

DODGING DOUBLE JEOPARDY: COMBINED CIVIL AND CRIMINAL TRIALS

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I. INTRODUCTION

Cheatem Medical Company provided expensive medical equipment to those who could not afford it. Medicaid reimbursed Cheatem for this equipment. Seeing an opportunity to make a little extra money, the company's president, Willie Cheatem, began padding his Medicaid reimbursements by billing for nonexistent patients, or double-billing for equipment. This, of course, was in contravention of Medicaid law and regulations. Willie averaged \$2000 per false claim but had second thoughts so he stopped after thirty false claims, making \$60,000 in illegal profits. State agents arrested Willie after receiving a tip from a disgruntled ex-employee. Florida's Medicaid program had been losing over \$230,000,000 a year in fraud, so it sought to make an example of this defrauder.

The State tried Willie and convicted him of criminal Medicaid fraud.¹ He was sentenced to one year in prison, of which he served two months. Though a short sentence, Willie's stint in prison set him straight, and from that day on he was an honest man. Six months later, the State brought a civil suit under the new Florida False Claims Act,² seeking treble damages for the \$60,000 that Willie illegally received, as well as a \$10,000 sanction per act. There were thirty separate acts, yielding \$300,000 in sanctions, plus \$180,000 in treble damages, for a grand total of \$480,000. Willie argued that he had already been punished by being sent to prison and that this prosecution was a second punishment which violated his right against being put in double jeopardy.³ The court dismissed

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1. Florida's criminal Medicaid provider fraud provision is located at FLA. STAT. § 409.920 (1995).

2. FLA. STAT. §§ 68.081–68.092 (1995) [hereinafter the Act].

3. See *United States v. Halper*, 490 U.S. 435, 438 (1989); *infra* notes 43–60 and accompanying text. The double jeopardy clause provides that no person shall be put in

the suit, holding that any subsequent prosecution which imposes a punishment is barred on double jeopardy grounds.⁴ The State ended up with no money and only a two month prison sentence to compensate for the cost of the fraud, the investigation, and the prosecution.

Willie's situation illustrates one of the problems facing the Florida False Claims Act. While statutes may authorize two punishments, it may not always be possible to enforce both punishments due to Constitutional issues raised in the Supreme Court in *United States v. Halper*.⁵ Courts, notably the Second Circuit in *United States v. Millan*, tried to get around this issue by creating a legal fiction: the "coordinated prosecution".⁶ A "coordinated prosecution" is really two separate prosecutions, one civil and one criminal, that are closely related. By calling it a "single, coordinated prosecution," the courts avoid the double jeopardy implications created by *Halper*.⁷

Millan has been strongly criticized, especially given the *Department of Revenue v. Kurth Ranch*⁸ decision. *Kurth Ranch* involved a drug tax which had heavy punitive fines assessed after a criminal conviction. The Court stated, in dicta, that civil forfeiture is a "separate legal proceeding."⁹ The Court went on to hold that the subsequent tax proceeding was separate because it was punitive in nature.¹⁰ The Court did not view the different proceedings against the Kurths as part of a "single, coordinated prosecution."¹¹ Contrary to the *Millan* view that parallel proceedings can, at least in name, be the same proceeding, *Kurth Ranch* suggests that a second proceed-

jeopardy twice for the same offense. U.S. CONST. amend. V. The Supreme Court has identified three distinct types of abuses which the double jeopardy clause prevents: "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Halper*, 490 U.S. at 440.

4. While this is not the law in Florida yet, it is the direction in which the law is headed. See *infra* notes 88-97 and accompanying text for a discussion on the evolution of the law in this area.

5. *Halper*, 490 U.S. at 435.

6. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

7. *Id.*

8. 114 S. Ct. 1937 (1994); see *infra* notes 112-25 and accompanying text for a discussion of *Kurth Ranch*.

9. *Id.* at 1947 n.21.

10. *Id.* at 1948.

11. The Kurths took part in four separate legal proceedings: criminal, civil forfeiture, bankruptcy, and drug tax assessment. *Id.* at 1942-44.

ing which is punitive in nature is functionally the same as “successive prosecution[s],”¹² regardless of the label placed on it by a court.¹³

The Supreme Court most recently spoke on the issue in *United States v. Ursery* when it reaffirmed, in dicta, the *Halper* test for civil penalties.¹⁴ The *Ursery* Court distinguished a civil forfeiture from a civil penalty, definitively holding that a civil forfeiture is a remedial sanction and, thus, does not constitute a punishment under the double jeopardy clause. While *Ursery* is important in the civil forfeiture arena, it adds little to the civil penalty analysis under *Halper*.¹⁵

One way to avoid the necessity of relying on the legal fiction of the coordinated proceeding and to sidestep the confusion of *Millan* and *Kurth Ranch* is to bring both the civil and the criminal suit in one combined proceeding. A single proceeding consists of one action in which all claims are brought before the same trier of fact. Thus, if both the civil action and the criminal action are brought within the same indictment and tried simultaneously, they do not run afoul of the subsequent prosecution danger of *Kurth Ranch*, and they also circumvent the “coordinated prosecution” quagmire. Many obstacles confront this approach, however. Criminal and civil proceedings are traditionally separate proceedings, as they are inherently different.¹⁶ However, these differences are not insurmountable.

In section II, this Comment will briefly discuss Florida's False Claims Act, focusing on the specific sections that affect double jeopardy. The Comment will explore the decisions that analyze the way the Act can violate double jeopardy in section III. In section IV, the

12. *Id.* at 1947 n.21.

13. For a good overview of the case law in this area, see *Alaska v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995) (dealing with the double jeopardy concerns of revoking a driver's license after a drunk driving conviction).

14. *United States v. Ursery*, 116 S. Ct. 2135 (1996), *rev'g* *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994). The Supreme Court explicitly held that *Halper*, *Austin*, and *Kurth Ranch* did not apply to purported double jeopardy violations in civil forfeiture proceedings, thus ending a long line of cases that applied the civil penalty analysis to a civil forfeiture. *Id.* at 4569. See *infra* notes 134–145 for a discussion of *Ursery*.

15. *But see Ursery*, 116 S. Ct. at 2152 (Stevens, J., concurring in part and dissenting in part). See also *infra* notes 150–74 (discussing the procedural obstacles to a combined civil and criminal proceeding).

16. Some of the larger differences are that they are assigned different docket numbers, they use different discovery and procedural rules, they are usually heard before different fact-finders, and they use different standards of proof.

Comment will examine the “coordinated prosecution” test and the method by which some courts have avoided double jeopardy implications. That section will also argue that the “coordinated prosecutions” test is dead or dying. Lastly, section V will suggest that the only feasible way to avoid double jeopardy is to bring both civil and criminal suits in one combined proceeding. That section will probe the procedural and substantive obstacles to this combined proceeding, and will propose ways in which those obstacles can be solved.

II. FLORIDA FALSE CLAIMS ACT

Florida's False Claims Act went into effect on July 1, 1994.¹⁷ The Act is heavily patterned on the Federal False Claims Act,¹⁸ with only minor differences.¹⁹ Basically, the Act is designed to allow the state to recover treble damages and civil penalties from those who knowingly file false claims with the state government.²⁰ Some of the problem areas which the Act was meant to address are government

17. FLA. STAT. §§ 68.081–68.092 (1995).

18. 31 U.S.C. §§ 3729–3733 (1994).

19. Under the Florida Act, subsection three provides that the court may reduce the treble damages for a cooperating defendant if *one* or more of three requirements is present. The requirements include a) that the violator furnish the investigating agency with all information known within 30 days of the date the violator received the information; b) that the violator fully cooperate with the agency; and c) that the violator furnish the information before he or she knew about the investigation or prosecution of the violation. Under the Federal Act, however, *all* three requirements must be met before the court can reduce the damages.

The Federal Act does not provide for the innocent mistake affirmative defense present in the Florida Act.

Regarding qui tam litigants, under the Florida Act, the department has 90 days to decide whether to intervene. Under the Federal Act, the government only has 60 days to decide whether to intervene. Florida also requires qui tam litigants to file all supporting evidence immediately. The Federal Act has no such immediacy requirement. Under Florida's Act, qui tam litigants are not entitled to a hearing if the department voluntarily dismisses the case over the objection of the litigant. However, the Federal Act provides that the government must notify the litigant and the court must hold a hearing on the motion. See John T. Boese, *The New Florida False Claims Act: Florida Borrows a Powerful Federal Anti-Fraud Weapon*, FLA. B.J., March 1995, at 24, for a complete overview of the differences between the two acts. For a definition of qui tam, see *infra* note 30.

20. FLA. STAT. § 68.081(2) (1995).

contracts²¹ and Medicaid fraud.²² This Comment will give a brief overview of the Act and focus on those areas that are significant for double jeopardy purposes.²³

A. Damages

Individuals found liable for filing a false claim must pay treble damages, calculated by whatever loss²⁴ the agency sustained because of the false claim.²⁵ Those liable must also pay between \$5,000

21. See *United States v. Barnette*, 10 F.3d 1553 (11th Cir.) (involving a government contract for laundry services for the U.S. Army in Germany), *cert. denied*, 115 S. Ct. 74 (1994).

22. See *United States v. Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989) (involving Medicaid fraud); see also *Keeping Fraudulent Providers Out of Medicare: Hearings Before the Subcomm. on Human Resources and Intergovernmental Affairs of the House Comm. on Government Reform*, 104th Cong., 1st Sess. (1995) [hereinafter *Keeping Fraudulent Providers*] (testimony of Gerald M. Stern, Special Counsel) (discussing the successful prosecution under the Federal False Claims Act of medical equipment companies); David Burda, *Postman Rings Again in Billing Probe*, MODERN HEALTHCARE, Aug. 28, 1995, at 26 (discussing government efforts to crack down on improper billing by hospitals).

