PORTIONING PUNISHMENT: CONSTITUTIONAL LIMITS ON SUCCESSIVE AND EXCESSIVE PENALTIES

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INTRODUCTION

There has been a remarkable increase during the last decade in the imposition of overlapping civil, administrative, and criminal sanctions for the same misconduct,[1] as well as a steady rise in the severity of those sanctions.[2] In response, defendants have balked,

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[1] Special taxes, forfeitures, and penalties of various kinds are commonly extracted in addition to criminal convictions, *see infra* notes 162-78, and criminal conduct is punishable under multiple criminal and civil statutes. In several states, for example, a drug offender may face fines, imprisonment, civil forfeiture, and a tax for the same conduct. *See infra* note 173 (collecting cases in which a defendant faces both criminal prosecution and a tax for drug-related conduct); *see also* PETER FINN & MARIA O. HYLTON, U.S. DEP'T OF JUSTICE, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR: RATIONALE, CASE STUDIES, AND CONSTITUTIONAL ISSUES 9-78 (1994) (discussing the use of civil remedies for a variety of criminal behavior, using case studies, and outlining effective and constitutionally defensible ways of using such remedies); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325-27, 1333-44 (1991) (illustrating with examples why "the current phenomenon of civil remedies blending with criminal sanctions never has been more actively or consciously pursued" and surveying how civil remedies are "used to complement enforcement of the criminal law"); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 4-5, 34-35 (1993) (describing overlapping penalties). For a thorough and recent analysis of the increased role of punitive civil sanctions in law enforcement, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796-98, 1800-01, 1844, 1849-54 (1992); *see also* Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1207-08 & n.245 (1995) (stating that successive prosecutions by state and federal prosecutors, "although still a small fraction of the total volume of criminal cases, have proliferated" and citing examples).

[2] As part of the continuing "war on drugs," legislatures have authorized sentences for nonviolent drug offenders that greatly exceed sentences formerly imposed. Many of these are mandatory sentences that do not vary with the particular characteristics of the offense or offender. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5-15 (1991) (recounting the historical development of mandatory minimum sentencing provisions and discussing the present and pending legislation); *see also* United States v. Spencer, 25 F.3d 1105, 1112 (D.C. Cir. 1994) (noting over 100 separate federal mandatory minimum penalty provisions as of 1991). Penalties for violent offenders are also rising. More than a dozen states passed "three-strikes" legislation in 1993 and 1994. *See* Richard C. Reuben, *Get-Tough Stance Draws Fiscal Criticism*, A.B.A. J., Jan. 1995, at 16, 16-17 (discussing the results of a study focused on the high costs of "three strikes" legislation, particularly in California). Fine ceilings, too, have risen. *See* Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (codified as amended at 18 U.S.C. §§ 3621-3623 (1988 & Supp. V 1993)) (increasing some fines for corporations to $1 million); U.S. SENTENCING COMM'N, GUIDELINES MANUAL §§ 8C2.4, .6 (1993) (setting the base fine for convicted organizations at the greatest of (1) the pecuniary gain to the defendant organization, (2) the pecuniary loss from the offense, or (3) an amount set according to the

arguing that legislators and the juries, judges, prosecutors, and regulators who apply legislatively authorized sanctions have overstepped the bounds of punishment permitted by the Constitution. Claiming that their penalties violate the Double Jeopardy, Due Process, Excessive Fines, and Cruel and Unusual Punishments Clauses in the Bill of Rights, civil and criminal defendants are prompting courts to reevaluate constitutional limits on excessive and successive penalties. Over the past six years, the United States Supreme Court has addressed some of these challenges, but its decisions have been tentative or contradictory.

The resulting uncertainty surrounding constitutional limits on punishment is most troublesome in cases in which defendants face cumulative or successive penalties for the same conduct. In one or more proceedings, defendants may be convicted of multiple criminal charges, subjected to both civil and criminal penalties, punished by more than one state or by both state and federal governments, or ordered to pay multiple punitive damage awards that are shared between the winning plaintiffs and the states in which plaintiffs bring suit.[3]

In this Article, I propose an approach for evaluating when these overlapping penalties exceed constitutional limits—an approach that recognizes that the various guarantees of the Fifth, Eighth, and Fourteenth Amendments must be considered together, as a forest rather than as separate free-standing trees. I begin with the premise that the contours of constitutional limits on the *amount* of punishment that can be inflicted for a particular wrong, traditionally a part of Eighth Amendment and due process law, are inseparable from the constitutional limitations on the *frequency* with which an offender can be punished for that wrong, typically rooted in double jeopardy doctrine. The two forms of regulation operate in tandem to regulate the totality of punishment.

A somewhat imperfect but useful analogy illustrates the point. When Congress first set out to detect and deter the laundering of illegally obtained cash, it insisted that banks report all cash transactions over $10,000. Faced with only a per-transaction limit on amount, money launderers happily laundered just as much tainted cash as they had before by breaking larger transactions into

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seriousness of the offense between $5000 and $72.5 million, and providing for aggravating factors that can increase the base fine by as much as 400%).

[3] *See infra* note 20 (collecting sources that discuss statutes requiring certain plaintiffs to split their punitive damage recoveries with the state).

multiple transactions of less than $10,000. It was not long before Congress realized that effective control of this behavior would require, at a minimum, that banks report not only single transactions over $10,000, but also multiple transactions that, when added together, totalled $10,000 or more.[4] It is time that courts attempting to limit punishment under the Bill of Rights learn the same lesson. A per-proceeding or per-charge limit on the size of a penalty leaves the government free to extract as many separate penalties as it wishes. So long as double jeopardy, due process, and common-law preclusion rules permit successive penalties for the same conduct, Eighth Amendment and due process rules limiting the amount of punishment must consider multiple penalties together. The need for some sort of "cumulative excessiveness" review thus varies inversely with the degree of protection against multiple penalties for the same conduct: the less vigorous the protection against multiple penalties, the more vigorous proportionality review must become, and vice versa.

Building upon this intuitively simple relationship, I propose in this Article several modifications to existing Fifth and Eighth Amendment doctrine. To illustrate the pressing need for attention to this area of the law, I first summarize in Part I the existing constitutional limits on multiplicity and proportionality of punishment and detail some of the puzzles created by the Court's most recent decisions. In Part II, I suggest purging the concept of proportionality from double jeopardy law and scaling back double jeopardy to a bar against multiple punishments for the same offense, as legislatively defined. I argue that legislatures are free to create, and prosecutors and courts are free to enforce, multiple penalties—separate offenses—that punish the same conduct, but that the Eighth Amendment and the Due Process Clause limit the total amount of punishment that legislatures and prosecutors can pile upon one offender in this way. In Part III, I explore how such "cumulative excessiveness" review might work under the Eighth Amendment. In particular, I examine how courts can determine which penalties to cumulate together and when those accumulated penalties exceed the limits of the Eighth Amendment.

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[4] *See* Sarah N. Welling, *Smurfs, Money Laundering and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287, 295-301, 307-09 (1989).

I. THE COURT'S EFFORTS TO DEFINE CONSTITUTIONAL LIMITS ON SUCCESSIVE AND EXCESSIVE PUNISHMENT

Two problems have confounded the Court in its attempts to define constitutional limits on the government's ability to punish. The first is the difficulty of determining when punishment is unconstitutionally disproportionate: How much is too much? The second is the puzzle posed by any theory that limits multiple punishment: What is it that may be punished only once? A legislatively defined offense, a discrete act or transaction, a course of conduct, a collection of evidence, or something else?

Not only the scope, but also the source of constitutional limits on the amount and repetition of punishment are controversial. Constitutional constraints on penalties could plausibly be attributed to one or all of several cryptic clauses—the Due Process Clauses, the Excessive Fines and Cruel and Unusual Punishments Clauses, or the Double Jeopardy Clause. In disputing which text is the proper source of restrictions on the frequency or severity of penalties, some of the Justices' opinions appear to treat these limits like hot potatoes, tossing them from one clause to the next, hoping they will be cooler to handle somewhere else. Debates over which part of the Bill of Rights is the best doctrinal home for a particular, often novel, theory of constitutional regulation are not uncommon and still dominate, for example, much of the commentary about jury discrimination and abortion. These debates, however, usually enjoy a well-accepted body of precedent that establishes rudimentary boundaries of scope and purpose for at least one of the doctrinal options, providing a settled pivot around which a debate can revolve. Because of the Court's limited or inconsistent declarations about the scope of constitutional prohibitions on excessively severe or duplicative penalties, no such pivot exists.

A. *Proportionality Review*

The Court has recognized that the Bill of Rights contains some limits that require that punishment be proportionate to the wrong punished, but it has done so only with profound reluctance. Often, it has opted not to enforce a penalty because of some flaw in the procedure that produced it, rather than because the penalty itself is unduly severe. For example, Professor Joseph Hoffmann has lamented that the Court's death penalty jurisprudence in the years

since *Gregg v. Georgia*[5] has been a complex tangle of procedural review of death sentencing proceedings, with little substantive review of who deserves death and who does not.[6] Procedure, not proportion, was also the focus of the Court's latest attempt to define limits on punitive damage awards in private litigation.[7] Some Justices prefer to sidestep proportionality review of penalties under both the Cruel and Unusual Punishments Clause and the Due Process Clauses by reading such review right out of these provisions, at least in particular contexts. Justice Scalia and Chief Justice Rehnquist have insisted that the Cruel and Unusual Punishments Clause bars only particular *methods* of punishment, regardless of offense or offender.[8] Justice Scalia has also argued that the Due

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[5] 428 U.S. 153 (1976).

[6] *See* Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 834 (1993) (arguing that the Court's process-oriented approach to interpreting the Eighth Amendment's Cruel and Unusual Punishments Clause has failed, and that the Court should "put some 'substance' back into the Eighth Amendment"); *see also* Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 11 (1980) (noting that the Court's "theoretical shifts . . . were accompanied by continued emphasis on procedural rather than substantive questions"); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143-50 (1980) (describing the Court's review of the death penalty under the Eighth Amendment's Cruel and Unusual Punishments Clause as a "super due process" approach in which the constitutionality of a death sentence depends primarily on the procedural safeguards applied in the sentencing process). Professor Hoffmann acknowledges that the Court has at times proclaimed that death is excessive punishment for certain classes of offenses or certain classes of offenders. *See* Hoffmann, *supra*, at 824; *see also* Thompson v. Oklahoma, 487 U.S. 815, 822-23 (1988) (holding that the Eighth Amendment bars the execution of persons who were under the age of 16 when they committed their offenses); Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (holding that the Eighth Amendment bars the execution of those who are insane at the time of execution); Enmund v. Florida, 458 U.S. 782, 797 (1982) (concluding that a defendant who participated in a robbery during which a murder was committed, but who did not do the killing, could not be executed consistently with the Eighth Amendment); Coker v. Georgia, 433 U.S. 584, 592 (1977) (concluding that death is a disproportionate penalty for the crime of raping an adult woman). This area of the law also illustrates what Professor Albert Alschuler has termed "a central dynamic of American criminal justice: Millions for procedure but not one dime for outcome." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 226 (1989).

[7] *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2339-42 (1994) (striking down Oregon's procedure for imposing punitive damages because it lacked sufficient safeguards to protect against the imposition of arbitrary awards).

[8] *See* Harmelin v. Michigan, 501 U.S. 957, 975-85 (1991) (plurality opinion) (concluding that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee"). Justice Scalia later admitted that a disproportionate fine may violate the Excessive Fines Clause of the Eighth Amendment. *See infra* text

Process Clauses contain absolutely no substantive limit on penalties at all.[9] In other cases, the Court has dismissed claims of unconstitutional disproportion or excessiveness by conceding that the Constitution does contain a limit of sorts, but concluding, without explaining what the limit is, that the penalty at issue does not surpass it.[10] Even when a majority of the Court has reached the merits of whether a given penalty is unconstitutionally severe under either the Eighth Amendment or the Due Process Clauses, its decisions have provided little guidance to lower courts.

1. Review of Proportionality Under the Eighth Amendment

In 1993, the Court, for the first time in more than forty years, identified a penalty that may have violated the Excessive Fines Clause.[11] "Rescuing" the Clause "from obscurity,"[12] the Court

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accompanying notes 13-19.

[9] *See* Albright v. Oliver, 114 S. Ct. 807, 814 (1994) (Scalia, J., concurring) ("Except insofar as our decisions have included within the Fourteenth Amendment certain explicit substantive protections of the Bill of Rights . . . I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty."). In the context of punitive damages, Justice Scalia has admitted that the guarantee of procedural due process may require limited review of proportionality but has suggested that courts need only enforce state, not federal, norms of proportionality. *See Honda Motor Co.*, 114 S. Ct. at 2342 (Scalia, J., concurring) (emphasizing that post-judgment review is "an important traditional procedure for enforcing *state*-prescribed limits" on punitive damages (emphasis added)). Justice Scalia and at least some United States Attorneys continue to shun proportionality review even under the Excessive Fines Clause in civil forfeiture cases. *See* Austin v. United States, 113 S. Ct. 2801, 2814-15 (1993) (Scalia, J., concurring) (arguing that excessiveness analysis for statutory in rem forfeitures should involve an instrumentality question—the relationship of the property to the offense—rather than a proportionality question); United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 937 (N.D. Ala. 1994) (mem.) (deducing from the Department of Justice memorandum on which the government's brief was modelled that the "United States obviously wants, at all costs, to avoid 'proportionality' as the controlling criterion for judging the excessiveness question").

[10] *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991) (upholding as constitutional a $1 million punitive damages award for insurance fraud that was four times the amount of compensatory damages awarded and more than the maximum fine that could have been imposed for insurance fraud under state statute).

[11] In 1947, the Court sliced a $3.5 million criminal contempt fine to $700,000 after finding the original sanction excessive given the defendant's financial resources. *See* United States v. United Mine Workers, 330 U.S. 258, 302-07 (1947).

[12] Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1958 n.2 (1994) (Scalia, J., dissenting) (noting that the Clause was "rescued from obscurity" by Alexander v. United States, 113 S. Ct. 2766 (1993), and Austin v. United States, 113 S. Ct. 2801 (1993)).

held in *Alexander v. United States*[13] that criminal asset forfeiture is a "fine" under the Eighth Amendment and remanded the case for a determination of whether the fine was "excessive."[14] Its advice was sparse: "It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was 'excessive' must be considered."[15] During the same term, the Court held that *civil* awards can qualify as "fines" under the Eighth Amendment.[16] In *Austin v. United States*,[17] the Court agreed that the civil judgment forfeiting Austin's home under the federal drug forfeiture statute was "punitive" rather than "remedial" and was therefore a fine limited by the Eighth Amendment.[18] Yet the Court continued to avoid the "excessiveness" issue.[19] In hundreds of lower court opinions decided since *Alexander* and *Austin*, judges have disagreed over which civil forfeitures or other civil sanctions are punitive enough to qualify as "fines"[20] and over which fines are "excessive."[21]

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[13] 113 S. Ct. 2766 (1993).

[14] *See id.* at 2775-76.

[15] *Id.* at 2776. Alexander had been convicted of 20 counts of racketeering and other crimes and was ordered to forfeit all of his business assets and proceeds, worth several million dollars. *See id.* at 2769-70.

[16] Only four years earlier the Court had rejected the claim that the Excessive Fines Clause limited punitive damages in private civil suits. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989).

[17] 113 S. Ct. 2801 (1993).

[18] *See id.* at 2810-12.

[19] Responding to Justice Scalia's proposed test for excessiveness of civil forfeitures, the Court stated only in a footnote, "We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive." *Id.* at 2812 n.15.

[20] Some defendants' claims to protection under the Eighth Amendment are quite novel. For example, nearly a dozen states have recently adopted statutes that require plaintiffs in punitive damage actions to share part of their awards with the state. *See, e.g.*, Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843, 845 n.14, 874-75 (1993) (discussing the split-recovery statutes of 10 states and the split-recovery bills of three other states); Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 106 (1994) (listing 10 states that have enacted split-recovery statutes and five additional proposed state and federal bills). Defendants who have been assessed punitive awards in some of these states have argued that their awards are "excessive fines," claiming that the state-payee distinguishes these awards from private damage awards that escape Eighth Amendment review. *Compare Browning-Ferris Indus.*, 492 U.S. at 298-99 (O'Connor, J., concurring in part and dissenting in part) (suggesting that the Eighth Amendment

Similar confusion surrounds standards for assessing claims under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Although the Court has endorsed individual assessment of death sentences under the Eighth Amendment, its position on noncapital penalties has seesawed.[22] Its latest word was a badly

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limits such awards) *and* McBride v. General Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (finding that Georgia's allocation statute violated the Excessive Fines and Double Jeopardy Clauses) *with* Burke v. Deere & Co., 780 F. Supp. 1225, 1242 (S.D. Iowa 1991) (finding that because the state share of a punitive damage award was paid into a trust fund to be administered by state courts, the statute extracting 75% of a $50 million punitive damage award did not violate either the Excessive Fines Clause or the Double Jeopardy Clause), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993), *and cert. denied*, 114 S. Ct. 1063 (1994) *and* Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 868 (Iowa 1994) (finding that the diversion of the plaintiff's punitive damage award does not transform a distribution-scheme statute into either a criminal or quasi-criminal statute and therefore does not trigger double jeopardy or excessive fines protection) *and* Tenold v. Weyerhaeuser Co., 873 P.2d 413, 423-24 (Or. Ct. App. 1994) (in banc) (finding that a split-recovery statute does not implicate the Eighth Amendment).

[21] *See, e.g.*, United States v. 429 S. Main St., 52 F.3d 1416, 1421-22 (6th Cir. 1995) (upholding, over dissent, forfeiture of the owner's house for two sales of marijuana, totalling $75, to government agents who arranged for the sales at the house); United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1495, 1498-99 (11th Cir. 1994) (finding forfeiture of a $150,000 house for gambling in violation of 18 U.S.C. § 1955(d) excessive under the Eighth Amendment); United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 940 (N.D. Ala. 1994) (mem.) (finding forfeiture of a drug dealer's house excessive); United States *ex rel.* Smith v. Gilbert Realty Co., 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (holding that the government's effort to make a defendant pay $290,000 in penalties for false claims that created only $1630 in actual losses violates the Excessive Fines Clause, although a $35,000 penalty would not); United States v. 835 Seventh St., 820 F. Supp. 688, 696 (N.D.N.Y. 1993) (finding forfeiture of a $70,000 house for the sale of less than seven grams of marijuana excessive under the Eighth Amendment), *appeal dismissed*, 28 F.3d 103 (2d Cir. 1994); City of Tampa Police Dep't v. Acosta, 645 So. 2d 551, 551-52 (Fla. Dist. Ct. App. 1994) (agreeing that forfeiture of a newly purchased automobile worth more than $21,000 was an excessive fine for the purchase of $20 worth of crack cocaine); State v. Hill, 635 N.E.2d 1248, 1256-57 (Ohio 1994) (remanding for determination of excessiveness, over dissent that considered forfeiture of an apartment complex so excessive as to constitute a patent constitutional violation).

The United States Department of Justice is among the most affected by this controversy. *See* Memorandum from Jo Ann Harris, Assistant Attorney General, to All United States Attorneys, All Section Chiefs and Office Directors, Criminal Division, and All Asset Forfeiture Components (Jan. 7, 1994), *reprinted in* 11 Dep't Just. Manual (P-H) B-584.138-229 to -230 (1994) [hereinafter Memorandum] ("The absence of a defined standard is causing a problem for federal attorneys who are being required to respond to numerous constitutional challenges to forfeitures . . . .").

[22] *Compare* Hutto v. Davis, 454 U.S. 370, 374-75 (1982) (per curiam) (upholding a sentence of 40 years for the possession of less than nine ounces of marijuana) *and* Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (upholding a mandatory life sentence after three minor nonviolent property felonies) *with* Solem v. Helm, 463 U.S. 277, 303

fractured decision in *Harmelin v. Michigan*,[23] a 1991 case in which the Court rejected a first-time drug offender's Eighth Amendment challenge to Michigan's mandatory sentence of life without parole for the possession of 672 grams of cocaine. Six Justices agreed that the Cruel and Unusual Punishments Clause requires some proportionality review of some noncapital sentences, but no single theory for applying proportionality commanded a majority.[24] Lower courts have questioned which of the two proportionality analyses advanced by *Harmelin* is required by the Eighth Amendment[25] and

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(1983) (finding that a mandatory sentence of life without parole for a seventh minor nonviolent felony was "significantly disproportionate" and thus invalid under the Eighth Amendment) *and* Robinson v. California, 370 U.S. 660, 667 (1962) (striking down a statute criminalizing addiction to narcotics as violative of the Eighth and Fourteenth Amendments) *and* Weems v. United States, 217 U.S. 349, 382 (1910) (finding unconstitutional a mandatory sentence of 15 years of *cadena temporal*—hard and painful labor in chains—for falsifying official records).

[23] 501 U.S. 957 (1991).

[24] Four Justices joined Justice Scalia in rejecting individualized proportionality review for sentences other than death, ensuring the survival of mandatory sentencing schemes. *See id.* at 994-96. On other issues, no majority appeared. Justices Scalia and Rehnquist rejected proportionality review entirely. *See supra* note 8 and accompanying text. Justices Blackmun and Stevens agreed with Justice White, who advocated proportionality review for all noncapital penalties under the Eighth Amendment, using the analysis set out in Solem v. Helm, 463 U.S. at 292. *See Harmelin*, 501 U.S. at 1009 (White, J., dissenting). *Solem* held that the Eighth Amendment requires: 1) a comparison of the gravity of the offense and harshness of the penalty; 2) a comparison of the questioned sentence to sentences imposed on other criminals in the same jurisdiction; and 3) a comparison of the questioned sentence to sentences imposed for commission of the same crime in other jurisdictions. *See Solem*, 463 U.S. at 290-92. Agreeing with neither extreme, Justice Kennedy, joined by Justices O'Connor and Souter, concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime," and that "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1001, 1005 (Kennedy, J., concurring in part and concurring in the judgment).

[25] At least one court has apparently concluded that *Harmelin* did not change the need to apply full proportionality review of the *Solem* type to all cases. *See* United States v. O'Banion, 943 F.2d 1422, 1432-33 (5th Cir. 1991) (concluding under the *Solem* proportionality analysis that imposing a felony sentence for failing to report the importation of monetary instruments in excess of $10,000 did not violate the Eighth Amendment). Other courts have followed Justice Kennedy's approach. *See* United States v. Cupa-Guillen, 34 F.3d 860, 864-65 (9th Cir. 1994) (upholding a 100-month sentence for illegal re-entry into the United States and rejecting the argument that it was "grossly disproportionate" to the crime), *cert. denied*, 115 S. Ct. 921 (1995); United States v. Salmon, 944 F.2d 1106, 1130-38 & n.12 (3d Cir. 1991) (upholding a sentence of 17 and a half years imprisonment and $150 special assessment for three drug offenses using Justice Kennedy's modified *Solem* analysis), *cert. denied*, 502 U.S.

whether either has any relevance outside the context of sentences of life without parole.[26]

2. Substantive Due Process Limits on Punishment

As for the constraints of substantive due process, they remain a perpetual source of some of the most troublesome interpretive questions in constitutional law, as much in this context of limiting the severity of penalties as in other contexts. Civil litigants regularly claim that punitive damage awards exceed due process limits, but the Court has yet to strike down an award on this basis. Only last year the Court clearly stated that due process limits the severity of punitive civil awards.[27] The prior term, in *TXO Production Corp. v. Alliance Resources Corp.*,[28] a majority of Justices agreed that a $10 million punitive award, 526 times the amount of actual damages, did not violate the due process rights of the defendant,[29] but could not agree why. The Court appears ready to tackle this issue once again, having agreed to review the constitutionality of punitive damages awarded in *BMW of North America v. Gore*.[30] The Court's recent activity is beginning to soften lower court resistance to due process challenges by defendants who face successive punitive damage

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1110 (1992); United States v. Hopper, 941 F.2d 419, 422 (6th Cir. 1991) (upholding a 10-month jail sentence for selling a machine gun using the "narrow proportionality principle" applied by the *Harmelin* plurality); *see also* United States v. 429 S. Main St., 52 F.3d 1416, 1424 n.1 (6th Cir. 1995) (Guy, J., concurring in part and dissenting in part) ("Recent cases question the applicability of a proportionality principle to the Eighth Amendment at all."); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1, 54 (1991) (concluding that the three inconsistent approaches in *Harmelin* make it "very difficult to articulate with any degree of certainty the current state of the proportionality doctrine in non-capital cases").

[26] *See* United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995) ("It is well settled that proportionality review is not appropriate for any sentence *less* than life imprisonment without the possibility of parole." (emphasis added)); United States v. Kratsas, 45 F.3d 63, 67 (4th Cir. 1995) (stating that the *Solem* proportionality review still applies after *Harmelin* to life sentences or the death penalty, and upholding a sentence of life without release).

[27] *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2335 (1994) ("[T]he Constitution imposes a substantive limit on the size of punitive damage awards.").

[28] 113 S. Ct. 2711 (1993).

[29] *See id.* at 2722-23.

[30] 115 S. Ct. 932 (1995), *granting cert. to* 646 So. 2d 619 (Ala. 1994).

awards for the same conduct,[31] but the parameters of this emerging protection remain murky at best.[32]

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[31] For years, defendants claiming "punitive overkill" from successive awards had little hope of success. *See* James R. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After* Pacific Mutual Life Insurance Co. v. Haslip, 22 ENVTL. L. 573, 613-15 (1992) (collecting cases); Charles D. Stewart & Philip G. Piggott, *Punitive Damages Since* Pacific Mutual Life Insurance Co. v. Haslip, 16 AM. J. TRIAL ADVOC. 693, 713-15 (1993) (same); Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising Out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First Comer" Doctrine)*, 11 A.L.R.4TH 1261 (1982 & Supp. 1994) (same); *see also* Dennis N. Jones et al., *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1, 32-33 (1991) (arguing that a rational policy is needed to "protect the due process rights of defendants against an unreasonably excessive aggregate amount of punitive damages"); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 61 (1983) (proposing that courts aggregate punitive damage claims in class actions to prevent excessive awards); Alan Schulkin, Comment, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1800-08 (1979) (describing various approaches designed to control multiple punitive damage awards).

[32] *See, e.g.*, Dunn v. Hovic, 1 F.3d 1371, 1389, 1391 (3d Cir. 1993) (in banc) (denying the defendant's due process argument on evidentiary grounds without deciding whether the aggregate amount of successive punitive awards may exceed the "maximum amount tolerable under the Due Process Clause," but halving the punitive award from $2 million to $1 million under Virgin Islands law, in part because the trial court "gave insufficient consideration to the effect of successive punitive awards in asbestos litigation"), *cert. denied*, 114 S. Ct. 650 (1994); Tudor Assocs. v. AJ & AJ Servicing, 843 F. Supp. 68, 79-80 (E.D.N.C. 1993) (setting aside a $7 million award because the defendants had already paid a $350,000 punitive damages judgment in a state court action based on the identical facts); Bradley v. Hubbard Broadcasting, 471 N.W.2d 670, 679 (Minn. Ct. App. 1991) (reducing a punitive damage award of $500,000 in a defamation case to $100,000, in part because "the jury was unaware that an additional civil penalty of $200,000 would be imposed" upon the defendant for its actions, over dissent that argued that the separate penalties should stand); *see also* W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (mandating bifurcated proceedings so that a defendant facing punitive damages can "build a record for a due process argument based on the cumulative effect of prior awards"); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 867 (Iowa 1994) (rejecting a due process challenge based on prior punitive awards because the defendant failed to show it had been "sufficiently punished for its manufactur[e] and sale" of an asbestos product).

The United States Court of Appeals for the Second Circuit, too, has recognized that the multiple imposition of punitive damages for the same course of conduct may violate due process if the defendant can show (1) that the first jury "understood its assignment to be the selection of that sum of money appropriate to punish the tortfeasor for the *full extent of its wrongful conduct, not merely a sum appropriate as punishment for the injuries to the plaintiffs in the lawsuit*," or (2) that the judge was "provided with a factual basis sufficient for evaluating the entire scope of the defendant's wrongful conduct" so that she could "determine that the aggregate of prior awards punishes the entirety of the wrongful conduct to the limit of due

B. *Limits on Multiplicity*

The Court has had even less success in providing a coherent rationale for explaining and applying constitutional limits on duplicative penalties. The primary source of any such limitation in the criminal context has been the Double Jeopardy Clause, which prohibits twice placing a defendant "in jeopardy of life or limb" for the "same offence."[33] Some aspects of the double jeopardy guarantee are well settled. For instance, the Clause prohibits a prosecutor or judge from unnecessarily aborting a trial and starting over on the same offense,[34] appealing or setting aside even an "erroneous" jury acquittal,[35] or reprosecuting a defendant on the same charge after an acquittal or conviction.[36] Yet a fundamental question remains unanswered: Who defines when two charges or penalties are the "same offence"—courts or legislatures? Before I turn to an analysis of the Court's contradictory positions on this question, let me capsulize this debate.

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process." Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 280-81 (2d Cir. 1990) (emphasis added), *cert. dismissed*, 497 U.S. 1057 (1990); *see also* Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) (recognizing the defendant's due process claim, but denying relief because the defendant failed to preserve its objection in the trial court).

[33] U.S. CONST. amend. V.

[34] *See* Oregon v. Kennedy, 456 U.S. 667, 673-76 (1982) (holding that if the defendant successfully moves for a mistrial, double jeopardy bars a second trial if the basis for the mistrial was prosecutorial or judicial conduct intended to prejudice the defendant into moving for a mistrial); Arizona v. Washington, 434 U.S. 497, 516 (1978) (stating that a mistrial order must be supported by a "high degree" of necessity); Downum v. United States, 372 U.S. 734, 737 (1963) (barring retrial of the defendant after a mistrial caused by the prosecutor's failure to ensure the presence of his witnesses).

[35] *See* United States v. Scott, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."); Sanabria v. United States, 437 U.S. 54, 75 (1978) (stating that a defendant may not be retried after an acquittal, even if the legal rulings underlying the acquittal were "egregiously erroneous"); Green v. United States, 355 U.S. 184, 190 (1957) (preventing retrial on a greater charge after a jury has rejected a greater offense for a lesser one); *see also* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122-55 (discussing acquittal rules).

[36] *See, e.g.*, United States v. Dixon, 113 S. Ct. 2849, 2855 (1993) ("[The Double Jeopardy Clause] applies . . . to successive prosecutions for the same criminal offense.").

1. Deference to Legislative Choice

At one end of the interpretive spectrum lies the legislative deference approach, premised on the belief that by referring to "offence" the Framers intended that prosecutors and judges adhere to legislative choices regarding the appropriate classification of conduct into culpable units—the word "offence," presumably, referring to a preexisting legislative definition.[37] Legislatures could be trusted to divide wrongdoing into appropriate units for punishment and prosecution, but prosecutors and judges could not necessarily be trusted to respect those choices.[38] Under this view, if Congress intends to create two separate offenses by enacting two separate provisions, then the Fifth Amendment does not prevent prosecutors from seeking successive penalties under both, regardless of how similar or even identical the two provisions appear.

