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DOUBLE JEOPARDY: CAN NON-MONETARY CIVIL SANCTIONS CONSTITUTE PUNISHMENT UNDER THE FIFTH AMENDMENT?

Robyn Scheina Brown

Introduction

The Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb”¹ Historically, this protection has been interpreted to include three possible scenarios: (1) a second prosecution for the identical offense after an acquittal; (2) a second prosecution for the identical offense after a conviction; or (3) multiple punishments for the same offense.² Although challenges based on the Fifth Amendment have traditionally dealt with multiple criminal punishments, the more recent focus on the Double Jeopardy Clause has not been on criminal sanctions, but instead on various civil sanctions and whether they constitute “punishment” for double jeopardy purposes. The Supreme Court has thus been forced to attempt to define what constitutes punishment within the context of the prohibitions against double jeopardy.

The Supreme Court Lays the Foundation

In 1989, the Supreme Court decided the case of *United States v. Halper*³ and for the first time held that a civil sanction imposed by the government could constitute punishment for the purposes of double jeopardy.⁴ In *Halper*, the defendant was convicted of violating a federal statute⁵ which prohibits making false claims against the United States Government.⁶ Subsequent to Halper’s conviction,⁷ the government brought civil charges against him under the Civil False Claims Act, based on the same conduct for which he was convicted.⁸ Halper then took a direct appeal to the Supreme Court⁹ on the issue of whether he was twice put in jeopardy when the government proceeded with the subsequent civil lawsuit.

The Supreme Court unanimously held that the

mere fact that the lawsuit was civil in nature did not mean that double jeopardy could not be implicated.¹⁰ The Court further explained that:

the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purpose that the penalty may fairly be said to serve. Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goal of punishment.¹¹

On the one hand, therefore, a civil sanction which serves only to compensate the government for its losses would not implicate the prohibitions of the Double Jeopardy Clause. On the other hand, a civil sanction which was intended as a deterrent or to seek retribution would constitute “punishment” for double jeopardy purposes.¹² Based on this reasoning, the Court concluded that where the subsequent civil sanction “bears no rational relation to the goal of compensating the [g]overnment for its loss, but rather appears to qualify as ‘punishment’ in the plain meaning of the word,”¹³ the defendant may validly assert a challenge to those sanctions based on double jeopardy grounds.¹⁴ The Court cautioned, however, that its interpretation was only to apply in “rare case[s],” such as the one the Court was confronted with in *Halper*.¹⁵

Four years later, the Supreme Court handed down its decision in *Austin v. United States*¹⁶ and held that civil forfeiture could constitute “‘payment to a sovereign as *punishment* for some offense.’”¹⁷ In *Austin*, the petitioner plead guilty to committing various drug offenses.¹⁸ The government subsequently

sought to have Austin's mobile home and auto body shop forfeited since evidence existed that these instrumentalities were "used or intended to be used" to facilitate Austin's drug operation.¹⁹ Austin opposed the forfeiture claiming that it violated the Excessive Fines Clause of the Eight Amendment.²⁰ After an extensive review of forfeiture at common law,²¹ the Supreme Court rejected the United States' claims that forfeiture was remedial only since the forfeiture: (1) served to protect the community because it removed instruments of the drug trade from the streets;²² and (2) compensated "the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade."²³ Regardless of these arguments, the Court found that since the civil forfeiture in Austin's case could "only be explained as serving *in part* to punish,"²⁴ it could be subjected to the Excessive Fines Clause of the Eighth Amendment.²⁵ *Austin*, therefore, suggests that the sanction must only be "in part" to punish in order to violate the defendant's constitutional rights. In *Halper*, however, the Court alluded to the fact that the sanction had to be solely for the purpose of punishment before it would be subjected to a double jeopardy analysis.²⁶ Thus, the controversy arises.

*Department of Revenue of Montana v. Kurth Ranch*²⁷ was decided one year after *Austin*. In *Kurth Ranch*, the Court further prodded the issue of what exactly constitutes "punishment" for double jeopardy purposes. By a 7-2 majority, the Court held that the imposition of a tax on the possession of dangerous drugs, after the defendants were convicted of various possession-related crimes, violated their Fifth Amendment rights.²⁸ Distinguishing *Kurth Ranch* from *Halper*,²⁹ the Court undertook its own analysis of whether a tax specifically violated the prohibitions against double jeopardy. In *Kurth Ranch*, the Court found that although "taxes are typically motivated by revenue-raising rather than punitive purposes,"³⁰ the prohibitions against double jeopardy were violated, since: (1) a large part of the tax imposed equated to more than eight times the market value of the contraband;³¹ (2) the tax was conditioned upon the commission of a crime;³² and (3) although the tax was characterized as a "property tax," it was imposed only after the illegal narcotics had been forfeited to the state.³³ The Court concluded by stating that "[t]his drug tax is not the kind of remedial sanction that may follow the first

punishment of a criminal offense," because it rose to the level of punishment for double jeopardy purposes.³⁴

The decisions in *Halper*, *Austin*, and *Kurth Ranch* unsurprisingly opened the door to an entire arena of litigation of whether various civil sanctions constituted punishment for the purposes of the Double Jeopardy Clause. No longer was double jeopardy limited to criminal actions. Since these three Supreme Court decisions, lower courts have been forced to grapple with the issues of when the decisions in *Halper*, *Austin* and *Kurth Ranch* are binding upon specific cases of civil sanctions, and where exactly to draw the line between sanctions that are remedial only, and those that are punitive in nature. Furthermore, lower courts have found themselves forced to address situations left unanswered by *Halper*, *Austin* and *Kurth Ranch*, including other civil penalties which could possibly constitute punishment for double jeopardy purposes. These civil penalties have included the revocation or suspension of a driver's license or a professional license, prison disciplinary proceedings, exclusion from participating in government programs, or the forfeiture of property to the State. Each of these issues will be discussed in more detail, as well as the effect of the Supreme Court's definitions of "punishment" on lower courts.

Driver's and Professional License Suspensions and Revocations

Since *Halper* was decided in 1989, an overwhelming number of jurisdictions have been forced to determine whether, in light of the principles enunciated in *Halper*, *Austin*, and *Kurth Ranch*, suspensions and revocations of driver's licenses and other professional licenses implicate the prohibitions of the Double Jeopardy Clause. For a variety of reasons, virtually every jurisdiction that has been confronted with such a task has held that the suspension of these licenses does not violate the protections afforded by the Fifth Amendment.³⁵

With regard to the suspension of an individual's driver's license, courts have uniformly held that, although the principles set forth in the three Supreme Court cases are instructive, their specific situations were distinguishable from the loss of a driver's license.³⁶ Therefore, although *Halper*, *Austin*, and *Kurth Ranch* were not factually binding upon these lower courts, the Supreme Court's respective analyses were nonetheless employed. Based on the Supreme Court's guidance,

lower courts have held that license suspension or revocation proceedings do not implicate the double jeopardy prohibitions for three main reasons.³⁷

First, many courts have never reached the issue of whether licensing sanctions constitute punishment for double jeopardy purposes, because these courts have held that a license revocation or suspension proceeding is administrative in nature and, therefore, the protections afforded by the Double Jeopardy Clause are inapplicable.³⁸ As stated by the Court of Appeals of Kansas, “[t]he decision to suspend [the defendant’s] driving privilege is an administrative action and not a criminal proceeding . . . [and] the imposition of administrative sanctions and criminal prosecutions are not prohibited under the [D]ouble [J]eopardy [C]lause.”³⁹ Furthermore, because a proceeding to determine if an individual’s license should be suspended or revoked “is entirely separate and distinct from the proceedings to determine the guilt or innocence of the person,” the protections afforded by the Double Jeopardy Clause are not implicated.⁴⁰