23. For a more thorough examination of the Florida False Claims Act, see Boese, *supra* note 19; see also John P. Robertson, Comment, *The False Claims Act*, 26 ARIZ. ST. L.J. 899 (1994) (discussing the federal False Claims Act and constitutional challenges to it).

24. The amount of loss is usually calculated by the amount of money the government falsely paid to the defrauder. See, e.g., *Barnette*, 10 F.3d at 1559. However, courts have included prosecutorial and investigative costs when performing *Halper's* punishment analysis. See *infra* notes 61–78 and accompanying text for a discussion of the punishment analysis.

25. FLA. STAT. § 68.082(2) (1995). Under subsection 3, the court can, in its discretion, reduce the treble damages if one of the following factors is present: a) the violator furnished the investigating agency with all information known within 30 days of the date the violator received the information; b) the violator fully cooperated with the agency; or c) the violator furnished the information before he/she knew about the investigation or prosecution of the violation. *Id.* § 68.082(3).

The use of the word “may” indicates that the reduction of damages by the court is discretionary. If the court does reduce the damages, the court must issue a written order indicating the basis for the reduction. *Id.* The Act only permits the court to reduce the award to a level of not less than twice the damages suffered. *Id.*

This section, which differs from the Federal Act, is confusing as it states that any of these requirements is enough to allow the judge to lower the amount of damages. However, the third requirement is a timing requirement with the apparent intent of making sure the violator did not know he or she was being prosecuted before he or she cooperated. This requirement, standing alone, should not be a factor for the court to consider, but apparently it is. Rather, the requirement seems to be integrally tied into the other two. It is possible that the Florida Legislature could have made a drafting error in this part of the statute.

and \$10,000 in civil penalties *per violation*.²⁶ In *United States v. Halper*, for example, the defendant was found responsible for padding sixty-five separate claim forms and pocketing \$9.00 per claim, for a total of \$585 of ill-gotten gains.²⁷ The defendant was fined more than \$130,000 in civil penalties. This civil penalty rose to the level of punishment under the Supreme Court's double jeopardy analysis and was disallowed.²⁸

B. Who Brings Suit?

Ordinarily, the Department of Legal Affairs is authorized to investigate a violation and to bring suit.²⁹ However, an interesting double jeopardy situation can occur when qui tam litigants bring suit, since technically the same person or department does not bring both the criminal suit and the civil False Claims suit.³⁰

The Act specifically authorizes a person to bring suit as a qui tam litigant.³¹ The person must identify the complaint as a qui tam action and file it in the Second Judicial Circuit in Leon County.³² The person must also immediately send, by registered return receipt requested mail, a copy of the complaint and disclosure of all evidence that the person has to the Attorney General and the Comptroller.³³

The department has ninety days after it receives the complaint

26. FLA. STAT. § 68.082(2) (1995).

27. *United States v. Halper*, 490 U.S. 435, 437 (1989).

28. *Id.* at 439–40. See *infra* notes 43–78 and accompanying text for a discussion of *Halper* and its progeny.

29. The Department of Banking and Finance may also sue if the violation arose from an investigation by that department and Legal Affairs has not yet filed an action. FLA. STAT. § 68.083(4) (1995).

30. A qui tam litigant is a private individual who brings suit in the name of the state and shares with it any proceeds from the action. See *infra* note 68 for a discussion of how a qui tam action can violate double jeopardy. One of the issues left unresolved by *Halper* is whether a qui tam action is considered an action between private parties or between the government and the individual. *Halper*, 490 U.S. at 451 n.11. A federal district court answered the issue in *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993) (applying the same double jeopardy analysis to a case brought by a qui tam litigant as a case brought directly by the government). See *infra* notes 68–71 and accompanying text for a discussion of *Gilbert Realty*.

31. FLA. STAT. § 68.083(2) (1995).

32. FLA. STAT. § 68.083(3) (1995).

33. *Id.* § 68.083(2).

and the evidence to intervene.³⁴ If it wishes, the department may pursue the action.³⁵ If not, the department must notify the court that it declines to pursue the case, and the qui tam litigant goes ahead with the action.³⁶ Further, even though the department has declined to participate, it must consent before the qui tam litigant is allowed to voluntarily dismiss the suit. If the department pursues the action, it has the right to voluntarily dismiss the case despite the qui tam litigant's objections.³⁷

The court also has the right to limit the qui tam litigant's participation if the department shows that the litigant is interfering with an investigation.³⁸ The court could also limit participation if the defendant shows that the litigant is harassing the defendant.³⁹

C. Where Does the Money Go?

The Act provides that the agency injured by the false claim will receive no more money than its compensatory damages with the remainder to go to Florida's General Revenue Fund.⁴⁰ This might have some impact on the double jeopardy analysis, discussed later, because a second "punishment" would not include an amount that was intended for compensation only.⁴¹ Proceeds also go to qui tam litigants, who must be compensated under Florida Statutes, section 68.085.⁴²

34. *Id.* § 68.083(3).

35. *Id.* § 68.083(6)(a).

36. *Id.* § 68.083(6)(b).

37. FLA. STAT. § 68.083(2) (1995).

38. Section 68.087 of the Florida Statutes bars qui tam litigants who received their information while they were attorneys for the state, employees, or former employees of the state.

39. Qui tam litigants must be wary, however, as the Act provides for attorney's fees and costs. FLA. STAT. § 68.086 (1995). If successful, the department may recover from the defendant reasonable attorney's fees, expenses, and costs. A qui tam litigant also is entitled to reasonable attorney's fees and costs (but presumably not expenses). *Id.* If the defendant is successful against a qui tam litigant, and the department did not proceed with the action, the defendant is entitled to reasonable attorney's fees and costs from the qui tam litigant. However, the defendant is never entitled to attorney's fees from the state. *Id.*

40. FLA. STAT. § 68.085(4).

41. See *infra* notes 45–61 and accompanying text for a discussion of *Halper's* punishment analysis.

42. If the department proceeds with the action, the qui tam litigant would receive 15% to 25% of the proceeds recovered under the judgment. FLA. STAT. § 68.085 (1995). However, if the court finds that most of the information was not provided by the qui

III. DOUBLE JEOPARDY AND FALSE CLAIMS

The double jeopardy clause provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”⁴³ The Supreme Court has identified three distinct types of abuses which the double jeopardy clause prevents: “a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.”⁴⁴

A. *United States v. Halper*

The seminal case in the interrelation between the double jeopardy clause and the Federal False Claims Act is *United States v. Halper*.⁴⁵ Though *Halper* involved the Federal False Claims Act, the analysis is easily extended to the Florida False Claims Act because of their identical nature. In *Halper*, the multiple punishment provision of the double jeopardy clause was triggered when the government criminally prosecuted and convicted Irwin Halper on sixty-five counts of filing false Medicaid claims.⁴⁶ Halper was fined \$5,000 and served a two-year jail term. After the criminal action, the government filed a civil action under the Federal False Claims Act, seeking over \$130,000 in civil sanctions.

The Supreme Court refused to allow this separate and subsequent civil sanction, holding that it violated the double jeopardy clause of the Fifth Amendment of the Constitution.⁴⁷ In order to arrive at its holding, the *Halper* Court had to distinguish important

tam litigant, the court may limit recovery from nothing to 10%. *Id.* If the department declines and the qui tam litigant proceeds with the action, the litigant is entitled to 25% to 30% of the proceeds. *Id.*

43. U.S. CONST. amend. V.

44. *United States v. Halper*, 490 U.S. 435, 440 (1989). The *Halper* Court observed that the foundations of double jeopardy extend back as early as 1641 to the Colony of Massachusetts' Body of Liberties. *Id.*

For an in-depth treatment of *Halper*, see Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929 (1990).

45. *Halper*, 490 U.S. at 435.

46. *Id.* at 437. Halper made \$9.00 from each false claim, for a total of \$585 in ill-gotten profits.

47. *Id.* at 445–46.

precedent. First, the *Halper* Court addressed *Helverling v. Mitchell*.⁴⁸ The *Halper* Court questioned the significance of *Mitchell*, which held that a sanction is not a punishment if it is merely remedial, and distinguished it from the circumstances of Halper's False Claims Act situation. The *Halper* Court interpreted *Mitchell* to suggest that a civil sanction "may constitute punishment under some circumstances."⁴⁹ The Court then distinguished *United States ex rel. Marcus v. Hess*,⁵⁰ focusing on the ratio of the government's costs to the amount of damages recovered. The Court found a great difference between *Hess*, where the costs roughly equaled the damages, and Halper's situation, where the "recovery is exponentially greater than the amount of the fraud."⁵¹ Finally, the Court distinguished *Rex Trailer Co. v. United States*⁵² and found that the civil sanction in that case was remedial but far removed from the level of sanctions in *Halper*.

By examining these cases, the *Halper* court determined that the "government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas."⁵³ However, when "rough justice becomes clear injustice," a double jeopardy violation will be found.⁵⁴ Key to the Court's holding was the determination that the civil sanction was so disproportionate when

48. 303 U.S. 391 (1938). In *Mitchell*, the defendant was prosecuted for tax evasion and subsequently acquitted. The government then brought a civil suit to collect the taxes and a 50% surcharge. The defendant argued that this surcharge was intended as punishment and was thus barred by the double jeopardy clause. The Supreme Court disagreed and allowed the tax. The Court held that the surcharge was intended by Congress to be remedial and was, in fact, remedial. Justice Brandeis, writing for the Court, reasoned that "in the civil enforcement of a remedial sanction there can be no double jeopardy," thus, rejecting the defendant's claim. *Id.* at 404.

49. *Halper*, 490 U.S. at 443. The Court used this language to justify the finding that Halper's civil fine could be considered a punishment.