This approach to the Double Jeopardy Clause protects defendants against cumulative and successive penalties in at least two ways. First, it mandates a *presumption*, favorable to defendants, that sanctions of sufficient similarity were intended by the legislature to be mutually exclusive alternatives—the same offense, not two different offenses.[39] The Court's formula for determining when two provisions are so similar that they must be presumed to be the "same offence" has come to be known as the *Blockburger* test: two provisions are presumed to describe and punish the same offense unless each provision requires proof of a fact that the other does not.[40] The Clause bars prosecutors from enforcing both of two provisions that fail this test, unless a clear indication of contrary legislative intent appears to rebut this presumption.[41] A classic

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[37] *See* Akhil R. Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 38-39 (1995).

[38] *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 603-04 (1993) (noting the majoritarian nature of the Court's double jeopardy jurisprudence).

[39] The Court has explained that the Clause requires this presumption not because a legislature is powerless to punish a person for the same thing using two separate statutes, but because "ordinarily" legislatures do not do so. *See* Whalen v. United States, 445 U.S. 684, 691-92 (1980).

[40] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

[41] *See, e.g.*, Garrett v. United States, 471 U.S. 773, 779 (1985) ("Insofar as the question is one of legislative intent, the *Blockburger* presumption must of course yield to a plainly expressed contrary view on the part of Congress."); Ohio v. Johnson, 467 U.S. 493, 499 n.8 (1984) ("Even if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end."); Albernaz v. United States, 450 U.S. 333, 337-42 (1981) (allowing dual prosecutions for offenses arising from a single agreement or conspiracy

example of this deferential approach in action is the case of *Missouri v. Hunter*.[42] In *Hunter*, the Court upheld two sentences imposed in a single trial under two separate state statutes, one that punished armed robbery, and one that punished "armed criminal action."[43] The Court agreed that the statutes were presumptively the "same offence" because neither required proof of a unique element, but found that the state legislature had nevertheless specifically authorized cumulative punishment under the two statutes.[44] Upholding the multiple punishment, the Court starkly proclaimed, "Legislatures, not courts, prescribe the scope of punishments."[45]

Not only does the deferential interpretation of the Double Jeopardy Clause presume, absent contrary proof of legislative intent, that the government must choose between offenses that lack distinct elements, the deferential interpretation defers to the legislature on only this point—the definition of "same offence." The Clause prohibits legislatures from obliterating by statute other parameters of double jeopardy protection. For example, legislators could not simply choose to redefine when "jeopardy" attaches or when, if ever, acquittals may be appealed.[46]

2. Limiting Legislative Choice

The competing view, which I will term the antimajoritarian interpretation of the Double Jeopardy Clause, is that the phrase "same offence" does more than create a defendant-friendly constitutional presumption which serves as a proxy for legislative intent when no better evidence of that intent is available. Instead, the phrase refers to some indivisible unit of culpability that the government is powerless to punish twice. This reading would defeat deliberate legislative efforts to create two separate crimes or two separate penalties for the same conduct. Based upon a distrust of legislatures, this approach presumes that legislators undervalue or ignore the threats to liberty posed by cumulative penalties and successive prosecutions.[47] Justice Marshall articulated this view in

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with dual objectives).

[42] 459 U.S. 359 (1983).

[43] *Id.* at 362.

[44] *See id.* at 368-69.

[45] *Id.* at 368.

[46] *See supra* notes 34-36 and accompanying text; *infra* note 79.

[47] *See, e.g.*, JAY A. SIGLER, DOUBLE JEOPARDY 169-82, 189, 195-96 (1969) (arguing that because the roles of the prosecutor, and the criminal law that he or she wields, are so much broader than they were at the founding, double jeopardy law can no

his dissent in *Missouri v. Hunter*, when he argued that the phrase "the same offence" has content independent of legislative pronouncement, so that "two crimes that do not satisfy the *Blockburger* test constitute 'the same offence' under the Double Jeopardy Clause *regardless of the legislature's intent to treat them as separate offenses.*"[48]

3. The Conflict

In its 1991 decision in *Grady v. Corbin*,[49] the Court reached an uneasy truce between these two competing views of the Double Jeopardy Clause. Nine Justices agreed that the legislative deference approach governed whether or not multiple penalties imposed in the same proceeding punished the "same offence," but five Justices adhered to a version of the antimajoritarian approach to determine whether or not successive prosecutions punished the "same offence." The Court reasoned that greater protection was required in the successive prosecution context because multiple trials, as compared to multiple penalties in the same trial, pose the greater threat to a defendant's interests in finality, accuracy, freedom from harassment, and jury leniency.[50]

To give independent content to the meaning of "same offence," the Court could have adopted any one of a variety of rules, including the one Justice Marshall had advocated earlier in *Hunter*. The specific rule adopted by the Court in *Grady* was more complex, however. Stated in basic terms, the Court held that even if two offenses *A* and *B* are not the "same offence" under *Blockburger*, the government may not prosecute a defendant for offense *B* after prosecuting him for offense *A* if the government will "establish" an "essential element" of offense *B* with "conduct that constitutes" offense *A*.[51]

Within two years, two of the five Justices who joined this compromise were no longer on the Court. The truce dissolved. In

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longer be constrained by formal reference to legislatively defined offenses).

[48] *Hunter*, 459 U.S. at 374 (emphasis added).

[49] 495 U.S. 508 (1990).

[50] Justice Brennan, joined by four other Justices, defended this arrangement, stating, "Even when a State can bring multiple charges against an individual under *Blockburger*, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding." *Id.* at 519.

[51] *Id.* at 510 (barring a state from prosecuting a defendant for manslaughter after the defendant had already pleaded guilty to two misdemeanors based on the same incident).

1993, a new majority concluded in *United States v. Dixon*[52] that *Grady* should be overruled. The Court held that the *Blockburger* test governs not only the ability of prosecutors to seek multiple penalties in the same proceeding, but also their ability to bring successive prosecutions.[53] Even though the Court in earlier cases had deferred to the legislative prerogative only when considering multiple punishments at a single trial,[54] *Dixon* rejected any distinction between the meaning of "same offence" in the context of multiple punishment as opposed to the context of multiple prosecutions. "[I]t is embarrassing to assert that the single term 'same offence' . . . has two different meanings," one for successive prosecutions and another for successive punishments, Justice Scalia wrote for the Court.[55] *Dixon* gave the go-ahead to government attorneys to cumulate prosecutions or penalties against offenders for the same course of conduct, as long as the legislature had approved.[56]

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[52] 113 S. Ct. 2849 (1993).

[53] For the majority, Justice Scalia wrote:

> Unlike *Blockburger* analysis, whose definition of what prevents two crimes from being the "same offence" . . . has deep historical roots and has been accepted in numerous precedents of this Court, *Grady* lacks constitutional roots. The "same-conduct" rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.

Id. at 2860.

[54] *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 369 (1983) (stating that the Court had to defer to the legislature's wish to impose cumulative punishment in a single trial).

[55] *Dixon*, 113 S. Ct. at 2860. This year in *Witte v. United States*, the Court cited *Dixon* for the proposition that "the same inquiry generally applies '[i]n both the multiple punishment and multiple prosecution contexts.'" 115 S. Ct. 2199, 2204 (1995) (quoting *Dixon*, 113 S. Ct. at 2882); *see also* George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. (forthcoming July 1995) (manuscript at 22, on file with author) ("How is it that same offense is a chameleon that changes meaning in different procedural contexts?").

[56] Justice Souter, dissenting in *Dixon*, criticized its sweeping results. Without more protection than *Blockburger* provides, he argued, the government, by

> defining its offenses with care . . . could not merely add punishment to punishment (within Eighth and Fourteenth Amendment limits), but could bring a person to trial again and again for that same conduct, violating the principle of finality, subjecting him repeatedly to all the burdens of trial, rehearsing its prosecution, and increasing the risk of erroneous conviction, all in contravention of the principles behind the protection from successive prosecution included in the Fifth Amendment. The protection of the Double Jeopardy Clause against successive prosecutions is not so fragile that it can be avoided by finely drafted statutes and carefully planned prosecutions.

Dixon, 113 S. Ct. at 2890.

Dixon could have ended the debate about whether legislatures can define what "same offence" means for double jeopardy. But a separate strand of the antimajoritarian approach survived *Grady*'s demise. This strand originated in 1989 in *United States v. Halper*,[57] two years before *Grady* and four years before *Dixon*. Halper had filed sixty-five false claims for Medicaid reimbursement, bilking the government out of a total of $585 in overpayments.[58] He was prosecuted, convicted, sentenced to two years in prison, and fined $5000. The United States then sued Halper, seeking $130,000 under the Federal False Claims Act.[59] Reviewing Halper's double jeopardy challenge, the Court first concluded that the False Claims Act penalty was punishment that triggered the protection of the

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Although Justice Souter's plea to require more than *Blockburger*'s presumption failed to persuade a majority in *Dixon*, the several opinions in *Dixon* revealed disagreement about the application of *Blockburger* in the context of contempt. The companion cases addressed in the decision each involved the successive prosecution of a defendant for contempt and for a substantive offense that formed the basis for the contempt charge. *See id.* at 2853. Justices Scalia and Kennedy applied *Blockburger* differently than the remaining members of the Court who reached the issue. Scalia and Kennedy looked to the judicial order allegedly violated by the contemnor for the elements of the contempt offense, essentially treating the judge who had issued the order as a separate legislature. *See id.* at 2856-58. They found that the judge had included proof of the substantive offense as an element of the contempt offense. *See id.* at 2858. Chief Justice Rehnquist and Justices O'Connor and Thomas took a different tack, arguing that the elements of contempt, as set out in the contempt statute rather than the judge's order, were different offenses under *Blockburger* from those of the underlying crime. *See id.* at 2865-68 (Rehnquist, C.J., dissenting). Justice Blackmun, too, found that the separate interests addressed by the contempt statute and the substantive crime rendered them separate offenses. *See id.* at 2880 (Blackmun, J., dissenting). I doubt that these Justices would disagree about how to apply *Blockburger* outside of the context of contempt.

Some have not interpreted *Dixon* as I have. *See* United States v. $405,089.23, 33 F.3d 1210, 1217 & n.5 (9th Cir. 1994) (suggesting that the quest for legislative intent in *Hunter* is not appropriate in successive prosecution cases, even after *Dixon*), *amended on other grounds by* 56 F.3d 41 (9th Cir. 1995), *and petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); Todd v. State, 884 P.2d 668, 675-77 & n.7 (Alaska Ct. App. 1994) (suggesting that *Dixon* may not allow legislative intent to authorize successive prosecutions as opposed to multiple punishments in a single trial), *petition for hearing granted*, No. S-6709, 1995 Alas. LEXIS 2 (Alaska Jan. 9, 1995); Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625, 628 n.18 (1995) (suggesting that even after *Dixon*, legislative intent is an appropriate guide only in the multiple punishment context, not the multiple prosecution context).

[57] 490 U.S. 435 (1989).

[58] *See id.* at 437.

[59] *See id.* at 438. Under the Federal False Claims Act, Halper was subject to penalties of $2000 per offense and an amount equal to twice the damages sustained plus costs. *See id.* The Act now provides for treble damages and penalties of $5000 to $10,000 per claim, plus costs. *See* 31 U.S.C. § 3729(a) (1988).

Double Jeopardy Clause, even though it was imposed under a civil statute.[60] The Court then took another leap, holding that the Double Jeopardy Clause barred the government from seeking this second penalty after securing a criminal conviction for the same conduct, even though Congress had authorized both penalties.[61]

Consider, for a moment, how *Halper* might have come out had the case reached the Court *after* the *Dixon* decision. One would have expected the Court to have reasoned something like this:

> In *Dixon* we held that there is only one meaning for "same offence" under the Double Jeopardy Clause. Our cases demonstrate that while we must presume, under *Blockburger*, that a legislature does not intend to allow a prosecutor to punish a defendant under both of two provisions that lack distinct elements, this presumption is rebuttable with clear evidence that the legislature intended both provisions to apply. *Hunter*. Here, the elements of the civil penalty and the criminal penalty are identical, but the intent of Congress to allow both criminal and civil penalties for Halper's fraud is clear. Thus, double jeopardy does not bar the subsequent sanction.

Instead, the Court in *Halper* interpreted the Double Jeopardy Clause to offer, in the context of *civil* penalties that follow convictions, more protection against the evils of multiple penalties than the legislature provides. *Dixon*'s later rejection of this same theory in the context of successive *criminal* penalties created a strange paradox. The two cases are based upon two premises about the Fifth Amendment's reach which are irreconcilable. *Halper*'s Double Jeopardy Clause protects defendants against oversights and overreaching in the legislative process; *Dixon*'s Double Jeopardy Clause binds other government actors to legislative will. Not only are the theories underlying the two cases at odds, but side by side they produce a ridiculous maxim: A once-punished criminal defendant is spared subsequent civil penalties for the identical wrong, but must endure subsequent criminal prosecutions.

Amazingly, *Halper*'s theory has survived *Dixon*. This past term, in *Department of Revenue v. Kurth Ranch*,[62] the Court, relying on

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[60] I discuss the propriety of treating civil sanctions as punishment under the Bill of Rights under the Double Jeopardy Clause *infra* part III.A.3. For my present purpose, which is to illustrate the inconsistency of the Court's double jeopardy theory, it is sufficient to assume that the civil penalty in *Halper* was indeed "punishment" subject to limitation by the Double Jeopardy Clause.

[61] *See Halper*, 490 U.S. at 447-49.

[62] 114 S. Ct. 1937 (1994).

Halper, held that the Double Jeopardy Clause prohibited Montana from collecting a state tax on the possession of illegal drugs from the defendants once it had convicted them of drug possession.[63] The Court seemed to have forgotten its holding in *Dixon*; it appeared to overlook the possibility that the tax and the possession charges were not the "same offence" within the meaning of the Clause, either because the criminal statute and the tax provision contained distinct elements or because the Montana legislature intended to punish drug possessors with both penalties.[64]

The juxtaposition of *Kurth Ranch* and *Dixon* cuts double jeopardy adrift from any consistent theory that may help the judges and litigants who must navigate its limits on overlapping penalties. In stark contrast to the Court's deference to legislative intent in

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[63] *See id.* at 1948.

[64] *See id.* at 1945, 1948. Justice Scalia, *Grady*'s strongest opponent, joined by Justice Thomas, advocated abandoning the *Halper* rule that would prohibit multiple punishment authorized by the legislature. *See id.* at 1959 (Scalia, J., dissenting). He argued that "by extending the no-double-punishments rule to civil penalties, while simultaneously affirming that it demanded more than mere fidelity to legislative intent, *Halper* gave the rule a breadth of effect it had never before enjoyed." *Id.* at 1957. He cited Justice Felix Frankfurter, *see id.* at 1955-56, who had expressed this vision of double jeopardy 50 years earlier:

> [W]here two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies.

United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 555 (1943) (Frankfurter, J., concurring); *cf.* Regina and Green, 41 O.R.2d 557, 559 (Ont. High Ct. of Justice 1983) (explaining that even a punitive forfeiture following conviction does not violate the double jeopardy protection in the Canadian Charter of Rights and Freedoms, and reasoning that an accused is not *finally* punished until all possible authorized penal consequences for the offense have been exhausted).

Justice Scalia, joined by Justice Thomas, has this year again reiterated his dissatisfaction with the *Halper* rule, stating, "This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well . . . ." Witte v. United States, 115 S. Ct. 2199, 2209 (1995) (Scalia, J., concurring).

Justice Scalia's dissent in *Kurth Ranch* has already been applauded by some jurists. *See, e.g.*, United States v. Haywood, 864 F. Supp. 502, 505 (W.D.N.C. 1994) (stating that "[t]his Court is of the opinion that [the Framers of the Double Jeopardy Clause] did not contemplate the prohibition of multiple punishments, but merely multiple prosecutions," and citing Justice Scalia's opinion in *Kurth Ranch*); People v. Vaughn, 524 N.W.2d 217, 233 n.7 (Mich. 1994) (Boyle, J., concurring) (noting the "[f]rustration with the inability of some to appreciate the absence of a multiple-punishment component of the Double Jeopardy Clause").

Dixon, its opinions in *Halper* and *Kurth Ranch* flout legislative will. Congress had authorized cumulative criminal and civil sanctions for Mr. Halper's conduct;[65] Montana intended to impose cumulative civil and criminal penalties upon its drug possessors.[66] Even if *Blockburger* warranted a presumption that these legislatures never meant to authorize the imposition of two separate penalties, that presumption was rebutted. Because double jeopardy, under *Dixon*, does not bar a legislature from authorizing multiple criminal penalties for the same conduct, it need not bar the substitution of a civil penalty for an otherwise permissible criminal one.[67] *Dixon*, then, has a stranglehold on *Halper*'s logic; efforts to resuscitate *Halper* short of overruling *Dixon* itself are doomed to fail.[68]

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[65] *Cf.* SENATE JUDICIARY COMM., FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 345, 99th Cong., 2d Sess. 31-32 (1986) (explaining that 31 U.S.C. § 3731(d) was added to give a plea of nolo contendere in criminal fraud cases collateral estoppel effect in a subsequent civil fraud action), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5296-97.

[66] *See Kurth Ranch*, 114 S. Ct. at 1960 (Scalia, J., dissenting) (noting that "the Montana legislature authorized these taxes *in addition to* the criminal penalties for possession of marijuana").

[67] The same can be said about those forfeiture cases in which courts have found that civil forfeiture precludes criminal prosecution for the same activity. *See, e.g.*, United States v. Ursery, 59 F.3d 568, 571-72 (6th Cir. 1995) (finding that a consent judgment in a civil forfeiture proceeding barred later prosecution); United States v. $405,089.23, 33 F.3d 1210, 1221-22 (9th Cir. 1994) (holding that the government violated the Double Jeopardy Clause by obtaining convictions in a criminal case and continuing to pursue a forfeiture action), *amended on other grounds by* 56 F.3d 41 (9th Cir. 1995), *and petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346). These cases make sense under *Halper* and *Kurth Ranch*, but are inconsistent with the reasoning of *Dixon*, because Congress clearly authorized both penalties. *See, e.g.*, United States v. Hendrickson, 22 F.3d 170, 175-76 (7th Cir.) (stating that "it is readily apparent that forfeiture was considered by the Sentencing Commission and was intended to be imposed in addition to, not in lieu of, incarceration"), *cert. denied*, 115 S. Ct. 209 (1994); United States v. Crook, 9 F.3d 1422, 1426 (9th Cir. 1993) (finding that civil forfeiture is not an authorized basis for departing below the sentencing range required by the Federal Sentencing Guidelines, and noting that even though Congress provided that fines should be set with collateral civil consequences of conviction in mind, no similar provision was included for length of incarceration), *cert. denied*, 114 S. Ct. 1841 (1994); United States v. Smith, 874 F. Supp. 347, 350 (N.D. Ala. 1995) (mem.) ("It is impossible to make a successful argument that Congress did not actually intend to permit both the 'civil' forfeiture of a drug dealer's real property and his incarceration, based on precisely the same conduct . . . .").

[68] Others would instead prefer to distinguish *Halper* or *Kurth Ranch*. For efforts to make this distinction, see Covelli v. Crystal, No. 534178, 1994 WL 722976, at *6, *8 (Conn. Super. Ct. Dec. 21, 1994) (concluding that *Kurth Ranch* and *Halper* are "wholly inconsistent with the entire approach to double jeopardy analysis traditionally associated with *Blockburger*," but suggesting that "[m]ultiple criminal proceedings [like those in *Dixon*] are typically required by the perceived demands of justice," while "the demands of justice do not require" coexisting civil and criminal penalties since the

And if this fundamental inconsistency is not reason enough to take a hard look at the Court's regulation of multiple penalties under the Fifth Amendment, *Kurth Ranch* has highlighted another problem—the difficulty of distinguishing between punitive civil sanctions governed by the Double Jeopardy Clause and remedial civil awards that should escape double jeopardy review. *Halper* unloosed a steady stream of double jeopardy challenges by convicted defendants facing civil forfeitures, administrative penalties, tax assessments, and other civil sanctions, *Kurth Ranch* being the most prominent example.[69] Also popular are "reverse-*Halper*" claims, affording those accused of a crime a basis for resisting criminal prosecution under the Double Jeopardy Clause using prior civil sanctions as a shield.[70] *Halper* and *Kurth Ranch* have left

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civil penalties could just as easily be obtained by increasing the criminal fine); Henning, *supra* note 1, at 45 (suggesting, prior to *Kurth Ranch*, that *Halper* applies only to cases involving fixed penalties assigned without regard to the severity of conduct); Thomas, *supra* note 55 (manuscript at 72-73) (arguing that the civil penalty sought in *Halper* was beyond that authorized by the spirit, although not the text, of the statute itself).

[69] *See, e.g.*, United States v. $405,089.23, 33 F.3d at 1221-22 (finding that civil forfeiture of proceeds under 18 U.S.C. § 981(a)(1)(A) (Supp. V 1993) and 21 U.S.C. § 881(a)(6) (1988), after conviction violates double jeopardy); United States v. Barnette, 10 F.3d 1553, 1560 (11th Cir.) (holding that the government could seek $50.5 million in a false claims suit after obtaining a criminal conviction and sentence of $7 million), *cert. denied*, 115 S. Ct. 74 (1994); United States v. Mayers, 957 F.2d 858, 860 (11th Cir.) (per curiam) (holding that criminal prosecution for filing false insurance claims did not preclude civil proceedings for filing false Medicare payments), *cert. denied*, 504 U.S. 989 (1992); Patel v. United States, No. 91-C-4407, 1992 U.S. Dist. LEXIS 560, at *8-10 (N.D. Ill. Jan. 17, 1992) (holding that double jeopardy barred the Department of Agriculture from collecting $79,986 in civil penalties from the defendant, who had previously been sentenced to 60 days on work release, three years' probation, and $640 costs and restitution for fraud, because the fine bore no rational relationship to the goal of making the government whole); United States v. Hall, 730 F. Supp. 646, 647, 654-55 (M.D. Pa. 1990) (mem.) (holding that the government could not seek a civil penalty of $1 million where the defendant had already been convicted and sentenced to one year's imprisonment, two years' probation, 400 hours of community service, and a $10,000 fine); New Mexico Taxation & Revenue Dep't v. Whitener, 869 P.2d 829, 833-34 (N.M. Ct. App. 1993) (barring assessment of $80,070.38 in drug taxes after the defendant had pled guilty and lost $33,000 in forfeiture because the Department failed to show how the assessment was proportionate to the remedial goals of the state), *cert. granted*, 871 P.2d 984 (N.M. 1994).

[70] *See, e.g.*, *Ursery*, 59 F.3d at 571-72 (reversing a drug conviction following civil forfeiture on double jeopardy grounds); United States v. Hudson, 879 F. Supp. 1113, 1116 (W.D. Okla. 1994) (finding that a prior civil penalty from the Office of the Comptroller of the Currency was "punishment" barring indictment for the same conduct); United States v. Sanchez, No. M-90-020, 1990 U.S. Dist. LEXIS 20194, at *18 (S.D. Tex. June 8, 1990) (finding that double jeopardy barred a smuggling

courts with numerous prickly problems, such as determining when jeopardy "attaches" in punitive civil proceedings or when a defendant waives his double jeopardy claim of multiple punishment by nonappearance or settlement.[71]

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prosecution following Customs fines of $232,000); State v. Cook, 870 P.2d 413, 417 (Ariz. Ct. App.) (affirming an order dismissing criminal charges against a defendant who had already been assessed $150,000 in penalties by the state securities commission), *vacated and remanded for reconsideration in light of* United States v. Dixon, 115 S. Ct. 44 (1994); *see also* David S. Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587, 601-02 & nn.84-85 (1993) (analyzing and collecting several reverse-*Halper* claims).

Some federal judges have released prisoners whose convictions on drug charges followed the civil forfeiture of their assets. *See* Oakes v. United States, 872 F. Supp. 817, 826-29 (E.D. Wash. 1994) (mem.) (granting a convicted defendant's petition under 28 U.S.C. § 2255 because the conviction was obtained after civil forfeiture, in violation of the Double Jeopardy Clause); United States v. McCaslin, 863 F. Supp. 1299, 1307 (W.D. Wash. 1994) (same).

[71] *See* United States v. Morgan, 51 F.3d 1105, 1110-11 (2d Cir.) (finding that absent explicit terms, the defendant did not waive the double jeopardy defense when he signed a civil contempt order, even though the defendant knew of the pending criminal investigation), *cert. denied*, 116 S. Ct. 171 (1995); United States v. Barton, 46 F.3d 51, 52 (9th Cir. 1995) (noting that jeopardy may attach upon filing of an answer in a forfeiture proceeding); United States v. Sanchez-Escareno, 950 F.2d 193, 201 (5th Cir. 1991) (finding that the mere execution of a promissory note covering a $232,000 civil fine for smuggling marijuana under 19 U.S.C. § 1584 (1988 & Supp. V 1993), which provides a $500 per ounce fine, is not punishment triggering the double jeopardy bar against later prosecution for drug trafficking charges), *cert. denied*, 113 S. Ct. 123 (1992); United States v. Lane, 891 F. Supp. 8, 11 (D. Me. 1995) (finding that double jeopardy had not attached in a prior forfeiture proceeding in which the defendant had failed to make a claim, even though there was no question that the defendant was the owner of the property forfeited); United States v. Tamez, 881 F. Supp. 460, 464-65 (E.D. Wash. 1995) (holding that in a claim of successive prosecution, rather than multiple punishment, jeopardy attaches at the time of conviction in criminal prosecutions and at the time of the forfeiture decree in civil forfeiture proceedings, instead of at the time the defendant enters into a stipulation of forfeiture); United States v. Martin, Nos. 95-C-609, 90 CR 452, 99 WL 124126, at *5 (N.D. Ill. Mar. 20, 1995) ("Jeopardy attaches in a forfeiture proceeding at the time evidence is first presented to the trier of fact."); United States v. Messino, 876 F. Supp. 980, 983 (N.D. Ill. 1995) (mem.) (noting that no jeopardy attaches in a civil forfeiture case until a hearing on the merits or until a pretrial release of assets); *Smith*, 874 F. Supp. at 350 (holding that double jeopardy did not bar subsequent prosecution even though the defendant had filed an offer of judgment in a civil forfeiture case); Quinones-Ruiz v. United States, 873 F. Supp. 359, 362-63 (S.D. Cal. 1995) (finding that the defendant did not waive the double jeopardy defense when he failed to contest forfeiture); United States v. Sanchez-Cobarruvias, No. 94-0732-IEG, 1994 U.S. Dist. LEXIS 20418, at *10-11 (S.D. Cal. Oct. 13, 1994) (holding that an administrative agency's final determination triggers double jeopardy, so that jeopardy attaches at the entry of a U.S. Customs Service Disposition Order in custom forfeiture case).

Confusion over *Halper*'s distinction between punitive and remedial civil sanctions mushroomed after the Court in *Austin* added to the first category the forfeiture of assets under the federal civil drug forfeiture statute. *Kurth Ranch* presented an opportunity to clarify the difference between punishment and remedy, but the Court squandered its chance. A majority of Justices concluded that Montana's tax on the possession of drugs had crossed the line separating those civil sanctions that government is free to pile upon an offender from those that trigger double jeopardy protection,[72] but the decision offered little assistance to courts in locating this line. The majority opinion first rejected, then invoked, rough equivalence with government loss as a litmus test for nonpunitive sanctions.[73] In separate opinions Justice O'Connor embraced this relationship as determinative and Justice Rehnquist condemned it as irrelevant.[74]

C. *The Challenge*

This summary of the Court's efforts to control punishment under the Bill of Rights reveals a seriously unstable combination. Conflicting limits on multiplicity accompany ambiguous and tentative limits on proportionality. Defendants who face overlapping civil or criminal sanctions cannot predict their exposure; prosecutors and legislatures cannot predict whether their enforcement efforts will survive constitutional challenge; and judges' interpretative pronouncements about these several constitutional provisions vary widely.

The place to begin in trying to bring more coherence to these rules is, I submit, the Double Jeopardy Clause. The rules of double jeopardy should form the foundation upon which other limits on punishment can be built. If double jeopardy doctrine permits legislatures to authorize successive penalties for the same conduct, then the more flexible commands of the Eighth Amendment and the Due Process Clauses must pick up the slack. I seek to resurrect Justice Felix Frankfurter's suggestion from fifty years ago that the appropriate source of constraints on legislative ability to cumulate punishment is the limit on proportionality in the Eighth Amend-

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[72] *See Kurth Ranch*, 114 S. Ct. at 1948.

[73] *See id.*

[74] *See infra* text accompanying notes 209-11.

ment and not the limit on multiplicity in the Fifth Amendment. Justice Frankfurter wrote:

> If it be suggested that a succession of separate trials for the enforcement of a great number of criminal sanctions, even though set forth in advance in a single statute, might be a form of cruelty or oppression, the answer is that the Constitution itself has guarded against such an attempt "to wear the accused out by a multitude of cases with accumulated trials" . . . by prohibiting "cruel and unusual punishments."[75]

I suggest that we follow the logical consequences of this insight and evaluate punishment under a robust Eighth Amendment that transcends legislative choice.

II. PROTECTING LIBERTY WITHOUT *HALPER* OR *GRADY*: DOUBLE JEOPARDY PROTECTION CONTINGENT UPON LEGISLATIVE DEFINITIONS OF OFFENSE

As my summary of the troubled state of double jeopardy law suggests, the Court remains undecided whether to leave to legislatures the ability, through their statutory definitions, to expand and contract a defendant's exposure to the risks of successive punishments and prosecutions. These risks include the unjustified cumulation of penalties by prosecutors bent on harassing defendants, undue trauma and burdens from successive trials, the erosion of the jury's power to grant leniency, the conviction of innocent defendants as a result of repeated attempts to convict, and cumulative punishment that is too severe.[76] The Court in *Dixon* appears ready to delegate to legislatures a portion of control over the degree to which a defendant is protected from these harms; the Court in *Halper* and *Kurth Ranch* seeks to retain more of this control in the judiciary, by setting a constitutional standard of "same offence" that the legislature cannot circumvent. The resulting combination is perverse: The Double Jeopardy Clause provides more protection to defendants who face overlapping criminal and civil punishment than it provides to defendants who face multiple criminal punishment. Yet once-convicted criminals like Halper who face additional *civil* punishment cannot *as a class* have greater entitlements to finality,

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[75] United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 556 (1943) (Frankfurter, J., concurring) (citations omitted).

[76] *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 127-31 (1980) (listing well-settled rationales for double jeopardy protection).

jury leniency, and proportionate punishment, or more reason to fear prosecutorial abuse and inaccurate judgments, than once-convicted criminals who face additional *criminal* prosecution. Just as the Court recognized in *Dixon* that it would "add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not,"[77] continuing to pretend that *Halper* survives *Dixon* is at least as destructive.