Second, the revocation or suspension of a driver’s license does not constitute punishment but, instead, serves other legitimate remedial purposes. These purposes include: (1) the promotion of public safety by removing drunk drivers from state highways;⁴¹ (2) providing a mechanism by which authorities can gather evidence of the commission of a crime;⁴² and (3) the rehabilitation of those drivers who are intoxicated.⁴³ Furthermore, the mere fact that the suspension or revocation of a driver’s license may “carry the sting of punishment” is not dispositive, because the primary purpose of the sanction is remedial and, thus, double jeopardy is not implicated.⁴⁴ As stated by the Supreme Court of New Mexico in *State v. Kennedy*, “[i]t is obvious that deterrence of misconduct will be one practical effect of any regulatory scheme that allows the government to revoke a license that authorizes a person to drive motor vehicles or pursue a livelihood. But this deterrent purpose does not mean that administrative revocation of these licenses is ‘punishment’ for purposes of the [D]ouble [J]eopardy [C]lause.”⁴⁵ Therefore, because “the motorist suffers no loss of liberty, no incarceration or fine as the result of the suspension or revocation of his license but merely forfeits the privilege of driving on public highways,”⁴⁶ the sanction is not punishment for double jeopardy purposes.

Third, many states have recognized that holding a driver’s license is a privilege and not a right. Hence,

it is within an individual state’s police powers to regulate the holding of a license.⁴⁷ In *State v. Savard*, the Supreme Judicial Court of Maine explained this rationale.

When issued a license, the vehicle operator agrees to abide by certain conditions and rules of the road . . . and acknowledges that the continued use of the license to drive is dependent on compliance with the laws relating to vehicle operation. A licensee has no absolute right of ownership in a motor vehicle operator’s license. A licensee’s right to use the license is specifically conditioned on observing specified operating standards. The suspension of that privilege merely signifies the failure of the holder to comply with agreed conditions.⁴⁸

Therefore, because the government is fully entitled to regulate the behavior at issue, it is not punishment to take away an individual’s license for any period of time. Rather, the government is simply withholding a privilege which the driver forfeited by his own actions.⁴⁹

Based on the foregoing reasons, jurisdictions have consistently held that the suspension of a driver’s license is not one of the “rare cases” described in *Halper* in which a civil sanction constitutes punishment for double jeopardy purposes.⁵⁰ Instead, the suspension or revocation of a driver’s license “is the all too common case in which a driver who has repeatedly endangered the lives and well-being of others by driving while intoxicated is merely deprived of the privilege to drive for a [specified] period.”⁵¹

Courts dealing with professional licensing schemes have also found the prohibitions of double jeopardy inapplicable. For instance, courts have upheld the restrictions, suspensions, or revocations of various types of professional licenses, including a license to practice medicine,⁵² a license to practice law,⁵³ a license to operate a funeral home,⁵⁴ a liquor license,⁵⁵ a business license,⁵⁶ a license to sell insurance,⁵⁷ and a license to sell real estate.⁵⁸ The rationale for allowing such sanctions is virtually identical to that of the suspension or revocation of a driver’s license. Namely, the sanction is not punitive in nature, but rather serves to protect the public from individuals not

competent to adequately perform their occupations.⁵⁹ Furthermore, since the proceedings are administrative rather than criminal in nature, double jeopardy has no bearing upon the sanctions imposed.⁶⁰ Therefore, it could be argued that any type of licensing scheme would not be subject to the claim that a revocation or suspension of that license constitutes punishment for double jeopardy purposes.

Prison Disciplinary Proceedings

Another area of the double jeopardy controversy which has continually surfaced despite the Supreme Court's decisions in *Halper*, *Austin*, and *Kurth Ranch* is that of prison disciplinary proceedings. Various jurisdictions throughout the nation have consistently held that prison disciplinary proceedings do not implicate the prohibitions outlined in the Double Jeopardy Clause of the Fifth Amendment.⁶¹ Many courts have further found *Halper* inapplicable to these proceedings because *Halper* involved a criminal prosecution followed by a civil suit for the same behavior.⁶² *Kurth Ranch* was similarly limited to only those situations where a tax was imposed as the penalty at issue.⁶³ *Austin* has not even been discussed within the context of prison disciplinary proceedings. Hence, since the three Supreme Court cases dealt with manifestly different issues than that of a prison disciplinary sanction, they were not binding upon these lower courts. Therefore, any argument that disciplinary actions by prison officials followed by a subsequent criminal prosecution implicates the prohibitions against double jeopardy will be futile.

The disciplinary sanctions often imposed upon inmates who have violated prison rules commonly include: (1) solitary confinement or other types of segregation from the rest of the prison population,⁶⁴ (2) loss of good time credit,⁶⁵ (3) loss of privileges, (4) a disciplinary transfer, or (5) a reduction in the prisoner's status.⁶⁶ Regardless of which sanction is imposed, however, courts have found the proscriptions of double jeopardy inapposite for several reasons.

First, a prison disciplinary proceeding is not the equivalent of a "criminal prosecution" or trial which would implicate the proscriptions against double jeopardy.⁶⁷ Therefore, since a disciplinary hearing is not a judicial proceeding with the purpose of determining the guilt or innocence of the defendant beyond a reasonable doubt, double jeopardy does not come into play.⁶⁸

Second, the purpose of a prison disciplinary

sanction is not punitive in nature. Rather, it is to maintain order and promote security within the entire prison system.⁶⁹ As stated by the United States Court of Appeals for the Second Circuit:

[p]unitive interests and remedial interests . . . are nowhere so tightly intertwined as in the prison setting, where the government's remedial interest is to maintain order and to prevent violent altercations among a population of criminals. Accordingly, the mere fact that a sanction imposed by prison officials has a punitive component does not mean that the sanction constitutes "punishment" for double jeopardy purposes.⁷⁰

Therefore, the promotion of internal security within the prison system, while conveying to other inmates that such behavior will not be tolerated, is not equated to punishment for double jeopardy purposes.

Third, courts have found that these disciplinary sanctions serve to rehabilitate the prisoner rather than punish him. As stated by the Colorado Court of Appeals, "[b]reaches of prison regulations reflect an inmate's disregard for rules of social and prison life and threaten prison security. Remediation of such infractions, therefore, is essential both to promote inmate rehabilitation and to maintain order."⁷¹

When confronted with a double jeopardy challenge in the context of prison disciplinary proceedings, courts have held that broad discretion should be allotted to prison officials and their judgments as to the appropriate sanction to be imposed in any given case.⁷² In *United States v. Newby*, the United States Court of Appeals for the Third Circuit explained that this discretion was given to prison officials in large part because:

the adoption and execution of policies and practices necessary to preserve internal order and discipline, and to maintain institutional security in the prison are "peculiarly within the province and professional expertise of corrections officers, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response[,] courts should ordinarily defer to their expert judg-

ment in such matters.”⁷³

Courts have noted that these same prison officials should not be faced with the various problems that could arise if the Double Jeopardy Clause were found applicable to these disciplinary proceedings. For example, if discipline by prison authorities barred a subsequent criminal prosecution, prison officials would then be forced to choose between implementing the sanctions within the prison system and forfeiting the possibility of any criminal prosecution, or the reverse.⁷⁴ Furthermore, since bringing an inmate to trial could take a considerable amount of time, the “difficulties and delay that a criminal prosecution entails would leave the prisoners who violated the prison rules without a prompt resolution of charges and hinder prison administration and discipline.”⁷⁵ Finally, one court recognized that it would be absurd on the one hand to allow “those violations of prison regulations that do not rise to the level of criminal behavior [to] come within prison officials’ duty to maintain prison discipline, while more heinous behavior is beyond their reach except at the cost of precluding subsequent criminal prosecution.”⁷⁶ Therefore, as long as the prison officials are acting within their prescribed limits, the sanctions they choose to impose will not be successfully challenged on double jeopardy grounds.