50. 317 U.S. 537 (1942). *Hess* involved private plaintiffs who brought a qui tam action against electrical contractors who had been criminally prosecuted and fined. The *Hess* Court found that the amount recovered, double damages and \$2,000 per count, was merely remedial and designed to "protect the government from financial loss." *Id.* at 548.

51. *Halper*, 490 U.S. at 445.

52. 350 U.S. 148 (1956). *Rex Trailer* purchased five trucks in contravention of the Surplus Property Act of 1944 by claiming veteran priority rights. *Rex Trailer* was prosecuted and fined \$25,000, after which the government brought a civil action seeking double damages and a \$2,000 per count sanction. The *Rex Trailer* Court found no double jeopardy violation because the recovery by the government was not "unreasonable or excessive." *Id.* at 154.

53. *Halper*, 490 U.S. at 446.

54. *Id.*

compared with the actual damages that it constituted a “punishment” which the double jeopardy clause prohibits. The Court refused to give a bright-line test to determine what amount would constitute a “punishment.” Rather, the Court stated that if the civil sanction bore no rational relation to the goal of compensation for the government, then the defendant was entitled to an accounting from the government to determine whether the line between remedy and punishment has been crossed.⁵⁵ If the amount of the sanction was reasonable, then it would be considered remedial compensation and would pass double jeopardy muster. However, if the sanction was grossly disproportionate to the government's harm, then the sanction would be deemed to be intended as “deterrence or retribution.”⁵⁶

However, the Court was quick to limit its holding to this particular case of a “prolific but small-gauge offender.”⁵⁷ In such a case, the ratio of actual loss to civil sanctions incurred is alarmingly high.⁵⁸ Still, the Court recognized that in the usual case, a fixed-fine plus a double damage provision would be merely remedial. More importantly, the *Halper* Court stated that the decision does not “prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties *in the same proceeding*.”⁵⁹ The Court stated that in such a single proceeding, the only issue would be to make sure that the total punishment did not surpass what the legislature authorized.⁶⁰ Subsequent to *Halper*, courts have taken a variety of approaches to

55. *Id.* at 448.

56. *Id.* at 449.

57. *Id.* Courts have not taken this advice to heart, however, and have applied *Halper* to not only different False Claims Act situations but also to excessive fines, Government forfeitures, and drunk driving cases as well. *Halper* has easily been applied to cases where defendants suffered extreme forfeitures due to several government theories. See *infra* notes 79–111 and accompanying text for a discussion of forfeitures and coordinated prosecutions. For a discussion of the application of double jeopardy to civil forfeiture and drunk driving cases, see Richard C. Reuben, *Double Jeopardy Claims Gaining: Issue Is Raised with Some Success in Civil-Forfeiture, Drunk-Driving Cases*, A.B.A. J., June 1995, at 16. See also *Alaska v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995) (dealing with the double jeopardy concerns of revoking a drivers license after a drunk driving conviction).

58. In *Halper*'s case, the ratio of actual harm to damages was \$585 to \$130,000 or 1 to 222. The ratio of the government's total loss, including investigative costs, to sanctions would be one to eight. *Halper*, 490 U.S. at 437–38.

59. *Id.* at 450 (emphasis added).

60. *Id.*

avoid double jeopardy pitfalls in dual criminal and civil cases.

B. The Remedial Approach: Post-*Halper*

Following *Halper*, courts have struggled to quantify the damages to sanctions ratio to an acceptable amount that would not constitute a “punishment” for double jeopardy purposes. For example, in *United States v. Barnette*, the Eleventh Circuit allowed a Federal False Claims Act recovery of \$50.5 million when the government's total loss was an estimated \$15.75 million.⁶¹ After subjecting the proposed \$50.5 million recovery to the *Halper* analysis, the *Barnette* court stated that such recovery would not violate the double jeopardy clause. The *Barnette* court noted that the ratio of damages to sanctions was \$15.75 million to \$50.5 million, or 1 to 3.2, and thus bore a “rational relation” to the government's loss.⁶²

In other cases, the damages to sanctions ratios allowed were even higher. For example, in *United States v. Pani*, the defendant filed sixty-three false claims for surgeries he had not performed.⁶³ The defendant was convicted on three of the false claims under the criminal Federal False Claims Act.⁶⁴ Two years later, the government brought a civil False Claims action for the filing of 157 fraudulent claims, which included the sixty-three claims from the previous criminal suit.⁶⁵ The government then sought summary judgment

61. *United States v. Barnette*, 10 F.3d 1553, 1559–60 (11th Cir. 1994). In *Barnette*, the defendant was convicted of a barrage of crimes, including mail fraud, bribery and racketeering. The government claimed over \$15 million in damages, and asked for a restitution order, which was denied. The government then brought a Federal False Claims Act action under 31 U.S.C. § 3729 (1994), as well as a Racketeer Influenced and Corrupt Organization Act (RICO) action under 18 U.S.C. § 1964 (1994). *Id.* at 1554.

Barnette is also significant because it subjected RICO's treble damages provision to *Halper's* double jeopardy analysis.

62. *Id.* at 1559–60. The *Barnette* court remanded the case for a proper determination of the Government's damages.

63. *United States v. Pani*, 717 F. Supp. 1013, 1014 (S.D.N.Y. 1989). Pani also submitted false claims to Blue Cross and Blue Shield of Greater New York. In the criminal case, Pani was ordered to pay restitution to both Blue Cross and Medicaid, sentenced to a two-year suspended sentence, ordered to perform 400 hours of community service, and fined \$30,000. *Id.* at 1014. *Pani* is also significant because it retroactively applied the 1986 amendments to the False Claims Act.

64. *Id.* at 1015–17; see also 18 U.S.C. § 287 (1994).

65. *Pani*, 717 F. Supp. at 1014.

on the three claims on which Pani had been previously convicted.⁶⁶ The defendant claimed that this would constitute a second punishment and would thus be prohibited under *Halper*. The *Pani* court disagreed and granted the summary judgment, holding that the total sanction of \$32,460 for three of the claims was not “overwhelmingly disproportionate” when compared to the amount of the three claims, which totaled \$1,280. Therefore, the *Pani* court held the sanctions passed double jeopardy muster under *Halper*.⁶⁷ Other jurisdictions have also considered the matter and found other ratios to be acceptable.

In *United States ex rel. v. Gilbert Realty Co.*, a \$35,000 sanction for \$1,630 in false claims passed the excessive fines analysis.⁶⁸ However, *Gilbert Realty's* significance lies in the fact that the court lowered the statutory sanction to an “acceptable” level.⁶⁹ The court lowered the statutory penalty under the False Claims Act from

66. *Id.* at 1015. This is a tactic often used by governments where the previous criminal proceeding is used as collateral estoppel in the civil proceeding. See *United States v. \$ 405,089.23 U.S. Currency*, 33 F.3d 1210, 1217 (9th Cir. 1994), *rev'd sub nom.* *United States v. Ursery*, 116 S. Ct. 2135 (1996) (explaining how it is advantageous for the government to try the criminal case first, then the civil case). See generally Stephen H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (6) and (7)*, 70 NOTRE DAME L. REV. 941, 965 (1995).

67. *Pani*, 717 F. Supp. at 1019. The damages to sanctions ratio was 1 to 25.3.

68. *United States ex rel. v. Gilbert Realty, Co.*, 840 F. Supp. 71 (E.D. Mich. 1993). In *Gilbert Realty*, the defendant violated a rental agreement with the government by endorsing 51 rent checks and making seven false certifications. The plaintiff, June E. Smith, brought a qui tam action on behalf of the government for Federal False Claims Act violations. *Id.* at 74.

Gilbert Realty answers one of the questions left open by *Halper*: whether a qui tam proceeding is subject to the double jeopardy analysis. The *Gilbert Realty* applied the excessive punishment analysis to a qui tam False Claims Act proceeding, just as if the government had brought the action. *Id.* at 74.

For purposes of *Gilbert Realty's* discussion, the excessive fines analysis is analogous to the double jeopardy analysis because both focus on the determination of whether a sanction is considered a punishment. The *Gilbert Realty* court said that, in applying *Halper*, the reasoning of the two was similar. *Id.* But see *United States v. Ursery*, 116 S. Ct. 2135, 2147 (1996) (excluding excessive fines analysis from double jeopardy application).

69. *Gilbert Realty*, 840 F. Supp. at 74–75. The court found that the actual damages were \$1,630 and the civil penalty sought \$290,000, for a damages to sanctions ratio of 1 to 178. The court held this to be excessive and tried to mitigate it. The court looked at the nature of the defendant's conduct and decided that only seven of the false claims warranted the imposition of a \$5,000 per claim sanction. The court, thus, held that any sanction above \$35,000 would violate the excessive fines analysis. *Id.*

\$290,000 for fifty-eight false claims to \$35,000, taking into account only seven of the false claims. This reduction went directly against the *Halper* district court's ruling, on reconsideration, that the statutory penalty of \$2,000 was mandatory, and thus the district court had no right to lower the penalty to an "acceptable" amount.⁷⁰ To justify the reduction, the *Gilbert Realty* court looked at not only the mathematical proportion, but also the nature of the conduct. Thus, the court found that the endorsing of fifty-one rent checks by the defendant, while enough to trigger liability under the statute, was not enough to justify the harsh sanction of \$5,000 per violation. The court found, however, that seven fraudulent certifications to the housing authority were enough to justify the \$5,000 per act sanction. Thus, the court found the defendant liable for \$35,000.⁷¹

Gilbert Realty was significant because it signaled that courts were willing to lower the statutory sanctions to an acceptable level. If other courts followed *Gilbert Realty*, the government could ask for the full statutory penalty and would not run the risk of having the entire claim thrown out because it violated double jeopardy. Instead, the court would simply lower the penalty to an appropriate amount, thus preventing a total loss. Likewise, Florida courts applying the Florida False Claims Act would be able to lower any penalty that ran the risk of violating double jeopardy.