In the following sections, I defend from a functional standpoint the legislative deference interpretation of the Double Jeopardy Clause that the Court adopted in *Dixon*. I leave to others the historical analysis of the Clause and its meaning, on the assumption that the murky history of the Double Jeopardy Clause itself will support the legislative deference approach of *Dixon* at least as well as the competing approach.[78] None of the risks that the *Grady* and *Kurth Ranch* majorities sought to avert requires judicial regulation of legislative choices regarding the division of culpable conduct into separately punishable units under the Double Jeopardy Clause. Each risk is better addressed by a combination of other constitutional safeguards and a meaningful presumption against multiple punishment whenever penalties overlap.[79] The phrase "same offence" in the Double Jeopardy Clause is not the only textual provision in the Bill of Rights that protects the interests of a defendant in finality, accuracy, prosecutorial good faith, jury nullification, and proportionate punishment. The Due Process, Cruel and Unusual Punishments, and Excessive Fines Clauses also protect these interests, supplementing *Dixon*'s more deferential interpretation of double jeopardy protection.

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[77] United States v. Dixon, 113 S. Ct. 2849, 2864 (1993).

[78] *See* Thomas, *supra* note 55 (manuscript at 16-18, 49-50) (noting English confusion at the time the Double Jeopardy Clause was framed about what constituted the same offense and asserting that double jeopardy has "always operated as a limitation on prosecutors and judges but not on the lawgiver"). *But see* Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 770 (1983) (arguing that "the proper historical context" reveals the legislative deference approach in *Blockburger* to be "fundamentally flawed").

[79] I do not endorse legislative control over aspects of double jeopardy doctrine other than the definition of "same offence." For instance, legislatures should not be free to manipulate the time at which jeopardy attaches, what constitutes jeopardy, or when civil penalties are punitive enough to become regulated by the Clause. *See, e.g.*, Crist v. Bretz, 437 U.S. 28, 37-38 (1978) (striking down a state statute providing that jeopardy does not attach in jury trials until after the first witness is sworn).

A. *The Constitutionally Based Presumption Against Multiplicity*

The most important feature of the legislative deference interpretation of "same offence" is its presumption against successive punishment. As Professor Michael Moore has argued, with thousands of criminal and civil penalties regulating conduct in this country, a legislature cannot be expected to consider all other possible punishments whenever it codifies a particular penalty for an act or class of acts.[80] Thus, it is not reasonable for courts to assume that every time a legislature adopts or amends a criminal statute, it meant to provide to prosecutors an additional, rather than alternative, sanction for particular conduct, or to assume that the legislature was fully aware of the effects of its added penalties on repose, proportionate punishment, jury power, or any of the other interests purportedly served by limiting successive punishment. Because legislatures are not omniscient, the Double Jeopardy Clause mandates a default rule favorable to the accused. Whenever two penalties meet some threshold of similarity, we *presume* they were intended to serve as alternatives, unless the government produces evidence of legislative intent to authorize the imposition of both. The presumption serves as a predictable means of identifying those sanctions which the legislature would *most likely* view as alternative rather than cumulative, rebuttable by evidence showing that the legislature knew exactly what it was doing when it added an additional penalty for the same conduct. Because legislators often are not aware of or do not consider multiplicity, double jeopardy protection will in many cases depend on the degree of similarity required to trigger the presumption and the clarity of contrary intent required to rebut it.

Although I am confident that such a presumption is integral to the Clause, I am not convinced that the formulation of this presumption in *Blockburger* is the best proxy for legislative intent. Several critics, including most recently, Akhil Amar and Jonathan Marcus, George C. Thomas III, and Michael Moore, have continued to attack the efficacy of the *Blockburger* test for the sameness of

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[80] *See* MICHAEL S. MOORE, ACT AND CRIME 336 (1993) ("[I]t serves the legislature poorly to cast upon it the burden of considering all other possible punishments under all other possible statutes when it is setting the punishment for some class of acts covered by any particular statute.").

offenses[81] and have proposed various alternative formulas that may prove to be better predictors of legislative intent than *Blockburger*.[82]

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[81] For decades, commentators and judges have attempted to define which offenses are the same, and the problem continues to be the focus of much of the contemporary scholarly criticism of double jeopardy doctrine. *See id.* at 325-90 (discussing legal, moral, and metaphysical approaches to analyzing the "sameness" of action-types); Amar & Marcus, *supra* note 37, at 28-49 (analyzing four subcategories of successive *Blockburger* prosecutions to point out the logical flaws in differentiating between "greater" and "lesser included" offenses, and then outlining the inadequacy of the *Blockburger* test in cross-sovereign contexts); Thomas, *supra* note 55 (manuscript at 15-38) (criticizing the *Blockburger* test, the same-transaction test, the total identity test, the partial identity test, and the legal realist test); Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1004 n.12 (1980) (discussing three purposes for the "same offense" terminology in the Fifth Amendment and noting the difficulty of formulating only one definition for "same offense"); *see also* SIGLER, *supra* note 47, at 65-69 (discussing a trial court's discretion in applying either the "single act" test, the "single transaction" test, the "same offense" test, or the "same evidence" test); Otto Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 534-42 (1949) (suggesting the "same transaction" test as an alternative to the "same evidence" test); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 269-77 (1965) (summarizing offense-defining tests and supporting case law). For a listing of 20 notes and articles that have attempted to define "same offence," see George C. Thomas III, *Sentencing Problems Under the Multiple Punishment Doctrine*, 31 VILL. L. REV 1351, 1356 & n.22 (1986).

[82] *See* MOORE, *supra* note 80, at 337-50 (advocating a moral approach to classifying act-types); Amar & Marcus, *supra* note 37, at 36-38 & n.183 (arguing that "same means same" and that double jeopardy does not bar successive prosecution of lesser or greater included offenses). George Thomas has expanded on Moore's work, proposing a presumption against punishment under two similar statutes when, after eliminating the common elements, any leftover act-type would ordinarily be noncriminal, a presumption that would be rebuttable only by clear evidence of legislative intent to punish the same act-type cumulatively. *See* Thomas, *supra* note 55 (manuscript at 24, 33) (arguing that "offence" refers to an act-type and not to a set of statutory elements, and stating that "a substantive test of same offense is the only way to produce a satisfying account of when offenses are truly the same").

My defense of the legislative deference approach is not based upon any hope of eliminating or avoiding the difficulty of identifying some "Platonic essence" for the textual phrase "same offence," against which the legislative definitions could be compared. *See* Amar & Marcus, *supra* note 37, at 37 n.184. I mention this because it is clear from the Court's opinions in *Dixon* that one of the reasons the Court rejected *Grady* in favor of the *Blockburger* approach was the sheer aggravation of agreeing upon or applying any other definition of "same offence." *See* United States v. Dixon, 113 S. Ct. 2849, 2864 (1993). Interpreting the Double Jeopardy Clause to defer to legislative intent regarding which offenses are the same will not make this problem disappear. Some abstract definition of "same offence" is needed to serve as a proxy when no legislative intent concerning multiplicity appears. More importantly, as I explain later, some method of dividing conduct into culpable units, independently of legislative choice, is necessary so long as judges are to regulate, under the Eighth Amendment and Due Process Clauses, the total amount of punishment that one person can be forced to endure for his misdeeds.

B. *Misplaced and Misunderstood Functions*

When legislative intent to impose successive and cumulative penalties rebuts the presumption against multiplicity, there is no persuasive reason to enlist the Double Jeopardy Clause to negate the legislature's deliberate choice. Instead, each of the interests that prompted the Court to prohibit even authorized multiple penalties under the Double Jeopardy Clause is adequately safeguarded without such a limitation.

1. Prosecutorial Harassment

Overlapping offenses and penalties for the same conduct give prosecutors the freedom to prosecute and punish a defendant more than once for the same conduct. The fear that prosecutors will deliberately decline to join overlapping penalties in order to rehearse their case or persecute a defendant has prompted some to insist that the Clause requires joinder of sufficiently similar offenses and penalties, even when a legislature created them separately.[83] Assuming that abusive severance practices demand some constitutional oversight,[84] they can be contained without muddying up the Double Jeopardy Clause with distinctions about which offenses, intended by a legislature to be cumulative, can and cannot be prosecuted in tandem. Independent of any mandatory joinder rule

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[83] *See supra* note 56 (discussing Justice Souter's dissent in *Dixon*).

[84] The position of the present Court on this point is not entirely clear. *Halper* and *Kurth Ranch* show that the Court *will* allow the prosecutor two bites at the punishment apple, so to speak, if one of those bites is in a civil proceeding. In neither case did the Court suggest that it would bar a second *attempt* to punish a defendant civilly if the defendant was acquitted earlier. *See* State *ex rel.* Fisher v. Cleveland Trinidad Paving Co., No. 65889, 1994 WL 463810, at *5 (Ohio Ct. App. Aug. 25, 1994) (rejecting a double jeopardy challenge to civil penalties for environmental regulatory violations when the previous criminal prosecution resulted in acquittal, and noting that *Halper* held the Double Jeopardy Clause applicable only if a subsequent penalty follows a criminal prosecution that results in conviction and sentence). It is not too surprising, given the complexity of these cases, that some courts have read *Halper* differently. *See* United States v. Collette, No. A92-154-CR (JKS), 1995 WL 413116, at *2-3 (D. Alaska July 5, 1995) (noting confusion on this point); Bartlett v. Alabama Alcoholic Beverage Control Bd., 654 So. 2d 1149, 1152-54 (Ala. 1994) (examining whether an administrative fine was a penalty, and therefore barred by the Double Jeopardy Clause, even though the defendant's earlier prosecution had been dismissed); *see also* Stanley E. Cox, Halper*'s Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. (forthcoming Summer 1995) (manuscript at 117, on file with author) (advocating that *Halper* should be applied to bar second *attempts* to punish, regardless of the result).

that would result from antimajoritarian interpretations of the phrase "same offence," two doctrines already limit the prosecutor's ability to try a defendant separately on related charges.

As the Court noted in *Dixon*, "collateral estoppel" already limits multiple prosecutions to some degree by barring relitigation of factual allegations once rejected by a fact-finder.[85] Equitable and flexible, the doctrine of collateral estoppel[86] sometimes binds separate agencies of the same sovereign even when they have no opportunity to coordinate their attacks.[87] But the Court has

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[85] *See Dixon*, 113 S. Ct. at 2863 n.15 (stating that prosecutors "have little to gain and much to lose" from bringing separate prosecutions because an "acquittal in the first prosecution might well bar litigation of certain facts essential to the second one"). Akhil Amar and Jonathan Marcus have explained how collateral estoppel complements double jeopardy in their recent article proposing a revised interpretation of "same offence." *See* Amar & Marcus, *supra* note 37, at 30-31; *see also* Anne B. Poulin, *Double Jeopardy:* Grady *and* Dowling *Stir the Muddy Waters*, 43 RUTGERS L. REV. 889, 898 (1991) (noting that prosecuting a defendant on a minor charge before proceeding on the greater one is "a foolish move" because of collateral estoppel). Estoppel bars not only multiple criminal actions, but also multiple civil actions and criminal actions after civil ones. *See, e.g.*, Ingalls Shipbuilding, Inc. v. United States, 21 Cl. Ct. 117, 124 (Cl. Ct. 1990) (holding that the United States, seeking forfeiture under 28 U.S.C. § 2514 (1988 & Supp. V 1993), was bound by the unchallenged factual findings of the Armed Services Board of Contract Appeals (ASBCA), a coordinate branch in the federal contract dispute-resolution process).

[86] The Court has rooted collateral estoppel rules in the Double Jeopardy Clause itself, *see* Ashe v. Swenson, 397 U.S. 436, 445-46 (1970) ("For whatever else the constitutional guarantee [against double jeopardy] may embrace . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time."), but others have argued that the Due Process Clause provides a better source for the same rules, *see* Amar & Marcus, *supra* note 37, at 31 ("The true source of the *Ashe* [collateral estoppel] idea is due process, not double jeopardy."); *see also* Eli J. Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 FLA. ST. U. L. REV. 121, 167-68 (1994) (arguing that the *Ashe* rule is based on the Due Process Clause); Westen & Drubel, *supra* note 35, at 88 n.40 ("[The] decision [where] to place a certain protection is largely a matter of convenience[; a]fter all, one can view the Double Jeopardy Clause in its entirety as part of the Due Process Clause without having to alter one's view of its scope.").

[87] *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S 381, 402-03 (1940) (concluding that a judgment in a suit between a party and a representative of the United States bars relitigation of the same issue between that party and another office of the federal government, because there is privity between officers of the same government); KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.4, at 263-64 (3d ed. 1994) (citing *Adkins* and stating the rule that an officer or agency of the government is in privity with every other officer or agency of the same government). Opponents of the Court's dual sovereignty exception to double jeopardy have suggested that estoppel could bind separate sovereigns as well. *See* Amar & Marcus, *supra* note 37, at 47 ("Perhaps, in an age of cooperative federalism, a state government could be bound by the litigation disabilities of the federal government, and vice versa—where ordinary citizens are involved and

crafted the collateral estoppel doctrine to prevent duplicate fact-finding, not to bar all instances of prosecutorial bad faith in seeking multiple punishment. A government is estopped from seeking a second penalty only if a fact-finder has only rejected the government's factual allegations, and it is often difficult or impossible to prove which factual allegations the fact-finder rejected.[88] In addition, the incentives created by collateral estoppel vary in strength depending upon whether the burden of proof at the second proceeding is equal to the burden at the first proceeding. Collateral estoppel is weakest in situations like *Halper* or *Kurth Ranch*, where a fact-finder's rejection of a factual element due to "reasonable doubt" will never bar later efforts to establish the same fact by a preponderance of the evidence.[89] As a result, collateral estoppel provides only limited assurance that prosecutors will not hold back a related penalty as a trump card in case their first suit fails.[90]

Supplementing estoppel, however, is the defendant's protection against bad-faith prosecutions under the Due Process Clauses. Due process has long prohibited prosecutorial conduct that is the product of illegitimate motives. A prosecutor cannot split up her

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governments presumably work together in law enforcement.").

[88] Collateral estoppel does not preclude relitigation of the same conduct or facts if "'a rational jury could have grounded its [earlier acquittal] on an issue other than that which the defendant seeks to foreclose from consideration.'" Dowling v. United States, 493 U.S. 342, 350 (1990) (citation omitted); *see also* Schiro v. Farley, 114 S. Ct. 783, 791-92 (1994) (finding that the jury's guilty verdict did not necessarily depend on a finding that Schiro lacked intent to kill, and therefore the court was not collaterally estopped from finding that the defendant satisfied an aggravating circumstance requiring intent). Because general verdicts make it difficult for defendants to establish estoppel, some commentators have advocated wider use of the specific verdict or special interrogatories to enhance the value of collateral estoppel protection. *See* Amar & Marcus, *supra* note 37, at 33 n.166 (encouraging the use of specific verdicts by defendants after acquittal to clarify the verdict's basis and to "better protect defendants against the risks of erroneous conviction and abusive prosecution"); Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283, 317-25 (1992) (advocating the use of special interrogatories).

[89] *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236-37 (1972) (collateral estoppel does not bar subsequent civil forfeiture action after criminal acquittal).

[90] *See, e.g.*, *Ashe*, 397 U.S. at 457 (Brennan, J., concurring) (noting that because the state, trying the defendant for robbery of one patron after a jury acquitted him of the robbery of a different patron, "offered no justification for not trying the other informations at [the first] trial, it is reasonable to infer that the other informations were held in reserve to be tried if the State failed to obtain a conviction on the [first charge]").

charges *solely* to harass a defendant or to rehearse her case any more than she could obtain a second trial by "goading" a defendant into moving for a mistrial,[91] prosecute a defendant because of his race,[92] or boost charges solely to punish a defendant for asserting a constitutional right.[93] As the Court relinquishes its regulation of legislative definitions of "same offence" under the Double Jeopardy Clause, it must not overlook, and should instead consider strengthening, this supplementary limit on a prosecutor's power.[94] A

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[91] *See* Oregon v. Kennedy, 456 U.S. 667, 676 (1982) ("Only where the government conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first of his own motion."); *see also* James F. Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching As a Bar to Reprosecution Under the Double Jeopardy Clause After* Oregon v. Kennedy, 69 CORNELL L. REV. 76, 96-99 (1983) (arguing that the *Kennedy* decision inadequately protects defendants from prosecutorial overreaching because the decision bars retrial only in cases in which the defendant can show that the prosecution intended to provoke a mistrial, rather than in the broader class of cases in which prosecutorial misconduct satisfies the plain error rule, even if such misconduct was intended only to secure conviction).

[92] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) (barring discriminatory prosecutions); *see also* United States v. Armstrong, 64 U.S.L.W. 3309 (U.S. Oct. 31, 1995) (No. 95-157) (agreeing to review whether the trial court properly ordered discovery in a selective prosecution claim by an African American defendant), *granting cert. to* 48 F.3d 1508 (9th Cir. 1995) (en banc); *cf.* Wayte v. United States, 470 U.S. 598, 608 (1985) (stating that a decision to prosecute cannot be based deliberately on race, religion, or another arbitrary classification); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (barring discriminatory enforcement of facially neutral regulations).

[93] *See* United States v. Goodwin, 457 U.S. 368, 384-86 (1982) (holding that the Due Process Clause prohibits prosecutors from bringing additional vindictive, retaliatory charges against a defendant who exercises his right to a jury trial in response to the original charge); Blackledge v. Perry, 417 U.S. 21, 28-29 (1974) (holding that the Due Process Clause prohibits prosecutors from bringing more serious charges against a defendant in response to his invocation of a statutory right to appeal); North Carolina v. Pearce, 395 U.S. 711, 723 (1969) (finding that even though neither the Double Jeopardy Clause nor the Equal Protection Clause prevents a judge from imposing a higher sentence upon retrial to punish a defendant for appealing, the Due Process Clause does); *see also* United States v. Lovasco, 431 U.S. 783, 789 (1977) (recognizing that the Due Process Clause may provide relief for a bad-faith delay in bringing charges, even though the delay did not violate the Speedy Trial Clause of the Sixth Amendment); *cf.* Arizona v. Youngblood, 488 U.S. 51, 57-59 (1988) (finding that the Due Process Clause grants relief for bad-faith destruction of evidence). Some Justices would undoubtedly oppose this interpretation of due process. *See, e.g.*, Albright v. Oliver, 114 S. Ct. 807, 814 (1994) (Scalia, J., concurring) (stating that the requirements of the Fourth, Fifth, and Sixth Amendments "are not to be supplemented through the device of 'substantive due process'").

[94] Although some have criticized existing due process remedies as ineffectual, *see, e.g.*, Stephen J. Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 500 (1977) (noting the difficulty of successfully maintaining a due process challenge that a prosecutor retried a defendant deliberately), some lower courts have granted relief on this basis and others have embraced the theory of using due process to control

meaningful due process limit would entail a *presumption* of bad faith whenever a prosecutor fails to join offenses of sufficient similarity, rebuttable by an "abuse-neutral" reason, or some similar explanation.[95] Combined with estoppel, this supplementary limitation means that prosecutors are not entirely free from constitutional constraints on their joinder decisions.[96]

"bad faith" failure to join related offenses. *See* United States v. P.H.E., Inc., 965 F.2d 848, 860-61 (10th Cir. 1992) (remanding for determination of whether the government's deliberate strategy of multiple prosecutions violated due process); United States v. Easley, 942 F.2d 405, 412 (6th Cir. 1991) ("We recognize . . . that multiple prosecutions brought by the government for the purpose of harassment, or in bad faith, may violate due process."); Tucker v. Makowski, 883 F.2d 877, 880-81 (10th Cir. 1989) (remanding for a determination of whether the defendant's "successive trials arising from admittedly separate crimes, but stemming from the same criminal transaction" violated the defendant's right to due process); Sanchez v. United States, 341 F.2d 225, 228-29 (9th Cir.) (noting that "planned exposure of an accused to a succession of trials for offenses clearly subject to joinder . . . , for the deliberate purpose of enhancing the chance of conviction on weak evidence, might well constitute fundamental unfairness" in violation of the Due Process Clause, but finding that failure to join offenses was not a deliberate scheme to enhance the chances of conviction, but was either inadvertent or due to surprise acquittal), *cert. denied*, 382 U.S. 856 (1965); United States v. American Honda Motor Co., 271 F. Supp. 979, 987 (N.D. Cal. 1967) (finding "successive grand jury inquiries and indictments for alleged separate conspiracies arising out of the same transaction may, and in this situation do, constitute harassment in violation of the Due Process Clause of the Fifth Amendment"); *see also* United States v. Rosenberg, 888 F.2d 1406, 1427 (D.C. Cir. 1989) (Edwards, J., dissenting in part) (noting that "an unjustified succession of prosecutions might very well support an inference of prosecutorial vindictiveness in violation of due process").

[95] I would lift a standard the Court has used in another due process context and require that the explanation for failing to join offenses must be based on verifiable, objective information. *See Pearce*, 395 U.S. at 726 (Douglas, J., concurring) (noting that "whenever a judge imposes a more severe sentence upon a defendant after a new trial," his reason must be based on objective information concerning conduct occurring after the time of the original sentencing). Also, I would insist that any explanation offered as justification for failure to join related offenses be rejected as a pretext if the prosecutor's office invokes it only selectively, just as some courts reject race-neutral reasons for peremptory strikes when prosecutors offer them only selectively. *See* Amar & Marcus, *supra* note 37, at 35-36 (arguing that due process requires prosecutors to offer a "legitimate nonvexatious reason to try [related] charges separately" and noting that a prosecutor charging a defendant with a lesser-included offense after securing a conviction and sentence for a greater offense that carries a greater penalty "would be hard-pressed to come up with a justification for [this] action other than a desire to harass the defendant"); Note, *supra* note 81, at 292-96 (explaining situations in which the prosecution should not be required to join offenses). *But see* United States v. Dixon, 113 S. Ct. 2849, 2872-74 (White, J., concurring in part and dissenting in part) (arguing that there is no legitimate reason for the United States to rush to prosecute criminal contempt rather than waiting to join the contempt charges with other substantive offenses).

[96] I do not share the *Dixon* majority's confidence in the power of resource

2. Finality and Repose

Requiring the joinder of related sanctions under the Double Jeopardy Clause, even when the legislature expressly authorizes separate imposition of those sanctions, has also been said to be an essential safeguard of finality. Such a rule forces prosecutors to be efficient and assures defendants, victims, and others that when the first proceeding or penalty is complete, the ordeal is over.[97] By comparison, an interpretation of the Double Jeopardy Clause that allows a legislature to choose to cumulate offenses permits legislatures, not courts, to allocate finality depending upon legislators' conclusions concerning how much finality is deserved by a person who performs certain culpable acts.

It does not seem intuitively wrong to allow legislatures, through their punitive choices, to set at least part of the finality "price" that must be paid for a given course of culpable conduct. There is no particular reason why the Double Jeopardy Clause must favor judicial rather than legislative choices about finality, at least when it comes to defining what constitutes an offense. Legislatures remain unable to eviscerate certain basic entitlements to finality under the Clause. For instance, no statute could effectively authorize prosecutors to appeal acquittals or arbitrarily abort trials mid-course and start over. These aspects of finality are guaranteed by the Double Jeopardy Clause and are not contingent on who defines when two sanctions are the "same offence." Nor could a legislature abrogate other constitutional rules that protect finality directly, such as collateral estoppel, or indirectly, such as the due process protection against prosecutorial harassment discussed

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constraints to prompt joinder of related offenses. Indeed, resources are sometimes allocated to prosecutors' offices depending on the quantity of convictions obtained, without regard to whether those convictions are for offenses that could have been joined together. *See* Lear, *supra* note 56, at 631-35. Professor Lear has noted that a prosecutor's desire to avoid aggravating judges may prevent repeated prosecutions within the same district, but not among separate federal districts. *See id.* at 631 (asserting that the bench "is hostile to the use of precious judicial resources to rehash events already litigated").

[97] For arguments that finality is the central protection provided by the Double Jeopardy Clause, see *Dixon*, 113 S. Ct. at 2882 (Souter, J., concurring in part and dissenting in part) ("Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'" (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting United States v. Jorn, 400 U.S. 470, 479 (1971) (plurality opinion)))); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 829 (asserting that double jeopardy protects "verdict finality").

above.[98] The Court has consistently treated finality beyond these essential components as a fluid concept, an interest that can be outweighed by other interests.[99] A defendant is not entitled to a single trial if his first trial ends in mistrial,[100] if his appeal reveals that the first trial was tainted with trial error,[101] or if a second offense arising from the same conduct is not complete at the time of the first trial.[102] Moreover, under the dual sovereignty exception, a defendant is not protected from a second prosecution for the same offense if another jurisdiction chooses to prosecute.[103] Additionally, the government routinely appeals sentences.[104] In each of these contexts, the interest of the defendant in one final

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[98] *See supra* part II.B.1. Thus, the finality that even *Dixon*'s reading of the Double Jeopardy Clause protects has content apart from whatever actual expectations a legislature may offer a defendant. As Justice Black and Professor Westen, among others, have explained, actual expectations of finality are easily changed by changing the law. *See* Bartkus v. Illinois, 359 U.S. 121, 162 (1959) (Black, J., dissenting) (noting that "people have apparently become more accustomed to double trials, once deemed so shocking" as a result of Supreme Court sanctioning); Westen, *supra* note 81, at 1005 (noting that the finality argument has two forms, expectations that a defendant actually has and expectations that a defendant is entitled to have). Nevertheless, some commentators still refer to actual expectations of finality when defining the scope of double jeopardy protection. *See, e.g.*, Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693, 700 (1994) (stating that the federal defendant who is reprosecuted after an initial state prosecution "possesses no legitimate expectation of repose that is defeated" because "the possibility of federal reprosecution [is] widely known").

[99] *See* Westen & Drubel, *supra* note 35, at 105 (arguing that a defendant's constitutionally protected interest in finality "is not absolute and must be balanced against society's interest in conducting further proceedings"); *see also* Poulin, *supra* note 85, at 911-15 (noting that the Court has valued the defendant's interest in the finality of acquittals more highly than the defendant's interest in the finality of convictions).

[100] Oregon v. Kennedy, 456 U.S. 667, 672-73 (1982) (explaining that the Double Jeopardy Clause does not bar a second trial after mistrial if the first trial was terminated because of a hung jury or as a result of the defendant's own motion, unless the motion was provoked by the prosecution).

[101] *See* Tibbs v. Florida, 457 U.S. 31, 40 & n.14 (1982) (explaining that the Double Jeopardy Clause does not prohibit a retrial after a reversal due to trial error); United States v. Ball, 163 U.S. 662, 672 (1896) (allowing reprosecution of a defendant whose conviction was reversed on appeal).

[102] *See* Diaz v. United States, 223 U.S. 442, 448-49 (1912) (holding that a prior trial for assault and battery does not bar a prosecution for a resulting homicide where the victim had not yet died at the time of the first trial).

[103] *See infra* text accompanying notes 151-54.

[104] At least in those jurisdictions that authorize government appeals by statute. *See, e.g.*, United States v. DiFrancesco, 449 U.S. 117, 136 (1980) (finding that the prosecutor's statutory right to appeal a sentence is not precluded by the Double Jeopardy Clause).

adjudication is sacrificed for another goal that the Court has found more compelling. To permit some arbitrary quantum of finality to control the meaning of "same offence" is to get it backwards. Deliberately imposed, separate penalties convey the legislature's judgment that separate penalty proceedings do not create an *undue* burden on finality, but impose only that burden deserved by one who commits the proscribed acts. A prosecutor's choice to seek all authorized penalties simultaneously, or to forego some of them entirely, is a *deal* for the defendant, not an entitlement.[105]

Undoubtedly, some defendants will expect more finality than the amount allocated to them by a legislature's penalty structure.[106] Some of these actual expectations may be based on the promises of prosecutors who expressly agree to abandon multiple penalty options, and other expectations may be based on blind confidence that prosecutors will decline to take advantage of multiple penalties established by law. A defendant in the first category does not need the Double Jeopardy Clause to secure finality—due process already bars prosecutors from breaking their promises to defendants.[107]

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[105] *Cf.* Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (holding that prosecuting a defendant to the full extent of the law after he refused to accept a plea bargain to a lesser charge did not violate the Due Process Clause). The classic question in the plea bargaining cases, as here, is whether the defendant has any enforceable *right* to leniency, and if so, under what conditions.

[106] As Professor Elizabeth Lear has pointed out recently, several jurisdictions have already embraced some form of compulsory joinder in criminal prosecutions. *See* Lear, *supra* note 56, at 665 (noting "twenty-three states . . . operating under some version of a transaction-based compulsory joinder regime").

[107] *See* Santobello v. New York, 404 U.S. 257, 262-63 (1971) (granting the defendant relief for breach of a plea bargain). Presently, however, courts may enforce only those promises that the promisor had the authority to make, a rule that can dash the expectations of finality of those defendants whose lawyers are unfamiliar with it. Examples of such worthless promises include agreements by Assistant U.S. Attorneys that a defendant need not fear later civil proceedings after pleading guilty and assurances by attorneys representing agencies such as the SEC or the SBA that settlement of the agency's action will protect a defendant from later criminal or civil actions. *See* United States v. Walcott, 972 F.2d 323, 327 (11th Cir. 1992) (finding that an SBA agent lacked authority to settle a civil suit to recover a loan); United States v. Killough, 848 F.2d 1523, 1526 (11th Cir. 1988) (finding that a False Claims Act suit was not barred by the promise of an Assistant U.S. Attorney in prior criminal proceedings); United States v. Williams, 780 F.2d 802, 803 (9th Cir. 1986) (stating that a VA administrator's promise could not bind a U.S. Attorney); Dresser Indus. v. United States, 596 F.2d 1231, 1237 (5th Cir. 1979) (finding that representations of the SEC did not bar a criminal prosecution by the Department of Justice), *cert. denied*, 444 U.S. 1044 (1980); FDIC v. Haddad, 778 F. Supp. 1559, 1569 (S.D. Fla. 1991) (rejecting the defendant's argument because an "Assistant U.S. Attorney has no authority to compromise a civil claim of the United States"); *see also* Johnson v. Lumpkin, 769 F.2d 630, 634 (9th Cir. 1985) (stating that a federal prosecutor's

A defendant in the second category should rely on his attorney to seek a "global" settlement of multiple penalty proceedings the first time around.