Exclusion from Participation in Government Programs

The double jeopardy controversy has also had little impact on the exclusion of individuals from participation in government programs. As with the other civil sanctions discussed, courts have held that the exclusion from government programs is remedial only, and therefore not punishment for double jeopardy purposes. For example, courts have upheld the exclusion of doctors from Medicare programs when it was shown that the doctors made fraudulent claims to these Medicare agencies.⁷⁷ Other areas of governmental exclusion have also been upheld, such as participation in the commodities trading market,⁷⁸ HUD housing programs,⁷⁹ and the Federal Drug Administration Program.⁸⁰ The rationale for these exclusions was very similar to that of the revocation or suspension of an individual’s driver’s license or professional license--protection of the public and of the industry. As explained by the United States Court of Appeals for the Seventh Circuit:

the decision to exclude [the defendant] from any contract market can be seen as an action to ensure the integrity of the markets and protect them from people like [the defendant]. Commodities and instruments representing billions of dollars are traded on the nation’s contract markets every year. Maintaining a fair and unadulterated open market is a profound and necessary pursuit for our economic well-being. If fraudulent practices undermining the integrity of the markets were to proceed unchecked, the vital efficiency of the market mechanism would be jeopardized.⁸¹

Courts dealing with similar governmental prohibitions have reached the same conclusion, holding that, although the individuals may consider the sanctions to be punishment, “rough remedial justice” cannot be equated to punishment for double jeopardy purposes.⁸² Furthermore, the severity or duration of the exclusion is of no import and will not serve to make an otherwise permissible sanction punishment within the prohibitions of double jeopardy.⁸³

Finally, one court outlined a number of factors which should be considered when determining whether a civil sanction is remedial or punitive in nature. These factors include:

[w]hether the sanction involves an affirmative disability of restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned⁸⁴

Therefore, taking all things into consideration, courts have uniformly held that the exclusion from government programs is not one of those “rare cases” enunciated in *Halper* which mandates the application of the Double

Jeopardy Clause of the Fifth Amendment.⁸⁵

Other Civil Sanctions Deemed Remedial

Lower courts have also found other civil sanctions remedial only and, therefore, not in violation of the Double Jeopardy Clause. Although these areas have not received as much attention as the suspension or revocation of a driver's or professional license, prison disciplinary proceedings, or the exclusion from participation in government programs, they nevertheless deserve to be mentioned as evidence of how lower courts have interpreted "punishment" within the context of the double jeopardy prohibitions.

For example, the expulsion of a child from school followed by juvenile proceedings arising out of the same conduct was held not to violate the principles of double jeopardy.⁸⁶ Courts addressing this issue have generally found that the expulsion did not rise to the level of punishment for double jeopardy purposes since: (1) the expulsion from school did not equate to a criminal prosecution which would subject the child to the double jeopardy analysis; and (2) the purpose of the expulsion was to protect the other students rather than to penalize the individual who committed the offense. As explained by the Court of Appeals of Arizona:

school officials, as a body and individually, have a responsibility for maintaining order upon the school premises so that the education, teaching and training of the students may be accomplished in an atmosphere of law and order. In measuring the reasonableness of an expulsion, courts must give credence to the role and purpose of the schools and the means available to school administrators to deal with their problems.⁸⁷

Furthermore, the termination of parental rights followed by a criminal prosecution for child abuse or neglect has been held not to implicate prohibitions against double jeopardy.⁸⁸ The rationale for such a finding is that a proceeding to terminate parental rights is not a criminal prosecution designed to determine innocence or guilt and, therefore, double jeopardy does not come into play.⁸⁹ Furthermore, the purpose of the termination of parental rights is to "provide children with permanent and stable family relationships,"⁹⁰ (i.e.,

do what is in the best interests of the child) and not to punish the parent offender.⁹¹

Holding an individual in contempt of court and ordering imprisonment unless that individual affirmatively decides to purge the contempt does not implicate the Double Jeopardy Clause of the Fifth Amendment.⁹² Courts have held that because a contempt proceeding is civil in nature,⁹³ and, more importantly, because the contemnor "[holds] the keys in his own pocket"⁹⁴ since he alone is capable of purging the contempt charge, the double jeopardy prohibitions are not violated when a criminal suit is also brought in conjunction with the contempt charge.

Finally, courts have held that other civil sanctions designed to serve remedial purposes only do not implicate the prohibitions of double jeopardy. Such sanctions include: (1) the reduction of an individual's pension;⁹⁵ (2) the withholding of vacation benefits from employees found to have engaged in criminal conduct;⁹⁶ (3) a dishonorable discharge from the military;⁹⁷ (4) the civil commitment of an individual;⁹⁸ and (5) the awarding of punitive damages in a civil suit between private parties.⁹⁹ Therefore, although courts have been careful not to apply the Double Jeopardy Clause where the sanction is remedial only, a flurry of litigation has nevertheless erupted in all areas of civil law which impose any penalties upon the wrongdoer.

Forfeiture of Property by a Sovereign

Whether the forfeiture of illegal proceeds by a sovereign constitutes double jeopardy has caused great dissention among and within the various jurisdictions which have addressed the issue. One would conjecture that the Supreme Court's decisions in *Halper*, *Austin*, and *Kurth Ranch* made the issue a simple one for lower courts. Such was not the case. The Supreme Court's "guidance" as to what should constitute punishment for double jeopardy purposes has only further muddied the waters for courts deciding if forfeiture bars a criminal prosecution. In fact, lower courts have disagreed on virtually every aspect of the double jeopardy analysis, including whether a civil forfeiture of property along with a criminal prosecution constitutes the "same offense" for double jeopardy purposes, whether such actions are part of the same proceeding for double jeopardy purposes, whether a civil forfeiture constitutes "punishment," and whether the three Supreme Court cases are even applicable to a forfeiture proceed-

ing.¹⁰⁰ Therefore, as one might expect, various cases addressing the issue of whether civil forfeiture constitutes punishment for double jeopardy purposes have reached conflicting conclusions.

The majority of lower courts addressing the issue have found that the principles of double jeopardy are not implicated when a sovereign brings an action to forfeit an individual's property. These courts have based their findings on a number of criteria. First, the main reason for finding double jeopardy inapposite to a civil forfeiture is that the forfeiture is remedial in nature and not punitive.¹⁰¹ In making such a determination, these courts have pointed to a number of factors as evidence that the specific statutory forfeiture provisions are remedial only. Some considerations include the fact that various statutes provide for a limited use of the property once forfeited to the state,¹⁰² the owner of illegal proceeds has no property interest in the objects forfeited to the state,¹⁰³ and that a forfeiture proceeding carries with it a lesser burden of proof than a criminal prosecution.¹⁰⁴

Second, courts examining the purpose of these forfeiture statutes have found that since they do not serve to punish, the prohibitions against double jeopardy are not implicated. Several purposes of forfeiture provisions have been enunciated by lower courts. The most common of these purposes is the situation where forfeiting an individual's property used in illegal activities provides compensation to the government for the cost of prosecution of such cases.¹⁰⁵ Other purposes espoused by various lower courts include the forfeiture of property in order to "abate past offending uses of property and prevent future offending uses of the property,"¹⁰⁶ and in cases where the amount forfeited is relatively small, "to save the government the time and expense of [a] judicial [forfeiture] proceeding."¹⁰⁷ Courts which have found the principles of double jeopardy inapplicable to an *in rem* civil forfeiture action have focused primarily on the compensation of the government as a legitimate purpose of the forfeiture provision at issue.