In a purely criminal context, the Supreme Court has held that a reduction in sentence is valid in order to avoid double jeopardy violations.⁷² In *Jones v. Thomas*, a circuit court imposed two sentences instead of one. In order to avoid a double jeopardy violation, the court vacated the shorter sentence and credited that sentence toward the longer one. The *Jones* Court relied on the policy concerns behind double jeopardy and found that the reduction in sentence served the spirit of the clause. Extending *Jones* to the civil or criminal context, a court should be able to reduce the civil fine or forfeiture. Coupling this with *Halper*, a reduction to a compensatory, remedial level would result in a valid civil fine or forfeiture that does not violate double jeopardy. This remedial civil fine would re-

70. See *Halper*, 490 U.S. at 439. The district court first imposed the full sanction on only eight of the 65 counts, for a total of \$16,000, after which the government moved for reconsideration.

71. *Gilbert Realty*, 840 F. Supp. at 74-75.

72. *Jones v. Thomas*, 491 U.S. 376, 387 (1989).

main valid even if brought in a separate suit because *Halper's* double jeopardy problems would not be triggered.

C. Not All Courts Agree

Not all courts have been as liberal with their ratios in determining whether civil sanctions rise to the level of punishment. In *United States v. Kanelos*,⁷³ the defendant was criminally convicted of fraud when he induced HUD to insure mortgages.⁷⁴ After the conviction, the government brought a civil Federal False Claims Act proceeding seeking nearly \$2 million in sanctions. The court refused to allow summary judgment on the sanctions and instead ordered the government to make an accounting of its investigative costs to determine whether the ratio was a permissible one.⁷⁵ However, the court also speculated on the apparent damages, engaging in some creative mathematics to arrive at surprising results. The government's damages, minus investigative and prosecutorial costs, were about \$630,000. Thus, the ratio between damages and sanctions was \$630,000 to \$2 million, or 1 to 2.26. However, the court went on to subtract the amount that the defendant had paid in restitution and the government's recoupment from the damages, yielding about \$80,000, for a new ratio of 1 to 17.7. The court was troubled by this ratio, stating that it "smells quite strongly of punishment rather than compensation."⁷⁶

Kanelos' significance lies in both the creative math used to artificially inflate the ratio and the fact that the court frowned upon that ratio. First, subtracting the restitution from the government's damages is questionable. Following the same logic, defendants would be able to buy their way out of the statutorily authorized penalty. For example, Willie Cheatem, the fictional Medicaid defrauder described in the introduction, could have repaid the money through restitution the \$60,000 he made in ill-gotten profits. Under *Kanelos'* questionable math, the government's damages minus the restitution would be zero. Thus, any amount that the government sought as restitution would constitute a punishment because the damages section of the ratio could be reduced by the defendant. A second

73. No. 93-C2251, 1994 WL 148655, at *1 (N.D. Ill. Apr. 20, 1994).

74. *Id.*

75. *Id.*

76. *Id.*

significant point in *Kanelos* is that the ratio of 1 to 17.7 is not as disproportionate as those allowed in *Pani* and *Gilbert Realty*.⁷⁷

What constitutes a reasonable ratio will be a question of fact to be determined in each case.⁷⁸ *Pani* suggests that it can go as high as 1 to 25, although *Kanelos* suggests it should be lower. In either case, a court may follow *Gilbert Realty's* analysis and lower the amount to an acceptable level that does not constitute a second punishment and thus does not violate the double jeopardy clause. Given the confusion in this area, however, and the difficulty of calculating the government's damages, courts have looked for another method to circumvent the double jeopardy prohibitions of *Halper* and to allow a civil suit subsequent to a criminal prosecution.

IV. COORDINATED PROSECUTIONS

A. The Birth of Coordinated Prosecutions: *Millan*

After *Halper*, courts created the legal fiction of the "coordinated prosecution" to allow a subsequent civil prosecution after a criminal prosecution. "Coordinated prosecution" is the term given by courts to separate criminal and civil prosecutions in order to avoid the double jeopardy problems created by *Halper*.⁷⁹ In *Millan*, the defendants were involved in an extensive heroin distribution organization, for which they were criminally indicted. Four months later, the government filed civil forfeiture proceedings under 21 U.S.C. § 881 against several of the defendants' properties and bank accounts. The defendants entered into an agreement with the government and settled the suit.⁸⁰ After the civil forfeiture suit was settled, the defendants moved to dismiss the criminal indictment, claiming a double jeop-

77. See *supra* notes 63–73 for a discussion of the damages to sanctions ratio.

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

79. *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993). Though *Millan* involved a civil forfeiture action, the court claimed the analysis under *Halper* was the same as for a False Claims Act action. *Id.* at 20. See *Austin v. United States*, 113 S. Ct. 2801 (1993) (applying the Eighth Amendment's excessive fines provision to *in rem* forfeitures). The Supreme Court has recently explicitly stated that *Halper's* analysis is incompatible with civil forfeitures. *United States v. Ursery*, 116 S. Ct. 2135, 2145 (1996).

80. *Millan*, 2 F.3d at 18. The stipulation provided that the government would release \$101,000 from seized bank accounts so the defendants could pay their lawyers, and the defendants would relinquish any claims to \$240,000 in cash and other properties seized by the government.

ardy violation.⁸¹ The trial court refused, finding that the civil and criminal prosecutions constituted a single proceeding. The *Millan* court upheld the trial court's judgment.⁸²

In *Halper*, the Supreme Court stated that “the decision [does not] prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding.”⁸³ The *Millan* court seized upon this language and determined that if a civil suit was considered part of a “single, coordinated prosecution,” then double jeopardy would not be implicated. The court set forth several factors to determine whether a civil and a criminal prosecution was indeed part of a coordinated prosecution.⁸⁴ Among these factors were that (1) the warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by a DEA agent; (2) the civil complaint incorporated the criminal indictment; and (3) perhaps most importantly, the defendants were aware of both proceedings against them.⁸⁵ The *Millan* court further noted that the fact that the two cases had separate docket numbers was not dispositive and that courts should look past the procedural requirements and look instead to the essence of the cases. The court thus held that the defendant's double jeopardy challenge failed.⁸⁶ It should be noted that the *Millan* court invented both the coordinated prosecution test and the factors, all without the aid of precedent.⁸⁷ Because of this, *Millan* has not been followed by all courts.

B. The Short and Turbulent Life of *Millan*:

81. *Id.* Crafty defendants such as the ones in *Millan* can use *Halper*'s protection as a weapon. The defendants make sure that there is a civil suit filed against them, then quickly settle it, thereby precluding a criminal prosecution. Alas, this strategy does not always succeed. See *United States v. Smith*, 874 F. Supp. 347, 349 (N.D. Ala. 1995).

82. *Millan*, 2 F.3d at 18.

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

84. *Millan*, 2 F.3d at 20. See also *United States v. Amiel*, 889 F. Supp. 615, 622 (E.D.N.Y. 1995) (applying *Millan* in a postal fraud scheme, even though the criminal proceeding was brought six months after the civil forfeiture proceeding).

85. *Millan*, 2 F.3d at 20. The properties seized in the civil case were also the same properties involved in the criminal case.

86. *Id.*

87. See *infra* notes 98–111 and accompanying text for a criticism of *Millan*.

The Eleventh Circuit Agrees

Subsequent to *Millan*, much confusion has set in, and the circuits are split. The Eleventh Circuit follows the *Millan* rule as set forth in *United States v. One Single Family Residence*.⁸⁸ In *One Single Family Residence*, the government filed a civil forfeiture action against the home of a husband and wife who were involved in a gambling operation.⁸⁹ At the civil forfeiture trial, the government filed a motion for summary judgment which was denied. At the criminal trial, the husband was convicted on all counts for conducting an illegal gambling operation.⁹⁰ The government then renewed the motion for summary judgment at the civil trial, based on additional information from the defendant's criminal conviction. The summary judgment was granted, and the district court ordered the forfeiture of the defendant's home.⁹¹ The defendants appealed on several grounds, including a double jeopardy violation.

On the issue of double jeopardy, the *One Single Family Residence* court held that the civil forfeiture action and the criminal gambling action constituted a "single, coordinated proceeding," and thus neither action was barred by the double jeopardy clause.⁹² The court noted that there was no indication "that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action."⁹³ The court did not

88. 13 F.3d 1493 (11th Cir. 1994). Recently, the Southern District of Florida decided the issue and followed *One Single Family Residence*, if somewhat grudgingly, in *United States v. One Parcel of Real Estate*, 872 F. Supp. 968, 972 (S.D. Fla. 1994). *One Parcel* involved a fact situation similar to *One Single Family Residence*. *One Parcel* is also significant in that it is a post-*Kurth Ranch* decision that upholds the current law of the Eleventh Circuit, although the court ignored *Kurth Ranch* in its analysis.

89. *One Single Family Residence*, 13 F.3d at 1494-95. Emilio and Yolanda Delio ran ongoing poker games at their home, which was discovered by government surveillance. After searching the home and discovering gambling records, poker chips, decks of cards and other gambling paraphernalia, the government seized the home, which was valued at \$150,000.

90. *Id.* Emilio Delio was convicted under 18 U.S.C. § 1955, which also provides for the forfeiture of any property, including real property, involved in the gambling operation.

91. *Id.* The parties consented to the summary judgment being tried before a Magistrate Judge.

92. *Id.* at 1499. The court cited both *Halper* and *Millan* for its conclusion. See *supra* notes 43-60 for a discussion of *Halper* and notes 79-87 for a discussion of *Millan*. But see *United States v. Ursery*, 116 S. Ct. 2135, 2145 (1996) (holding *Halper* inapplicable to forfeiture proceedings).