3. Risk of Convicting the Innocent

Preventing multiple prosecutions for the same conduct is also said to prevent prosecutors from gaining an unfair adversarial advantage at later trials. Permitting separate trials of related offenses allows prosecutors to "plug holes" in their cases through rehearsal,[108] robbing defendants of the opportunity to surprise the government's witnesses on cross examination or to catch prosecutors without counter proof. This lopsided relationship makes it so easy for the government to win, the argument goes, that the risk of convicting innocent defendants becomes intolerable without double jeopardy protection against rehearsal.[109]

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promise does not bind state authorities). *But see* Thomas v. INS, 35 F.3d 1332, 1337 (9th Cir. 1994) (holding that the INS was bound by the representation of a U.S. Attorney); United States v. Shaw, 26 F.3d 700, 701-02 (7th Cir. 1994) (declining to decide if and how equitable estoppel could prevent enforcement of the penalty provisions in criminal statutes because the defendant did not contend that he relied to his detriment on an INS form stating that reentry after deportation is punishable by up to two years imprisonment, when in fact the recidivist statute actually authorized up to 15 years imprisonment); United States v. Hall, 730 F. Supp. 646, 652 (M.D. Pa. 1990) (granting the defendant's motion for summary judgment enforcing the plea agreement, and finding that the Assistant U.S. Attorney's statement during plea negotiations could reasonably have been understood by the defendant as an assurance that no civil action would be brought).

[108] *See* Ashe v. Swenson, 397 U.S. 436, 459 (Brennan, J., concurring) ("One must experience a sense of uneasiness with any double-jeopardy standard that would allow the State this second chance to plug up the holes in its case.").

[109] *See, e.g.*, United States v. Dixon, 113 S. Ct. 2849, 2877 (1993) (White, J., dissenting) (stating that a prohibition against repeated prosecutions prevents the "government from gradually fine-tuning its strategy, thereby minimizing exposure to a mistaken conviction"); United States v. Scott, 437 U.S. 82, 91 (1978) ("To permit a second trial . . . would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" (quoting Green v. United States, 355 U.S. 184, 188 (1957))); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 621-22 (1994) (discussing the unfairness of a federal trial following a state acquittal); Lear, *supra* note 56, at 647 (arguing that some innocent defendants will plead guilty to avoid the expense and fatigue of successive trials, and that innocent defendants who are tried again "may be convicted by a well-choreographed presentation of the evidence"); Schulhofer, *supra* note 94, at 505-06 (discussing how retrials dim defendants' "prospects for acquittal" because they allow prosecutors to remedy setbacks from first trials and to learn what the defense has planned, strategically and substantively).

This risk is simply overblown. The lawyers who conduct successive punishment proceedings may not benefit significantly from the knowledge gained by others who prosecuted the defendant earlier.[110] And even if all enforcers worked together like gears in a well-oiled machine,[111] the advantage of surprise of which defendants are deprived is not a basis for a rule of joinder more exacting than the one a legislature creates. Not only is surprise a dwindling commodity under increasingly popular reciprocal discovery rules,[112] but it also has very little to do with safeguarding innocence. To insist that any litigant remain less prepared than he might otherwise be has never advanced accuracy, as decades of reform in the rules of civil and criminal discovery have recognized.[113] The protectiveness some feel toward a defendant's opportunity to catch the government off guard may reflect the concern that overlapping penalty proceedings may jeopardize the defendant's privilege against self-incrimination or allow the prosecutor to manufacture false evidence to meet exposed defenses.[114] Needless to say, both of these concerns are more properly addressed directly as claims for relief under the Due Process Clause for prosecutorial misconduct or as violations of the Fifth Amendment's privilege against self-incrimination.

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[110] *See, e.g.*, Rudstein, *supra* note 70, at 611 (citing as an example a case in which Commodity Futures Trading Commission lawyers first sought penalties in an administrative hearing, and the United States Attorney's office later sought conviction in a criminal prosecution).

[111] *See* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 611 n.151, 621-22 (1994) (noting joint criminal and civil investigatory task forces in certain regulatory areas and examples of close cooperation between United States Attorneys and attorneys for the SEC and the Office of the Inspector General).

[112] *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1232-33 (8th ed. 1994) (concluding that the trend has been to expand the ability of prosecutors to obtain pretrial discovery of defense information); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1570-71 (1986) (describing the erosion of traditional defense protections, which enables prosecutors to obtain more information).

[113] *See, e.g.*, FED. R. CRIM. P. 16 (providing for limited discovery by the prosecutor of defense information prior to trial); CAL. PENAL CODE § 1054.3 (West 1985 & Supp. 1995) (providing that the defense must disclose to the prosecution the names and statements of all witnesses it intends to call and any real evidence it intends to offer at trial).

[114] Conversely, Professor Lear recently noted that in her conversations with prosecutors on this point, they believe that "the government's case does not improve with age. The government's witnesses have also been cross examined and may well forget key information during the later trial." Lear, *supra* note 56, at 647 n.103.

That the risk of rehearsal to accuracy is inflated is probably best demonstrated by the absence of any other limitations on government rehearsal in the criminal justice system. Outside these double jeopardy debates, courts and commentators have not been troubled that government witnesses will learn from one proceeding how to be a more persuasive witness—"touching up" their testimony, as Justice Brennan put it.[115] Government witnesses commonly rehearse their testimony before trial—before grand juries and at preliminary hearings, in proceedings concerning other defendants, and during the routine woodshedding that litigators include as part of their trial preparation.[116] Defendants are routinely retried using the same witnesses after appeals and mistrials, and sometimes after trial in another jurisdiction. No basis exists for imposing greater limits on joinder under the Double Jeopardy Clause, when these common and well-accepted procedures probably have at least an equally significant impact on testimonial distortions.[117]

Finally, a constitutional rule requiring prosecutors to join related offenses in a single trial may not be a significant improvement as far as accuracy goes. An innocent defendant may be convicted because of the sheer volume of charges against him.[118]

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[115] *See* Ashe v. Swenson, 397 U.S. 436, 459 (1970) (Brennan, J., concurring).

[116] Lacking a handy empirical source on this point, I will quote Prosecutor Marcia Clark. "In every criminal case which goes to trial, the prosecution interviews the witnesses before they testify," Clark stated in response to a defense challenge regarding a "practice session" with witness Mark Fuhrman. Andrea Ford & Jim Newton, *Strongest DNA Figure Yet Offered in Simpson Trial*, L.A. TIMES, June 21, 1995, at A1, A19.

[117] Government attorneys are also allowed to repeat proof of previously prosecuted conduct or present proof of untried offenses at sentencing hearings. "Real offense" sentencing requires federal prosecutors to enhance an offender's sentence with wrongful conduct for which the offender may be separately prosecuted. *See* Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOK. L. REV. 725, 744-45 (1994) (arguing that sentence enhancement for untried offenses raises a "very real possibility" that a defendant "may be convicted of a crime after repeated dry runs by the government"). The Supreme Court held this year that prosecuting a defendant for an offense and also using that offense to enhance the sentence for a different offense does not violate the rights of the defendant under the Double Jeopardy Clause. *See* Witte v. United States, 115 S. Ct. 2199, 2207 (1995) ("A defendant has not been 'punished' any more for double jeopardy purposes when relevant conduct is included in the calculation of his offense level under the Guidelines than when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account."); *see also* Schiro v. Farley, 114 S. Ct. 783, 789 (1994) (noting that the Court has "upheld the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried").

[118] *See* Estelle v. McGuire, 502 U.S. 62, 70 (1991) (declining to determine whether

A rule that simultaneously guards against both the risk of wrongful conviction by aggregation and the risk of wrongful conviction by rehearsal would require that a prosecutor condense many prosecutions into one, and then trim that single trial to a reasonable scope, foregoing some charges entirely. Although this may remain the ideal to which we hope prosecutors will aspire,[119] as well as a laudable goal for future statutory reform,[120] it is not required by the Double Jeopardy Clause.

4. Jury Nullification

Multiple prosecutions are also said to undermine the jury's power to shield the accused from the full punishment that the law provides.[121] What power does the jury retain, if its leniency can be tossed aside by a prosecutor who seeks a second penalty for the same conduct, albeit under the guise of a different "offence"? The

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erroneous admission of similar-acts evidence can constitute a violation of due process because of this effect); Henry v. Estelle, 33 F.3d 1037, 1041-42 (9th Cir. 1994) (finding that the admission of testimony concerning alleged incidents similar to those charged denied defendant's due process), *rev'd on other grounds sub nom.* Duncan v. Henry, 115 S. Ct. 887 (1995); *see also* KAMISAR ET AL., *supra* note 112, at 1084 (noting an empirical study concluding that joinder of offenses in a single trial increases the likelihood of conviction).

[119] Justices Marshall and Stevens in the past advocated just this rule. *See* Missouri v. Hunter, 459 U.S. 359, 371-74 (1983) (Marshall, J., dissenting) (noting reasons why "[t]he creation of multiple crimes serves only to strengthen the prosecution's hand"); Ball v. United States, 470 U.S. 856, 867-68 (1985) (Stevens, J., concurring) (quoting Marshall's dissent in *Hunter* at length in explaining why allowing the simultaneous prosecution of overlapping offenses "encourages prosecutors to tilt the scales of justice against the defendant").

[120] *See* Lear, *supra* note 56, at 670-71 (proposing that severance statutes and rules be adjusted to accommodate the increased prejudice that would result from a mandatory joinder rule in the federal system).

[121] *See* Crist v. Bretz, 437 U.S. 28, 36-37 (1978) (holding that "jeopardy attaches when the jury is empaneled and sworn," and reasoning that the defendant has a "right to have his trial completed by a particular tribunal," a right that has "roots deep in the historic development of trial by jury" and "that lies at the foundation of the federal [double jeopardy] rule"); *see also* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) (arguing that "the double jeopardy clause . . . should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment"); Lear, *supra* note 56, at 649-50 ("The jury possesses a 'species of legislative power'—the power to dispense leniency where the law prescribes none . . . . [A jury's initial decision] cannot logically be confined to the specific offense definition; it represents a rough approximation by the jury of the appropriate punishment for the defendant's behavior."); Westen & Drubel, *supra* note 35, at 89-91 (discussing the interest of a defendant in having his trial completed by a particular tribunal as a right to conclude his confrontation with society once and for all).

answer is that criminal jury acquittals remain sacrosanct, charge by charge,[122] and estoppel prevents government attorneys from relitigating facts rejected by a jury the first time around. There is no basis for extending to the trial jury any more power to protect defendants than this ability to be lenient charge by charge, fact by fact. The function of selecting the appropriate penalty from *among* several different charges, as opposed to assessing guilt on particular charges, is not one that the Constitution has assigned to trial juries. This function belongs to grand juries or prosecutors.

Indeed, short of some hybrid criminal/civil/administrative action that also allows the joinder of criminal and civil penalties from every jurisdiction in which defendant may face punishment,[123] one trial jury's verdict may be a particularly *un*reliable

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[122] Both outright acquittals and implicit acquittals bar later prosecution efforts. *See* Green v. United States, 355 U.S. 184, 191 (1957) (finding that the jury's decision to convict the defendant of second-degree murder implicitly acquitted him of murder in the first degree). Professor Westen has argued that this protection of the jury's right to nullify is the only persuasive reason for the near absolute ban on appealing jury acquittals as compared to the less stringent finality afforded other events, such as mistrials, sentencings, bench trials, and dismissals. *See* Westen, *supra* note 81, at 1018. Nullification is also unique to *criminal* juries; estoppel provides the appropriate respect for decisions favorable to the defendant when successive penalties follow civil or administrative proceedings.

[123] The majority in *Dixon* observed that nothing "short of a same-transaction analysis will eliminate this problem." United States v. Dixon, 113 S. Ct. 2849, 2863 n.15 (1993). But even joining all the available *crimes* from the same transaction in the first trial would not provide the jury a full view of the civil and criminal penalties a defendant may face. On the inability of government attorneys to bring overlapping penalties in the same proceeding, see Henning, *supra* note 1, at 55 nn.285-86.

Not surprisingly, several lower courts interpreting *Halper*'s mandate that prosecutors should seek civil and criminal sanctions in a single proceeding have given little weight to the purported interest of an accused in one jury's assessment of punishment. These courts seemed to have concentrated on actual expectations of finality rather than on an entitlement to the first jury's assessment, assuming that as long as the defendant has notice, in the form of simultaneous filing of civil and criminal actions, no multiple punishment problem arises. *See, e.g.*, United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994) ("[T]he simultaneous pursuit ... of criminal and civil ... sanctions falls within the contours of a single, coordinated prosecution."); United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993) ("[C]ourts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated."), *cert. denied*, 114 S. Ct. 922 (1994). *But see* United States v. $405,089.23, 33 F.3d 1210, 1216 (9th Cir. 1994) ("We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same 'proceeding.'"), *amended on other grounds by* 56 F.3d 41 (9th Cir. 1995), *and petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.)

guide of the punishment a community would assign to a particular defendant for his misdeeds.[124] Perhaps two hundred years ago juries were able to structure sentencing, given the combination of grand jury charging, no plea bargaining, and predictable sentences for many crimes,[125] but today's juries are almost entirely out of the loop when it comes to determining the punishment an offender receives for his conduct. Prosecutors are the key players, selecting from among charges that are accompanied by limited ranges of penalties and selecting which of the defendant's assets to forfeit.[126] A judge selects penalties from within the range offered to him by the prosecutor's charging decision and the jury's finding of guilt. With the exception of capital cases, juries rarely sentence defendants.[127] Even a jury's decision to acquit, or to convict a

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(suggesting that simultaneous initiation of civil and criminal penalty proceedings is insufficient to avoid double jeopardy bar, and noting that the Court "did not think the fact that the two [actions in *Kurth Ranch*] were pending contemporaneously mattered"), *cert. denied*, 115 S. Ct. 669 (1994).

[124] Moreover, the concern that government will ride roughshod over a jury's verdict is unwarranted in the majority of multiple prosecution and multiple punishment contexts. In more than 80% of criminal cases, the defendant *waives* his right to a jury trial by pleading guilty or accepting a bench trial. *See* Westen & Drubel, *supra* note 35, at 133-35 (explaining why there is no equivalent right to judge nullification). When a defendant waives a jury trial and accepts either the prosecutor's offer or a judge's fact-finding, he also waives his right to jury nullification. Although a second prosecution after a plea or bench trial that has resolved a similar charge might raise a question about the prosecutor's motives, it would not cheapen the value of jury nullification at all.

[125] *See, e.g.*, Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 921-25 (1994) (discussing the rapid growth of plea bargaining, which was unheard of in the United States before 1804); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 120 (1992) ("'There was no plea bargaining in felony cases in the eighteenth century.'"). *See generally* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993) (detailing changes in the criminal justice system during American history).

[126] *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991) (terming plea bargaining "the most important part of the sentencing process"); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1229-33 (1993) (explaining the enhanced power of prosecutors under the Federal Sentencing Guidelines).

[127] *See* Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 189 (1994) ("[W]hether a trier of fact holds an offender liable under one grade or the next has little practical effect on the sentence that most sentencing judges have the discretion to give."). A few states still allow juries to select sentence length. Arkansas, Kentucky, and Texas, for instance, allow juries to choose the term of years that convicted defendants will serve. *See* ARK. CODE ANN. § 5-4-103 (Michie 1994) (bifurcating guilt determination and sentencing but still allowing the jury to impose a sentence); KY. REV. STAT. ANN. § 532.055(2) (Michie 1990 & Supp. 1994) (providing

defendant of a lesser charge, does not represent an informed community choice regarding just deserts, for courts do not allow juries to learn what punishment follows from their verdicts of guilt.[128] Unless that first jury has before it information about the full extent of a defendant's actions and the option of subjecting the defendant to the maximum punishment that he may face in multiple proceedings for the entirety of those actions,[129] there is no reason to interpret its verdict as the community's assessment of the maximum amount of punishment the defendant deserves.

5. Proportionate Punishment

The remaining reason to trump deliberate legislative choice to cumulate penalties with a constitutional standard for "same offense" is to prevent excessive punishment.[130] For instance, the Court's

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for jury determination of a sentence within a statutorily defined range); TEX. CODE CRIM. PROC. ANN. art. 37.07(2)(b) (West Supp. 1995) (stating that the defendant may elect that the jury determine the sentence).

[128] *See, e.g.*, United States v. McDonald, 933 F.2d 1519, 1526 (10th Cir.) (affirming a lower court's decision to deny a defense request to inform the jury of the sentence), *cert. denied*, 502 U.S. 897 (1991). *But see* United States v. Datcher, 830 F. Supp. 411, 415 (M.D. Tenn. 1993) (granting defendant's request to inform the jurors about a "draconian sentence" in argument, and reasoning that "if community oversight of a criminal prosecution is the primary purpose of a jury trial, then to deny a jury information necessary to such oversight is to deny a defendant the full protection to be afforded by jury trial"); COMMITTEE ON MORE EFFECTIVE USE OF JURIES, ARIZONA SUPREME COURT, JURORS: THE POWER OF 12, at 104-07 (1994) (on file with author) ("Of all the factors that might persuade a jury to exercise its power to nullify in criminal cases, the fact that the defendant stands to receive what in the jurors' judgment is a grossly unfair sentence appears to be one of the most rational. Still, we do not tell them."). Researchers attempting to quantify or detect the effect of penalty-severity knowledge on conviction decisions disagree about the strength of the effect. *See, e.g.*, Martin F. Kaplan, *Setting the Record Straight (Again) on Severity of Penalty: A Comment on Freedman et al.*, 18 LAW & HUM. BEHAV. 697, 698 (1994) (disputing the claim that penalty severity has no effect on verdicts).

[129] *Cf.* Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989) (noting the difficulty of barring subsequent punitive damages awards once a defendant has already been punished by a prior award for the same conduct, and noting that the various state limits on punitive awards make it "impossible for this court to ensure that the 'one and only' prior award contemplated the 'full' damage caused by a defendant's wrongful conduct," and noting that a "jury making a prior award of punitive damages may not have considered the full effect of a defendant's conduct with respect to those people other than the plaintiff[s] who were injured by such conduct").

[130] *See, e.g.*, MOORE, *supra* note 80, at 310 (stating that "the multiple punishments ban of double jeopardy is justified by the same value that justifies proportionality review under the Eighth Amendment: both are concerned with excessive punishment").

decision in *Halper* barring government attorneys from seeking super-compensatory civil penalties after already securing a criminal conviction appeared to many (including Justice Scalia in hindsight[131]) to be the Court's way of preventing the imposition of cumulative penalties that it considered excessive.[132] *Halper*, like *Kurth Ranch*, clearly cut down on the total punishment available to government enforcers in such cases, but it did so in an inept and haphazard way. By barring later efforts to punish defendants with penalties that cannot be joined with penalties obtained in earlier prosecutions, the Court has forced government attorneys to choose only one penalty. This is the case even when no single penalty option has any relationship either to the total punishment that the legislature meant to assign to particular conduct, or, more importantly, to any constitutional ceiling on the amount of punishment permissible for particular conduct. It is not surprising to find the Court enlisting the Double Jeopardy Clause as yet another procedural substitute for direct review of the proportionality of the punishment that legislatures authorize. But a mandate to use only one of several authorized penalties is a poor way to prevent punishment from exceeding a constitutional ceiling on severity.[133]

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[131] *See* Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1958 n.2 (1994) (Scalia, J., dissenting) (suggesting that the Court in *Halper* "was motivated by concern for the harsh consequences of applying a per-transaction penalty to a 'prolific but small-guage offender'" (quoting United States v. Halper, 490 U.S. 435, 449 (1989))).

[132] *See* Elizabeth S. Jahncke, Note, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 147 (1991) (stating that the decision revealed the Court's attempt "to protect Halper from such a disproportionate fine within a double jeopardy framework").

[133] *See* MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 203 (1969) (noting that "rules against multiple convictions provide a means—although a clumsy and inadequate one—of controlling sentencing by the trial courts," and concluding that "it would be preferable to do away completely with [the rules] against multiple convictions and punishments and to provide a full and adequate right of appeal against sentence to protect the accused from unwarranted punishment"); Henning, *supra* note 1, at 67-71 ("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."); Rudstein, *supra* note 70, at 602-05 (criticizing the effect of barring criminal proceedings following civil punishment); Westen & Drubel, *supra* note 35, at 114 (noting that "the multiplication of statutes" punishing a single act may result in excessive punishment, but stating that "the statutes would be unconstitutional under the Eighth Amendment rather than the Double Jeopardy Clause"); Jahncke, *supra* note 132, at 139 (arguing that despite *Halper* the ability to impose severe punishment in one proceeding still remains); Note, *Double Jeopardy and the Multiple-Count Indictment*, 57 YALE L.J. 132, 138 (1947) (criticizing the use of double jeopardy doctrine to limit the amount of punishment, and noting that "[r]eview of sentences

The Court would do better to confront the risk of disproportionate penalties directly, under the Eighth Amendment, than to employ the clumsy proxy of mandatory joinder under the Double Jeopardy Clause.

C. *When Seeking the Intent of One Legislature Lacks Meaning*

Let me address a final concern about the legislative deference approach to double jeopardy and its rebuttable presumption against allowing multiple penalties of sufficient similarity. The idea of comparing two offenses to determine whether a legislature intended them to be alternative or cumulative assumes that one legislature has promulgated both offenses. The task of discerning legislative intent breaks down when separate lawmaking bodies define overlapping offenses.

The clearest need for interlegislative analysis arises under a challenge that today remains only hypothetical—when a defendant claims that double jeopardy bars the successive imposition of similar offenses enacted by different sovereigns. By expressly permitting the legislatures and prosecutors of separate sovereigns to act independently of each other, the "dual sovereignty" exception to double jeopardy law presently defeats all such claims. Given this gap in double jeopardy protection, courts need not worry today about whether one or both of two separate sovereigns really intended to punish the same wrong twice. For example, a federal prosecutor may charge a defendant with a crime that looks just like a state crime for which the defendant was already prosecuted in state court. Because of the dual sovereignty exception, she need not search for evidence of congressional intent to impose its penalties on top of state penalties, nor for evidence that the state legislature

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on the merits . . . would allow the desired result to be achieved without turning conceptualistic handsprings").

Judges, too, have noted the counter-intuitive effects of *Halper*'s rule, especially in reverse-*Halper* cases. *See* United States v. McCaslin, 863 F. Supp. 1299, 1306 (W.D. Wash. 1994) ("[I]ntuition may suggest that the forfeiture rather than the prison sentence should yield—i.e., that the criminal sanction should be upheld and the defendant reimbursed for the loss of his property."). One commentator's proposal illustrates the awkwardness. Professor Rudstein argues that the government should be allowed to either (1) reopen the civil proceeding and secure an award just below the punishment threshold, and then renew its criminal prosecution, or (2) secure a criminal conviction with no sentence, but with all of the collateral consequences of a criminal conviction. *See* Rudstein, *supra* note 70, at 610, 614-15; *see also* United States v. Collette, 892 F. Supp. 232, 235-36 (D. Alaska 1995) (concluding that *Halper* and *Austin* bar only additional punishment, not subsequent conviction).

anticipated that the federal government could proceed separately for the same offense.

But the dual sovereignty exception to double jeopardy may not withstand renewed attacks by its critics,[134] and other, more subtle versions of the dual-legislature problem already exist today. First, consider a case like *Dixon* in which contempt penalties overlap with more typical offenses. The judge in a contempt proceeding functions as a virtual legislature by defining the scope of prohibited conduct as well as the sanctions for violating that prohibition. In *Dixon*, Justices Scalia and Kennedy implicitly recognized the legislative role of judges in contempt proceedings when they applied *Blockburger*: Instead of looking to the contempt *statute* for the elements of contempt, Justices Scalia and Kennedy examined the *order* which the contemnor was alleged to have violated,[135] treating

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[134] *See infra* note 154. Professor Amar and Jonathon Marcus address the difficulty of comparing separate jurisdiction's offenses for "sameness," should the dual sovereignty exception to double jeopardy be abolished. They advocate a test for determining whether two offenses of separate sovereigns are the same that "would not presume legislative intent to create separate offenses merely because different words are used" by separate legislatures, but that would "seek to discern whether in fact the statutes substantively describe the same offense with the same real elements." Amar & Marcus, *supra* note 37, at 44.

[135] *See* United States v. Dixon, 113 S. Ct. 2849, 2856-58 (Scalia, J., plurality opinion):

> The statute . . . provides that "[a] person who has been conditionally released . . . and who has violated a condition of release shall be subject to . . . prosecution for contempt of court." . . . Dixon could not commit an "offence" under this provision until an order setting out conditions was issued. . . . [T]he "crime" of violating a condition of release cannot be abstracted from the "element" of the violated condition. The Dixon court order incorporated the entire governing criminal code. . . . 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.

See also id. at 2859 n.5 (stating that the terms of the court's order "define the prohibited conduct. . . . To ignore the CPO when determining whether two offenses are the 'same' is no more possible than putting aside the statutory definitions of criminal offenses").

Chief Justice Rehnquist and Justices O'Connor and Thomas disagreed on this point, arguing that the appropriate source of comparative elements was the contempt statute itself, not the judge's specific order. They also argued that allowing a contempt prosecution to bar a prosecution for the much more serious substantive offense was "counter-intuitive" and "defies commonsense." *Id.* at 2867 (Rehnquist, C.J., dissenting).

I agree, in part, with all of them. In the context of successive prosecutions for contempt, any presumption against multiple penalties must compare the statutory offense with the order violated, not the contempt statute, because of the unique grant of legislative authority given to judges. Yet the application of the *Blockburger*

the judge as a second lawmaker.

The dual-legislature problem also arises whenever separate legislatures make law for a single sovereign. Congress and territorial legislatures act independently, but the Court considers them one under the Double Jeopardy Clause.[136] For example, the defendants in a recent case challenged their federal prosecution for murder for hire following an earlier acquittal in Puerto Rico of charges that they attempted to murder the same victim.[137] The United States Court of Appeals for the Eleventh Circuit applied the *Blockburger* presumption even though "[t]he statutes under which [defendants] were charged were drafted by two distinct legislatures" that "hardly intended the statutes each drafted to share space in the same criminal code," causing what the court termed an "awkward fit between *Blockburger* and this case."[138] The criminal prohibitions of state and local legislatures, although independently enacted, also are subject to the "same offence" test.[139]

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presumption creates a result that makes little sense. That is a problem with the presumption and the standards for finding sufficient rebutting proof, however, not a problem with the choice of whether to look initially for evidence of legislative intent in the contempt statute itself or in the judge's order.

[136] *See* Puerto Rico v. Shell Co. (P.R.), 302 U.S. 253, 264 (1937) ("Both the territorial and federal laws and the courts, whether exercising federal or local jurisdiction, are creations emanating from the same sovereignty. Prosecution under one of the laws in the appropriate court, necessarily, will bar a prosecution under the other law in another court." (citations omitted)); Grafton v. United States, 206 U.S. 333, 354-55 (1907) ("[T]he cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States.").

[137] *See* United States v. Sanchez, 3 F.3d 366, 367 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994).

[138] *Id.* at 367. The Court of Appeals concluded that the two offenses were distinct under *Blockburger* because murder for hire required proof of "the promise of remuneration," and the attempt charge required "proof of an act unequivocally directed at the offense." *Id.*; *see also* Virgin Islands v. Foster, 734 F. Supp. 210, 212 (D.V.I. 1990) (applying *Blockburger* to offenses passed by Congress and the legislature of the Virgin Islands territory). *But see* United States v. Lopez Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) (finding, over dissent, that Puerto Rico is a separate sovereignty for purposes of double jeopardy), *cert. denied*, 486 U.S. 1034 (1988).

[139] *See* United States v. Wheeler, 435 U.S. 313, 318-22 (1978) ("City and state . . . are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone. And the 'dual sovereignty' concept . . . does not permit a single sovereign to impose multiple punishment for a single offense . . . ."); Waller v. Florida, 397 U.S. 387, 395 (1970) (holding that in the context of prosecutions by both the state and municipal governments, "a 'dual sovereignty' theory is an anachronism" and thus "the second trial constituted double jeopardy").

The fiction of the unitary legislature loses its credibility in these situations,[140] and some alternative is required if the Double Jeopardy Clause is to retain its focus on legislative intent to determine when two proceedings or penalties involve the "same offence." In my view, the most sensible approach, and the approach most protective of defendants' interests, is to apply the presumption against multiple penalties across legislatures but require rebutting evidence of intent to cumulate penalties by *both* lawmakers.[141]

In sum, there is no functional justification for an interpretation of the Double Jeopardy Clause that includes a meaning for "same offence" other than that provided by legislatures. To read the Bill of Rights to protect defendants from legislative choices regarding punishment makes sense, but it makes better sense to limit cumulative penalties under the Eighth Amendment and the Due Process Clauses, provisions that are more easily read to impose antimajoritarian rules.

III. LIMITS ON PROPORTIONALITY

The remainder of this Article examines the Eighth Amendment's limits on proportionality in light of legislative ability to fragment conduct into separate offenses under the Double Jeopardy Clause. The Amendment must protect against the most serious risks of

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[140] Agencies, too, are sometimes granted so much discretion to define the offenses for which penalties may be sought that they might be regarded as virtual "legislatures" upon which double jeopardy analysis must focus. With continued expansion of administrative penalties, it becomes less and less tenable to presume that every aspect of administrative, civil, and criminal enforcement is fully coordinated by Congress. Yet because of the variety of congressional controls over agency action, Congress is more likely to become aware of the overlap between criminal and administrative penalties than to understand the overlap between certain nonadministrative penalties. Professor Lear has argued, however, that one particular agency cannot be trusted to speak the will of Congress. She maintains that the statements of the United States Sentencing Commission cannot provide the necessary congressional intent to override the *Blockburger* presumption. *See* Lear, *supra* note 117, at 750-51 & nn.104-09 ("Realistically, the Guidelines represent the intent of the Sentencing Commission rather than of Congress.").

[141] Professor George Thomas has also criticized the dual sovereignty exception and has argued that it is possible to apply a presumption against multiple punishment—even one that is rebuttable by legislative intent—across sovereigns. It is unclear whether Thomas's presumption against overlapping punishment of separate sovereigns could be rebutted by evidence of contrary intent of *either* sovereign, or whether it would require that *both* sovereigns anticipate cumulation. *See* Thomas, *supra* note 55 (manuscript at 70) ("If the legislature intends to punish the same culpable act-type more than once in the dual sovereignty context, it need only say so.").

disproportionate penalties posed by double jeopardy law, but it must also accommodate the extraordinary variety of approaches to punishment in our federal system, including punishment practices only crudely tuned to an individual offender or his offense, such as treble damage awards and mandatory minimum sentences. In the following sections, I offer several suggestions for shaping Eighth Amendment law to perform this function, each of which grows out of my initial premise that the Eighth Amendment complements the Double Jeopardy Clause to create a coherent set of limits on punishment. In Part A, I argue that the Eighth Amendment requires review of the proportionality of *all* penalties against the same offender for his conduct, even if those penalties call for different sacrifices (property or liberty), are payable to separate sovereigns, or are imposed in separate proceedings (civil, criminal, or administrative). I also suggest ways in which courts can determine when to count a civil sanction or a sanction imposed by a separate sovereign among the penalties totalled for purposes of Eighth Amendment review. In Part B, I address the next step after identifying which penalties to cumulate—identifying a disproportionate total. Not wishing to rehash past debates over the appropriate formula for determining how much punishment is too much, I limit my discussion in this section to suggestions that follow directly from my argument that the Eighth Amendment protects defendants not only from single, disproportionate criminal sentences, but also from disproportionate penalties that cumulate as a result of multiple punishment proceedings. In particular, I suggest that certain types of penalties warrant closer review for excessiveness and criticize methods of judging excessiveness under the Eighth Amendment that do not consider the severity of the sanction relative to the offender's culpability.