A third reason why some courts have dismissed the notion that a civil forfeiture proceeding implicates the protections afforded by the Double Jeopardy Clause is that, when dealing with a statute permitting the forfeiture of property *intended to be used* in illicit activity, the intention of use is a separate and distinct offense from the possession of illicit materials or contraband.¹⁰⁸ Therefore, double jeopardy is not violated

because the defendant is not twice put in jeopardy for the same offense.

Finally, in various cases, courts have avoided the issue of whether civil forfeiture constitutes punishment altogether. Instead, these courts have found that since the defendants did not contest the civil forfeiture, they were not placed in jeopardy a first time, so as to preclude a second jeopardy by a criminal prosecution.¹⁰⁹ As explained by the Court of Appeals for the Fifth Circuit in *United States v. Clark*, "the forfeiture was not contested, and we have recently held that a 'summary forfeiture, by definition, can never serve as a jeopardy component of a double jeopardy motion.'"¹¹⁰

Courts upholding the various forfeiture proceedings as constitutional have distinguished the forfeitures at issue from the facts of *Halper*.¹¹¹ Nevertheless, these same courts have employed the *Halper* rationale and have concluded that the various forfeitures were rationally related to the offenses committed and were not so disproportionate in nature as to rise to the level of punishment for double jeopardy purposes.¹¹²

Although the majority of courts confronted with the issue have held that civil forfeiture does not implicate the prohibitions of double jeopardy, a growing minority have found that civil forfeiture may, in fact, prevent a criminal prosecution. The courts have relied heavily on the Supreme Court's decision in *Austin*, regardless of the fact that *Austin* only dealt directly with the issue of punishment in the context of the Eighth Amendment Excessive Fines Clause.¹¹³ As explained by the Court of Appeals of Louisiana in *State v. 1979 Cadillac Deville*, "[a]lthough not specifically deciding a double jeopardy claim in *Austin*, the Court's reasoning makes it clear that double jeopardy applies in [a civil forfeiture case] because forfeiture of derivative contraband is not solely remedial, and therefore it constitutes punishment."¹¹⁴

Using the rationale of *Austin*, some jurisdictions have found that civil forfeiture proceedings implicate the prohibitions of double jeopardy because these procedures do, in fact, constitute punishment for double jeopardy purposes. For example, many courts have pointed out the fact that various statutes provided for an "innocent owner defense," whereby an individual may be exempt from the forfeiture of his property if he can show that he did not know that his property was being used for illicit purposes, leads to the conclusion that those statutes aim to punish the offenders who do not fall into the category of "innocent owners."¹¹⁵

Furthermore, these courts have also found that the forfeiture of property does constitute the “same offense” as the criminal prosecution.¹¹⁶ Using the “same elements test” derived from *Blockberger v. United States*,¹¹⁷ the Court of Appeals for the Sixth Circuit explained that:

the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense. . . . Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate [the defendant’s] residence without a showing that he was manufacturing marijuana.¹¹⁸

Therefore, when proof of the underlying felony is necessary for the forfeiture of the individual’s property, courts have generally held that the subsequent forfeiture proceeding is barred by double jeopardy principles.

Some courts have held that a forfeiture that partially serves remedial purposes is not dispositive for double jeopardy purposes. Following the Supreme Court’s guidance, one lower court found that “[i]n the wake of *Austin* and *Kurth Ranch*, we believe that a forfeiture under the [specific forfeiture statute] constitutes punishment even though it may serve some remedial purposes.”¹¹⁹ Finally, courts also have opined that the fallacious belief that the forfeiture of property removes a dangerous item from society will no longer be a valid defense to the forfeiture of that property. Although such a rationale may be appropriate when the item to be seized is contraband, the rationale loses its credibility when the items to be seized are an individual’s home or motor home.¹²⁰

Although the various federal and state statutes permitting the forfeiture of property upon the commission of a crime may vary somewhat and therefore partially account for the differing holdings among lower courts, forfeiture will nevertheless continue to be a source of great debate among lower courts. Regardless of the statute at issue in any given case, lower courts have continually had difficulty in coming to terms with whether forfeiture constitutes punishment for the purposes of the Double Jeopardy Clause and whether the three seminal Supreme Court cases in reality aid the lower courts in their quest.

Conclusions

Upon close examination of the evolution of the Double Jeopardy Clause over the past six years and how courts have defined punishment in the context of civil proceedings, it becomes apparent that what was originally espoused in *Halper* as the “rare case” has come full circle. As evidenced by the previous civil sanctions discussed, the scope of the decisions in *Halper*, *Austin*, and *Kurth Ranch* have arguably reached an entirely new level never contemplated by the Justices who handed down these three Supreme Court decisions. The “rare case” enunciated in *Halper* over six years ago has been transformed into the “common case” in an attempt to encompass virtually all areas of civil law which impose any type of sanction upon the wrongdoer. The warnings by the Court in *Halper* that “[w]hat we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction *overwhelmingly disproportionate* to the damages he has caused,”¹²¹ have practically gone unnoticed. Until the Supreme Court affirmatively addresses the limitations of *Halper* to civil sanctions other than those discussed in *Halper*, lower courts will undoubtedly continue to grapple with the phenomena of what civil sanctions, if any, constitute punishment for double jeopardy purposes.

Furthermore, it is also a distinct possibility that although some of these lower courts may, in fact, have viewed the civil sanctions as additional punishments for double jeopardy purposes, they have nevertheless chosen to hide behind the Supreme Court’s rationales in *Halper*, *Austin*, and *Kurth Ranch* in an effort to reach an equitable result. For example, it would seem ridiculous in a case where a doctor has been convicted of sexually assaulting his patients to bar the subsequent revocation or suspension of his license due to the prohibitions of twice being placed in jeopardy for the same offense. In the same instance, it would seem equally ridiculous to prohibit the doctor’s criminal prosecution due to the previous suspension or revocation of his license. The same analysis would follow for the suspension or revocation of a driver’s license or prison disciplinary proceedings. Therefore, the lower courts have quite possibly attempted to rationalize their findings by holding the principles of double jeopardy inapplicable. While the civil sanctions in reality may constitute a punishment for the offense committed, it is unlikely that courts will openly declare this fact and

allow society to suffer the consequences of prohibiting one form of punishment, whether it be the criminal prosecution or the civil sanction.

Finally, lower courts have struggled with the appropriate standard to apply in determining whether the civil sanction involved is remedial only or if it rises to the level of punishment for double jeopardy purposes. *Halper*, in 1989, announced that "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather *can only be explained* as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."¹²² *Austin*, on the other hand, explained that the forfeiture of property could be subjected to the principles of double jeopardy if "it can only be explained as serving *in part* to punish."¹²³ Based upon these two principles, the question then becomes: must the sanction be solely for punitive purposes before it will be barred by the Double Jeopardy Clause, or must it only be in part to punish before the double jeopardy analysis will come into play? Put in other terms, does *Austin* seek to further explain what was originally enunciated in *Halper*, or does it create a new standard to apply? Once again, before further clarification is provided by the Supreme Court on the proper standard to apply, lower courts will continually be in conflict regarding which rule, if either, should be followed when faced with a double jeopardy challenge.

In sum, beginning in 1989 with the decision in *United States v. Halper*, a multitude of litigation has reached federal and state courts regarding which civil sanctions, if any, necessitate the application of the Double Jeopardy Clause of the Fifth Amendment. Due to the newly espoused principles by the Supreme Court in *Halper*, *Austin*, and *Kurth Ranch*, it is unlikely that the debate will end quickly or quietly, as courts try to define what constitutes punishment in the civil arena so that defendants may receive the full protections afforded by the Fifth Amendment of the United States Constitution: to be free from twice being put in jeopardy for the same offense.