93. *One Single Family Residence*, 13 F.3d at 1499.

note any other rationale for its holding other than that both the civil and criminal penalties were authorized by different sections of the same statute.⁹⁴ The court reversed the forfeiture, however, stating that it probably violated the excessive fine prohibition that *Austin v. United States*⁹⁵ extended to forfeiture proceedings.⁹⁶ The court remanded the case so that the government would have a chance to present evidence of the costs that it had incurred. The court would then be able to determine whether the forfeiture was remedial.⁹⁷

C. The Short and Turbulent Life of *Millan*: Ninth Circuit Disagrees

In *United States v. \$405,089.23 U.S. Currency*, the Ninth Circuit disagreed with *Millan* and refused to follow the coordinated prosecution theory.⁹⁸ The defendant in that case was previously convicted in a criminal case for conspiracy and money laundering.⁹⁹ Following the criminal indictment, the government instituted a civil forfeiture proceeding seeking several hundreds of thousands of dollars in cash and property.¹⁰⁰ After the criminal conviction, the government sought and was granted summary judgment. The defendants appealed *pro se*.

The *\$405,089.23 U.S. Currency* court found that the two prosecutions were not part of a “single, coordinated prosecution.”¹⁰¹ The

94. 18 U.S.C. § 1955(a) provides for the imposition of criminal penalties, and subsection (d) provides for the civil forfeiture of property. 18 U.S.C. § 1955 (1994).

95. 113 S. Ct. 2801 (1993).

96. *One Single Family Residence*, 13 F.3d at 1498. The court stated that the forfeiture of the home, valued at \$150,000, was “an imposition of a disproportionate penalty.” *Id.*

97. *Id.*

98. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *rev'd sub nom.* *United States v. Ursery*, 116 S. Ct. 2135 (1996).

99. *\$405,089.23 U.S. Currency*, at 1214. The defendants were accused of conducting an extensive methamphetamine production operation. The defendants laundered the money through false gold mining corporations. *Id.*

100. *Id.* The government listed the following property which they claimed was involved in the crimes: over \$400,000 in bank accounts, \$123,000 in cash, 138 silver bars, one Bell 47 G-2 helicopter, one shrimp boat, a Piper 6 Cherokee airplane, 11 cars, and one boat.

101. *Id.* at 1216. In order to decide the case, the court also determined that the forfeiture constituted a punishment under *Halper* and *Austin*. *Id.* at 1220. See *supra* notes 93–94 and accompanying text for a discussion of the multiple punishment prong of double jeopardy. See also *United States v. Plunk*, No. A94-036 CR (JWS), 1994 U.S. Dist. LEXIS 20397, at *1 (D. Alaska Nov. 4, 1996) (applying *\$405,089.23 U.S. Currency* and

court rejected the “coordinated prosecution” theory of both *Millan*¹⁰² and *One Single Family Residence*,¹⁰³ stating that they contradicted “controlling Supreme Court precedent as well as common sense.”¹⁰⁴ The *\$405,089.23 U.S. Currency* court stated that a forfeiture case and a criminal prosecution would be considered the same proceeding if they were both brought “in the same indictment and tried at the same time.”¹⁰⁵ The court examined *Jeffers v. United States*,¹⁰⁶ a Supreme Court opinion, and determined that parallel criminal actions, even if instituted at about the same time and based on the same conduct, violated double jeopardy because they were brought on separate indictments.¹⁰⁷

In *Jeffers*, the government brought two indictments on the same day against the defendant, who opposed a government motion to join the offenses at trial. The jury in the first trial convicted the defendant, who then moved to dismiss the second case on double jeopardy grounds. In a fragmented opinion, the Supreme Court held that double jeopardy would ordinarily bar the second prosecution. However, because the defendant opposed the government's motion to join the two proceedings, he waived any objections to separate proceedings.¹⁰⁸ The dissent argued that the defendant did not waive his objections to the separate proceedings, and therefore the double jeopardy clause barred a second prosecution.¹⁰⁹ Eight of the nine Justices in *Jeffers* opined that the two parallel criminal cases, which were part of a “single, coordinated prosecution,” were actually separate proceedings for double jeopardy purposes.¹¹⁰ Therefore, the *\$405,089.23 U.S. Currency* court held that whether the civil and the criminal actions are brought as part of a “single, coordinated prosecution” is irrelevant; a civil forfeiture suit and a criminal prosecu-

disallowing a criminal prosecution after a civil forfeiture).

102. See *supra* notes 79–87 and accompanying text for a discussion of *Millan*.

103. See *supra* notes 88–97 and accompanying text for a discussion of *One Single Family Residence*.

104. *\$405,089.23 U.S. Currency*, 33 F.3d at 1216.

105. *Id.* The court did not discuss whether bifurcated proceedings in front of the same judge and jury would violate double jeopardy.

106. 432 U.S. 137 (1977).

107. *\$405,089.23 U.S. Currency*, 33 F.3d at 1217.

108. *Jeffers*, 432 U.S. at 152 (plurality opinion).

109. *Id.* at 158–60 (Stevens, J., dissenting). Stevens' dissent was joined by three other Justices.

110. *\$405,089.23 U.S. Currency*, 33 F.3d at 1218.

tion tried separately and "based upon the same offense constitutes a separate proceeding."¹¹¹

D. *Kurth Ranch*: The Death of Coordinated Prosecutions?

Millan has been roundly criticized and was of questionable precedential value after the Supreme Court's decision in *Department of Revenue v. Kurth Ranch*.¹¹² *Kurth Ranch* involved a tax on illegal drugs. The Kurth family operated a farm in central Montana where they grew and sold marijuana. On October 18, 1987, law enforcement officers raided the farm, confiscated the drugs, and put an end to the operation. The State of Montana charged the Kurths with criminal possession and sale of dangerous drugs. After the Kurths entered guilty pleas, the court sentenced two of the six family members to prison and imposed suspended or deferred sentences on the other four. The county attorney also filed a forfeiture action against the Kurths, which was settled. A third action involved the assessment of a new tax on dangerous drugs, in which the Department of Revenue attempted to collect almost \$900,000 in taxes.¹¹³ The Kurths contested the assessments in administrative proceedings. A petition for bankruptcy filed by the Kurths, however, automatically stayed those proceedings.

In the bankruptcy action, the Kurths again objected to the assessment and challenged the constitutionality of the tax. The bankruptcy court held that most of the tax assessment was arbitrary and, therefore, invalid.¹¹⁴ The bankruptcy court also held, however, that another part of the assessment was not arbitrary but was nevertheless invalid under the Constitution.¹¹⁵

The district court affirmed the bankruptcy court's findings, holding that the Montana Dangerous Drug Tax Act punished the Kurths a second time for the same crime.¹¹⁶ According to the district court, this second punishment violated the Fifth Amendment's dou-

111. *Id.* The court could have avoided much work by examining *Kurth Ranch*.

112. 114 S. Ct. 1937 (1994).

113. *Id.* at 1942. Montana's Dangerous Drug Tax Act imposed a tax "on the possession and storage of dangerous drugs" and allocated that money to a special fund to support substance abuse programs and drug enforcement. MONT. CODE ANN. §§ 15e-25-101-15e-25-123 (1987) (repealed 1995).

114. *Kurth Ranch*, 114 S. Ct. at 1943.

115. *Id.*

116. *Id.*

ble jeopardy clause, and the tax was, therefore, unconstitutional. The Ninth Circuit Court of Appeals affirmed.¹¹⁷ The court held that the tax was an impermissible second punishment and was unconstitutional as applied to the Kurths.¹¹⁸

The Supreme Court affirmed the Ninth Circuit Court of Appeals.¹¹⁹ In a five to four decision, the Supreme Court decided that the subsequent proceeding initiated by Montana to collect the tax violated the double jeopardy clause of the Fifth Amendment because the tax constituted a punishment. Writing for the Court, Justice Stevens determined that a tax can be subject to double jeopardy analysis.¹²⁰ The Court recognized that a tax could lose its character as remedial and become a punishment after a certain point. The Court took this and *Halper's* statement that labels do not control a double jeopardy inquiry into account to determine that the tax was subject to double jeopardy scrutiny.¹²¹ To determine whether the drug tax was indeed a punishment, the Court looked at several factors, including the high rate of taxation and the obvious deterrent nature of the tax.¹²² Although not dispositive, these factors were consistent with a tax of a punitive character.

Another unusual feature of the tax was that it was conditioned on the commission of a crime, which also pointed to the punitive nature of the tax.¹²³ The *Kurth Ranch* Court found the Montana tax exceptional because it was levied on goods that the owner no longer owned. Taken as a whole, the Montana tax was too far removed from normal revenue laws and was best characterized as a punishment. Therefore, the Court concluded that because the tax was a second punishment for the same crime, it was invalid under the

117. *Id.* The Court of Appeals decision is located at 986 F.2d 1308 (9th Cir. 1993).

118. *Id.* at 1943–44.

119. *Kurth Ranch*, 114 S. Ct. at 1949. While the case was pending on appeal, the Montana Supreme Court held that the drug tax was not excessive and did not violate the Fifth Amendment. *Sorensen v. State Dept. of Revenue*, 836 P.2d 29, 33 (Mont. 1992). The *Sorensen* decision directly conflicted with the federal decisions involving the Kurths, so the United States Supreme Court granted certiorari. *Id.* at 1944.

120. *Id.* at 1946.

121. *Id.* at 1945–46. The majority stated that the *Halper* test was inappropriate for taxes, since it served a different function than sanctions. Instead, the Court looked to the unusual nature of the tax to determine that it was indeed punitive. *Id.* at 1948; see *id.* at 1950 (Rehnquist, J., dissenting).

122. *Id.* at 1946.