A. *Scope of Protection: Guidelines for Application*

If the Eighth Amendment is to serve as a backup for the cumulative punishment that double jeopardy permits, then courts must be able to assess the effects of several penalties together. Judges, however, are used to evaluating the proportionality of penalties one at a time.[142] Until very recently, the awkward limits

[142] Consider, for example, the Court's dicta in a case disposing of the claim of excessive punishment raised by John O'Neil, who was sentenced to nearly 55 years in prison for 307 violations of a Vermont law prohibiting the sale of liquor. O'Neil had

of the *Halper* rule and pre-*Dixon* successive prosecution cases have held cumulative penalties somewhat in check. With the adoption of the legislative deference approach to the "same offence" for double jeopardy in *Dixon*, cumulative penalties will probably occur more often. Judges and litigants must start thinking of Eighth Amendment limits in a broader way, not simply penalty-by-penalty. Any approach that ignores the successive and overlapping nature of punishment contains the same fatal flaw that doomed Congress's early efforts to control money laundering. In the quest for simplicity, it ignores the simplest math. Any portion is the sum of smaller sub-portions; proportionate penalties can add up to disproportionate punishment.

1. Proportionality Review for All Penalties: Exemptions for None

To begin with, no penalty can be exempt from judicial review for proportionality under the Eighth Amendment.[143] Justice Scalia and Chief Justice Rehnquist, however, have concluded that the Eighth Amendment includes no protection against disproportionately long sentences and limits only those punishments that are uniquely inhumane in method.[144] Other Justices would allow for

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filled 307 separate mail orders for small quantities of liquor. Before noting that the Eighth Amendment did not bind the states, the Court stated:

> The punishment imposed by statute for the offence with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offences. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed.

O'Neil v. Vermont, 144 U.S. 323, 331 (1892).

[143] As the Court itself has stated, "no penalty is *per se* constitutional." Solem v. Helm, 463 U.S. 277, 290 (1983).

[144] *See* Harmelin v. Michigan, 501 U.S. 957, 975-85 (1991) (plurality opinion) (concluding that the Framers, as well as contemporaneous legislatures and courts, understood the Cruel and Unusual Punishments Clause to prohibit particular modes of punishment, rather than disproportionate punishment); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 839-44 (1969) (suggesting that the Framers considered "cruel and unusual" to refer to torturous methods of punishment).

some judicial second-guessing of the proportionality of sentences, but may limit that review to cases involving the extreme penalties of death or life without parole.[145] Moreover, although the Court has agreed to limit forfeitures and contempt penalties under the Excessive Fines Clause, it has not considered an Eighth Amendment challenge to any other type of monetary penalty. It may yet choose to limit review under the Excessive Fines Clause to only those monetary sanctions that lack legislated ceilings.[146]

If the Court were to limit proportionality review in these ways, the bulk of the sanctions imposed in this country would escape review entirely. Very few convicted defendants receive sentences of death or life without parole. The only penalties that lack caps set by the legislature are forfeitures,[147] contempt fines,[148] fines for

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[145] *Cf. Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (noting that "[p]etitioner's life sentence without parole is the second most severe penalty permitted by law"); *id.* at 1028 (Stevens, J., dissenting) (noting that a death sentence and a life sentence without parole share a common characteristic: "The offender will never regain his freedom."); *see also supra* note 26 (citing similar appellate court decisions).

[146] Typically, neither contempt fines nor forfeitures are capped by the legislature. *See infra* notes 147-48. On the other hand, Justices Scalia and Thomas suggested in *Kurth Ranch* that the result in *Halper* could be attributed to excessive fines analysis, even though in *Halper* the legislature *had* set a maximum amount for fines. *See* Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1958 n.2 (1994) (Scalia, J., dissenting).

Another possibility is that the Court will limit proportionality review to monetary sanctions only, on the theory that the profit motive supports reading the Eighth Amendment to provide for closer review of "fines" than other forms of penalties. *See Harmelin*, 501 U.S. at 979 n.9 (plurality opinion) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."). In my view, however, this difference in economic incentives does not warrant abandoning review of *non*monetary sentences altogether. Sentences of imprisonment are, as a class, more *severe* than sentences that do not involve the deprivation of liberty, and may require closer scrutiny for that reason. *See Solem*, 463 U.S. at 289 (characterizing a fine as a "lesser punishment" compared to imprisonment). Notably, even after *Austin* and *Alexander*, at least one court appears to be under the impression that proportionality review is required *only* for terms of imprisonment. *See* United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) ("[The] proportionality principle, if it does exist in the Eighth Amendment, derives from the Cruel and Unusual Punishment Clause and not the Excessive Fines Clause."), *cert. denied*, 115 S. Ct. 1792 (1995).

[147] Legislatures typically set no upper limits on the value of forfeitable assets, although many forfeiture statutes require that the government must establish some relationship between the property subject to forfeiture and the prohibited activity. *See Chandler*, 36 F.3d at 369 (Wilkinson, C.J., concurring) (stating that because the jury in a contested civil forfeiture action under 21 U.S.C. § 881 (1988) must find both that the property was used or intended to be used to facilitate illegal activity and that the owner was aware of that use, the jury "determines . . . to a great extent that forfeiture . . . is not harsh or excessive," thus "foreclosing an Eighth Amendment

treason,[149] and punitive damage awards.[150] If one looks at the typical penalty in isolation, precluding constitutional review does not appear to be that unreasonable, especially because a legislature and at least one representative of another branch (prosecutors, judges, sentencing commissions, etc.) have already approved of its severity. But if one recognizes that penalties are, in many cases, neither imposed nor experienced in isolation, but as part of a package of punishment made up of civil, administrative, and criminal sanctions from multiple sources, then immunizing classes of penalties from constitutional scrutiny has more serious consequences. The Eighth Amendment is of little use as a limit on

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challenge in all but egregious circumstances"). Still, this relationship test is not very exacting. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 (1974) (finding a vessel worth $19,800 forfeitable under Puerto Rico law, even though only one marijuana cigarette was found aboard); United States v. 1990 Toyota 4Runner, 9 F.3d 651, 654 (7th Cir. 1993) (finding a car forfeitable merely because it was driven to a meeting where the logistics of a drug deal were discussed); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (remanding to the trial court to determine whether 18 U.S.C. § 1963(a)(2) authorized forfeiture of defendant's entire 92% stock interest in a company worth $3 million, even though defendant's benefit from his illegal conduct totalled only $335,000); People *ex rel.* Waller v. 1989 Ford F350 Truck, 642 N.E.2d 460, 466 (Ill. 1994) (remanding to the trial court to determine whether forfeiture of a pick-up truck, in which the defendant was found with a small packet of cocaine and $55.99 in his pocket, violated the Excessive Fines Clause).

Once this statutory minimum relationship is established, no further statutory ceiling exists for judges to consult in order to determine whether a given forfeiture is too severe. Instead, the degree of punishment imposed by criminal or civil forfeiture is limited only by the prosecutor's discretion in choosing to seek or to refrain from seeking forfeiture of a particular asset. *See* United States v. 461 Shelby County Rd. 361, 857 F. Supp 935, 939 (N.D. Ala. 1994) ("When the United States undertakes a forfeiture, it is the United States which has selected the amount of the 'fine', and not the Congress, and not the courts.").

[148] *See* International Union v. Bagwell, 114 S. Ct. 2552, 2559 (1994) ("Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct."); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1026-27 & nn.4-6 (1993) (noting the unlimited power of judges to impose severe contempt fines, and describing cases involving "breathtakingly severe" fines).

[149] *See* 18 U.S.C. § 2381 (1988) (providing that individuals who are convicted of treason against the United States "shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000").

[150] Many states have not imposed caps on punitive damage awards in private litigation, either in the form of absolute dollar amounts or multiples of compensatory damages. Some of these damage awards, if shared with the state, may qualify as fines. *See infra* text accompanying notes 232-33.

disproportionate punishment that results from cumulative penalties if it exempts most penalties entirely.

2. Cumulating Penalties of Separate Sovereigns

Just as courts that review punishment under the Eighth Amendment must consider all types of penalties in order to assess the true totality of punishment that the government exacts, they must not ignore certain penalties just because they were imposed in a different jurisdiction. The Eighth Amendment can and should bridge the gap left by double jeopardy's dual sovereignty exception, an exception that allows the states,[151] the federal government,[152] and tribal governments[153] to each prosecute the same defendant for essentially the same crime.[154] Preventing a single jurisdiction

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[151] *See* Heath v. Alabama, 474 U.S. 82, 88 (1985) (rejecting a double jeopardy challenge to an Alabama conviction and death sentence after the defendant had pled guilty to the same murder in Georgia and was sentenced there to life in prison). *But cf.* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 5 & n.15 (1992) (noting that nearly half of the states have statutes that limit reprosecution under these circumstances).

[152] *See* Abbate v. United States, 359 U.S. 187, 195-96 (1959) (rejecting a double jeopardy challenge to a federal prosecution for conspiracy to destroy a federal facility after a state conviction for conspiracy to destroy the same property); Bartkus v. Illinois, 359 U.S. 121, 139 (1959) (rejecting a double jeopardy challenge to a state robbery prosecution after the defendant had been acquitted of federal bank robbery charges); United States v. Lanza, 260 U.S. 377, 382 (1922) (rejecting a double jeopardy challenge to federal prosecution for manufacturing, transporting, and possessing alcohol after a state conviction for the same offense).

[153] *See* United States v. Wheeler, 435 U.S. 313, 329-30 (1978) (holding that tribal prosecution for contributing to the delinquency of a minor does not bar prosecution for statutory rape in federal court). *But see* Grafton v. United States, 206 U.S. 333, 351-52 (1907) (barring a Phillipine prosecution for an assassination after acquittal at a military court-martial for homicide, and rejecting the argument that the defendant "committed two distinct offenses—one against military law and discipline, the other against the civil law").

[154] Academics have renewed their attack on the dual sovereignty exception, arguing either for complete abolition or drastic curtailment. *See* Amar & Marcus, *supra* note 37, at 2 (proposing "to abandon the general dual sovereignty doctrine in double jeopardy law"); Braun, *supra* note 151, at 36 (arguing that the dual sovereignty exception is theoretically flawed); Cassell, *supra* note 98, at 708-19 (providing a critique of the dual sovereignty exception); Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 282 (1992) (arguing that "[t]he dual sovereignty doctrine is unconstitutional because it denegrates the principle of popular sovereignty underlying the Double Jeopardy Clause"); Guerra, *supra* note 1, at 1161-62 (arguing that the "dual sovereignty exception violates the spirit, if not the letter, of the Double Jeopardy Clause"); Herman, *supra* note 109, at 618 & n.32 (collecting a dozen law review articles and notes published since 1930 criticizing the dual sovereignty exception); Paul Hoffman,

from imposing a disproportionately severe penalty is not much of a shield against excessive punishment if several jurisdictions can freely cumulate punishment for the same wrong.[155] A dual sovereignty exception to the Eighth Amendment is, for this reason, a mistake.

The incorporation of Eighth Amendment protections through the Fourteenth Amendment against the states undermines any basis for reviewing the punishment of separate sovereigns separately. Incorporation appropriately brought an end to one sovereign's ability to use evidence illegally obtained by another sovereign.[156] The same argument supports cumulating, rather than separating, penalties of state and federal governments under the Eighth Amendment.[157]

Double Jeopardy Wars: The Case for a Civil Rights "Exception", 41 UCLA L. REV. 649, 661-71 (1994) (arguing for the abolition of the dual sovereignty doctrine, with an exception for civil rights cases). The United States Court of Appeals for the Second Circuit recently questioned "whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interest that the dual sovereignty doctrine is universally needed to protect one from another." United States v. All Assets of G.P.S. Auto. Corp., No. 94-6115, 1995 U.S. App. LEXIS 26482, at *50 (2d Cir. Sept. 18, 1995).

[155] I assume here that the Court will eventually apply the Eighth Amendment's Excessive Fines Clause to the states. It would be remarkable if the Court did not, given its prior treatment of both the Bail and the Cruel and Unusual Punishment Clauses. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (noting that the Bail Clause "has been assumed" to apply to the states); Robinson v. California, 370 U.S. 660, 667 (1962) (applying the Cruel and Unusual Punishments Clause to the states, invalidating a state criminal statute as cruel and unusual punishment in violation of the Fourteenth Amendment). Agreement on this point appears universal. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 283-84 (1989) (O'Connor, J., dissenting) (arguing that all elements of the Eighth Amendment should apply to the states); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 148, 151-58 (1986) (stating that the "applicability [of the Excessive Fines Clause] to the states seems clear"); Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1440-41 (1987) (discussing the applicability of the Excessive Fines Clause to the states).

[156] *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (barring a state from compelling a witness to give testimony that might be used against him in federal prosecution); Elkins v. United States, 364 U.S. 206, 223 (1960) (barring the introduction in a federal prosecution of evidence illegally seized by state officers).

[157] Incorporation is the basis on which some critics have attacked the dual sovereignty exception to double jeopardy. *See* Heath v. Alabama, 474 U.S. 82, 102 n.3 (1985) (Marshall, J., dissenting) (stating that *Murphy* and *Elkins* "can be read to suggest that despite the independent sovereign status of the Federal and State Governments, courts should not be blind to the impact of combined federal-state law enforcement on an accused's constitutional rights"); Amar & Marcus, *supra* note 37, at 12-26 (noting that although the Court eventually recognized that the dual

Indeed, the most persuasive reason to retain a dual sovereignty exception to the Fifth Amendment's prohibition of *duplicative* penalties fails to support a similar dual sovereignty exception to the Eighth Amendment's prohibition of *disproportionate* penalties. Without such an exception to double jeopardy, an offender who had been acquitted or punished only moderately by one sovereign could entirely escape punishment in another sovereign's courts. The classic worst-case scenario is one involving a state official accused of violent, racially motivated state crimes against an African-American victim. An acquittal in state court could completely undermine the nation's legitimate punitive objectives by barring a later federal prosecution for the same offense.[158] The same difficulty does not arise with cumulative excessiveness review under the Eighth Amendment. The effects of ignoring state, federal, tribal, and even international boundaries under the Eighth Amendment are less drastic. The only time an all-governments-are-one approach to Eighth Amendment review would affect a sovereign's ability to punish an offender is when the offender's prior punishment approaches excessiveness. In that situation, it is not likely that any legitimate punitive interest of the subsequent sovereign would be frustrated because the offender has already received plenty of punishment.

Other interjurisdictional tensions may arise from a rule of first-come-first-serve under the Eighth Amendment, but none are serious enough to warrant a different rule. Lucrative civil penalties, forfeiture, and state-shared punitive damage awards are becoming increasingly popular supplements to costly incarceration, prompting governments to compete to be the first to punish a defendant; now revenue, not simply justice, is at stake.[159] Some high-profile cases generate political capital as well and have occasionally fueled competition between federal and state authorities.[160] The poten-

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sovereignty doctrine was no longer defensible in the realms of unreasonable searches and compelled self-incrimination, it has refused to dismantle the doctrine as applied to double jeopardy).

[158] Opponents of the dual sovereignty exception in double jeopardy law have addressed this problem. *See* Amar & Marcus, *supra* note 37, at 23-24 (suggesting that incorporation undermines the blanket dual sovereignty exception, but arguing that Section 5 of the Fourteenth Amendment must permit reprosecution of state officials for civil rights violations when prior state prosecutions have "failed to vindicate Fourteenth Amendment values"); Hoffman, *supra* note 154, at 661-66 (arguing for a civil rights exception to the proposed elimination of the dual sovereignty exception).

[159] *See, e.g.*, *infra* notes 251-56 and accompanying text (discussing the monetary incentives of forfeiture).

[160] *See, e.g.*, Cassell, *supra* note 98, at 702 & n.55 (summarizing the competition

tial of an unseemly "race to the courthouse" by separate sovereign plaintiffs to see who gets to collect the spoils of penalty proceedings is an unfortunate byproduct of any system which limits total punishment by reference to *all* government extractions. But the frustration of one sovereign's alleged entitlement to the potential revenues from prosecution cannot override a defendant's interest in protection from excessive punishment at the hands of separate sovereigns. The Eighth Amendment's limit on punishment binds all governments, state and federal, and cannot be cast aside merely because one jurisdiction is deprived of the opportunity to take credit for some quantum of the punishment that a defendant endures. Moreover, when more than one sovereign assists in investigating, apprehending, or prosecuting a wrongdoer, the participating governments can arrange to share the defendant's assets. Repeated competition in the context of forfeiture, for instance, has led federal authorities to adopt "pot-splitting" rules in order to resolve competing claims against a single asset.[161] Similar solutions are possible should enough cases arise in which the total of separate sanctions sought by competing sovereigns exceeds constitutional limits.

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between state and federal authorities in the BCCI scandal); *see also* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models–and What Can Be Done About It*, 101 YALE L.J. 1875, 1888 (1992) (noting reasons why agencies would insist on maintaining criminal prosecutions even if punitive civil sanctions were available, including fostering their image as "tough, 'no-nonsense' enforcer[s]" of the law, enhancing recruiting efforts, maintaining morale, and obtaining funding).

[161] *See* 21 U.S.C. § 881(e)(1)(A) (1988 & Supp. V 1993) (authorizing the Attorney General to transfer property civilly or criminally forfeited under § 881 "to any Federal[,] . . . State or local law enforcement agency [that] participated directly in the seizure or forfeiture of the property"); United States v. $12,390.00, 956 F.2d 801, 803 (8th Cir. 1992) (upholding forfeiture to federal government of monies seized by local law enforcement officers in a drug raid); Cavaliere v. Town of N. Beach, 646 A.2d 1058, 1063 (Md. Ct. Spec. App. 1994) (upholding a cooperative proceeds-sharing arrangement in which the DEA instituted forfeiture proceedings against a car originally seized by state officials, over a challenge that use of the federal statute impermissibly circumvented more restrictive local law). Novel proposals for dual state-federal prosecutions, first suggested as solutions to the dual sovereignty problem under double jeopardy, could also be tried here. *See* LEONARD G. MILLER, DOUBLE JEOPARDY AND THE FEDERAL SYSTEM 124-25 (1968) (relating proposals for joint trial of state and federal charges).

3. Cumulating Criminal Sanctions with Civil Sanctions: Defining When a Civil Sanction Is a "Fine"

Cumulative excessiveness review requires judges to consider all penalties for the same wrong together, regardless of form or source. This requires resolving the question of when, if ever, civil sanctions are "fines" or "punishment" limited by the Eighth Amendment. The range of civil sanctions that could potentially fall within the scope of the Eighth Amendment is daunting. It includes deportation,[162] revocation of parole or probation,[163] prison discipline,[164] eviction,[165] civil contempt fines,[166] orders barring a defendant from further contracting privileges,[167] enforcement of university con-

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[162] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (stating that deportation is not considered punishment under the Constitution and does not trigger due process protection, right to trial by jury, or freedom from cruel and unusual punishments); *cf.* Harisiades v. Shaugnessy, 342 U.S. 580, 594 (1952) (holding that the Ex Post Facto Clause is not applicable to deportation because deportation is not a criminal sanction); United States v. Yacoubian, 24 F.3d 1, 9-10 (9th Cir. 1994) (same).

[163] *Cf.* United States v. Entendencia, No. 93-30367, 1994 U.S. App. LEXIS 23978, at *5-7 (9th Cir. Aug. 31, 1994) (stating that revocation of parole is not considered punishment under the Double Jeopardy Clause).

[164] *Cf.* United States v. Brown, 59 F.3d 102, 104 (9th Cir. 1995) (holding that criminal prosecution for conduct that had already been sanctioned with prison discipline did not violate the Double Jeopardy Clause); United States v. Hernandez-Fundora, 58 F.3d 802, 807 (2d Cir. 1995) (rejecting defendant's double jeopardy challenge, stating that "subsequent prosecutions will be barred only in those exceedingly rare circumstances where the disciplinary sanction imposed is grossly disproportionate to the government's interest in maintaining prison order and discipline"); Garrity v. Fiedler, 41 F.3d 1150, 1153 (7th Cir. 1994) (rejecting double jeopardy challenge to conviction for conduct previously punished in prison discipline proceeding), *cert. denied*, 115 S. Ct. 1420 (1995); Lucero v. Gunter 17 F.3d 1347, 1351 (10th Cir. 1994) (finding prison discipline remedial, not punitive, and rejecting double jeopardy challenge); State v. Lynch, 533 N.W.2d 905, 909 (Neb. 1995) (rejecting a prisoner's double jeopardy claim that criminal prosecution was barred by previous administrative disciplinary hearing).

[165] *Cf.* City of New York v. Wright, 618 N.Y.S.2d 938, 939 (App. Term. 1994) (holding, over strenuous dissent, that eviction was not punitive, and therefore not barred by double jeopardy); NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE MANHATTAN DISTRICT ATTORNEY'S NARCOTICS EVICTION PROGRAM 8 (1995) ("Legal scholars believe that eviction would not be double punishment.").

[166] *Cf.* International Union v. Bagwell, 114 S. Ct. 2552, 2562 (1994) (holding a $52 million "civil" contempt fine a criminal penalty that could not be imposed without a jury trial).

[167] *Cf.* Bae v. Shalala, 44 F.3d 489, 496-97 (7th Cir. 1995) (holding that a retroactive civil debarment statute, which excluded the defendant from Medicare participation following a criminal conviction, did not violate the Ex Post Facto Clause); United States v. Furlett, 974 F.2d 839, 844 (7th Cir. 1992) (holding that an imposition of a commodities'-futures trading bar after conviction does not amount

duct codes,[168] removal of professional licenses,[169] driver's license suspensions,[170] forfeiture of contraband, criminal proceeds, or property used to facilitate crime,[171] forfeiture of smuggled goods or unreported funds, penalties paid to the government based on the amount of loss to non-government victims or the amount of gain to the intended beneficiary of the defendant's offense,[172] taxes on substances illegally possessed,[173] punitive damages shared with the

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to a second "punishment" under the Double Jeopardy Clause); Manocchio v. Kusserow, 961 F.2d 1539, 1543 (11th Cir. 1992) (holding that a physician's exclusion from Medicare participation following a criminal conviction for Medicare fraud does not constitute punishment for double jeopardy purposes); *see also* James F. Bennett, Double Jeopardy and the Administrative State 15-20 (Apr. 20, 1995) (unpublished manuscript, on file with author) (analyzing double jeopardy implications of debarment sanctions after *Halper*).

[168] *Cf.* Ronnie Glassberg, *'U' Refuses to Open Code Hearing at Request of Accused*, MICH. DAILY, Jan. 25, 1995, at 1, 7 (quoting a professor who charged that enforcement of student code of conduct after student was subjected to criminal charges for the same conduct is double jeopardy).

[169] *Cf.* Schillerstrom v. State, 885 P.2d 156, 158-59 (Ariz. Ct. App. 1994) (holding that the revocation of a chiropractor's license was not punishment under the Double Jeopardy Clause); Loui v. Board of Medical Examiners, 889 P.2d 705, 711 (Haw. 1995) (stating that suspension of medical license furthered nonpunitive purposes of protecting public from harm); Rudstein, *supra* note 70, at 640-42 (noting cases in which courts have considered claims that license suspension was double punishment under the Double Jeopardy Clause).

[170] The number of drunk driving cases raising issues of double punishment since *Halper* continues to explode. For case summaries, see Halper *Challenges Swell: A Rule for the Rare Case?*, 9 Crim. Prac. Manual (BNA) 360, 361-62 (July 19, 1995); *New Drunk Driving Defense Rejected by Eight Appeals Courts*, LAW. WKLY. USA, July 3, 1995, at 1.

[171] *Cf.* United States v. Chick, 61 F.3d 682, 688 (9th Cir. 1995) (finding that forfeiture under 18 U.S.C. § 2513 (1988) of electronic equipment, allegedly used for the unauthorized interception of satellite communications for financial gain, would have been punishment barring subsequent prosecution of owner under 18 U.S.C. § 2512 (1988) had the punishments not been based upon separate offenses); *supra* note 67 (discussing cases in which courts have found criminal prosecutions precluded by earlier civil forfeitures).

[172] *Cf.* United States v. Morgan, 51 F.3d 1105, 1115 (2d Cir.) (finding that "[a]lthough the actual losses . . . sustained by the government are not identical with the harm [the defendant] inflicted on the failed bank," the bank's loss is a reasonable measure of the government's damages occasioned by the defendant's actions, so that the order requiring the defendant to pay the government this amount was not punitive), *cert. denied*, 116 S. Ct. 171 (1995).

[173] *Compare* Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) (finding that Montana's drug tax is "punishment" for double jeopardy purposes) *and* People v. Bracket, Nos. 93CA1278, 93CA1288, 1995 Colo. App. LEXIS 81, at *9 (Colo. Ct. App. Mar. 23, 1995) (assuming, without deciding, that if liability were established, a drug tax would be punishment under *Kurth Ranch*), *cert. granted*, No. 955C331, 1995 Colo. LEXIS 322 (Colo. Sept. 11 1995) *and* Covelli v. Crystal, No. 534178, 1994 Conn. Super. LEXIS 3276, at *12-13 (Conn. Super. Ct. Dec. 21, 1994) (holding that Connecticut's drug tax is punishment that triggers double jeopardy

state,[174] customs assessments for smuggled goods,[175] civil penalties of various types,[176] treble damages in antitrust actions,[177] and more.[178]

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protection, referring to a legislator's statement that the tax "double-whack[s]" drug offenders) *and* Stennett v. State, No. 14-93-00303-CR, 1995 WL 351756, at *3 (Tex. Ct. App. June 8, 1995) (holding that the collection of the Texas Controlled Substances Tax is punishment barring later prosecution for possession of marijuana) *with* Department of Taxation v. Allison (*In re* Allison), No. BK-93-24478-RCJ, Adv. No. 94-2024-RCJ, 1995 Bankr. LEXIS 136, at *8 (Bankr. D. Nev. Feb. 10, 1995) (holding that Nevada's drug tax is not punishment triggering double jeopardy) *and* Milner v. State, 658 So. 2d 500, 502 (Ala. Civ. App. 1994) (finding that Alabama's drug tax is remedial and not punitive, rejecting the double jeopardy challenge of previously convicted taxpayers) *and* State v. Lange, 531 N.W.2d 108, 117 (Iowa 1995) (holding that Iowa's drug tax stamp does not trigger double jeopardy) *and* State v. Gulledge, 896 P.2d 378, 389 (Kan. 1995) (holding that Kansas's drug tax was not punishment barring later prosecution of taxpayer).

[174] *See supra* note 20 (citing cases considering whether such awards implicate the Eighth Amendment).

[175] *See, e.g.*, United States v. Ziegler Bolt & Parts Co., No. 95-03-00162, 1995 Ct. Intl. Trade LEXIS 4, at *31-32 (Ct. Int'l Trade Jan. 13, 1995) (holding a customs penalty of nearly $6 million for violations of 19 U.S.C. §§ 1304, 1592 (1988) not punishment that would trigger double jeopardy or excessive fines protection, even though the defendant had already been convicted of violating § 1304 and fined $7500), *dismissed on other grounds*, 883 F. Supp. 740 (1995).

[176] *Cf.* Helvering v. Mitchell, 303 U.S. 391, 402-04 (1938) (holding that double jeopardy does not bar the imposition of civil tax penalties following criminal conviction); United States v. Williams, No. 93-5435, 1995 U.S. App. LEXIS 13019, at *13 (4th Cir. May 30, 1995) (per curiam) (rejecting double jeopardy challenge to prosecution after the Federal Mines Safety and Health Review Commission fined defendant over $300,000 under 30 U.S.C. § 820(a) (1988 & Supp. V 1993)); United States v. Hudson, 879 F. Supp. 1113, 1116 (W.D. Okla. 1994) (finding that fine set according to the Office of the Comptroller of Currency "civil money penalty matrix" was punitive, noting that the government's losses were not considered in its determination); Ianniello v. Commissioner, 98 T.C. 165, 180 (1992) (holding that the imposition of a civil fraud penalty following criminal conviction does not violate double jeopardy); *Ex parte* State Alcoholic Beverage Control Bd., 654 So. 2d 1149, 1154 (Ala. 1994) (finding, over dissent, that a $500 fine was not double punishment for a prosecuted licensee who allegedly sold liquor to underage purchasers); Kvitka v. Board of Registration in Medicine, 551 N.E.2d 915, 918 (Mass.) (finding a $10,000 fine imposed by the licensing board after the defendant had already been convicted for unlawfully dispensing drugs constituted a second punishment that violated the defendant's rights under *Halper*), *cert. denied*, 498 U.S. 823 (1990); J. Richard Johnston, *The Civil Fraud Penalty and Double Jeopardy*, CAL. TAX LAW., Summer 1994, at 5, 6 (suggesting that *Kurth Ranch* may have undermined the holding in *Helvering v. Mitchell*).

[177] *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 274-75 (1989) (noting that treble damage awards were authorized at the time of the Framers, but that the Eighth Amendment did not expressly include exemplary damages within its scope); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . . .").

[178] For other examples of arguably punitive civil sanctions, see Artway v. Attorney

Not surprisingly, considering the longevity of many of these potentially punitive civil sanctions, the Justices and their critics have debated at length the merits of possible methods of distinguishing those civil and administrative sanctions that should be regarded as criminal or punitive for one purpose or another from those sanctions that should be accepted as civil for all purposes.[179] Three decades of opinions on this topic have shaped the outline for a workable and appropriate method for distinguishing which civil sanctions are subject to Eighth Amendment review.

Gen., 876 F. Supp. 666, 692 (D.N.J. 1995) (finding that the state Sexual Offender Registration Act is punitive and refusing to apply it retroactively because of the Ex Post Facto Clause); *In re* H.J., 854 P.2d 381, 383 (Okla. Ct. App. 1993) (holding that the termination of parental rights does not constitute second punishment for double jeopardy purposes); *In re* Jeremiah A., 534 N.W.2d 907, 913 (Wis. Ct. App. 1995) (same); State v. Coolidge, No. 01C01-9307-CR-00202, 1995 Tenn. Crim. App. LEXIS 287, at *7 (Tenn. Crim. App. Mar. 30, 1995) (holding that a drunk driving defendant failed to demonstrate that detention of six hours, purportedly for the purpose of detoxification, was punitive rather than remedial, and rejecting his claim of double punishment); City of Milwaukee v. Arrieh, No. 91-2628, 1994 Wisc. App. LEXIS 1180, at *3 (Wis. Ct. App. Sept. 27, 1994) (remanding to trial court the question whether nuisance abatement proceeding is punishment under the Eighth Amendment).