About the Author:

Robyn Scheina Brown is a 1996 graduate of the University of Baltimore School of Law. She will be serving as a law clerk to the Honorable Charles E. Moylan, Jr. of the Court of Special Appeals of Maryland for the 1996-97 term.

ENDNOTES

¹ U.S. Const. amend. V.

² *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

³ 490 U.S. 435 (1989).

⁴ *Id.* at 448-49. See also David S. Rudstein, *Civil Penalties and Multiple Punishment under the Double Jeopardy Clause: Some Unanswered Questions*, 46 Okla. L. Rev. 587 (1993).

⁵ 18 U.S.C. § 287.

⁶ Specifically, Halper worked as a manager at New City Medical Laboratories where he submitted claims for various patients eligible for Medicare. In this capacity Halper submitted 65 separate false claims, which Blue Cross and Blue Shield of Greater New York paid and for which New City Medical Laboratories received reimbursement. *United States v. Halper*, 490 U.S. at 437.

⁷ Halper was convicted on all 65 counts and sentenced to two years imprisonment and a fine of \$5,000. *Id.*

⁸ 31 U.S.C. §§ 3729-3731. The District Court granted summary judgment to the government on the issue of liability and imposed a penalty of \$130,000 upon Halper. *Halper*, 490 U.S. at 437.

⁹ *Id.* at 440.

¹⁰ *Id.* at 447-48.

¹¹ *Id.* at 448.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* The Court in *Halper* eventually concluded that the \$130,000 fine imposed upon Halper was "sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy . . ." *Id.* at 452.

¹⁵ *Id.* Questions have also arisen whether *Halper* applies when the criminal prosecution is subsequent to the imposition of civil penalties upon an individual. This question arises because *Halper* specifically states that it applies when a defendant "previously has sustained a criminal sanction" and a civil sanction is subsequently initiated. *Id.* (emphasis added). Courts addressing this issue have applied the double jeopardy analysis regardless of the order of the proceedings.

¹⁶ 113 S. Ct. 2801 (1993).

¹⁷ *Id.* at 2812 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)) (emphasis added).

¹⁸ *Austin* plead guilty to one count of possession of cocaine with the intent to distribute and was sentenced to seven years imprisonment.

¹⁹ 113 S. Ct. at 2803.

²⁰ *Id.* It should be noted that the decision in *Austin* was based entirely on the Eighth Amendment and not the Double Jeopardy Clause of the Fifth Amendment. Although the Court in *Austin* extensively reviewed whether forfeiture constituted punishment

at common law and today, and further referred to *Halper* on several occasions, it did not technically address whether forfeiture constituted “punishment” for double jeopardy purposes. Therefore, it is questionable whether *Austin* would even apply to a double jeopardy analysis of civil sanctions. On the other hand, several lower courts have examined *Austin* in the same context as *Halper* and *Kurth Ranch*, 114 S. Ct. 1937 (1994), on the grounds that although the Supreme Court did not explicitly extend *Austin* to double jeopardy cases, it did so implicitly.

²¹ The review made it quite clear that at common law forfeiture was considered punishment. *Id.* at 2806-08.

²² The Court ultimately rejected this stance because, although a valid argument exists that removing the contraband itself would serve to protect the public from harm, such an argument would not apply to the removal of an object such as a car, since “[t]here is nothing even remotely criminal in possessing an automobile.” *Id.* at 2811.

²³ *Id.*

²⁴ *Id.* at 2806 (emphasis added).

²⁵ The Court ultimately did not rule on whether the forfeiture in Austin’s case amounted to an excessive fine, but rather remanded the case for such a determination. *Id.* at 2812.

²⁶ *Id.* at 2806. The Court in *Halper* stated, “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.” *Halper*, 490 U.S. at 448.

²⁷ 114 S. Ct. 1937 (1994).

²⁸ The Kurths operated a grain and livestock plant, from which they eventually began to grow and sell marijuana. They were subsequently charged with conspiracy to possess drugs with the intent to sell, and eventually entered into separate plea agreements to the counts charged. Two of the defendants were sentenced to imprisonment and the others received suspended sentences. *Id.* at 1942. See also Tad Ravazzini, *Department of Revenue v. Kurth Ranch: The Expansion of Double Jeopardy Jurisprudence into Civil Tax Proceedings*, 25 Golden Gate U. L. R. 331 (1995).

²⁹ The Court reasoned that because a tax statute was fundamentally different from the civil penalty involved in *Halper*, “[s]ubjecting Montana’s drug tax to the *Halper* test for civil penalties is therefore inappropriate.” 114 S. Ct. at 1948.

³⁰ *Id.* at 1946.

³¹ *Id.*

³² *Id.* at 1947.

³³ *Id.* at 1948. The Court stated that “a tax on ‘possession’ of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character.” *Id.*

³⁴ *Id.*

³⁵ See e.g., *State v. Rehm*, 821 S.W.2d 127, 129 (Mo. App. 1992); *State v. Young*, 530 N.W.2d 269, 279 (Neb. App. 1995); *People v. Frank*, 631 N.Y.S.2d 1014, 1018 (N.Y. Crim. Ct. 1995); *Voisinet v. State*, 909 S.W.2d 262, 264 (Tex. App. 1995); *State v. O’Brien*, 609 A.2d 981, 982 (Vt. 1992).

³⁶ *Baldwin v. Department of Motor Vehicles*, 42 Cal. Rptr. 2d 422, 430 (1995) (“license revocation here at issue is fundamentally different from a tax and serves a different purpose”); *State v. Maze*, 825 P.2d 1169, 1174 (Kan. App. 1992) (because the facts in *Halper* are materially different from those involved in a license

suspension, *Halper* is inapplicable to present situation); *State v. Zimmerman*, 539 N.W.2d 49, 55-56 (N.D. 1995) (*Halper* and *Kurth Ranch* sufficiently distinguishable due to fact that money was sanction involved); *Tench v. Commonwealth*, 462 S.E.2d 922, 925 (Va. App. 1995) (because *Austin* did not involve double jeopardy principles, it was not controlling in case of license revocation); *State v. McMaster*, 543 N.W.2d 499 (Wis. App. 1995) (*Kurth Ranch* limited to only those situations where a tax is imposed).

³⁷ See also Jesselyn McCurdy, *Talking Points: Double Jeopardy/ Administrative License Revocation*, 29 Prosc. 21 (1995), for a discussion of possible arguments that license revocation does or, in the alternative, does not implicate the Double Jeopardy Clause.

³⁸ *State v. Maze*, 825 P.2d at 1174; *State v. Cassidy*, 662 A.2d 955, 959 (N.H. 1995); *Schriever v. Motor Vehicles Div.*, 802 P.2d 706, 706 (Or. App. 1990), cert. denied, 810 P.2d 855 (Or. 1991); *City of Orem v. Crandall*, 760 P.2d 920, 922 (Utah App. 1988).

³⁹ *State v. Maze*, 825 P.2d at 1174 (citations omitted).

⁴⁰ *State v. Kennedy*, 904 P.2d 1044, 1050-51 (N.M. 1995).

⁴¹ See e.g., *Baldwin*, 42 Cal. Rptr. 2d at 428; *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995); *Kennedy*, 904 P.2d at 1044, 1057.

⁴² *Baldwin*, 42 Cal. Rptr. 2d at 428 (immediate goal of license suspension is to “obtain the best evidence of blood-alcohol content”); *McMaster*, 1995 WL 654042, at *2 (one of purposes of license suspension is to “facilitate the gathering of evidence against those drivers”).