123. *Id.* at 1948. In *United States v. Sanchez*, 340 U.S. 42, 45 (1950), the Court used the lack of this condition to distinguish a tax as civil rather than criminal.

double jeopardy clause.¹²⁴

The *Kurth Ranch* Court did not view the different proceedings against the Kurths as parts of a “single, coordinated prosecution.” Contrary to *Millan's* holding that parallel proceedings can be, in name at least, the same proceeding, *Kurth Ranch* suggests that a second proceeding which is punitive in nature is functionally the same as a “successive criminal prosecution.”¹²⁵ Thus, the analysis focuses solely on whether there is a successive punishment, and any legal fiction of coordinated prosecution can and should be ignored.

E. Applying *Kurth Ranch*

In *U.S. v. Torres*,¹²⁶ the Seventh Circuit criticized *Millan* and questioned its continued usefulness after *Kurth Ranch*. In *Torres*, the defendant was caught in a sting when he attempted to buy \$60,000 worth of cocaine from federal agents. The money was seized and forfeited under 21 U.S.C. § 881, and the defendant made no claim at the forfeiture proceeding. Subsequently, the defendant pled guilty to drug offenses at the criminal trial and was sentenced to seventy-three months imprisonment.¹²⁷ The defendant appealed, arguing that the prior forfeiture constituted a punishment under *Austin* and *Halper*, and therefore, the criminal conviction was barred by double jeopardy.¹²⁸ The *Torres* court disagreed, but only because the defendant had not made a claim at the forfeiture pro-

124. *Kurth Ranch*, 114 S. Ct. at 1948. There were three separate dissents.

Chief Justice Rehnquist dissented, disagreeing with the decision to subject a tax statute to double jeopardy analysis. Rehnquist concluded that the Court should not have characterized the tax as a punishment and should have regarded it as a genuine tax. *Id.* at 1949–52 (Rehnquist, J., dissenting).

Justice O'Connor dissented, although she agreed that a tax is not exempt from double jeopardy scrutiny. O'Connor argued that the tax should have been subject to a *Halper* analysis and that it would have borne a rational relation to the staggering costs of drug control activities. *Id.* at 1952–55 (O'Connor, J., dissenting).

Justice Scalia, joined by Justice Thomas, dissented and questioned whether the double jeopardy clause extended to punishments. Scalia would have found that the Montana tax proceeding did not constitute a second criminal prosecution and, therefore, did not violate the Constitution. *Id.* at 1955–60 (Scalia, J., dissenting).

125. *Id.* at 1948. *See, e.g., Utah v. Davis*, 903 P.2d 940, 944 n.6 (Utah Ct. App. 1995).

126. 28 F.3d 1463 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994).

127. *Id.* at 1465.

128. *Id.*

ceeding.¹²⁹ Because the defendant was not a party to the proceeding, jeopardy had not attached.¹³⁰ Therefore, the “subsequent” criminal conviction was not a second punishment or proceeding.¹³¹

However, *Torres* is significant not so much because of its holding, but because of the court's discussion of the effects of *Kurth Ranch* on criminal and civil prosecutions. Although the *Torres* court upheld the criminal sentence because the defendant had not made himself a party to the civil action, the court also suggested that if the defendant *had* been a party, the subsequent criminal proceeding would have violated double jeopardy. The court stated that if the prosecutor sought “both prison and forfeiture in a single indictment, [it] would have ensured that there would be a single trial (and hence only one jeopardy).”¹³² The court interpreted *Kurth Ranch* to espouse that the coordinated but separate nature of the proceedings did not matter. Only the fact that there were two successive punishments is relevant for double jeopardy purposes. Most importantly, however, the *Torres* court advised the government that it should seek imprisonment, fines, and forfeiture in the same proceeding.¹³³

F. *United States v. Ursery*: The Nail in the Coffin?

In *United States v. Ursery*, the Supreme Court put to rest the confusion regarding the forfeiture double jeopardy analysis by expressly disagreeing with the Ninth Circuit's position.¹³⁴ The *Ursery* court held that *in rem* civil forfeitures are not “punishments” or “criminal” for double jeopardy purposes. Chief Justice Rehnquist, writing for the Court, began the analysis by reviewing the precedent

129. *Id.*

130. *Id.*

131. *Torres*, 28 F.3d at 1464–65. The court surmised that because the defendant did not claim the money, he could have well been acting as a courier. The court refused to set the defendant free just because the “forfeiture may have penalized one of his confederates in crime, even his best friend.” *Id.* at 1466.

132. *Id.* at 1464.

133. *Id.* See also *Utah v. Davis*, 903 P.2d 940, 944–45 (Utah Ct. App. 1995) (holding that a civil forfeiture proceeding and a criminal prosecution were not a “coordinated prosecution” when they were brought at different times before different judges, different warrants were issued, and the civil forfeiture complaint did not incorporate the criminal information).

134. 116 S. Ct. 2135, 2149 (1996), *rev'g* *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994).

in the civil forfeiture and double jeopardy arena.¹³⁵ The Court cited *Various Items of Personal Property v. United States*¹³⁶ for the proposition that a sharp distinction existed between civil forfeitures, which could not be punitive in nature, and civil penalties, which could be punitive in some circumstances. The Court then traced the evolution of the law to *United States v. One Assortment of 89 Firearms*,¹³⁷ where the Court stated that the double jeopardy clause would not be triggered unless the forfeiture provision was intended as punishment.¹³⁸ The Court concluded that a civil forfeiture was not an additional penalty for the commission of a criminal act but was instead a civil remedial sanction.

The *Ursery* Court re-emphasized the consistency of the decisions applying double jeopardy analysis to civil forfeitures. The Court explicitly stated that the Ninth Circuit was wrong in applying *Halper*, *Austin*, and *Kurth Ranch* to civil forfeiture proceedings. *Halper*, the Court explained, involved a civil penalty under the False Claims Act, which was distinguishable from a civil forfeiture.¹³⁹ The Court contrasted civil penalties from forfeitures, stating that the penalties are “designed as a rough form of ‘liquidated damages’ for the harms suffered by the Government,” whereas forfeitures are designed primarily to confiscate property used in criminal activity, among other purposes.¹⁴⁰ The Court ended its discussion of *Halper*’s applicability by asserting “[q]uite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the government against the size of the penalty imposed, is inapplicable to civil forfeiture.”¹⁴¹

135. *Ursery*, 116 S. Ct. at 2139.

136. 282 U.S. 577 (1931).

137. 465 U.S. 354 (1984).

138. This seems like an incompatible position: First, saying that forfeiture statutes are not punitive, then saying that a forfeiture is valid as long as it is not punitive. For a discussion and attempt at reconciliation between these two disparate positions, see *Ursery*, 116 S. Ct. at 2149–51 (Kennedy, J., concurring).

139. *Ursery*, 116 S. Ct. at 2144. See *supra* notes 45–60 for a discussion of *Halper*.

140. *Id.* at 2145. Civil forfeiture of property involved in criminal activity serves important purposes, such as encouraging property owners to better manage their property, abating nuisances, preventing forbidden merchandise from circulating, and ensuring that persons do not profit from their illegal acts. *Id.* at 2148–49.

141. *Id.* at 2145. Rehnquist states that the Court’s analysis in *Kurth Ranch* should have made this clear, since it refused to apply *Halper* to *Kurth Ranch*’s tax statute. The *Ursery* Court likewise dismissed *Austin*, declaring that “the holding of *Austin* was limited to the Excessive Fines Clause of the Eight Amendment, and we decline to import the

G. *Ursery's* Significance

Ursery is significant because it finally laid to rest some of the confusion that courts have had applying the seemingly incompatible analysis of forfeitures to civil penalty cases, like False Claims Act violations. *Ursery* called into question the whole existence of the “coordinated prosecution” as it relates to civil penalties. Furthermore, *Ursery* definitively dispelled any illusion of a “coordinated prosecution” for a civil forfeiture case; under current law there simply is no need for it anymore.

There is also important language in *Ursery* that solidified the position that two “punishment” proceedings are simply incompatible with the double jeopardy clause, regardless of any “coordinated prosecution.” Justice Stevens, concurring in part and dissenting in part, touched on the procedural obstacles involved in a combined civil forfeiture and criminal prosecution.¹⁴² In *Ursery*, the government argued that the Court should treat the civil forfeiture and the criminal conviction as one proceeding because they were both commenced before a final judgment was entered in either one.¹⁴³ The government also claimed that the civil and criminal sanctions could never be joined together under our system of justice. Justice Stevens was unpersuaded and disagreed “with the Government's view that there is any *procedural obstacle* to including a punitive forfeiture in a final judgment entered in a criminal case.”¹⁴⁴

Most importantly, Justice Stevens stated that if civil forfeitures are indeed punitive, “a single judgment encompassing the entire punishment for the defendant's offense is precisely what the double jeopardy clause requires.”¹⁴⁵ It is not much of a leap to conclude that the same should apply to a punitive civil sanction such as a False Claims Act fine. Justice Stevens argued that a government's decision to “create novel and additional penalties should not be permit-

analysis of *Austin* into our double jeopardy jurisprudence.” *Id.* at 2147.

142. *Ursery*, 116 S. Ct. at 2163 (Stevens, J., concurring in part and dissenting in part).

143. *Id.* at 2162. This is essentially the same “single, coordinated prosecution” argument.

144. *Id.* at 2163 (emphasis added). See also FED. R. CRIM. P. 32(d)(2) (effective Dec. 1, 1996) (allowing an order of forfeiture to be included in the judgment of the criminal case).

145. *Ursery*, 116 S. Ct. at 2163.

ted to eviscerate the protection against governmental overreaching embodied in the double jeopardy clause." Indeed, the "novel penalty" of the False Claims Act should not be allowed to bypass the double jeopardy clause by way of a fictional "coordinated prosecution."