The Court has upheld pretrial detention for dangerousness as "regulatory," but it has noted that such preventive detention may become "punitive" if it lasts too long. *See* United States v. Salerno, 481 U.S. 739, 747 n.4 (1987) (intimating "no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal"). Since *Salerno*, courts have struggled to distinguish regulatory detention that does not violate a defendant's rights to due process from punitive detention that does. *See, e.g.*, United States v. Orena, 986 F.2d 628, 630 (2d Cir. 1993) (noting that the due process limit on the duration of preventive detention requires case-by-case balancing of the length of detention, the prosecutor's responsibility for the delay, and the proof of defendant's dangerousness); *see also* Floralynn Einesman, *How Long Is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 42 (1992) (proposing changes to the Bail Reform Act to ensure the law comports with due process).

[179] *See* Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 507 (1974) (formulating a test for distinguishing civil sanctions from criminal penalties); Cheh, *supra* note 1, at 1349 (outlining approaches to help make the distinction between civil sanctions and criminal penalties); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 435-94 (1976) (recommending that upon a finding that a sanction "imposes a 'disproportionate burden'" on conduct that is purposive and proscribed a presumption of punishment arises, which can be dispelled upon a showing that the sanction is narrowly tailored to accomplish a nonpunitive purpose); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) (arguing that the condemnation of the community distinguishes criminal sanctions from civil sanctions); Mann, *supra* note 1, at 1816-36 (tracing various approaches the Court has taken since the nineteenth century).

a. *The General Rule: When Civil Sanctions Are "Fines" Under the Eighth Amendment*

The Court took the first step over thirty years ago when it concluded that a legislature's choice to label a penalty civil or administrative does not automatically deprive defendants facing such a penalty of the constitutional rights ordinarily guaranteed to criminal defendants. Rather than defer to a legislature's classification of a particular penalty as civil, the Court adopted a multifactor test to distinguish between civil sanctions that are essentially criminal and those that are not, a test that considers not only the intended goals of the statute authorizing the sanction but also the nature of the sanction and its effects.[180]

More recently, the Court has recognized that some civil awards that fail to qualify as essentially criminal under this test are nevertheless subject to those provisions in the Bill of Rights that "limit the government's power to punish,"[181] namely the Double Jeopardy and Excessive Fines Clauses. In *Halper*, the Court refused to limit the protections of the Double Jeopardy Clause to those criminal charges or civil proceedings that are so punitive that they must carry the full array of criminal procedure safeguards.[182] Four years later, in *Austin*, the Court found that the same was true

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[180] In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court found that the forfeiture of citizenship was a criminal penalty mandating the procedural safeguards of the Fifth and Sixth Amendments after considering:

> (1) Whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69. The Court later applied this test to a monetary sanction in United States v. Ward, 448 U.S. 242, 249-50 (1980) (finding a civil penalty for the discharge of oil not punitive). Recently, the Court adopted a somewhat less deferential test to determine whether a judge's imposition of contempt sanctions was a civil penalty, or a criminal one that required a jury trial under the Sixth Amendment. *See* International Union v. Bagwell, 114 S. Ct. 2552, 2563 (1994) (finding criminal the imposition of $52 million in fines for ongoing out-of-court violations of a complex injunction, stating that "[w]here a single judge, rather than a legislature, declares a particular sanction to be civil or criminal, such deference to the state court's finding is less appropriate").

[181] Austin v. United States, 113 S. Ct. 2801, 2805 (1993).

[182] *See* United States v. Halper, 490 U.S. 435, 448-49 (1989).

for the Excessive Fines Clause. Reasoning that the distinguishing quality of a fine under the Eighth Amendment is not whether it is criminal or civil, but whether it constitutes "payment to a sovereign as punishment for some offense,"[183] the Court found that the civil forfeiture of Austin's home under the federal drug forfeiture statute met this standard. Together, *Halper* and *Austin* create[184] a three-tiered hierarchy of civil sanctions: (1) sanctions that are not punitive, which require only the safeguards typically afforded to civil litigants; (2) punitive civil sanctions, which trigger constitutional limits on the multiplicity and severity of punishment;[185] and (3) sanctions that are essentially criminal, which activate all constitutional rights normally associated with criminal cases.[186]

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[183] *Austin*, 113 S. Ct. at 2812 (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

[184] Professor Mann has argued that *Halper* resurrected, rather than created, this approach. *See* Mann, *supra* note 1, at 1842; *see also* Clark, *supra* note 179, at 393 n.45 (noting early cases that applied double jeopardy protections to forfeiture and money-penalty cases).

[185] The Court may also adopt the *Halper/Austin* test to determine which civil sanctions trigger the protections of the Ex Post Facto Clause of Article I of the Constitution, as lower courts have already begun to do. *See* Bae v. Shalala, 44 F.3d 489, 496 (7th Cir. 1995) (noting that ex post facto analysis "closely parallels" the analysis used by the Court in *Austin* and rejecting the multi-factor test of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)); Martel v. Fridovich, 14 F.3d 1, 3 (1st Cir. 1993) (finding that release eligibility rule changes were related to community safety, not retribution or deterrence, and thus did not implicate the Ex Post Facto Clause); Doe v. Poritz, 662 A.2d 367, 393 (N.J. 1995) (rejecting the *Mendoza-Martinez* test in favor of the *Halper/Austin* test for ex post facto issues). *But see* Artway v. Attorney Gen., 876 F. Supp. 666, 673 n.8 (D.N.J. 1995) (rejecting *Halper* and *Austin* as the appropriate test for punitiveness under the Ex Post Facto Clause). The president's power under Article III to grant reprieves and pardons for "offences" against the United States may also be interpreted to coincide with the double jeopardy limits on twice prosecuting "offences." *But see* Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 370-71 & nn.150-54 (1989) (arguing that clemency does not encompass qui tam actions).

Whether the Court will further expand the list of constitutional safeguards applicable to this in-between category is beyond the scope of this Article. For a sampling of discussion, see United States v. Private Sanitation Indus. Ass'n, 44 F.3d 1082, 1085 (2d Cir. 1995) (Heaney, J., dissenting) (arguing that a civil RICO action is "quasi-criminal" and the barring district court's decision to grant summary judgment in favor of the government as a matter of due process); Commonwealth v. $9847.00, 637 A.2d 736, 746 (Pa. Commw. Ct.) (concluding that a civil forfeiture award that amounts to punishment entitles a defendant to the right to appointed counsel, as a matter of due process), *appeal granted*, 656 A.2d 993 (Pa. 1994); Coffee, *supra* note 160, at 1891 (arguing that certain punitive civil sanctions require the right to a jury trial in front of an Article III judge); Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 399, 404-05 (1988) (advocating that courts extend certain Fifth Amendment guarantees and the right to counsel to such cases); *supra* note 1 (citing sources).

[186] The Court's reasoning in *Halper* and *Austin* implicitly rejected what is perhaps

The Court also set out in *Halper* and *Austin* a viable framework for determining which civil sanctions are "punishment" subject to both double jeopardy and Eighth Amendment limits. Once again, the Court's test starts with a presumption: sanctions denoted as civil or administrative by the legislature are presumptively nonpunitive. This presumption can be rebutted in two ways. A civil sanction is punitive if the defendant can demonstrate either (1) that the statute authorizing the sanction cannot "fairly be said to serve" *any* remedial goal, or (2) assuming the statute does makes some attempt to calibrate sanctions to a remedial purpose, that the particular sanction in question was imposed in a form or amount unrelated to that purpose.[187] A remedial purpose is anything other than deterrence and retribution, the two quintessential goals of criminal punishment.[188] In *Halper*, the $130,000 in penalties that the government sought ($2000 for each of Halper's sixty-five claims) bore no rational relationship to the only plausible remedial aim of the Act—compensating the United States for its losses from fraud. That portion of the $130,000 that exceeded rough compensation for Halper's fraud ($585 plus the costs of investigating and prosecuting Halper's offenses, estimated to be at most $16,000) was punishment.[189]

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the simplest method of distinguishing between criminal and civil sanctions, most recently advocated by Professor Mary Cheh in her article, *supra* note 1, at 1330, 1348-60. Cheh reasoned that the essential difference between criminal and civil proceedings is not legislative purpose, penalty size, or probable stigma, but rather that criminal proceedings, unlike civil proceedings, are "ceremonies of guilt adjudication" that "express society's ideology of individual free will and personal responsibility and serve as a reaffirmation of moral rules." *Id.* at 1330. Thus, she concluded that a sanction can only be criminal "if formally intended to be and denominated as such" by the legislature. *Id.* at 1360.

[187] *See Halper*, 490 U.S. at 447-48 ("[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."); *see also Kennedy*, 372 U.S. at 169 (stating that one factor distinguishing criminal from civil sanctions is "whether it appears excessive in relation to the alternative purposes assigned" to it).

[188] *See Austin*, 113 S. Ct. at 2806 (stating that if a sanction "can only be explained as serving in part to punish," the sanction is not purely remedial); *Halper*, 490 U.S. at 448-49 ("[A] defendant who already has been punished . . . may not be subjected to an additional civil sanction to the extent that sanction may not be characterized as remedial, but only as a deterrent or retribution."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 2-3, 8-9 (1968) (considering retribution and deterrence "among the conceivable aims" of a system of punishment); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 26 (1968) (noting that the two aims of punishment are prevention of undesired conduct and retribution for perceived wrongdoing).

[189] *See Halper*, 490 U.S. at 452.

In *Austin*, the Court applied this distinction again, to the civil forfeiture of a home under the federal drug forfeiture statute. Although the government argued that the provision was designed to achieve the remedial aims of protecting the community from the threat of continued drug activity and compensating the United States for its drug war efforts,[190] the Court disagreed. A home, it observed, absent some showing beyond that required by the forfeiture statute, poses no continuing threat of illegal activity, unlike contraband.[191] Moreover, any relationship between government expense and the value of assets forfeited under the statute was purely coincidental.[192]

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[190] *See Austin*, 113 S. Ct. at 2811 (reciting the government's argument that forfeiture under the statute was remedial because removed "instruments" of the drug trade financed the government's fight against drugs); *see also* United States v. Santaro, 866 F.2d 1538, 1544 (4th Cir. 1989) ("These remedial purposes [of civil forfeiture] include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of illgotten gains, stripping the drug trade of its instrumentalities, including money, and financing Government programs designed to eliminate drug-trafficking." (quoting United States v. 2639 Meetinghouse, 633 F. Supp. 979, 994 (E.D. Pa. 1986))).

[191] *See Austin*, 113 S. Ct. at 2811 (noting that possession of real property must be distinguished from the criminal activities that may take place on the property, just as contraband has been distinguished in Court precedents from the automobiles that may carry it); *see also* Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 317-18 & n.190 (1992) (arguing that unless the property is necessary for the wrongful conduct and difficult to replace, its forfeiture cannot be justified by an ostensible remedial goal of depriving criminals of the "tools by which they conduct their illegal activities"). The forfeiture of contraband—items that may not lawfully be possessed—has been justified as advancing the government's interest in keeping dangerous items out of the hands of the public. *See, e.g.*, People *ex rel.* Waller v. Seeburg Slot Machs., 641 N.E.2d 997, 1005 (Ill. App. Ct. 1994) (finding that because "slot machines are contraband . . . and, thus, inherently illegal, the defendant has *no* right to them and he cannot argue that their forfeiture constitutes an excessive fine"), *cert. denied*, 647 N.E.2d 1016 (Ill. 1995); Clark, *supra* note 179, at 478 (arguing that forfeiture of "contraband whose possession by any private citizen is unlawful" does not punish because such property is never legally owned); Stahl, *supra*, at 306 nn.130-31 (terming forfeiture of contraband "remedial").

[192] *See Austin*, 113 S. Ct. at 2812 n.14 (stating that, because the value of forfeited assets can vary greatly, any relationship between the government's costs and the penalty is "merely coincidental"). The *Halper/Austin* approach is similar to the test advocated by Professor Clark nearly 20 years ago, except that Professor Clark advanced a rebuttable presumption of punishment whenever a sanction singled out criminal offenders. *See* Clark, *supra* note 179, at 459-62 (advocating a purpose test under which the government, upon a showing that a sanction burdens those who have committed a criminal offense, must demonstrate that its nonpunitive purpose "was not capable of fulfillment in a way that would not have placed special burdens on persons who commit forbidden acts," and noting that the government's "alternative explanation of a sanction must be couched in terms that retribution and deterrence

Several observations lead me to endorse this method of distinguishing between those penalties that escape Eighth Amendment review and those that do not. First, the *Halper/Austin* test is consistent with the premise of this Article that constitutional limits on multiplicity and proportionality must be considered together, as a unified limit on total punishment. If the Eighth Amendment is to serve as a backstop to check the power that legislatures enjoy under the Double Jeopardy Clause, it is appropriate to employ the same concept of "punishment" for both.[193]

Second, the *Halper/Austin* definition of civil punishment imposes a meaningful and sensible limit on total punishment, without denying to government enforcers the flexibility to choose that combination of civil, administrative, and criminal penalties that is most effective and efficient. The aspect of *Halper* that has proved most crippling to regulators—and most at odds with the rest of double jeopardy law—is the Court's decision to deprive them of the opportunity to pursue all penalties authorized by the legislature. It is this "one-hit-and-you're-out" ruling of *Halper* that I argued earlier has no place in double jeopardy doctrine; I have no quibble with the Court's efforts to classify some civil sanctions as punishment.[194] Removing the "one-hit-and-you're-out" rule of *Halper* from double jeopardy doctrine allows prosecutors and regulators to seek more than one penalty against a defendant for his wrong, yet it doesn't leave defendants at sea without a raft. Civil punishment is subject to the presumption against multiple penalties under the Double Jeopardy Clause as well as to the due process limits discussed earlier. Furthermore, when neither due process nor double jeopardy bars successive penalties, the Eighth Amendment may. In

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alone do not fulfill").

[193] Most courts and commentators have assumed that any award qualifying as a "fine" for Eighth Amendment purposes under *Austin* will also be punishment for double jeopardy purposes under *Halper*. *See, e.g.*, Rudstein, *supra* note 70, at 636 (stating that *Austin* indicated that whatever constitutes "punishment" for Eighth Amendment purposes also constitutes "punishment" for Fifth Amendment double jeopardy purposes). *But see* Henning, *supra* note 1, at 66-67 (concluding that the threshold for fines under *Austin* is lower than that for punishment under *Halper*).

[194] This point bears repeating: I agree that the civil sanction in *Halper* was punitive; I disagree that its imposition after conviction violated the Double Jeopardy Clause. Because Halper's civil penalty and his conviction were both punishment, and because the elements of each "offence" were identical, it is correct to presume, initially, that Congress intended that courts use criminal and civil penalties alternatively rather than in tandem. But proof of contrary congressional purpose clearly rebutted this presumption in that case.

short, the Constitution may not save an offender from legislatively authorized multiple punishment, but it always rescues him from legislatively authorized excessive punishment.

My last reason for supporting the *Halper/Austin* distinction between punitive and nonpunitive civil sanctions is its relative simplicity. It has two steps. First, a court must decide if a statute may fairly be said to serve any remedial goal at all. A judge need not guess what motives the legislature or government plaintiff had in mind when enacting or applying a given provision, an endeavor that would lead to judicial speculation and the adoption of boilerplate preambles. Instead, the judge must examine what Justice Kennedy has termed "objective factors"[195] in order to determine whether the sanction is rationally related to potential remedial purposes. These factors include the basis for the penalty calculations, the legislative history of the sanction,[196] and any statutory requirement of culpability on the part of the person sanctioned.[197] If the statute sets sanctions *without* regard to any remedial goal, then every penalty imposed pursuant to the statute is punishment. Statutory sanctions that fall into this per se punitive category include forfeitures of noncontraband instrumentalities of crime, as in *Austin*, and those portions of punitive damage awards paid to states under state-sharing statutes. As the Court in *Austin* observed, it would not be "fair" to characterize 21 U.S.C. § 881(a)(8), providing for the forfeiture of real estate that has "facilitated" narcotics activity, as serving a remedial purpose.[198] A judge or prosecutor cannot strip punishment of this sort of its punitive character simply by offering an after-the-fact accounting of government losses or other remedial explanations that happen to justify a

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[195] *Halper*, 490 U.S. at 453 (Kennedy, J., concurring).

[196] *See Austin*, 113 S. Ct. at 2811 ("The legislative history of § 881 confirms the punitive nature of these provisions.").

[197] *See id.* at 2812 (noting the "historical understanding of forfeiture as punishment," and the "focus" of the statutory provisions "on the culpability of the owner"); *id.* at 2814 (Scalia, J., concurring) (noting that under the statute at issue, the "owner must not be completely without fault").

[198] *See id.* & n.14 (rejecting a case-by-case approach to determining whether a civil forfeiture constitutes "punishment"); *id.* at 2812-14 (noting that forfeitures under § 881(a) are "fines" because the value of the property forfeited is unrelated to the offense and because the statute requires some culpability on the part of the owner); *see also* United States v. $405,089.23, 33 F.3d 1210, 1219-20 (9th Cir. 1994) (interpreting *Austin* as focusing on the forfeiture *statute*, rather than on the particular award or conduct allegedly punished), *amended on other grounds by* 56 F.3d 41 (9th Cir. 1995), *and petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

particular penalty under the statute, because the test is one of legislative purpose as well as effect. Accordingly, the Court in *Austin* correctly refused to contrast the value of the Austins' forfeited assets with the government's costs in order to determine whether the forfeiture was punishment. Just as a criminal fine does not become civil simply because its amount happens to resemble government losses, the forfeiture of an asset under a punitive statute does not cease to be punishment just because it happens to roughly equal the costs of detection and enforcement to the government plaintiff.[199]

The majority of statutes authorizing civil sanctions do, however, contain objective factors demonstrating remedial design. Sanctions under the False Claims Act, for instance, are at least somewhat dependent upon actual damages to the government. Thus, it *is* fair to say that the False Claims Act serves the remedial goal of compensation. Under such statutes, not every resulting sanction is punitive, so the Court requires a second step. To decide whether a sanction imposed under this type of statute is punishment under either the Fifth or the Eighth Amendments, the judge must consider whether the particular sanction exceeds the statute's remedial purposes.[200] In *Halper*, the sanction could not be justified by the remedial purpose of the False Claims Act.[201] Another example of civil punishment is a civil contempt

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[199] *See, e.g.*, United States v. McCaslin, 863 F. Supp. 1299, 1302 (W.D. Wash. 1994) ("Even if the value of the property forfeited happens to be the same as or less than the government's costs of prosecution, the forfeiture is still categorized as punishment because the relationship is accidental.").

[200] *See Halper*, 490 U.S. at 448-49 (stating that determination of "punishment" demands a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve"); United States v. Furlett, 781 F. Supp. 536, 543-47 (N.D. Ill. 1991) (considering first whether the purpose of the statute was entirely punitive, and, if not, whether actual sanctions are so punitive in effect as to negate remedial purpose, and concluding that the fines imposed by the Commodity Futures Trading Commission (CFTC) were not so overwhelmingly disproportionate to the CFTC's investigation and litigation expenses as to be punitive), *aff'd*, 974 F.2d 839 (7th Cir. 1992).

[201] *See Halper*, 490 U.S. at 452 ("The Court approximated the government's expenses at no more than $16,000 as compared to the asserted liability of Halper in excess of $130,000."). The award in *Halper* was punishment because of its disproportionality with the purported purposes of the statute. When a conflict exists between what is authorized by a statute's text and structure and what is authorized by the legislature's purported purpose, it is appropriate to assume that the legislature had in mind at least those additional purposes that could explain the text. Otherwise, Halper could have challenged his penalty under the statute itself, as beyond what the legislature actually authorized, rather than under the Fifth Amendment. At least one

sanction set in an amount greater than that needed to coerce future compliance with court orders, or greater than that needed to compensate the government for the expenses of dealing with the contemnor's misconduct (the only remedial purposes that the civil contempt statute may be said to serve).[202] Similarly, an order of forfeiture of the alleged proceeds of crime cannot escape the label of "punishment" if the government has no proof tracing the forfeited assets to the crime, and an order barring a defendant from further contracting privileges is punishment if it cannot be explained by the goals of preserving professional integrity, protecting the public, or eliminating corrupting influences from government dealings.[203]

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commentator has argued that the penalty in *Halper* violated the False Claims Act itself, not the Constitution. *See* Thomas, *supra* note 55 (manuscript at 72-74).

[202] As the Court has explained:

> A contempt fine . . . is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained. Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge.
> . . .
> . . . .
> . . . At no point did the trial court attempt to calibrate the fines to damages caused by the union's contumacious activities or indicate that the fines were "to compensate the complainant for losses sustained." The nonparty governments, in turn, never requested any compensation or presented any evidence regarding their injuries . . . .

International Union v. Bagwell, 114 S. Ct. 2552, 2558, 2561 (1994) (citations omitted). For another case considering monetary coercion toward a remedial goal, see Alexander v. Louisiana State Bd. of Medical Examiners, 644 So. 2d 238, 244 (La. Ct. App. 1994) (finding that a "conditional" fine of $5000, payable if the defendant fails the licensing examination or violates the terms of the licensing board order, is not punishment for double jeopardy purposes, because it is designed to "protect the public whom he may seek to serve"), *writ denied*, 649 So. 2d 423 (La.), *and cert. denied*, 116 S. Ct. 64 (1995).

[203] *Cf.* Bae v. Shalala, 44 F.3d 489, 496 (7th Cir. 1995) (finding that the drug company president's permanent debarment from service in drug manufacturing industry was not disproportionate to "the remedial goals of the [Generic Drug Enforcement Act of 1992] or to the magnitude of his wrongdoing"); United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) (finding debarment remedial, and noting "[i]t is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds"); Clark, *supra* note 179, at 484-86 (concluding that disbarment could be punitive but noting that disbarment of offenders typically advances the remedial goal of "preserving public confidence in the profession"); Rudstein, *supra* note 70, at 640-45 (discussing cases involving revocation of license to practice in a profession or exclusion from participating as government contractor and concluding that such sanctions are remedial).

Likewise, a civil award under a statute designed in part to provide compensation

Three types of sanctions, however, continue to trouble lower courts that now must apply the *Halper/Austin* distinction: cases in which the government seeks to forfeit proceeds of criminal activities,[204] cases in which the government seeks to forfeit cash or other assets that a defendant concealed or failed to report, and

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to victims may be punitive if the penalty is never paid to the victims. *Cf.* United States v. Blodgett, No. 93-3652 MN, 1994 U.S. App. LEXIS 21564, at *2 (8th Cir. Aug. 15, 1994) (finding that criminal prosecution for fraud following FTC seizure under 15 U.S.C. §§ 45(a)(2), 53(b) (1988) of assets in order to provide restitution to his fraud victims did not violate his double jeopardy rights, noting "a civil sanction designed for victim restitution is not a criminal penalty unless the sanction bears no rational relation to the goal of compensation" (citation omitted)), *cert. denied*, 115 S. Ct. 1414 (1995); *see also* Charney, *supra* note 179, at 499 (arguing that sanction is compensatory only if recouped by individuals injured and in an amount related to their loss); Clark, *supra* note 179, at 470 n.270, 472 n.275 (citing cases arguing that a sanction is compensatory when the government collects funds on behalf of specific individuals).

[204] *Compare* United States v. $405,089.23, 33 F.3d 1210, 1220-21 (9th Cir. 1994) (finding that all forfeitures, even of proceeds, under 21 U.S.C. § 881 are punitive), *amended on other grounds by* 56 F.3d 41 (9th Cir. 1995), *and petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346) *and* Quinones-Ruiz v. United States, 864 F. Supp. 983, 988-89 (S.D. Cal. 1994) (applying *Austin* to reach the conclusion that forfeiture under 31 U.S.C. § 5317(c) (1988) is punitive) *and* United States v. 4204 Thorndale Ave., No. 92 C 3744, 1994 U.S. Dist. LEXIS 17415, at *27-28 (N.D. Ill. Nov. 23, 1994) (concluding that because 21 U.S.C. § 881(a)(6) is not limited to actual proceeds of crime, forfeiture under this section is subject to the Excessive Fines Clause) *and* People v. $31,500.00, 38 Cal. Rptr. 2d 836, 843 n.17 (Ct. App. 1995) (suggesting that forfeiture of proceeds under state statute is punitive) *and* Stahl, *supra* note 191, at 307 n.135 (arguing that any forfeiture of proceeds under 21 U.S.C. § 881 is not remedial, claiming that its punitive purpose is demonstrated by: (1) the ability of *innocent* owners to avoid forfeiture of the fruits of others' illegal activities and (2) the statute's failure to limit forfeiture of proceeds to assets that can be traced entirely to illegally obtained funds in that § 881(a)-(b) allows for forfeiture of entire assets that are purchased only partially with the proceeds of prohibited activity) *and id.* at 314 n.180 (arguing that forfeiture of proceeds cannot be justified by the argument that the owner never really had a right to own the proceeds in the first place, because the legal right to own the asset has no impact on the actual deterrent effect of the forfeiture) *with* United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) ("Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity.") *and* United States v. Tilley, 18 F.3d 295, 300 (5th Cir.) (stating that forfeiture of proceeds is not punitive), *cert. denied*, 115 S. Ct. 574 (1994) *and* United States v. Borromeo, 995 F.2d 23, 27 (4th Cir.) (same), *aff'd in part and rev'd in part on other grounds*, 1 F.3d 219 (4th Cir. 1993) *and* District Attorney v. Iadarola, 623 N.Y.S.2d 999, 1005 (Sup. Ct. 1995) (collecting conflicting cases and concluding that forfeiture of proceeds is not punitive) *and* Kathleen F. Brickey, *RICO Forfeitures As "Excessive Fines" or "Cruel and Unusual Punishments"*, 35 VILL. L. REV. 905, 915 (1990) (concluding that forfeiture of fruits of crime can never be excessive because they were never the property of the owner) *and* Memorandum, *supra* note 21, at B-584.138-231 to 138-237 (stating that the forfeiture of proceeds cannot possibly be considered "punishment" or a "fine" under the Eighth Amendment).

cases involving taxes on illegal activities or goods. The proceeds cases turn on whether depriving a defendant of assets he had no legal right to own is a remedial or a punitive objective.[205] The tax and disclosure cases raise a different question, one that should have been resolved by a careful reading of *Austin*: When is it fair to say that a sanction serves the remedial goal of compensating the government for its costs? Judging from the number of cases addressing this issue and the variety of approaches to its solution, even among Justices of the Supreme Court, it warrants further consideration here.

b. *Containing Compensation As a Catch-All Remedial Justification*

The distinction between sanctions that can "fairly be said" to further the remedial goal of compensation and those that cannot is not a problem in many cases. For instance, it made sense for the Court in *Halper* to compare the sanction there to government loss—the penalty provisions of the False Claims Act were calibrated to actual losses caused by the defendant's culpable acts. But other sanctions, like those in *Austin*, are set without reference to government loss. Unfortunately, courts examining a variety of civil sanctions have ignored the relevance of *Austin*, and instead have mimicked the reasoning in *Halper*, sometimes fabricating a compensatory purpose where it does not exist.

Consider the disclosure cases first. Some courts have concluded that the government does not punish a property owner when it forfeits assets that the owner fails to report in violation of a variety of disclosure laws, so long as the forfeited assets roughly compensate the government for its costs of detection and investigation.[206]

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[205] I tend to agree with the majority of courts that have examined this question that confiscating the proceeds of crime, like confiscating contraband, serves remedial as well as punitive goals. See also the Court's discussion of the forfeitability of the proceeds of criminal activity in Caplan & Drysdale, Chartered v. United States, 491 U.S. 617, 627-28 (1989). The question is unavoidable in the face of a double jeopardy challenge, but an Eighth Amendment challenge to an order forfeiting proceeds offers an easier tack, at least if the forfeiture of proceeds is the *only* "punishment" for defendant's wrong. Even assuming that the forfeiture of proceeds is a fine, the amount is easily warranted by the punitive goal of deterrence. Indeed, effective deterrence would require at the very least that the defendant be deprived of the profits of his crime.

[206] *Compare* United States v. $69,292, No. 93-56545, 1995 U.S. App. LEXIS 20701, at *7 (9th Cir. Aug. 7 1995) (concluding that forfeiture under 31 U.S.C. § 5317 is punitive) *and* United States v. $145,139, 18 F.3d 73, 76 (2d Cir.) (holding, over the dissent of Judge Kearse, that the forfeiture of undeclared funds under 31 U.S.C.

What these courts overlook is that the amount of sanctions under these statutes varies not with the amount of government expense, but only with the value of the assets that the defendant fails to report, a measure as unrelated to the goal of compensating the government as those controlling the forfeiture of "instrumentalities" in *Austin*.[207] Without some calibration to government loss, forfeitures under these statutes cannot be rationalized as compensatory any more than the forfeiture in *Austin*.

A look at the tax cases, in particular at the Justices' opinions in *Kurth Ranch*, reveals the same flawed reasoning. In *Kurth Ranch*, the Court considered whether the Double Jeopardy Clause barred Montana from collecting a tax on illegally possessed marijuana, after the taxpayer had already been convicted and sentenced for the crime of possessing the same marijuana. The amount of the tax was set by statute to be the greater of either ten percent of the market value of the marijuana or $100 per ounce. There was no evidence

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§ 5317(c) did not violate either the Double Jeopardy or the Excessive Fines Clauses because the money was the instrumentality by which the crime was committed), *cert. denied*, 115 S. Ct. 72 (1994) *and* United States v. $50,000, No. 93-C-3874, 1994 WL 75145, at *5 (N.D. Ill. Mar. 9, 1994) (rejecting Eighth Amendment challenge to forfeiture of currency under 31 U.S.C. § 5317(a), reasoning that forfeiture of items involved in customs violations is wholly remedial and serves as a "reasonable form of liquidated damages") *and* High Star Toys, Inc. v. United States, 32 Fed. Cl. 176, 181 (Fed. Cir. 1994) (concluding that the Consumer Products Safety Commission was not barred by *Austin* from seeking civil penalties for violation of the Federal Hazardous Substances Act, 15 U.S.C. § 1263 (1988), after Customs had already forfeited some of the offending product under statute providing for forfeiture of any illegally introduced merchandise, 19 U.S.C. § 1595a(c), reasoning that the forfeiture of a portion of the offending goods here is different than the forfeiture of noncontraband separate property used to facilitate an illegal transaction) *with* Quinones-Ruiz v. United States, 864 F. Supp. 983, 991 (S.D. Cal. 1994) (finding that forfeiture of unreported funds is punishment barred by *Halper* after transporter/owner has already been convicted of failing to report the cash and has been sentenced to two years probation and a $50 fine). *See also* United States v. Haywood, 864 F. Supp. 502, 507 (W.D.N.C. 1994) (finding that the purpose of forfeiting laundered funds was to "recoup the loss from the money laundering scheme" and that the amount of the government's loss was equal to the amount of funds that would have been forfeited as illegal proceeds had they not been laundered and kept secret from government detection).