⁴³ *Schwander*, 1995 WL 413248, at *2 (purpose of license suspension procedures is to “prevent the offending licensee from operating a motor vehicle until rehabilitation is completed by attendance at one of the approved treatment programs”).

⁴⁴ *State v. Toyomura*, 904 P.2d 893, 902 (Haw. 1995); *State v. Higa*, 897 P.2d 928, 933 (Haw. 1995); *Butler v. Department of Public Safety and Corrections*, 609 So. 2d 790, 797 (La. 1992); *Savard*, 659 A.2d at 1268; *State v. Parker*, 538 N.W.2d 141, 143 (Minn. App. 1995), aff’d 543 N.W.2d 93 (Minn. 1996); *Kennedy*, 904 P.2d at 1058-59; *Zimmerman*, 539 N.W.2d at 55-56.

⁴⁵ *Kennedy*, 904 P.2d at 1058-59.

⁴⁶ *Butler*, 609 So. 2d at 796; accord *City of Orem*, 760 P.2d at 922.

⁴⁷ *State v. Zerkel*, 900 P.2d 744, 753 (Alaska App. 1995) (the government has the power to require a license for the performance of certain tasks because “the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure”); *State v. Talavera*, 905 P.2d 633, 638 (Idaho 1995) (“[t]he right of a citizen to operate a motor vehicle upon the public streets and highways, is subject to reasonable regulation by the state in the exercise of its police powers”).

⁴⁸ *Savard*, 659 A.2d at 1267-68.

⁴⁹ See also *Jones v. State*, 340 Md. 235, 252, 666 A.2d 128, 136 (1995), cert. denied 116 S. Ct. 1057 (1996) (“[t]o ensure that the public is protected, licensing systems also typically require licensees to meet certain standards of conduct, and a license may typically be suspended or revoked when a licensee acts improperly”); *Parker*, 538 N.W.2d at 143 (“[d]riving is a privilege voluntarily granted by the state”).

⁵⁰ *Baldwin*, 42 Cal. Rptr. 2d at 430; *Butler*, 609 So. 2d at 797; *Kennedy*, 904 P.2d at 1058-59.

⁵¹ *State v. Parker*, 538 N.W.2d at 142-43.

⁵² *Rondberg v. Arizona Bd. of Chiropractic Examiners*, 897 P.2d

711, 713-14 (1995)(chiropractor); *Schillerstrom v. State*, 885 P.2d 156, 159 (Ariz. App. 1994)(chiropractor); *Loui v. Board of Medical Examiners*, 889 P.2d 705, 711 (Haw. 1995)(physician); *Alexander v. Louisiana State Bd. of Medical Examiners*, 644 So. 2d 238, 243-44 (La. App. 1994), *cert. denied*, 116 S. Ct. 64 (1995); *Allen v. Louisiana State Bd. of Dentistry*, 603 So. 2d 238, 242 (La. App. 1992); *Arthurs v. Bd. of Registration in Medicine*, 418 N.E.2d 1236, 1248 (Mass. 1981)(physician).

⁵³ *People v. Marmon*, 903 P.2d 651, 655 (Colo. 1995).

⁵⁴ *Sweeny v. State Bd. of Funeral Directors*, 666 A.2d 1137, 1139 (Pa. 1995).

⁵⁵ *Reed v. Alcoholic Beverage Control Div.*, 746 S.W.2d 368, 369 (Ark. 1988); *Slovak-American Citizens Club of Oakview v. Pennsylvania Liquor Control Bd.*, 549 A.2d 251, 255 (Pa. 1988).

⁵⁶ *Moser v. Richmond County Bd. of Comm'rs*, 428 S.E.2d 71, 72-73 (Ga. 1993)(revocation of business license to operate health spa not punishment for double jeopardy purposes, but only remedial in nature).

⁵⁷ *In re Friedman*, 457 A.2d 983, 987 (Pa. 1983).

⁵⁸ *Klien v. Real Estate Comm'r*, 528 P.2d 1355, 1358 (Or. 1974).

⁵⁹ *Loui*, 889 P.2d at 711 (suspension of medical license "designed to protect the public from unfit physicians"); *Sweeny*, 666 A.2d at 1139 ("the revocation [of the funeral director's license] occurred because Sweeny had breached the trust which the public had placed in him as a funeral director, and because the Board is charged with the responsibility of protecting the public from further breaches of the trust").

⁶⁰ *Rondberg*, 897 P.2d at 714.

⁶¹ *United States v. Brown*, 59 F.3d 102, 104 (9th Cir. 1995); *Coleman v. State*, 642 So. 2d 532, 533 (Ala. Crim. App. 1994); *People v. Frazier*, 895 P.2d 1077, 1079 (Colo. App. 1994); *State v. Lynch*, 533 N.W.2d 905, 909-11 (Neb. 1995); *Porter v. Irvin*, 615 N.Y.S.2d 953, 953 (1994); *People v. Rivera*, 592 N.Y.S.2d 482, 482 (1993); *Guerrero v. State*, 893 S.W.2d 260, 261 (Tex. Ct. App. 1995); *Mott v. State*, 846 S.W.2d 398, 399 (Tex. Ct. App. 1992); *State v. Fonder*, 469 N.W.2d 922, 926 (Wis. App.), *cert. denied*, 502 U.S. 993 (1991).

⁶² *Mott v. State*, 846 S.W.2d at 399; *See also United States v. Brown*, 59 F.3d at 104; *Smith v. State*, 827 S.W.2d 71, 72 (Tex. Ct. App. 1992); *Wild v. Commonwealth*, 446 S.E.2d 626, 627 (Va. App. 1994).

⁶³ *Hernandez v. State*, 904 S.W.2d 808, 811 (Tex. Ct. App. 1995).

⁶⁴ Furthermore, the fact that the segregation may be termed "disciplinary segregation" does not automatically render the sanction "punishment" for double jeopardy purposes. *State v. Walker*, 646 A.2d 209, 212 (Conn. App.), *cert. denied*, 648 A.2d 159 (Conn. 1994).

⁶⁵ *In State v. Mullins*, 647 N.E.2d 676, 678 (Ind. App. 1995), the Court of Appeals of Indiana rejected the appellant's argument that revoking thirty days of good time credit, in essence, lengthened the appellant's prison sentence. The court reasoned that "[c]redit time is a bonus created by statute and the deprivation of credit time cannot rise to the level of infringing upon a fundamental liberty interest triggering double jeopardy concerns." *Id. Accord United States v. Newby*, 11 F.3d 1143, 1145-46 (3d Cir. 1993), *cert. denied*, 115 S. Ct. 111 (1994)(forfeiture of one thousand days good time credit, although seemingly harsh, did not violate double jeopardy prohibitions because it was a "reasonable and necessary" sanction); *People v. Watson*, 892 P.2d 388,

390 (Colo. App. 1994), *cert. denied* (Colo. Apr. 3, 1995)("good time earned and good time credits do not constitute service of sentence, but only serve the purpose of determining an inmate's parole eligibility date").

⁶⁶ *Id.*

⁶⁷ *Smith v. State*, 1 Md. App. 297, 303, 229 A.2d 723, 726 (1967)("the institutional punishment received by appellant was not the equivalent of a trial and he was not put in jeopardy thereby").

⁶⁸ *Wild*, 446 S.E.2d at 627; *Walker*, 646 A.2d at 211.

⁶⁹ *Newby*, 11 F.3d at 1145. *See also Wild*, 446 S.E.2d at 627 ("[t]he purpose of the administrative disciplinary hearing was to maintain order in the correctional facility. Its purpose was to determine whether correctional facility rules had been broken and to maintain institutional order, rather than to prosecute criminal conduct. It was not intended to vindicate or punish the crime against the injured offender.").

