiveness. The more attenuated the connection, the more likely a court will judge a forfeiture of valuable items, especially real estate or businesses, to be a violation of the Eighth Amendment. The very concept of excessiveness requires a degree of comparison between the crime and the scope of the punishment, so that the Excessive Fines Clause will require proportionality in the imposition of sanctions.

The Excessive Fines Clause is especially amenable to the proportionality analysis when monetary penalties are considered in relation to the underlying violation. Consideration of whether a sanction rises to the level of “excessive” invokes the type of comparative analysis that the Court imprudently undertook in Halper. Before Austin, the lower courts, except for the Court of Appeals for the Second Circuit in 38 Whalers Cove Drive, had been unwilling to extend the Eighth Amendment's proportionality principle to civil forfeiture cases, holding that it only applies to criminal actions. For criminal forfeitures, however, the courts began to recognize that a proportionality analysis is required by the Eighth Amendment. In Alexander v. United States decided on the same day as Austin, the Court held that criminal in personam forfeiture actions are also subject to the limitations of the Excessive Fines Clause.

The rationale for the different treatment was that civil actions were only in rem proceedings against the property and not a criminal action, which had

369. See United States v. One Parcel of Property Located at 508 Depot Street, 964 F.2d 814, 817 (8th Cir.) (court reluctantly agrees that Eighth Amendment does not apply to civil actions), rev'd sub nom. Austin v. United States, 113 S. Ct. 2801 (1993); United States v. One Parcel of Real Property, New Shoreham, RI, 960 F.2d 200, 207 (1st Cir. 1992) (“[P]roportionality analysis is inappropriate in civil forfeiture cases brought under section 881(a)(7).”); United States v. Real Property and Residence at 3097 S.W. 11th Ave., 921 F.2d 1551, 1557 (11th Cir. 1991) (proportionality analysis in criminal forfeitures not applicable to civil forfeitures); United States v. On Leong Chinese Merchant Association Bldg., 918 F.2d 1289 (7th Cir. 1990) (courts have uniformly held that Eighth Amendment does not apply to in rem actions because they are remedial); United States v. One 107.9 Acre Parcel of Land Located in Warren Township, 898 F.2d 396, 401 (3d Cir. 1990) (application of civil forfeiture provision to real property does not violate Eighth Amendment); United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988) (constitution hardly requires proportionality review of civil forfeitures if it permits in rem forfeiture of innocent owner's property); cf. United States v. Premises Known as 318 South Third Street, 988 F.2d 822, 828-29 (8th Cir. 1993) (proportionality review permitted of civil forfeitures under gambling statute, 18 U.S.C. § 1955, because forfeiture is permissive, not mandatory, and therefore district court need not order forfeiture if disproportionate to underlying violation).

370. See United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993) (proportionality analysis required when defendant makes prima facie showing that forfeiture is grossly disproportionate to seriousness of the offense); United States v. Busher, 817 F.2d 1409, 1414 (9th Cir. 1987) (because RICO forfeiture provision is without limitation, it may exceed constitutional bounds and requires proportionality analysis).


372. Id. at 2775-76.
been considered the limit of the Eighth Amendment's coverage. Such an analysis, when coupled with *Halper*'s proportionality feature, created a potentially anomalous structure. Criminal forfeitures were subject to proportionality review under the Eighth Amendment, and civil forfeitures may be subject to *Halper* proportionality if there is a parallel criminal proceeding that will trigger double jeopardy protection. A civil forfeiture, standing alone, would not be subject to any constitutional limitation, no matter the value of the seized property or its relation to the underlying violation, because it cannot meet the prerequisites for the Double Jeopardy Clause, a prior prosecution, or the presumed outer limit of the Eighth Amendment: a criminal prosecution. *Austin* resolves that anomaly by permitting consideration of the Excessive Fines Clause whenever the sanction may involve punishment, regardless of the procedural label applied to the action.

The problem now, however, is that *Halper* still permits some defendants to use the proportionality principle embodied in the Eighth Amendment, but the effect is much greater than that allowed under that constitutional provision. A double jeopardy violation may prohibit a second proceeding involving offenses that incorporate the same elements or are a species of lesser included offense, which could preclude the government from bringing a criminal action if the civil sanction was imposed first. An Eighth Amendment violation, on the other hand, only prohibits the disproportionate aspect of the punishment, because a court can only impose a sanction that is commensurate with the violation. The issue of what constitutes punishment requires different treatment when the claim involves a possible violation of double jeopardy than when the issue is whether the sanction rises to the level of excessiveness. The better approach to limiting the government's power to inflict punishments that exceed the acceptable threshold is through the Eighth Amendment rather than the Double Jeopardy Clause.

V. CONCLUSION

The Supreme Court has made the Double Jeopardy Clause the Sargasso Sea it bemoaned over a decade ago because its decisions do not reflect any clear consideration of how its shifting rationales for preventing or permitting successive actions affect other types of cases. For a constitutional provision that results in the prohibition of a prosecution, rather than some lesser remedy, the Court should strive for a measure of consistency in its analysis rather than announcing rules that appear broad but are ostensibly limited to the "rare case."

*Grady* and *Halper* were the result of the Supreme Court's attempt to announce principled decisions in cases in which sympathetic facts called out for a result that the theory of the Double Jeopardy Clause and the Court's precedents should not permit. Those decisions especially show the Court
operating in a vacuum that does not consider the effect of a decision on other forms of government enforcement activity.

Grady's same conduct test could have expanded double jeopardy to require, in most instances, that the government bring all of its actions in a single proceeding. The Court first rejected such a broad approach in Felix, but it could not bring itself to overrule Grady. The next term, it put Grady to rest in Dixon, but did little to clarify the scope of the Blockburger test by applying it both broadly and narrowly in the same decision. The Court's effort to accommodate competing analyses of the same elements test creates confusion rather than certainty, which conflicts with the principal value of verdict finality embodied in the Double Jeopardy Clause.

Halper's proportionality principle is better suited to an Eighth Amendment analysis rather than an extension of double jeopardy beyond criminal cases to cover punishments that exceed some vague threshold. Halper fits best with fixed-penalty statutes that require imposition of heavy sanctions for what may be an isolated incident or innocuous series of violations. Much like the Supreme Court in Felix limited Grady to a particular type of case, Halper's peculiar application of the multiple punishment analysis to a successive prosecution should be confined to a limited set of circumstances that avoids any broad application of the proportionality principle to the Double Jeopardy Clause. The key to limiting Halper rests in distinguishing the meaning of punishment for double jeopardy purposes and the prohibition on excessive fines. In the former, punishment is the conclusion of an analysis that is designed to protect specific values embodied in the Double Jeopardy Clause, while for the latter constitutional protection, virtually any sanction may be considered punishment because that is only the beginning of the analysis of whether a sanction is too severe to pass constitutional muster.

Halper is an example of how the procedural posture of a case is a crucial element in determining the scope of double jeopardy's protection. The Court ignored the status of the parallel proceedings as raising successive prosecution concerns, which led it to adopt a rule that it was forced to assert was only for the "rare case." A fact-specific analysis whose application can only be defined vaguely by statements of what the rule does not cover misinterprets the scope of the Double Jeopardy Clause. Defendants and prosecutors need certainty above all else in decisions about double jeopardy because the consequences of a constitutional violation can be so great. The weakness of the confused analysis in Grady, Dixon, and Halper is that they demonstrate that the Court cannot bring itself to adopt bright-line rules that permit relatively sound judgments about the government's power to seek sanctions.