[207] A similar situation arises when the government seizes cash used in bribery—the bribe money may have been legally acquired, and its amount is not necessarily related to any remedial purpose of the government. *See, e.g.*, United States v. Slusher, No. 92 Cr 322-02 (CSH), 1995 WL 417077, at *4 (S.D.N.Y. July 13, 1995) (ordering the parties to address in a subsequent hearing the legal question "whether or not [seizure of bribe money under] 18 U.S.C. § 3666 may fairly be characterized as remedial," in a case in which the bribe money was received by a supervisor of the New York State Department of Motor Vehicles).

that the Montana legislature designed this assessment to approximate public losses from a taxpayer's drug possession.[208] Instead, like the forfeiture provisions in *Austin*, any correlation between the state's actual expenses from the defendant's drug activity and the tax assessed was entirely coincidental. Both the majority and Chief Justice Rehnquist in his dissent recognized the absence of any calibration between sanction and compensatory purpose.[209] Even so, the Court could not resist going on to consider whether the threatened tax exceeded potential government expenses, leaving open the argument that even when compensation for such expenses is a completely fictitious legislative goal, government expenditures are always relevant to the characterization of a penalty as remedial or punitive.[210] In her dissent, Justice O'Connor went even further, embracing the comparison between government loss and

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[208] As Justice Kennedy suggested, *see supra* text accompanying note 195, preambles or statements of purpose in statutes cannot alone establish a compensatory rationale. Otherwise, boilerplate language would immunize even the most punitive civil sanctions from review. Even if such language was relevant, the Montana legislature noted in its preamble only that "some" of the revenues from the tax would "be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana," Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1941 n.4 (1994), not that the tax amount itself approximated government loss from this activity.

[209] *See Kurth Ranch*, 114 S. Ct. at 1948 (stating that examining whether the tax exceeds rough compensation would be "inappropriate" on the facts, since the tax statute serves entirely different purposes). Chief Justice Rehnquist put it best:

> [T]he reasoning quite properly employed in *Halper* to decide whether the exaction was remedial or punitive simply does not work in the case of a tax statute. Tax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities. Thus, in analyzing the instant tax statute, the inquiry into the State's "damages caused by the [Kurth's] wrongful conduct" . . . is unduly restrictive.

Id. at 1950 (Rehnquist, C.J., dissenting) (citations omitted); *see also* Clark, *supra* note 179, at 468 ("[A] compensatory purpose should perhaps be recognized only if that purpose affirmatively appears on the face of the law and some formula is provided to estimate the sum of compensation due by reference to actual state costs.").

[210] *See Kurth Ranch*, 114 S. Ct. at 1948 ("Even if it were proper to permit such a showing, Montana has not claimed that its assessment in this case even remotely approximates the cost of investigating, apprehending, and prosecuting the Kurths, or that it roughly relates to any actual damages that they caused the State."). Noting that the tax was imposed at an "unrivaled" "high rate," that it had an "obvious deterrent purpose," that it was exacted only after the taxpayer had been arrested for the conduct that gave rise to the tax obligation, and that it was imposed on goods that the taxpayer had no legal right to possess and that had already been confiscated, the Court concluded that Montana's drug tax was no normal revenue law. *Id.* at 1946-48.

sanction amount as the only permissible method for drawing the punitive/nonpunitive distinction, on the facts of *Kurth Ranch* or seemingly in any case.[211]

The cost of apprehending, prosecuting, and incarcerating drug offenders may be a handy stand-in for some sort of ceiling on state taxing authority, but utility is no substitute for relevance. If the tax in *Kurth Ranch* was punishment, it was not because the amount assessed had no relationship to compensation, a purpose the statute did not purport to achieve, but because it exceeded other legitimate remedial purposes that the tax could be fairly interpreted to accomplish. Chief Justice Rehnquist had the right idea. He first reviewed the structure and language of the tax provision and found that the tax had the nonpenal purpose of raising revenue and had little to do with compensating the state for drug detection and enforcement costs.[212] Using similar types of taxes imposed on lawful products as a comparison for what tax assessments are reasonable given the remedial purpose of raising revenue with excise or property taxes,[213] he concluded that Montana's tax was not punitive.[214] His method was more faithful to *Halper* and *Austin* than that of any other Justice.[215]

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[211] Although baldly stating that Montana's legislature "determined that $100 per ounce of marijuana is an appropriate estimate of its costs of drug control," *id.* at 1954, Justice O'Connor reasoned that the defendant failed to show that the amount of the tax was not rationally related to Montana's compensatory objectives:

> Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective. This will obtain when, as in *Halper*, the amount of the sanction is "overwhelmingly disproportionate" to the damages caused by the wrongful conduct and thus "is not rationally related to the goal of making the Government whole."

Id. at 1953 (O'Connor, J., dissenting) (citations omitted).

[212] *See id.* at 1949 (Rehnquist, C.J., dissenting).

[213] The United States, too, argued that a tax on illegal goods can be "punitive" but only when it is not of the type and amount "ordinarily imposed on *legal* goods." Brief for the United States as Amicus Curiae Supporting Petitioner, *Kurth Ranch* (No. 93-144); *see also* Reply Brief of Petitioner at 14-15 *Kurth Ranch* (No. 93-144) (citing Sonzinsky v. United States, 300 U.S. 506 (1937) (approving a tax 20 times the value of the illegal commodity) and Excise Act of 1791, ch. 15, 1 Stat. 199 (taxing whiskey at over 60% of value)).

[214] *See Kurth Ranch*, 114 S. Ct. at 1952 (Rehnquist, C.J., dissenting).

[215] The Kurths argued that Montana's legislature could not have been serious about raising revenue from the possession of drugs because it taxed only possessors who were arrested or convicted of the crime of possessing drugs. *See* Brief of Respondents at 10, *Kurth Ranch* (No. 93-144) (arguing that if the tax were solely for a revenue raising purpose, "it could have been carefully tailored to achieve that purpose without being necessarily linked to a criminal prosecution"). But this cannot

The eagerness of Justice O'Connor and many lower courts to paper over sanctions that should be marked as punishment with a compensatory label[216] is easily traceable to the central flaw of *Halper*—its prohibition of legislatively authorized multiple punishments. No doubt it is more expedient to avoid the consequences of that rule by refusing to find that a penalty constitutes punishment than to challenge the rule directly.[217] Consider Justice O'Connor's

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be right. Any civil sanction limited to defendants who participate in otherwise illegal activity would be punitive under this view, even though there are legitimate nonpunitive reasons to seek compensation, revoke licenses, recover lost revenues, ensure future compliance, provide restitution for victims, and so on from those who are arrested and convicted, rather than from all possible offenders. *See* Allen v. Illinois, 478 U.S. 364, 370 (1986) ("That the State has chosen not to apply the [Sexually Dangerous Persons] Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."). Even the Court was not prepared to rely on the statute's isolation of criminal offenders alone as proof of its punitive nature. *See Kurth*, 114 S. Ct. at 1947 nn.19-20. Moreover, even if this was a feature that, on its own, was *sufficient* to support a finding that a particular sanction was punitive and not remedial, it cannot be a *necessary* feature of civil punishment. For example, the forfeiture provisions in *Austin* were punitive, but they affected criminals and noncriminals alike. A hapless owner's negligence in allowing his property to be used in crime can fall far short of establishing criminal liability but may subject him to forfeiture.

[216] Several courts have tried to explain civil forfeiture as compensatory. *See, e.g.*, United States v. United States Fishing Vessel Maylin, 725 F. Supp. 1222, 1223 (S.D. Fla. 1989) (deeming forfeiture of a $55,000 boat rationally related to injury caused to the government by fish and game violations, so that forfeiture under 16 U.S.C. § 3374(a)(2) (1988) did not constitute double jeopardy following criminal conviction of owner); Freeman v. 1215 E. 21st St., No. CX-94-484, 1994 WL 440263, at *3 (Minn. Ct. App. Aug. 16, 1994) ("[F]orfeiture might violate the Double Jeopardy Clause unless it reflects no more than the actual costs to the state due to his criminal conduct."); *Ex parte* Camara, 893 S.W.2d 553, 558 (Tex. Ct. App. 1994) (noting that the defendants failed to show that the forfeiture of their mobile home and lot before their criminal prosecutions lacked a rational relation to the state's loss); *see also Ex parte* State Alcoholic Beverage Control Bd., 654 So. 2d 1149, 1154 (Ala. 1994) (finding that a $500 penalty recently imposed upon a state liquor licensee for selling to minors was "rationally related to the State's cost of regulating its licensees," although a dissenting justice argued that the statute authorizing the fine had nothing to do with compensating the state for any costs or losses, and that the amount of the fine was therefore irrelevant to the determination of whether it was punishment).

[217] Also tripping up some courts is the Court's reference in *Halper* to the rarity of the case in which a civil penalty will amount to punishment. *See* United States v. Halper, 490 U.S. 435, 449 (1989). This statement is true enough in the context of penalties under the False Claims Act because compensation explains all but the rare sanction under that statute. But the characterization does not apply to penalties like those under 21 U.S.C. § 881(a)(7) (1988), providing for the forfeiture of real estate used or intended to be used to facilitate narcotics violations. As the Court observed in *Austin*, any relationship between the amount of a penalty under this provision and purported remedial purposes is purely coincidental—every penalty, not just the rare case, involves punishment. *See, e.g.*, People *ex rel.* Waller v. 1989 Ford F350 Truck,

alarm that the Court's decision in *Kurth Ranch* would bar states entirely from taxing criminalized conduct.[218] A better way to relieve this concern is to oust *Halper*'s "one-hit-and-you're-out" rule from the Double Jeopardy Clause, not eviscerate, as her test does, the Court's admirable attempt to distinguish punitive from nonpunitive sanctions under the Constitution.[219]

Under Justice O'Connor's test, the amount of government loss caused by any given wrong can be manipulated with so little effort that almost any sanction, it seems, can be explained as compensation. The test would classify as rough remedial justice any civil award against any defendant involved in drug activity, as long as that award does not exceed that defendant's fair share of not only the state's drug enforcement budget (past, present, and future) but also drug abuse education, deterrence, and treatment expenses.[220]

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642 N.E.2d 460, 464-66 (Ill. 1994) (interpreting *Austin* to render in rem forfeitures under a statute that resembles 21 U.S.C. § 881(a)(4) or (7) to be subject to the Excessive Fines Clause).

[218] *See Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting).

[219] It is my position that *even if* the tax in *Kurth Ranch was* punitive, its imposition did not deprive the Kurths of any right secured to them by the Double Jeopardy Clause. Because the Montana legislature clearly intended both penalties to be imposed cumulatively, any presumption that the legislature intended the penalties to be alternative was rebutted.

[220] *See Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting) (noting that the "State and Federal Governments spend vast sums on drug control activities," that "Montana has a legitimate nonpunitive interest in defraying the costs of such activities," and that the "Kurths are directly responsible for some of these expenditures—the costs of detecting, investigating, and raiding their operation, the price of prosecuting [and incarcerating] them . . . and part of the money spent on drug abuse education, deterrence, and treatment"). Justice O'Connor recognized that because "measuring the costs actually imposed by every participant in the illegal drug trade would . . . [be too] complex," the state was entitled to estimate. *Id.* at 1954; *see also* United States v. Tilley, 18 F.3d 295, 299 (5th Cir.) (noting that the forfeiture was not disproportionate because illegal drug sales produce up to $100 billion per year, while costing government and society up to $120 billion per year), *cert. denied*, 115 S. Ct. 574 (1994); United States v. 40 Moon Hill Rd., 884 F.2d 41, 44 (1st Cir. 1989) (allowing forfeiture of nearly 18 acres of land, home, and other structures, reasoning that "the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to growing . . . marijuana"); United States v. Haywood, 864 F. Supp. 502, 508 n.8 (W.D.N.C. 1994) (finding that forfeiture of $280,000 was not punishment, reasoning that "[g]iven the vast sums of money spent by State and Federal Governments on drug control activities and the size of the . . . drug conspiracy, the fine involved here is simply not disproportionate to the damages caused by the wrongful conduct"); Commonwealth v. Wingait Farms, 659 A.2d 584, 590-91 (Pa. Commw. Ct. 1995) (finding the forfeiture of farm, vehicles, and horses not punitive, and noting that the "potential damage to society from the use of

The State of Montana in its brief to the Court in *Kurth Ranch* noted that one study estimated in 1980 that "the total direct and indirect cost of drugs on society was almost 47 billion dollars."[221] It would be hard to come up with a dollar limit over which any drug-related forfeiture, tax, or other sanction becomes punitive under this theory.[222]

Compensable harm must be limited to that caused by the defendant's particular conduct, not by the actions of others.[223] A broad definition of harm that includes harm from others like the defendant, and foreseeable as well as actual harm, makes sense if the sanction was meant to *deter* conduct; deterrence looks forward, toward expected harm from all future violators.[224] Conversely, compensation faces back in time and is actor-specific.

The remedial goal of compensation also cannot support a sanction that exceeds an estimate of actual damages to the plaintiff. Some judges have also expanded the compensatory justification of *Halper* by allowing one sovereign to recover for another sovereign's

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[$483,760 of] marijuana is incalculable").

[221] Reply Brief of Petitioner at 16 n.14, *Kurth Ranch* (No. 93-144).

[222] Such reasoning is especially suspect in cases that resemble the forfeiture in *Austin*, in which the federal government appeared to incur little enforcement expense compared to the state that prosecuted *Austin* for his crime. *See* Brief for Petitioner at 1-32, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073) (noting that state, not federal, authorities investigated, arrested, charged, convicted, and imprisoned Austin).

[223] For critiques of the use of compensation as a catch-all remedial purpose, see Charney, *supra* note 179, at 499-500 (arguing that unless the value of a property transmitted to an identifiable recipient is actually calculated by "estimating the value of the interests lost by the recipient as a result of the actions of the defendant," the government would be allowed to blur, for its own benefit, "the distinction between compensatory and punitive actions"); Clark, *supra* note 179, at 471 ("If indeed the motive is compensation, the government should proceed under rules which . . . demonstrate a close relationship between loss suffered and compensation sought."); Stahl, *supra* note 191, at 330-31 nn.236-40 (citing cases discussing compensation as a remedial purpose); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 190 (1990) (criticizing the argument that civil forfeiture under 21 U.S.C. § 881 simply compensates the government for the costs of enforcing the drug laws, noting that such an argument could explain all criminal fines as merely remedial compensation for enforcement expenses); *id.* ("A civil remedy exists only when the costs of the single act can be associated with a specific harm. . . . The costs of past and future drug enforcement cannot be traced to the particular activity giving rise to forfeiture.").

[224] Thus it is proper to consider these factors when asking whether a punishment is excessive, as opposed to asking whether a sanction amounts to punishment. These two questions may too easily be conflated in a case raising double jeopardy and Eighth Amendment claims.

losses.[225] As Judge Noonan objected, this "gives the government an essentially arbitrary choice as to the system whose expense is shared and a virtual blank check as to the amount it can assess."[226]

Determining whether a sanction is compensatory requires not only an estimate of those losses but a judgment about how much the penalty may exceed the loss and still be remedial. The Court has in the past recognized that damages sustained by the government need not be replicated *exactly* by individual penalties in order for those penalties to be "compensatory."[227] Some courts have suggested that civil sanctions do not trigger constitutional scrutiny under the Double Jeopardy Clause or the Excessive Fines Clause even when those sanctions exceed three times the amount of the loss.[228]

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[225] The lower court in *Kurth Ranch*, for example, was willing to go even farther than Justice O'Connor and allow Montana to recover sanctions that bore some rational relationship to "the staggering costs associated with fighting drug abuse in this *country*." *In re* Kurth Ranch, 986 F.2d 1308, 1312 (9th Cir. 1993) (emphasis added), *aff'd*, 114 S. Ct. 1937 (1994).

[226] United States v. Walker, 940 F.2d 442, 444 (9th Cir. 1991) (Noonan, J., dissenting) (objecting to the majority's conclusion that the defendant's fine bore a reasonable relationship to costs of administering the customs system as a whole).

Not only are government attorneys expanding the concept of compensable injury beyond logical limits, but they may also neglect to factor in amounts already repaid. The government must not be permitted to argue that a sanction is remedial when it has already secured restitution. This issue arose in United States v. Barnette, 10 F.3d 1553 (11th Cir.), *cert. denied*, 115 S. Ct. 74 (1994). After securing convictions on 17 counts of fraud, bribery, and tax charges, the United States brought a civil action seeking between $18 million and $50 million in damages under RICO, the False Claims Act, and "various common law theories." The United States Court of Appeals for the Eleventh Circuit explained that any civil damage recovery must be offset by the $7 million the defendant had already paid as restitution in the criminal action. *See id.* at 1560; *see also* United States v. Pani, 717 F. Supp. 1013, 1017 (S.D.N.Y. 1989) (noting that the government subtracted restitution paid in prior criminal action in calculation of the civil penalty).

[227] *See* Rex Trailer Co. v. United States, 350 U.S. 148, 153-54 (1956) (finding that double damages plus $2000 per offense assessed against convicted defendants who defrauded the government were nonpunitive, escaping the Double Jeopardy Clause, because the damages resulting from this injury may be difficult or impossible to ascertain, and the sanction served the function of a liquidated damages clause); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 550-51 (1943) (noting the general practice of allowing double, treble, or even quadruple damages); Helvering v. Mitchell, 303 U.S. 391, 401 (1938) (finding that a 50% tax on tax deficiencies resulting from tax fraud was not intended as punishment but instead served to reimburse the government for the expense of investigation and loss from the taxpayer's fraud).

[228] *See* United States v. Barnette, 10 F.3d 1553, 1558-60 (11th Cir.) (concluding that a 3.2:1 ratio between the amount of civil penalties sought and the amount of loss suffered by the government as a result of the defendant's conduct does not implicate the Double Jeopardy Clause), *cert. denied*, 115 S. Ct. 74 (1994); Connecticut *ex rel.* Blumenthal v. Tobacco Valley Sanitation Serv. Co., 818 F. Supp. 504, 508 (D. Conn. 1993) (concluding that the defendants could not challenge the imposition of treble

Such a bright-line rule has the positive effects of reducing litigation and uncertainty, eliminating the need to reevaluate past pronouncements concerning treble damages and leaving intact the well-established authorization of double and triple damages in private actions before and after the adoption of the Fifth and Eighth Amendments.[229] Yet, while double or treble damages may be rough remedial justice in many or even most cases, where actual damages are very high, tripling that amount may be well above any conceivable total cost to the government.[230] Consequently, a presumption rather than a bright line test would be a better rule here.

c. *When the Government Is Not a Party*

The above analysis identifies which civil sanctions are punitive enough to qualify as "fines" or punishment so that they may be considered together with other criminal penalties under the Eighth Amendment. To qualify as a fine, however, a civil sanction must not only be sufficiently punitive, it must also be sufficiently public. Even an obviously punitive sanction is not a fine if it is awarded in a suit between private parties.[231] Does the Eighth Amendment

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damages plus attorneys' fees in an antitrust suit under the Double Jeopardy Clause because such penalties "may reasonably be considered remedial"); *cf.* United States v. J & T Coal, Inc., 818 F. Supp. 925, 928 (W.D. Va. 1993) (holding that civil penalties of nearly $300,000, almost twice the amount spent on investigating and litigating sanctions, did not constitute punishment for double jeopardy purposes).

[229] *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 273-76 (1989) (concluding that large punitive damage awards were recognized before the Eighth Amendment and that the Eighth Amendment is inapplicable to such damages in civil suits between private parties); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1273 (1987) ("An award of two to three times actual damages might be thought presumptively within the constitutional limits, inasmuch as the practice of double or treble damages has a historical pedigree.").

[230] *Cf.* State v. Sokol (*In re* Sokol), 181 B.R. 27, 31 (S.D.N.Y. 1995) (stating that civil treble damages awards imposed for conduct already punished in a criminal proceeding are not per se unconstitutional, because the determination of whether the penalty will be constitutional must await litigation of the amount of defendant's theft and the imposition of a penalty against him).

[231] *See Browning-Ferris*, 492 U.S. at 275. The Court explained:

> [E]ven if we were prepared to extend the scope of the Excessive Fines Clause beyond the context where the Framers clearly intended it to apply, we would not be persuaded to do so with respect to cases of punitive damages awards in private civil cases, because they are too far afield from the concerns that animate the Eighth Amendment.

Id.

limit punitive civil sanctions that are awarded in a suit between private parties but that are payable, in part, to the state or federal government? This question arises in two types of suits—those authorized by qui tam statutes that permit private plaintiffs to litigate in the government's interest and then keep a portion of the award,[232] and punitive damages actions between private parties governed by a "state sharing" or "split recovery" statute that entitles the state to a specified portion of each punitive award.[233]

The name listed as plaintiff should not determine whether a clearly punitive sanction is a fine; what matters is the identity of the payee. Criminal actions are sometimes prosecuted by private parties, in both state and federal courts, as they were before the dawn of the public prosecutor.[234] Just as the participation of private parties should not render these otherwise typical criminal prosecutions any less criminal,[235] the presence of a private party acting as collection agent for the government should not render punitive awards paid to the state any less punitive.[236] Courts

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[232] The Court in *Browning-Ferris* left this question unanswered, suggesting that qui tam awards may be limited by the Excessive Fines Clause. *See id.* at 276 n.21; *see also* United States v. Halper, 490 U.S. 435, 451 n.11 (1989) (declining to express an opinion as to whether a qui tam action is properly characterized as a suit between private parties for the purposes of double jeopardy). At least one federal court has decided that the Eighth Amendment limits such awards. *See* United States *ex rel.* Smith v. Gilbert Realty Co., 840 F. Supp. 71, 74 (E.D. Mich. 1993) (finding that qui tam damages constitute punishment under the *Halper* test).

[233] *See supra* note 20 (collecting cases examining the application of the Excessive Fines Clause to punitive damages awards split between plaintiff and forum state).

[234] Contempt proceedings furnish the best known examples of this. *See* Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 801 (1987) (allowing courts to appoint private prosecutors in contempt actions only after the U.S. Attorney declines to prosecute); Dudley, *supra* note 148, at 1058-59 (describing private prosecution of contempt charges and listing cases in which private parties have litigated contempt proceedings). Private parties have litigated noncontempt prosecutions as well. *See generally* New Jersey v. Kinder, 701 F. Supp. 486, 491 (D.N.J. 1988) (noting "a widespread practice in the municipal courts of New Jersey [of allowing] citizens to enforce the laws of the state in instances where the municipal prosecutor routinely does not prosecute because of a lack of resources"); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 531-36 (1994) (describing cases in which private parties participated in prosecuting criminal actions).

[235] *See* United States v. Dixon, 113 S. Ct. 2849, 2872 n.3 (White, J., concurring in part and dissenting in part) (assuming that even though the contempt charge was prosecuted by a private party, double jeopardy still applied).

[236] Evan Caminker has argued that defendants in qui tam suits do not deserve any more procedural protection than civil defendants facing other private plaintiffs, because statutory constraints on the qui tam plaintiff already offer defendants in such suits greater protection from unwarranted litigation than criminal defendants enjoy.

reviewing Eighth Amendment challenges to cumulative punishment must include these awards as well.

4. Cumulating Different "Offences"—Defining the Unit of Culpability Under the Eighth Amendment?

The previous sections have proposed which civil and criminal sanctions may be subject to proportionality review under the Eighth Amendment in any case. This section examines which of these penalties a judge must consider together in a given case. If the Eighth Amendment will serve as a check on the disproportionate punishment that may result from overlapping sanctions and multiple "offences" for the same wrong, then judges assessing the proportionality of the latest penalty under the Eighth Amendment must consider all prior penalties for that wrong. Eighth Amendment review, in other words, is concerned with the excessiveness of punishment inflicted for particular conduct, not the excessiveness of whatever penalty is assigned to a discrete offense by the legislature. If judges could strike down only single penalties in relation to single, legislatively defined offenses, they would be powerless to control the totality of punishment inflicted by government. Which penalties, then, punish a defendant for the same wrong? Conceptually, this is the "same offence" problem of double jeopardy law transplanted into the Eighth Amendment.

An example may illustrate the issue. Assume a defendant agreed to assist a drug deal, permitted his home to be used as a transfer point, and was prosecuted. Because of the amount of drugs involved in the transaction, the defendant could be sentenced to mandatory life in prison under state law.[237] Our defendant's home could be forfeited in federal court as an instrumentality of his

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See Caminker, *supra* note 185, at 373-74. None of these constraints, however, provide protection from excessive penalties as opposed to frivolous claims. For more detailed treatment of this question, see Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1087-92 (1991) (concluding that defendants in federal qui tam cases should be able to raise double jeopardy and Eighth Amendment challenges); *see also* Klaben, *supra* note 20, at 141-47, 150, 156 (arguing that a punitive damages award is subject to review under the Excessive Fines Clause when a state split-recovery statute grants to the state a prejudgment interest in the award, noting that a split award might escape Eighth Amendment review if the state's share was allocated to an entity "wholly separate from the government and free of state control").

[237] *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (rejecting an Eighth Amendment challenge to a sentence of life without parole by a defendant convicted of possessing 672 grams of cocaine).

illegal activity. If he drove his car to meet others to plan the transaction, it too could be forfeited.[238] He could be taxed in a state tax assessment proceeding.[239] A separate conspiracy conviction would be possible in either state or federal court, or in both. Double jeopardy may permit the successive imposition of all of these penalties, depending on the legislature's intent, but without cumulative excessiveness review, the proportionality of each of these penalties would be assessed independently, and it is likely that none of these penalties would be judged excessive in isolation.[240]

If a judge considered these penalties together, however, the judge might conclude that, given the totality of defendant's conduct and all of the different harms addressed by these many penalties, the total penalty exceeds constitutional limits. The judge must first decide whether to cumulate all of the penalties or just some of them. Even if these penalties are separate offenses under double jeopardy law—either because each contains a distinct element or because there is clear legislative intent that each should be imposed successively—some or all of them might be considered together under the Eighth Amendment. The concept of punishment under the Eighth Amendment, unlike the textual reference to "offence" in the Fifth Amendment, is not limited by statutory elements or legislative intent. But how should they be grouped? If the conspiracy and car forfeiture penalties in the above hypothetical effectively punish the defendant for *conspiring* to violate the law as opposed to dealing drugs, perhaps they should not be cumulated with penalties for the drug sale itself.[241] On the other hand,

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[238] *See* United States v. 1990 Toyota 4Runner, 9 F.3d 651, 654 (7th Cir. 1993) (noting that use of the car in the drug deal "facilitated the attempted transportation, receipt, and possession of illegal drugs, thus bringing the car within the statute's grasp").

[239] *See* Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994).

[240] For other scenarios, see Lear, *supra* note 56, at 629 ("[A] single sale of drugs may constitutionally give rise to a series of federal prosecutions for offenses ranging from distributing drugs within one hundred feet of a video arcade facility and using a telephone in connection with a drug transaction, to knowingly providing drugs to a pregnant woman." (citations omitted)); George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1359, 1370-86 (1984) (hypothesizing nine possible offenses that a federal prosecutor could charge a suspect with, given a single criminal scheme, and analyzing whether the *Blockburger* test places any limits on this theoretical possibility).

[241] *Cf.* United States v. Felix, 503 U.S. 378, 380-81 (1992) ("[P]rosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause."); United States

perhaps the planning and commission of the offense are all part of one culpable transaction so that the judge must consider whether the total of all of these penalties is excessive in light of all of the defendant's conduct.

The easiest way for judges to group penalties under the Eighth Amendment would be to employ the formula they now use to determine when the legislature intended penalties to exist as mutually exclusive alternatives for the "same offence." Instead of looking for legislative intent to the contrary, however, they would ignore legislative intent entirely. It makes sense to use the same test to identify cumulative penalties under the Eighth Amendment that one uses to predict probable legislative intent regarding multiplicity under the Double Jeopardy Clause—if sanctions are similar enough to presume that a legislature would have intended them to be the same, then they are probably similar enough to be cumulated under the Eighth Amendment. Presently, however, the Court's presumption regarding what is the "same offence" under double jeopardy, the same elements test of *Blockburger*, is not well-suited to this function. It is too narrow. A judge deciding which penalties to lump together under the Eighth Amendment, using only *Blockburger* as a guide, would cumulate Halper's civil penalty and criminal sentence, but might not consider the Kurths' taxes together with their sentences, or Austin's forfeiture with his sentence[242]—two

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v. Garcia, 32 F.3d 1017, 1019 n.1 (7th Cir. 1994) ("It is established doctrine that a conspiracy to commit a crime is distinct from the crime itself.").

[242] A drug prosecution and a civil forfeiture proceeding may not trigger the *Blockburger* presumption—the underlying drug offense requires intent on the part of the defendant beyond the negligence required for forfeiture, and forfeiture requires the use of property, which the underlying offense does not. *See* United States v. Leaniz, No. CR-2-90-18, 1995 WL 143127, at *5-6 (S.D. Ohio Mar. 31, 1995) ("The forfeiture proceeding was an in rem action against the property itself, not against the defendant . . . . [T]here has been no adjudication of any culpability on his part, nor has there been any determination of his relationship to the property."); State v. Romero, No. 01-94-01219-CR, 1995 Tex. App. LEXIS 1852, at *14 (Tex. Ct. App. Aug. 10, 1995) (noting that forfeiture and drug offenses usually include separate elements). *But see* United States v. Ursery, 59 F.3d 568, 574 (6th Cir. 1995) (rejecting the argument based on *Dixon* and *Blockburger* that forfeiture and conviction are separate offenses, stating that "the criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action"). The tax penalty requires nonpayment of taxes, and the drug offense requires intent. *See* Collins v. State, 645 N.E.2d 1089, 1093 (Ind. Ct. App. 1995) (finding that the *Blockburger* formula does not bar imposition of both a drug offense and the state's drug tax because each offense includes an element the other does not); State v. Perez, No. 04-94-00476-CR, 1995 Tex. App. LEXIS 2273, at *8 (Tex. Ct. App. Aug. 9, 1995) (same).

results I find unsupportable.[243] A more inclusive grouping formula is needed that will do a better job than *Blockburger* of replicating our intuitive, moral classifications of culpable conduct.

Advocates of judicial restraint need not shudder at a test under the Eighth Amendment that groups together more penalties than *Blockburger* does today. The line that separates the disproportionate from the proportionate is sufficiently blurry that the grouping decision will, in many cases, make no difference to the success of an individual defendant's claim of excessive punishment. Moreover, when it does, the limit will not always operate like double jeopardy, barring a subsequent penalty proceeding entirely, but will instead require only that the latest penalty imposed be mitigated by degree.[244]

United States v. Louisville Edible Oil Prods., 926 F.2d 584 (6th Cir.), *cert. denied*, 502 U.S. 859 (1991), is one example of many cases that may warrant grouping under the Eighth Amendment beyond that provided by *Blockburger*, had the defendant raised an Eighth Amendment claim. The defendant had objected on double jeopardy grounds to the cumulation of several state fines and subsequent criminal penalties under the Clean Air Act and CERCLA. Because of the dual sovereignty exception and because each federal claim contained a distinct element under *Blockburger*, the court rejected the double jeopardy claim, even when assuming the state sanctions amounted to punishment under *Halper*. *See id.* at 586-88. Under cumulative excessive review, probably all of these sanctions would be assessed together. *See* Guerra, *supra* note 1, at 1200 (noting cases in which courts allowed separate prosecutions of offenses that would be the same but for the element that the firearm affected interstate commerce).