⁷⁰ *United States v. Hernandez-Fundora*, 58 F.3d 802, 806 (2d Cir.), *cert. denied*, 115 S. Ct. 2288 (1995).

⁷¹ *Watson*, 892 P.2d at 390.

⁷² *Walker*, 646 A.2d at 212 (courts are to give "wide-ranging deference to the decisions of prison administrators in considering what is necessary and proper to preserve order and discipline"); *Hernandez*, 904 S.W.2d at 808 ("courts traditionally have deferred to the expertise of prison authorities regarding questions of prison administration and discipline").

⁷³ *Newby*, 11 F.3d at 1146 (quoting *Bell v. Wolfish*, 441 U.S. 520, 548 (1979)).

⁷⁴ *Id.* at 1146.

⁷⁵ *Id.*

⁷⁶ *Hernandez-Fundora*, 58 F.3d at 807.

⁷⁷ *Mannochio v. Kusserow*, 961 F.2d 1539, 1541-42 (11th Cir. 1992)(physician banned from participation in Medicare program for at least five years when physician submitted fraudulent Medicare claims); *Kahn v. Inspector General of the U.S. Dept. of Health and Human Serv.*, 848 F. Supp. 432, 437 (S.D. N.Y. 1994)(podiatrist excluded from Medicare program who submitted false claims to program over a period of eleven months); *Greene v. Sullivan*, 731 F. Supp. 835, 840 (E.D. Tenn. 1990)(pharmacist falsely billed state for filling a prescription with a brand name drug when he actually substituted a generic drug which cost less).

⁷⁸ *United States v. Furlett*, 974 F.2d 839, 844-45 (7th Cir. 1992).

⁷⁹ *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990).

⁸⁰ *Bae v. Shalala*, 44 F.3d 489, 496-97 (7th Cir. 1995)(president of drug manufacturing company disbarred from "providing any service in any capacity to a person that has an approved or pending drug product application." *Id.* at 490 (quoting 21 U.S.C. § 335a-c.)).

⁸¹ *Furlett*, 974 F.2d at 844. *See also Bae*, 44 F.3d at 496; *United States v. Hudson*, 14 F.3d 536, 542 (10th Cir. 1994).

⁸² *Furlett*, 974 F.2d at 844; *Mannochio*, 961 F.2d at 1542; *Bizzell*, 921 F.2d at 267.

⁸³ *Bae*, 44 F.3d at 495.

⁸⁴ *Id.* at 496.

⁸⁵ *Furlett*, 974 F.2d at 845; *Sullivan*, 731 F. Supp. at 840.

⁸⁶ *In re Dandridge*, 614 So. 2d 129, 130-31 (La. App.), *cert. denied*, 616 So. 2d 684 (La. 1993); *In re Appeal in Gila County Juvenile Delinquency Action Nos. DEL 6280082*, 816 P.2d 950,

951 (Ariz. 1991).

⁸⁷ *In re Gila County*, 816 P.2d at 951.

⁸⁸ *Malone v. State*, 864 S.W.2d 156, 159 (Tex. App. 1993) (restriction on rights of parent following conviction for aggravated sexual assault upon defendant's daughter); *In re Amanda A. v. Darrell A.*, 534 N.W.2d 907, 912-13 (Wis. App), *cert. denied*, 537 N.W.2d 574 (Wis. 1995) (termination of parental rights ordered when defendant convicted of murdering children's mother).

⁸⁹ *Malone*, 864 S.W.2d at 158-59.

⁹⁰ *In re Amanda A.*, 534 N.W.2d at 913.

⁹¹ *Id.* at 912-13.

⁹² *Mahoney v. Commonwealth*, 612 N.E.2d 1175, 1179 (Mass. 1993); *State v. Mertz*, 514 N.W.2d 662, 666-67 (N.D. 1994).

⁹³ In *Mahoney*, 612 N.E.2d at 1179, the Supreme Judicial Court of Massachusetts held that because the purpose of the contempt charge was to "compel compliance with the protective orders that the defendant had previously disobeyed," it did not constitute "punishment" for double jeopardy purposes.

⁹⁴ *Mertz*, 514 N.W.2d at 666.

⁹⁵ *LePrince v. Board of Trustees, Teacher's Pension and Annuity Fund*, 631 A.2d 545, 549 (N.J. Super. 1993), *cert. denied*, 114 S. Ct. 1072 (1994) ("[f]ull or partial forfeiture of pension rights is based on the employee's violation of the implied condition that the employee render honorable service").

⁹⁶ *Stuart v. Department of Social and Rehabilitation Serv.*, 846 P.2d 965, 969 (Mont. 1993).

⁹⁷ *United States v. Blocker*, 33 M.J. 349, 352 (1991).

⁹⁸ *In re Blodgett*, 490 N.W.2d 638, 646-47 (Minn. App. 1992), *aff'd*, 510 N.W.2d 910 (Minn.), *cert. denied*, 115 S. Ct. 146 (1994).

⁹⁹ *Jines v. Seiber*, 549 N.E.2d 964, 966 (Ill. App. 1990) (court notes that *Halper's* holding was specifically limited so as not to apply to prevent private parties from litigating for damages).

¹⁰⁰ *Austin* has been challenged more frequently than *Halper* or *Kurth Ranch*, since many courts have simply asserted that *Austin* is inapplicable because it does not deal with the Fifth Amendment, but rather focuses on the Eighth Amendment. This issue was discussed in more detail, *supra*. See also Gary M. Maveal, *Criminalizing Civil Forfeitures*, 74 Mich. B. J. 658 (1995) for further discussion regarding the effect of *Austin* on Fifth Amendment challenges to forfeiture proceedings.

¹⁰¹ *In re Forfeiture of 1986 Pontiac Firebird v. Burgess*, 600 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 1992); *State v. 1989 Ford F-150 Pickup*, 888 P.2d 1036, 1037 (Okla. App. 1995).

¹⁰² *1989 Ford F-150 Pickup*, 888 P.2d at 1037 ("[a]nother remedial aspect of the forfeiture statutes in question is the restriction on the government's use of funds derived from forfeitures. Under [the statute], funds can only be used by governmental agencies for: (1) payment of the actual expenses of preserving the property and legitimate costs related to civil forfeiture proceedings, and (2) enforcement of controlled dangerous substance laws, drug abuse prevention, and drug abuse education").

¹⁰³ *United States v. Salinas*, 65 F.3d 551, 554 (6th Cir. 1995) ("one never acquires a property right to proceeds, which include not only cash but also property secured with the proceeds of illegal activity"); *District Attorney of Kings County v. Iadarola*, 623 N.Y.S.2d 999, 213-14 (1995) ("a convicted felon has no proprietary interest in proceeds of the criminal activity . . . [t]aking away property in which a person has no possessory interest or no lawful ownership

right is not punishment, but remedial").

¹⁰⁴ *People v. Krizek*, 648 N.E.2d 313, 316 (Ill. App. 1995); *1989 Ford F-150 Pickup*, 888 P.2d at 1037.

¹⁰⁵ *State v. Johnson*, 632 So. 2d 817, 818 (La. App.), *writ granted*, 642 So. 2d 1302 (La. 1994); *1989 Ford F-150 Pickup*, 888 P.2d at 1037; *Commonwealth v. Wingait Farms*, 659 A.2d 584, 591 (Pa. Commw. 1995), *cert. granted*, 668 A.2d 1137 (Pa. 1995); *State v. Clark*, 844 P.2d 1029, 1035 (Wash. App. 1993), *aff'd*, 875 P.2d 613 (Wash. 1994).