H. Death Is At Hand

In sum, death has come to the "coordinated prosecution." The Ninth Circuit rejected it outright, and in dicta *Kurth Ranch* suggested that any subsequent proceeding that imposes a punishment violates double jeopardy. *Ursery* eliminated the need for a "coordinated prosecution" in a civil forfeiture case and strongly questioned its continued existence in a civil penalty case. Without resorting to the legal fiction of a "coordinated prosecution," the government must find an alternative to collect civil sanctions under the False Claims Act and avoid double jeopardy.

V. AVOIDING THE DOUBLE JEOPARDY IMPLICATIONS OF KURTH RANCH AND HALPER

A. Ways Around Double Jeopardy: Is the Same Indictment the Only Way Out?

As stated above, the coordinated prosecution is no longer a viable option. If the government is willing to seek both criminal and civil sanctions, it must respect double jeopardy. Nevertheless, there are ways for the government to safeguard both prosecutions.¹⁴⁶

146. One alternative would be for the government to use the acts of a third person to seek the civil penalty. This would necessarily depend on the facts of the case, but if the government can establish that a third party was involved, then a civil penalty could be sought based on that person's illegal conduct. The primary defendant would not be "punished" twice because the penalty would not be based on the defendant's conduct. Another situation in which the penalty would not be based on defendant's conduct would be one such as *Torres*, where the defendant did not become a party to the penalty action, so no jeopardy attaches.

A second alternative could be to use different acts, using one for the criminal proceeding and another for the civil proceeding. For example, a False Claims Act case typically involves hundreds of violations, each of which is a separate offense. By "sacrificing" a few of these violations and not using them in the civil suit, they could be saved for a criminal prosecution. Because the two proceedings would now be based on separate and distinct violations, there should be no double jeopardy implications.

One suggested problem with this method is that the government would no longer be able to use the prior criminal conviction in a motion for summary judgment in the civil proceeding, as the two offenses should be separate. The government would have to

Bringing both the criminal and the civil case in the same indictment as a single proceeding would be the safest way to avoid double jeopardy.

A single proceeding consists of one action in which all claims are brought before the same trier of fact. Under *Halper*, the two punishments are allowed in the same proceeding as long as they are both statutorily authorized.¹⁴⁷ Thus, if both the civil action and the criminal action are brought in the same indictment and tried at the same time, then *Kurth Ranch* and *Ursery* would not be implicated, and there would be no double jeopardy violation. Although the Florida Statutes do not prohibit this approach, none authorize it either. The *Federal Rules of Criminal Procedure* allows combining criminal and civil contempt proceedings, and recent amendments will allow a civil forfeiture to be entered during a criminal sentencing proceeding.¹⁴⁸ Many obstacles confront this technique.¹⁴⁹ Criminal and civil

face the burden of proving the civil case without the benefit of the easy summary judgment provided by the prior criminal conviction. While this would be more expensive, the amount of money recovered in these cases is so great that the added expense would well be worth it. See, e.g., *Keeping Fraudulent Providers*, *supra* note 22 (testimony of Gerald M. Stern, special counsel) (discussing the great success of the U.S. Attorney's office in the Southern District of Florida in freezing or suspending over three million dollars in funds in seven cases filed over less than one year).

Another suggestion for the different acts strategy occurs in the case where the civil proceeding precedes the criminal proceeding. It could be argued that the civil forfeiture or fine is not a "greater included offense" of the criminal prosecution due to the differing standards of proof. However, given the *Halper* and *Kurth Ranch* decisions, this strategy is questionable.

A third strategy that has been suggested is that the government obtain the civil penalty by proving intent to violate the applicable statutes. By basing the penalty on "an inchoate, but intended, violation, [the penalty] would be allowable (disregarding any due process claims) since it would be based upon an incomplete offense for which the defendant would not have been prosecuted." McClain, *supra* note 66. McClain cautions that this would not work if the criminal offense was attempt, which is itself an inchoate offense. While McClain focuses on forfeiture proceedings, the same analysis is relevant to Fraud Claims Act proceedings. See *id.* See also *United States v. Moffitt, Zwerling & Kemler*, 875 F. Supp. 1190, 1196-97 (E.D. Va. 1995).

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

148. FED. R. CRIM. P. 42. The Supreme Court has held that a combined civil and criminal contempt proceeding must result in "substantial prejudice" before courts should take action to protect the litigant. *United States v. United Mine Workers of America*, 330 U.S. 258, 300-01 (1947). See also FED. R. CRIM. P. 32(d)(2) (effective Dec. 1, 1996). No such provision exists for a civil penalty under the False Claims Act.

149. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal — Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1369-94 (1991) (discussing the constitutional problems of using civil laws to achieve the objectives of criminal laws).

proceedings are inherently different, so they have always been brought separately. Among the larger differences: they are assigned different docket numbers; they use different discovery and procedural rules; they are usually heard before different fact-finders; and they use different standards of proof.¹⁵⁰ However, these problems are not insuperable.¹⁵¹

1. Different Docket Number

Many of the obstacles to pursuing a civil and a criminal proceeding in the same indictment are merely procedural and are established more by tradition than for any notable reason.¹⁵² The defendants in *Millan* pointed out that the civil and criminal actions in their case were filed separately and had their own docket numbers. The *Millan* court acknowledged this, stating that cases must be filed and docketed separately by virtue of the civil and criminal procedure systems. The court overlooked this, however, saying that “courts 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.”¹⁵³

An example of these procedural requirements is found in the Florida Statutes, which provides that circuit court clerks “may keep separate progress dockets for civil and criminal matters.”¹⁵⁴ The statutory language suggests that the docket arrangement is made discretionary on the part of the clerks. Thus, clerks have the option to combine civil and criminal matters into one docket.

2. Different Fact-Finders

The problem of having different fact-finders in a civil and a criminal case is eliminated once the cases are combined. At a bench trial, the judge could act as “both” fact-finders. The fact that the judge presides over the combined case would not create a disparity. Even if the cases were tried separately, it is conceivable that the

150. *Id.* at 1325. See also McClain, *supra* note 66.

151. See *Ursery*, 116 S. Ct. at 2163 (Stevens, J., concurring in part and dissenting in part).

152. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993).

153. *Id.*

154. FLA. STAT. § 28.211 (1995) (emphasis added). Cf. *McSwiggan v. Edson*, 186 So. 2d 13, 15 (Fla. 1966) (allowing transfer from equity to law docket).

same judge could be assigned to both cases.¹⁵⁵ Indeed, the *Manual for Complex Litigation* suggests that “related criminal and civil cases *should* be assigned, if possible, to the same judge.”¹⁵⁶ Thus, the *Manual for Complex Litigation* foresees that a judge would have to make separate factual determinations in two separate cases. Therefore, making those determinations in one combined case would present no more of a challenge.

In a jury trial, the risk for confusion increases substantially. Even if properly instructed, a jury may have trouble distinguishing between different factual issues between the criminal case and the civil case. Therefore, one solution would be to impanel two separate juries to keep the factual issues separate.¹⁵⁷ For example, both juries would sit in during most of the case, but when some fact that should not be heard in the criminal case arises,¹⁵⁸ the criminal jury would be excused, and only the civil jury would hear that evidence.¹⁵⁹ This situation arises when federal and state actions are consolidated. By combining these actions into one joint trial, the efficiency of the judicial system is heightened, especially in complex cases where the factual issues are extensive and complex.¹⁶⁰ While impaneling two juries creates problems, these problems can be solved.

3. *Impaneling Two Juries*

155. See, e.g., *Watkins v. Murray*, 493 U.S. 907, 908 (1989) (Marshall, J., dissenting from denial of certiorari). In *Watkins*, the defendant was tried and convicted of murder in two separate proceedings, and the same judge presided over both trials.

156. MANUAL FOR COMPLEX LITIGATION § 3 (Federal Judicial Center ed., 3d ed. 1995) (emphasis added).

157. While there is no direct statutory authority in Florida or the federal system for impaneling two juries, courts usually resort to the inherent power of the court. See *United States v. Rowan*, 518 F.2d 685, 690 (6th Cir.), cert. denied, 423 U.S. 949 (1975).

158. Different facts may be admissible in a civil case as opposed to a criminal case due to a number of factors, including evidentiary issues and differing elements in the criminal and civil cases.

159. See William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1727–32 (1992) (discussing the possibility of consolidating actions in the federal system and the state system into one trial).

160. *Id.* at 1727.

Some of the problems exhibited with having two juries in the same case include logistics, delays, and improper impressions upon the juries. Logistically, there may be problems with the accommodations of two juries in certain courtrooms. For example, the jury box may not be able to seat enough jurors.¹⁶¹ Additionally, there may be a shortage of rooms when it comes time to deliberate, since both juries should deliberate separately. These are small problems that are usually present in any large and complex trial, and they are easily solved.

There may also be problems with delays, especially in the criminal portion of a trial. For example, if a juror gets sick, it would delay both trials.¹⁶² Problems may arise with the right to a speedy and fair trial, especially if the sick juror is from the civil jury. This problem can also easily be solved by merely providing alternate jurors, although this would, again, increase the logistical problems of the trial. The number of alternate jurors would have to be double that in a normal case, as both the criminal jury and the civil jury would need their own alternates since the alternates would have to accompany an excused jury in the event factual or evidentiary issues came up that necessitated excusal of one jury.

A further problem may lie in the negative impression that the excused jury may get when the other jury is allowed to remain in the courtroom.¹⁶³ However, any negative impressions created would be very similar to those now created when a regular jury is excused or sees the lawyers and judge whispering at sidebar. Both are merely cases in which, for some reason or another, the jury is not allowed to hear certain information. The excused jury could be reminded, by judicial instruction, that their excusal is not to affect their view of the case or their deliberations in any way.

a. The Two Jury Mechanism at Work

161. *Id.* at 1729. Anticipating the need in complex cases, a California federal courthouse has built a special courtroom containing two jury boxes. Alex A. Gaynes, *Two Juries/One Trial: Panacea of Judicial Economy or Personification of Murphy's Law*, 5 AM. J. TRIAL ADVOC. 285, 285 (1981).