[243] Consider for example, the remarkable decision by the Illinois Court of Appeals in People v. Pudlo, 651 N.E.2d 676 (Ill. App. Ct. 1995), in which two of the three judges decided that two offenses were not the same under *Blockburger* because one required a property owner to *remove* refuse and the other prohibited the owner from *allowing it to accumulate*. *See id.* at 678.

[244] If a court finds that a sentence is unconstitutionally severe, it may resentence or remand for resentencing to a lesser term. When the excessive penalty is a mandatory sentence, and no legislatively authorized lower penalty is available, courts have improvised, resentencing under prior statutes, as if the defendant had been convicted of the next most serious lesser included offense, sometimes resentencing to a term that would be constitutional, even though such a term has no legislative approval. *See generally* Palm, *supra* note 25, at 76-77 (noting that in situations in which sentences are unconstitutional, "state courts have adopted a number of different approaches to resentence offenders").

Remitting forfeitures has proven controversial, however. Forfeiture statutes generally do not authorize courts to forfeit only *part* of a piece of property or to order payment in cash or other property in lieu of the forfeited asset. Some courts have assumed that when forfeiture of an entire asset would violate Eighth Amendment limits, a judge can tailor the forfeiture to those limits, either by ordering that only a portion of the asset be forfeited, by limiting other punishment, or by ordering the relinquishment of substitute assets. Others have adhered rigidly to the statutory premise of indivisibility. *Compare* United States v. Bieri, 21 F.3d 819, 824 (8th Cir.)

Beyond these preliminary observations, I will not here attempt to offer a tidy solution to the offense/conduct problem that, in the double jeopardy context, has prompted more than a century of legal debate.[245] The point is that the Court cannot escape this intractable problem simply by allowing legislatures to define "same offence" under the Double Jeopardy Clause. Not only does the problem persist in the debate over whether *Blockburger* is the proper proxy for legislative intent under the Double Jeopardy Clause,[246] it also

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(authorizing forfeiture of less than the whole in order to tailor a remedy to fit within the "broad boundaries of constitutional proportionality"), *cert. denied*, 115 S. Ct. 208 (1994) *with* United States v. Chandler, 36 F.3d 358, 364 (4th Cir. 1994) ("[A] judgment of forfeiture is largely an all-or-nothing situation, and an inquiry into excessiveness can determine only on which side of the line the facts place the property.") *and* United States v. 318 S. Third St., 988 F.2d 822, 828-29 (8th Cir. 1993) (agreeing that courts do not have authority to subdivide property in order to create proportional forfeitures, but may refuse to order a forfeiture at all when proportionality concerns warrant) *and* United States v. Plat 20, Lot 17, 960 F.2d 200, 207 n.7 (1st Cir. 1992) (rejecting claimant's argument that the court has power to order forfeiture of less than the whole amount, noting that such a rule would "interfere with Congress's unmistakable intent") *and* United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 939 (N.D. Ala. 1994) ("No court, high or low, has thus far told this court how to 'split the baby,' so to speak, and this court is not Solomon."). *See also* Stahl, *supra* note 191, at 326 n.220 (arguing that the government should sell property and reimburse the claimant for the value of the nonoffending portion).

In my view, the reluctance of courts to mitigate excessive forfeiture is caused, in part, by mistaken fidelity to the fiction that the forfeited property, not the owner, is the culprit. By the time a judge gets around to determining the excessiveness of a judgment of forfeiture, the judge has already decided that it is the *owner* that is culpable, and that forfeiture is his *fine*. There is nothing so sacred about a chunk of land or a truck or a plane that its value cannot be portioned between the owner and the government. Regulations already provide that, upon proper application, when "extenuating circumstances indicat[e] that some relief should be granted to avoid extreme hardship," the federal government may mitigate the effect of a forfeiture by charging a penalty instead. *See* 28 C.F.R. § 9.5(c) (1994). Governments also share the value of forfeited assets between themselves when more than one law enforcement agency assists in securing the judgment of forfeiture. If a government is willing to share the value of an asset with another agency to preserve goodwill, it cannot complain about sharing the value of an asset with its owner to preserve constitutional principles.

[245] *Compare, e.g.*, SIGLER, *supra* note 47, at 101, 129, 133 (terming the problem "virtually insoluble" at least until the "recodification and integration of criminal law" and concluding that "[t]he problem of the scope of the criminal act has not been solved in England any more than it has in the United States" and that in Canada, the tests are "almost unintelligible") *and* Westen & Drubel, *supra* note 35, at 115 ("Previous attempts to define offenses other than by reference to the legislature's intent have all failed.") *with* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1, 8-16 (1956) (noting that courts successfully barred successive prosecutions for the same offense within, and among, the several sovereigns of the British Empire).

[246] *See supra* text accompanying note 81.

plays a prominent role in the review of overlapping penalties under the Eighth Amendment.

B. *Determining Excessiveness*

Assuming that one has identified the penalties that must be evaluated under the Eighth Amendment and grouped them in sensible categories, the next step is to determine whether or not their sum total exceeds constitutional limits. This step is key—if the Eighth Amendment is to limit a legislature's ability to pile on punishment and replace pre-*Dixon* double jeopardy limits that in the past only sporadically and clumsily held punishment to reasonable proportions, then judicial review of the severity of punishment must have substance and strength. Some form of proportionality analysis that compares the severity of the penalty to the gravity of the offense and the culpability of the offender is required, such as the one the Court adopted in *Solem*.

In addition, review under the Eighth Amendment should include three features in order to respond to cumulative punishment. First, the analysis should be flexible enough to address varying risks of excessiveness, allowing for increased scrutiny of especially problematic punishments. Second, review under the Eighth Amendment must measure the proportionality of punishment for all penalties, monetary or nonmonetary, in the same way, so that even when courts compare penalties that appear to be apples and oranges, they are comparing them for the same feature. Finally, in cases involving multiple penalties for related conduct, courts should take special care to guard against unwarranted double-counting.

1. Heightened Scrutiny for Certain Categories of Punishment

The closeness with which courts examine punishment under the Eighth Amendment need not be identical in all types of cases. Capital punishment has received closer regulation from the Court than other penalties[247] primarily because of the finality and

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[247] The Court has interpreted the Eighth Amendment to guarantee to every capital defendant a right to an individualized sentence and the opportunity to present mitigating evidence at the sentencing proceeding. *See* Penry v. Lynaugh, 492 U.S. 302, 318 (1989) ("[A] sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death."). Noncapital defendants, on the other hand, may be sentenced under mandatory sentences that provide for no individualized consideration of offender or offense. *See* Harmelin v. Michigan, 501 U.S. 957, 996

severity of the sanction,[248] but also because the history of discriminatory application of the penalty by juries and prosecutors has sensitized the Court to the risk of arbitrary and disproportionate death sentences. Other noncapital penalties also pose a heightened risk of arbitrariness and disproportionality, although for different reasons. They too may warrant heightened vigilance on the part of courts under the Eighth Amendment, although perhaps not the individualized treatment that the Court mandates for each and every death sentence. Stricter scrutiny might entail presumptions or other burden-shifting or -setting devices, or a flexible multifactor analysis that requires reviewing judges to consider the greater risk of excessiveness in these cases.[249]

First, contempt raises a unique risk of excessive punishment that should prompt close review. This risk is not that judges, as opposed to legislatures or juries, cannot be trusted to assess proportionate punishment. If that were the premise, then judicial review of sanctions under the Eighth Amendment would be perverse. Instead, contempt sanctions are more likely to be disproportionate than other penalties because of the judge's role as "judge of his own cause."[250]

(1991) (rejecting a claim that imposition of a mandatory life sentence without parole in the absence of individualized consideration violates the Cruel and Unusual Punishments Clause and stating that "[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further").

[248] *See Harmelin*, 501 U.S. at 995 ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself."); *id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. . . . And it is unique . . . in its absolute renunciation of all that is emobodied in our concept of humanity.").

[249] *Cf.* Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 266-75 (1989) (suggesting that a rebuttable presumption against the execution of defendants below a certain age at the time they commit their offenses is superior to a bright-line rule barring such executions under the Cruel and Unusual Punishments Clause).

[250] *See* Green v. United States, 356 U.S. 165, 199 (1958) (Black, J., dissenting). The Court's past willingness to scrutinize carefully contempt sanctions suggests that the Court has already recognized a need for special scrutiny in such cases. *See* Spallone

Second, forfeiture provides incentives to prosecutors to seize assets, without regard to proportionate punishment. Critics of forfeiture have long objected to its potential for abuse.[251] Prosecutors who benefit indirectly, if not directly, from forfeiture revenues and who use forfeited assets[252] find civil forfeiture a convenient and lucrative alternative to criminal prosecution.[253] Targeted defendants become those offenders who own the most valuable assets, not those offenders who pose the greatest threat to society.[254] As two critics have charged, civil forfeiture may have

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v. United States, 493 U.S. 265, 276 (1990) ("[I]n selecting contempt sanctions, a court is obliged to use 'the least possible power adequate to the end proposed.'" (quoting United States v. City of Yonkers, 856 F.2d 444, 454 (2d Cir. 1988) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821))) (citation omitted)); Dudley, *supra* note 148, at 1028 n.9, 1065 (noting that the Court's frequent reiteration of this principle "suggests that it perceives the severity of the [contempt] sanction as distinctly important in this context"). In contempt cases in which a judge is the subject of *personal* insults, the Court has held that due process requires a different judge to hear the contempt charges. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) (requiring a different judge in a case in which the defendant called the trial judge a "dirty sonofabitch," a "dirty tyrannical old dog," and a "fool," and told the judge to "[g]o to hell" and "[k]eep [his] mouth shut").

[251] Courts are well aware of the incentives of forfeiture. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 n.2 (1993) (noting a 1990 Justice Department memorandum urging the initiation of more forfeiture proceedings in order to meet the Department's targeted $470 million budget).

[252] *See, e.g.*, Michael F. Alessio, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429, 453 nn.172 & 174 (1995) (describing prosecutors who adopt seized sports cars as their own and agents who stop buyers coming *in* to the state but not couriers driving *out* of the state because seized cash is more useful to the agency than seized drugs); *cf.* People *ex rel.* Sandstrom v. County of Pueblo, 884 P.2d 707, 712 (Colo. 1994) (holding that the district attorney's share in proceeds of asset forfeitures does not disqualify the district attorney's office under a state statute requiring special prosecutors in cases in which the district attorney has an interest).

[253] *See, e.g.*, Giuffre v. Bissell, 31 F.3d 1241, 1251-53 (3d Cir. 1994) (finding that a prosecutor was not protected by absolute immunity in a civil suit brought by a property owner who gave up property worth $100,000 in return for dismissal of criminal charges, after being given only one hour to decide, without an opportunity to contact his attorney; the property was later sold to two individuals with alleged ties to the prosecutor's office for $20,000, even though the owner had tried to buy back the property for $100,000). Some claim that 80% of those who lose property in federal forfeiture proceedings are never charged with a crime. *See* M. Lynette Eaddy, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After* Austin v. United States, 45 FLA. L. REV. 709, 715 (1993).

[254] *See* David Fried, *Criminal Law: Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMONOLOGY 328, 387-88 (1988) (arguing that the determination of which co-conspirators are subject to forfeiture "should not depend upon accidental and irrelevant details in the manner in which the crime was carried out," such as in whose house the conspirators chose to meet or store their contraband).

"more to do with rent-seeking by legislators and law enforcement officials than with the eradication of drug use."[255] The risk of disproportionate punishment from forfeiture is also aggravated by the lack of a clear method by which a judge or jury can tailor the amount of the forfeiture sanction to the gravity of the owner's offense.[256]

Finally, I must mention one type of penalty to which some judges have already extended greater protection under the Eighth Amendment, but which I believe does *not* warrant heightened vigilance by courts: forfeiture of the home. At least one court has stated boldly that because a person's homestead has been protected from government invasion throughout history more carefully than other property, "[i]t is much more likely that the taking of the homeplace would constitute an excessive fine than the taking of other property of equal value."[257] This argument resonates with Fourth Amendment doctrine that restricts government access to the home more severely than access to other property.[258] The reluctance to forfeit homes may also be linked to judicial predictions that such forfeitures will punish innocent family members and only "add to the list" of homeless, unemployed, and government-dependent individuals.[259]

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[255] Donald J. Boudreaux & A.C. Pritchard, Civil Forfeiture and the War on Drugs: Lessons from Economics and History 45 (1995) (unpublished manuscript, on file with author).

[256] *See* United States v. One 1990 Ford Ranger Truck, 888 F. Supp. 1170, 1174 (N.D. Ga. 1995) (noting that the jury was not asked to determine excessiveness nor "to find a 'substantial connection' between property and offense before approving the forfeiture"); Stahl, *supra* note 191, at 321-24 (noting that even those courts that require a "substantial connection" between property and illegality under the statute accept virtually any connection between the property and drug activity).

[257] United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 938 (N.D. Ala. 1994) (finding forfeiture of home and lot excessive and extending special protection to homesteads); *see also* United States v. 6380 Little Canyon Rd., 59 F.3d 974, 985 (9th Cir. 1995) (stating that in determining proportionality, the court must consider "the intangible, subjective value of the property, e.g., whether it is the family home"); United States v. 9638 Chicago Heights, 27 F.3d 327, 331 (8th Cir. 1994) (including in excessiveness analysis consideration of "the fact that the property was a residence" and the effects on "innocent occupants . . . including children"). *But cf.* United States v. Lot 5, 23 F.3d 359, 363 (11th Cir. 1994) (finding that federal drug forfeiture statutes preempt protection of homestead property from forfeitures accorded by the Florida Constitution), *cert. denied*, 115 S. Ct. 722 (1995).

[258] *See, e.g.*, Payton v. New York, 445 U.S. 573, 585-90 (1980) (stating that the physical entry and search of a home is the primary evil that the Fourth Amendment is meant to prohibit).

[259] *See, e.g.*, United States v. Oakes, 11 F.3d 897, 899 (9th Cir. 1993) (agreeing that the prosecutor's decision to seek a mandatory sentence for a first-time offender, while

This is a very curious position. To begin with the historical argument, although direct seizure of homes may be novel, many forms of punishment have carried with them the collateral consequence of the loss of the home. There seems to be no reason to limit stricter excessiveness review to home forfeitures alone and not to extend it to penalties that threaten certain loss of rented or purchased shelter. Second, forfeiture of a home does not always strand innocent third parties.[260] Even when it does, plenty of other penalties exist that harm these individuals just as severely. Finally, a lower tolerance for home forfeiture might be based, alternatively, on the home's supposed special significance to the person punished. But assets of comparative significance are likely to surface—one man's living room is the next man's heirloom.[261] In short, there is no persuasive basis for singling out the forfeiture of residences, as opposed to forfeitures in general, for special treatment under the Eighth Amendment.[262]

2. Proportionality Review for All Penalties, Including Civil Forfeiture

I argued earlier that all penalties must be at least subject to review for excessiveness under the Eighth Amendment in order for the Bill of Rights to limit cumulative punishment imposed through multiple penalties or in multiple proceedings. But just any sort of

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also forfeiting his home and thereby rendering his wife and two small children homeless, led to "bizarre" results), *cert. denied*, 114 S. Ct. 1569 (1994).

[260] Depending on the property laws of the state in which the home is located, the United States may have to wait until the death or divorce of an innocent owner spouse to take over a jointly owned home. *See* United States v. 44133 Duchess Drive, 863 F. Supp. 492, 500-03 (E.D. Mich. 1994) (reviewing Eleventh and Sixth Circuit law on this point).

[261] The Ninth Circuit has recently settled on a proportionality test that requires an assessment of the subjective value of the property to the owner, and it suggested that one *example* of property with intangible value is the home. *See 6380 Little Canyon Rd.*, 59 F.3d at 985 (requiring courts to take into account "the intangible, subjective value of the property, e.g., whether it is the family home").

[262] Judges also need not approach penalties imposed in a civil proceeding with a sharper Eighth Amendment scalpel than they would use for criminal sentences. Some courts have reasoned that excessiveness is more likely to be a problem when conduct is proven by evidence which falls short of the "beyond a reasonable doubt" standard. On its face, this logic has some appeal, for the surer we are that a defendant committed an offense, the less squeamish we are about punishing him for it. But if the combination of loose procedure and stiff penalty seems irksome, the proper response is to tailor the procedure to the penalty, not the other way around. The Eighth Amendment should not be pressed into service as a substitute for procedural due process.

consideration of excessiveness will not do. Cumulative review of penalties requires that all penalties must be evaluated in roughly the same way—for disproportion in relation to the offender's culpability. This common-sense notion has been neglected by many judges puzzling over how to assess the excessiveness of civil forfeiture penalties after *Austin* because of Justice Scalia's deft submission of a competing theory in his *Austin* concurring opinion.

Although the Court in *Austin* was content to let lower courts figure out how to assess the excessiveness of civil forfeitures, Justice Scalia was not. He argued that as long as the relationship of the property to the crime was "close enough to render the property, under traditional standards, 'guilty' and hence forfeitable," civil forfeiture, however punitive, could not be excessive.[263] In his view, the Eighth Amendment analysis must ignore the value of the forfeited asset and the culpability of the offender, and instead consider only whether the property has a close enough relationship to illegal activity. Many lower courts and the Department of Justice have leapt at this suggestion, perhaps because it allows them, once again, to avoid direct review of the proportionality of punishment, or perhaps because very few forfeitures would surpass its limits.[264]

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[263] *See* Austin v. United States, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in part and concurring in the judgment).

[264] The versions of Scalia's test now in use in state and federal courts range from the simple to the very complex. The Department of Justice has a fairly simple model:

> A civil or criminal forfeiture should not violate the Eighth Amendment where:
>
> A. The criminal activity involving the property has been sufficiently *extensive* in terms of time and/or spatial use of the property; *or*
>
> B. The *role* of the property was *integral* or *indispensable* to the commission of the crime(s) in question; *or*
>
> C. The particular property was *deliberately selected* to secure a special advantage in the commission of the crime(s).

Memorandum, *supra* note 21, at B-584.138-246. The Fourth Circuit recently unveiled a hybrid, three-part, five-subfactor test to determine if the property forfeited was sufficiently "guilty" to come within Eighth Amendment limits:

> [I]n determining excessiveness of an *in rem* forfeiture under the Eighth Amendment . . . a court must apply a three-part instrumentality test that considers
>
> (1) the nexus between the offense and the property and the extent of the property's role in the offense,
>
> (2) the role and culpability of the owner, and
>
> (3) the possibility of separating offending property that can readily be separated from the remainder.
>
> In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following

However attractive, this conception of excessiveness has no place in the Eighth Amendment.[265]

Not only is this "relationship" or "nexus" test at odds with an interpretation of the Eighth Amendment that requires judges to protect defendants against cumulative punishment, it is inconsistent with the Court's decision to characterize civil forfeiture as punishment in the first place. To be a "fine" at all, excessive or not, the forfeiture must punish *the owner* for the owner's culpable act. The Eighth Amendment does not protect Cessnas, Cadillacs, buildings, and bank accounts from excessive penalties; it protects the people who own them. Proportionality can only be measured in relationship to the owner's culpability; the relationship of the property to the offense is meaningless once it is determined that the forfeiture is a "fine."[266] In addition, the Court has already noted that

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factors:

> (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous;
> (2) whether the property was important to the success of the illegal activity;
> (3) the time during which the property was illegally used and the spacial extent of its use;
> (4) whether its illegal use was an isolated event or had been repeated; and
> (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.

United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

[265] For these reasons, the Department of Justice was shortsighted when it asserted recently, "there is no reason why [the standard developed under the Cruel and Unusual Punishments Clause] should automatically translate as the standard for determining challenges under the Excessive Fines Clause." Memorandum, *supra* note 21, at B-584.138-245. Perhaps the two standards need not be identical, but there *is* a reason why proportionality must serve as the root of each—the need to assess the constitutionality of cumulated, as opposed to isolated, punishment.

[266] *See, e.g.*, People *ex rel.* Waller v. 1989 Ford F350 Truck, 642 N.E.2d 460, 466 (Ill. 1994) ("[The relationship test] is patently inadequate and necessarily conflates the [E]ighth [A]mendment excessive fine analysis with the determination of whether the property is subject to forfeiture in the first instance."); Thorp v. State, 450 S.E.2d 416, 418 (Ga. 1994) (adopting the proportionality test, noting that "[s]ince the claimant is the person punished for the offense . . . it would be illogical not to consider relevant the extent of the claimant's involvement in the offense" (quoting United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 734 n.4 (C.D. Cal. 1994))). Other courts have combined the two theories. *See, e.g.*, United States v. Milbrand, 58 F.3d 841, 847-48 (2d Cir. 1995) (holding that excessiveness of forfeiture of uncharged owner depends upon (1) the harshness of the forfeiture, (2) the relationship between the property and the offense, and (3) the culpability of the owner).

excessiveness analysis for *criminal* forfeiture must focus on the extent and degree of the defendant's culpability, the gravity of the offense, and the value of the property forfeited.[267] There is no reason that the analysis for determining the excessiveness of the fine of civil forfeiture should differ at all from the analysis used to assess the fine of criminal forfeiture. Each punishes the owner for wrongful conduct.

3. Calibrating Penalties and Culpability When Offenses Overlap

The last essential modification of Eighth Amendment doctrine that I propose is perhaps the most important—heightened judicial vigilance of penalties that punish the same conduct more than once. Double jeopardy doctrine is the wrong vehicle for limiting legislative prerogative to fragment the same conduct into various overlapping offenses; the threat of excessive punishment from multiple penalties is more appropriately controlled by Eighth Amendment review. In short, courts must take care to ensure that multiple punishment (permitted by the Fifth Amendment) does not become disproportionate punishment (forbidden by the Eighth Amendment).

The risk of undue double-counting may arise whenever the same conduct is punished by separate offenses. It is most acute, however, in cases in which there is some doubt about whether the legislature (or legislatures) defining separate offenses considered their cumulative punitive effect.[268] One example of this risk involves a

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[267] *See* Alexander v. United States, 113 S. Ct. 2766, 2776 (1993) (holding that the court of appeals should have considered the forfeiture "in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time"). On remand, the court of appeals set out a more detailed excessiveness analysis for assessing the constitutionality of criminal forfeiture, which also did not consider the degree to which the property was involved with the crime. *See* United States v. Alexander, 32 F.3d 1231, 1235-37 (8th Cir. 1994). The Department of Justice advocates the use of the same standard in civil and criminal forfeitures as well, but rejects proportionality review in favor of a relationship test. *See* Memorandum, *supra* note 21, at B-584.138-286 n.96 (asserting that the analysis should be based on whether the property was tainted by unlawful use, rather than on "the relative seriousness of the particular violation, the owner's relative degree of culpability, or the owner's criminal history").

[268] Legislative efforts to coordinate penalties can reduce the threat of excessiveness from overlapping punishment, but they cannot eliminate it. For instance, sentencing guidelines in the federal system and in several states have considered some of the risks of cumulation by grouping offenses and defining situations in which sentences are concurrent or consecutive. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL §§ 3D1.1-.5 (1993) (instructing judges to use the most serious offense as a starting

defendant convicted of several crimes, each of which contains a common element that also constitutes a crime.[269] Excessiveness may also arise from the imposition of a large number of modest penalties for related conduct. In the words of Justice Field: "It does not alter its character as cruel and unusual that for each distinct offence there is a small punishment, if, when they are brought together, and one punishment for the whole is inflicted, it becomes one of excessive severity."[270] The imposition of succes-

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point and to add on successive reduced penalties based on the nature of the additional crimes); David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 200 (1995) (noting that sentencing guidelines systems have varying solutions to what the author calls the problem of setting a "volume discount" for multiple related crimes, but that all reduce the discretion of the judge about whether to make some or all sentences run concurrently or consecutively); *see also* STANDARDS FOR CRIMINAL JUSTICE SENTENCING Standards 18-1.2 to 1.3 (American Bar Ass'n 1994) (recommending that every jurisdiction establish a permanent sentencing commission or agency to create determinate sentencing provisions that limit the discretion of sentencing courts); MODEL PUNITIVE DAMAGES ACT § 10 (Discussion Draft 1995) (providing set-off for prior punitive damages awards for "the same act or cour[se] of conduct"). Certainly, courts reviewing cumulative punishment that has been explicitly authorized by a legislature or its agents owe more deference to such penalties than they owe to cumulative punishment that has not been considered and approved by the legislative branch. *See* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (stating that courts "'should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes'" (quoting Solem v. Helm, 463 U.S. 277, 290 (1983))). Still, no one jurisdiction's commission can fully coordinate the punishment of all jurisdictions, nor can legislative choice entirely displace judicial review under the Eighth Amendment.

[269] For instance, assume a defendant is convicted in state court of possession with intent to deliver one ounce of marijuana and receives 20 years and is also convicted in federal court of possession of that ounce of marijuana near a school, receiving 25 consecutive years, and conspiracy to possess that ounce of marijuana, receiving 20 more years, for a total cumulated penalty of 65 years. Double jeopardy presently allows separate prosecution and penalties for all three offenses because of their independent elements, but there is one crime common to them all—possession of that ounce of marijuana. If we learn that both the state and federal legislatures also set the maximum penalty for the possession of one ounce of marijuana at 15 years, then it begins to look as if our defendant's multiple punishment may have been excessive punishment as well. A better estimate of the cumulative punishment due our hypothetical defendant may be 40 years, not 65: 15 years (for the possession itself) plus 5 years (the extra penalty for planning to deliver it) plus 10 years (the premium for possessing those narcotics near a school) plus 5 years (the extra penalty for conspiring). When an element common to multiple penalties also constitutes a crime, double-counting the penalty for that lesser included offense may exceed not only legislative design, but the bounds of the Eighth Amendment. Admittedly, because proportionality review cannot and should not be reduced to an equation, and because multiple penalties often do not contain components as neatly packaged and pre-weighed as those in the above hypothetical, this kind of analysis must serve as a guideline rather than as a rule.

[270] O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting). Professors

sive criminal and civil penalties requires careful analysis as well. However varied these contexts, the guiding premise remains the same: Because the Eighth Amendment serves as a citizen's last defense against excessively severe punishment that may result from the proliferation of overlapping penalties, a court cannot review cumulative, multiple punishments for related conduct with the same deference that it would extend to a one-shot penalty.

IV. CUMULATIVE REVIEW AS COMMON SENSE

Undoubtedly, the cumulative review of penalties I propose requires judges to make difficult distinctions, including when civil sanctions are punishment, which penalties must be considered together, and when combined penalties become unconstitutionally severe. But the difficulties are not insurmountable. Perhaps the best proof of the practicality of this approach is the willingness of judges to adopt it on their own.

Several judges have already begun to consider total punishment under the Eighth Amendment regardless of when, where, or how many penalties are imposed. For instance, a panel of the Sixth Circuit recently evaluated a cruel and unusual punishment challenge to consecutive sentences for a firearms conviction and a robbery conviction arising out of the same conduct by evaluating the total punishment for both penalties together.[271] Other courts evaluating excessive fines challenges to civil forfeitures that follow convictions are asking whether the owner has been "sufficiently punished" for his conduct by the criminal sentence so that further punishment through civil forfeiture would be excessive.[272] Judges considering

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Paul Robinson and John Darley surveyed several hundred nonlawyer respondents who assigned longer penalties for two crimes than for one but did not double the sentence. The authors refer to this as the "multiple-offense discount notion." PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 189-97 (1995).

[271] *See* United States v. Duerson, 25 F.3d 376, 384 (6th Cir. 1994) ("Congress contemplated that the penalties for the *two crimes* . . . could reach a *total* of 360 months, and we are not prepared to say that a total of 157 months is either cruel or unusual." (emphasis added)).

[272] *See, e.g.*, United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 939-40 (N.D. Ala. 1994) (finding that further punishment of homeowners through forfeiture of their $70,000 home was excessive, considering that the owners, husband and wife, had each pled guilty to drug charges, served their five year sentences (custody and probation, respectively) and had paid or were paying the fines, court costs, and restitution ordered as part of their sentence). Courts considering the excessiveness of criminal forfeiture have also considered related sentences of imprisonment. *See,*

Eighth Amendment challenges are also combining state and federal penalties, implicitly acknowledging that the Eighth Amendment limits the totality of punishment imposed by all governments.[273] A similar trend is emerging in cases involving due process challenges to multiple punitive damage awards. Unable to limit punitive damages between private parties using the Eighth Amendment, courts are beginning to employ the Due Process Clause to perform the same function, limiting the totality of cumulated penalties.[274] These judges understand that punishment which may not be excessive alone may become excessive if repeated. It is time this intuition became a routine ingredient of the constitutional review of punishment.

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e.g., United States v. Alexander, 32 F.3d 1231, 1237 (8th Cir. 1994) (ordering the district court on remand for excessiveness analysis to "consider the *sentences* imposed in determining whether the *forfeiture* has been grossly disproportionate" (emphasis added)); United States v. Feldman, 853 F.2d 648, 664 (9th Cir. 1988) (evaluating for excessiveness a forfeiture of nearly $2 million along with five years of probation on mail fraud conviction, concurrent sentences of 10 years for RICO violations and interstate transportation of fraudulently obtained funds), *cert. denied*, 489 U.S. 1030 (1989); United States v. Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987) (noting that the court must determine that the forfeiture of the entire property "together with other punishments imposed is not so disproportionate to the offense committed as to violate the Constitution"); United States v. Busher, 817 F.2d 1409, 1415 n.10, 1416 (9th Cir. 1987) (ordering the district court to assess the total penalty, including forfeiture, jail time, and fines, to determine whether the combined penalty exceeds constitutional limits and to limit either the forfeiture or the other penalties if it does).

[273] For example, one trial judge relied on the dual sovereignty exception to double jeopardy to reject the defendants' double jeopardy challenge to their federal prosecution after state forfeiture proceedings, but went on to note:

> Defendants also contend that this criminal prosecution constitutes an excessive punishment which violates the Eighth Amendment even if it is not prohibited by the Double Jeopardy Clause. Based on the present record I am unable to conclude that the forfeitures in this case were so excessive as to bar any further punishment through criminal prosecution.

United States v. Collins, 877 F. Supp. 516, 519 n.2 (D. Or. 1995); *see also* United States v. 429 S. Main St., 843 F. Supp. 337, 342 (S.D. Ohio 1993) (rejecting excessive fines challenge to federal civil forfeiture of home after state conviction, considering "combined penalty" of forfeiture and state sentence of one year and fine of $6000 for three drug sales), *aff'd in part*, 52 F.3d 1416 (6th Cir. 1995).

[274] *See supra* note 32.