¹⁰⁶ *1989 Ford F-150 Pickup*, 888 P.2d at 1037; *Wingait Farms*, 659 A.2d at 591.

¹⁰⁷ *United States v. Baird*, 63 F.3d 1213, 1217 (3d Cir.), *cert. filed*, 64 U.S.L.W. 3310 (Oct. 17, 1995).

¹⁰⁸ *State v. Solar*, 906 S.W.2d 142, 147 (Tex. App. 1995).

¹⁰⁹ *United States v. Washington*, 69 F.3d 401, 404 (9th Cir. 1995); *United States v. Clark*, 67 F.3d 1154, 1163 (5th Cir. 1995).

¹¹⁰ *Id.* (quoting *United States v. Arreol-Ramos*, 60 F.3d 188 (5th Cir. 1995)).

¹¹¹ *In re Forfeiture of 1986 Pontiac Firebird*, 600 So. 2d at 1179 ("Halper is not a civil forfeiture case, a fact we deem dispositive of this appeal"); *Allen v. State*, 91 Md. App. 775, 786, 605 A.2d 994, 1000 n. 4 (1992), *cert. denied*, 328 Md. 92, 612 A.2d 1315 (1992) ("Halper is factually inapposite. Halper was not a forfeiture case.").

¹¹² *State v. Johnson*, 632 So. 2d at 818 (conviction for possession of over 400 grams of cocaine followed by seizure of \$976.00 "can hardly be said to constitute 'a sanction overwhelmingly disproportionate to the damages [the defendant] has caused'"); *People v. Hellis*, 536 N.W.2d 587, 592, *cert. denied*, 539 N.W.2d 504 (1995).

¹¹³ *State v. 1979 Cadillac Deville*, 632 So. 2d 1221, 1226-27 (La. App.), *writ granted*, 642 So. 2d 1302 (La. 1994); *State v. Davis*, 903 P.2d 940, 947-48 (Utah App. 1995); *State v. Clark*, 875 P.2d 613, 617 (Wash. 1994). *But see State v. Johnson*, 632 So. 2d at 818 ("[t]he court in *Austin* discussed forfeitures only in relation to an Eighth Amendment Excessive Punishment analysis. While the Court's opinion paints with a broad brush, the language should be limited to the legal issue before the court; that is, are in rem forfeitures subject to the limitations of the Eighth Amendment's Excessive Fines Clause").

¹¹⁴ *1979 Cadillac Deville*, 632 So. 2d at 1228.

¹¹⁵ *United States v. \$69,292.00*, 62 F.3d 1161, 1164 (9th Cir. 1995); *Ex parte Ariza*, 913 S.W.2d 215, 222-23 (Tex. App. 1995).

¹¹⁶ *United States v. Ursery*, 59 F.3d 568, 573-74 (6th Cir.), *cert. filed*, 64 U.S.L.W. 3161 (Aug. 28, 1995); *Ex parte Ariza*, 913 S.W.2d at 218.

¹¹⁷ 284 U.S. 299 (1932).

¹¹⁸ *Ursery*, 59 F.3d at 573-74.

¹¹⁹ *Towns*, 646 N.E.2d at 1371.

¹²⁰ *Clark*, 875 P.2d at 617.

¹²¹ *Halper*, 490 U.S. at 449 (emphasis added).

¹²² *Id.* at 448 (emphasis added).

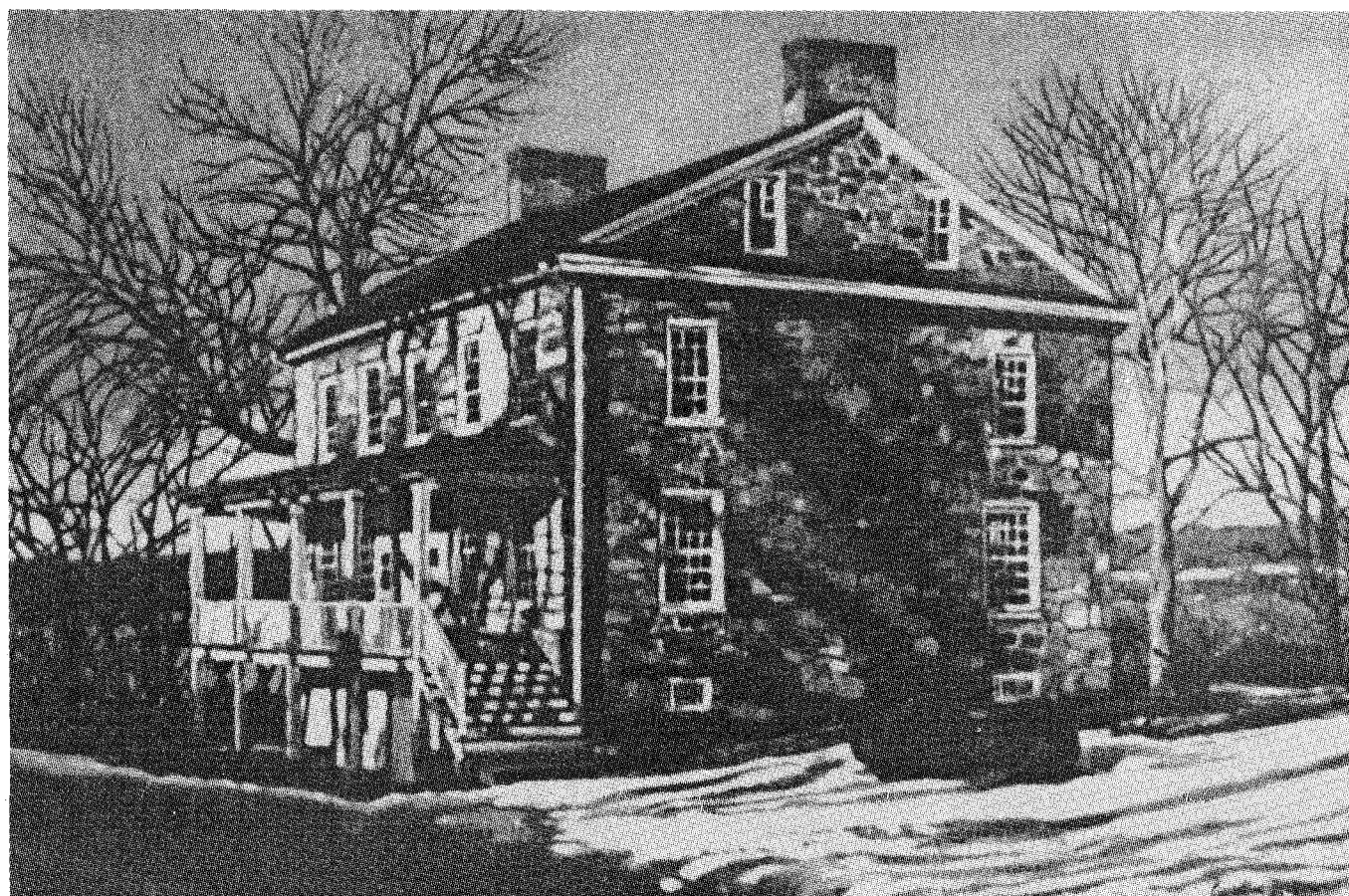
¹²³ *Austin*, 113 S. Ct. at 2806 (emphasis added).

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RODGERS TAVERN 1695

Susquehanna River traffic brought many visitors to the tavern, located at the site of the Lower Ferry in Perryville, Maryland, directly across the river from Havre de Grace. Most notably, George Washington was a frequent guest during the late 18th Century. This formidable stone structure is the birthplace of Commodore John Rodgers, founder of the United States Navy.