162. Schwarzer, *supra* note 159, at 1729.

163. Schwarzer, *supra* note 159, at 1730. This improper influence could lead to appeals that could "frustrate the goal of greater judicial economy." *Id.*

There have been cases in which joint trials with two juries have been allowed. For example, *Martin v. Bell Helicopter Co.* involved several plaintiffs suing for injuries that occurred in a helicopter crash.¹⁶⁴ Many suits were originally brought in federal court in both California and Colorado. Due to the complex nature of the case and the volume of information, the court determined that the cases should be consolidated. However, California and Colorado strict liability law differed significantly, so the court directed that two juries be impaneled to hear the case. One jury would be instructed on California law and the other on Colorado law. The *Martin* court set out particular measures to be taken in the case. Among these measures were orders to prevent contact between the two juries by keeping them separated in court, providing them with separate jury rooms, and admonishing them to refrain from contact with one another. The court also stated that although most evidence would be admissible to both juries, if some evidence was admissible to only one jury under the laws of that particular state, then one jury would be excused while the other heard that evidence. The court also warned the lawyers to keep opening arguments general and avoid getting into areas where there would be differences in the law. The juries were to hear separate closing arguments and, of course, be instructed separately.¹⁶⁵

Martin, though it dealt with civil jurisdictional issues, can easily be applied to a combined civil and criminal proceeding. Applying the different civil and criminal laws is similar to applying the different laws of two states. The procedures set out in *Martin* can just as readily be used in a combined civil and criminal case.

There have been challenges to this two jury system, but courts have still allowed the cases to continue. In *Michigan v. Brooks*, the court held that the defendant was not deprived of a fair trial when two separate juries heard the same opening statement and direct examination of witnesses.¹⁶⁶ The court further held that the "traffic jams" in the courtroom, the seating of one of the juries outside the

164. *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654, 655 (D. Colo. 1980). As a result of the crash of an Army Bell UH-1H helicopter, five passengers were killed, and five were severely injured. The plaintiffs included those injured as well as the relatives of those killed. *Id.* at 656.

165. *Id.*

166. *Michigan v. Brooks*, 285 N.W.2d 307, 307-08 (Mich. Ct. App. 1979). The defendant in *Brooks* was tried along with his codefendant for breaking and entering.

jury box, and the ability for the jurors to see each other did not deprive the defendant of a fair trial.

The Sixth Circuit has likewise held that the simultaneous prosecution of four defendants before two juries did not create an excessively confusing atmosphere.¹⁶⁷ In a False Claims Act situation, only one defendant would be present. The differing issues would be tried, and the jury instructions would be given to the separate juries. By setting up some simple procedures, the civil and the criminal case could be tried in the same proceeding, thereby not only saving time, but safeguarding the double jeopardy concerns of *Halper*.¹⁶⁸

4. Differing Standards of Proof

A basic principle of law is that civil proceedings have a different standard of proof than criminal proceedings. This basic difference would be present in a combined civil and criminal case, but a couple of solutions are possible. First, the court could instruct a single jury on the two differing standards of proof. However, this may prove confusing to the jury and might prejudice the defendant. If a jury is not sure of which standard of proof to apply, it may inadvertently apply the civil standard to the criminal count, or vice versa. Even if properly informed, the jury could also, not having been fully convinced of guilt, "split the baby" and find the defendant not guilty of the criminal count. The jury may then feel like they have to give the prosecution something and find the defendant liable on the civil count.¹⁶⁹

In a bench trial, the judge would have the legal knowledge to separate the two standards of proof and come to a fair decision.¹⁷⁰ In

167. *United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir.), *cert. denied*, 434 U.S. 984 (1977).

168. In order to safeguard the right to a fair trial, some special procedures may have to be set up. For example, if the criminal jury returns the verdict before the civil jury, the court should keep that verdict sealed until both juries are done deliberating to prevent any possible contamination. *Gaynes*, *supra* note 161, at 291-92.

169. A recent, over-publicized analogy lies in the O.J. Simpson double murder case. Defense attorneys were concerned that because the jury was instructed on both first degree murder and second degree murder, they would convict on second degree murder even though they were not fully convinced of Simpson's guilt. Alas, this turned out to be of little concern. Transcript # 1565, *Larry King Live 9:00 pm ET*, CNN, October 14, 1995, available in LEXIS, News Library, Current News File.

170. See *supra* notes 155-56 and accompanying text for a discussion of the possibilities of having the same judge sit in both separate civil and criminal trials.

a jury case, the solution would once again be to merely have two juries.¹⁷¹ The two juries would hear the case, which, after all, involves the same facts. Then, one jury could decide the criminal count and receive the criminal standard of proof instructions, and the other jury would decide the civil count and receive the civil standard of proof instructions.

5. *Discovery and Procedural Rules*

This is a thorny area, but one which can be safely traversed, especially given the availability of two separate juries. Some of the problems include the fact that defendants may be required to disclose matters in civil cases that would incriminate them in criminal cases thus raising constitutional problems. For example, the defendant does not have to take the stand in a criminal case but does in a civil case. Again, the solution to this lies in having two separate juries. By excusing the criminal jury during the defendant's testimony, the civil jury would be able to listen to the relevant testimony. The defendant would, therefore, not have impinged his right not to take the stand in a criminal case, since the criminal jury would not have heard the testimony.

6. *Inconsistent Verdicts*

One concern with combining both a civil and a criminal case, particularly given the fact that two separate juries would decide each count, is the possibility of an inconsistent outcome.¹⁷² For example, the civil jury could find the defendant not liable, yet the criminal jury could find the same defendant guilty under a higher standard of proof. These concerns are legitimate, but they are present in any situation. If the cases were brought separately, the same potential for inconsistent verdicts exists. A significant concern of most observers is that of appearances — that the jury system would seem inconsistent and public confidence in it would be undermined.¹⁷³ However, because the juries would be applying different rules of law and possibly would be exposed to different facts, this

171. See *supra* notes 161–63 and accompanying text for a discussion of the logistics and problems of impaneling two juries.

172. See Gaynes, *supra* note 161, at 290; Schwarzer, *supra* note 159, at 1730.

173. Schwarzer, *supra* note 159, at 1730.

result could be justified.¹⁷⁴ While inconsistent verdicts would be more noticeable in the same trial, the potential would be the same if the civil and criminal actions were brought separately.

7. *A More Radical Approach: Criminalizing False Claims Act*

Another approach is to simply criminalize the now civil False Claims Act. Civil forfeiture proceedings, for example, have a criminal counterpart.¹⁷⁵ Prosecutors shun this criminal counterpart, however, as the lower burden of proof in the civil case makes the forfeiture of property much easier.¹⁷⁶ If the government was only interested in money, then it would still be able to bring a single action under the civil component and enjoy the lower burden of proof.

Like the forfeiture laws, the False Claims Act could have a criminalized counterpart. The burden of proof would be higher, but this may be justified by the great hardship that such a high statutory sanction imposes on the defendants. The government would have no trouble bringing the two criminal charges in the same indictment. All of the problems described above associated with bringing a civil and a criminal suit are avoided by this approach. Furthermore, no double jeopardy violation would exist, as there would be no subsequent prosecution.¹⁷⁷

VI. CONCLUSION

The Supreme Court's decision in *Halper* would subject the Florida False Claims Act to double jeopardy analysis. Given the high fines possible under the Act, courts may find that the sanctions imposed in the Act constitute a punishment. Thus, a second proceeding to collect it would be barred under double jeopardy. The Second and the Eleventh Circuits have created the legal fiction of the "coordi-

174. *Id.*

175. Under 21 U.S.C. § 853 (1994), the government may pursue a criminal forfeiture proceeding, but it must prove a criminal violation and must do so under the "beyond a reasonable doubt" standard of proof. Since the criminal forfeiture is considered a penalty imposed at sentencing, it does not violate double jeopardy. However, under new rules, the civil forfeiture will also be a penalty imposed at sentencing, thus eliminating the double jeopardy argument. See FED. R. CRIM. P. 32(d)(2) (effective Dec. 1, 1996).

176. RICO also has both a civil and a criminal component. See FLA. STAT. § 895.04 (1995).

177. Multiple punishments, as long as they are statutorily authorized, do not violate double jeopardy. *United States v. Halper*, 490 U.S. 435, 450 (1989).

nated prosecution” test in order to allow this second subsequent prosecution to continue. However, the criticism of this test by other circuits and the Supreme Court's decisions of *Kurth Ranch* and *Ursery* cast doubt on the continued viability of the “coordinated prosecution” test in a civil penalty situation.

One solution that would absolutely avoid any double jeopardy dangers would be for the government to bring both the criminal and the civil case in a single proceeding. Doing this would sidestep the implications of *Kurth Ranch* and placate the Ninth Circuit's aversion to “coordinated prosecution,” since the government may pursue more than one punishment as long as it is statutorily authorized. While there are obstacles to this combined proceeding approach, most center on the long held belief that civil and criminal cases are separate and distinct creatures. In False Claims Act cases, however, the government seeks to exact a punishment. Even though this is done in a civil context, the government is trying to achieve the arguably criminal goals of deterrence and retribution as well as compensation. These civil cases have more in common with a criminal proceeding, especially since the acts they are predicated on are the same as the criminal acts that the government seeks to punish. It would, therefore, make sense and promote judicial efficiency to bring them in a single proceeding. It may also be the only way, constitutionally, for the government to dodge double jeopardy.