Recovery from Halper: The Pain from Additions to Tax is Not the Sting of Punishment

Suellen M. Wolfe

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RECOVERY FROM HALPER: THE PAIN FROM ADDITIONS TO TAX IS NOT THE STING OF PUNISHMENT

Suellen M. Wolfe*

CONTENTS

I. INTRODUCTION ........................................... 162

II. TAXATION: REVENUE RAISING, REFLECTION OF SOCIETY, AND PUNISHMENT? ................ 167
   A. Taxation in the United States: Revenue and Righteousness .................. 167
   B. The Identification of Illegal Gain as Income .................................. 171

III. CHARACTERISTICS OF A REVENUE SYSTEM .............. 177
    A. Taxpayer Behavior: The Role of Taxation ............ 177
    B. Taxpayer Compliance: The Role of Enforcement .... 182

IV. THE ADDITIONS TO TAX—CIVIL TAX SANCTIONS: JUST REWARD OR PUNISHMENT? ................. 187
    A. The Development of Civil Tax Sanctions .......... 187
    B. The Additions to Tax ................................ 189

V. CRIMINAL VIOLATIONS .............................. 190
    A. The Tax Crimes ................................ 191

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I. INTRODUCTION

"[T]he power to tax involves the power to destroy . . . ."1 Outcries of the politician or economist advocating a particular tax philosophy echo this famous warning. Sometimes these words are expressed by the individual taxpayer who believes he or she has been violated by the breadth and complexity of the current Internal Revenue Code ("IRC"). Civil tax sanctions have already survived attacks based on protection from double jeopardy and excessive fines afforded by the Fifth and Eighth Amendments, respectively.2 But recent changes in both criminal law and tax law have enabled criminal defendants to broaden their attacks on prosecution by repeating their assertion that collateral tax proceedings violate these constitutional rights.

This Article addresses whether civil tax penalties may constitute punishment. Criminal defenses revisit civil tax sanctions because of two

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2. The Fifth Amendment provides that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Under the Eighth Amendment, the imposition of excessive fines is unconstitutional. See U.S. CONST. amend. VIII.
recent Supreme Court decisions, *United States v. Halper*\(^3\) and *Austin v. United States*.\(^4\) In both cases the Court provided the defendant with more expansive constitutional protection. Recently however, in *Thomas v. Commissioner*,\(^5\) the Fourth Circuit affirmed the United States Tax Court, which held that civil tax sanctions imposed on the defendant, along with the federal income tax liability of Thomas' unreported income from drug transactions, did not violate either the Fifth or the Eighth Amendment. Subsequent to *Thomas*, the Sixth Circuit concurred in *United States v. Alt*.\(^6\)

This Article agrees with the holdings in *Thomas* and *Alt*, but uses a different perspective in analyzing the issue. The Article concludes that the tax system has unique characteristics which require civil tax sanctions to be evaluated with respect to their necessity and purpose. It proposes a five part analysis which can be used to determine if a civil tax sanction constitutes punishment:

1. What is the purpose of the statute?
2. Does the applicability of the statute depend on a unique element of conduct?
3. Is scienter required?
4. Does the statute exhibit the normal features of its genre of tax?
5. Has there been a calculation of the level of the infraction to enable assurance that the sanction roughly corresponds to a remedial purpose?

The overlap of jurisprudence is not unique to criminal and tax law. A single act may have several ramifications, and various statutes, both criminal and civil, may be applicable. Behavior may constitute several crimes. For example, the incident may constitute a federal crime as well as a state crime. The various statutes may conflict not only in terminology, but in principles as well. Only the violation of a criminal statute provides for punishment. But all of taxation is punishment in a generic sense.\(^7\) This inherent feature of taxation must be defined according to its

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3. 490 U.S. 435 (1989) (holding that an individual may not be criminally prosecuted and sentenced and then later subjected to a civil judgment based on the same conduct unless it is rationally related to the goal of making the government whole).
4. 509 U.S. 602 (1993) (holding that forfeiture is a monetary punishment and therefore subject to the limitations of the Eighth Amendment).
5. 62 F.3d 97 (4th Cir. 1995).
6. 83 F.3d 779 (6th Cir. 1996).
7. It has been asserted that the Framers of the Constitution intended that legislation be prohibited from directing punishment. See U.S. CONST. art. I, § 9, cl. 3. The concern about punishment is not exclusive to tax law. The prosecution of office-holders subsequent to removal from office is permissible under U.S. CONST. art. I, § 3, cl. 7. Authorities have used this interpretation to suggest that some offenses are defined politically (impeachment) and not pursuant to the criminal law. See
context. Testing a civil tax sanction for the danger of punishment apart from the purpose for which it was designed threatens the core of the system of taxation in the United States. Sanctions are an integral part of a self-assessing tax.

The assertion of the Fifth Amendment’s double jeopardy protection and the Eighth Amendment’s prohibition against excessive fines, by coupling consequences from both criminal and civil proceedings, is a result of the tremendous increase in upstart areas of the criminal law. Civil sanctions, whether additions to tax or forfeiture, imposed by a defendant’s exposure to multiple statutory provisions, have been examined recently in a succession of cases. In United States v. Halper, new directives were issued to aid in affording protection against double jeopardy. In Austin v. United States, parameters on forfeiture of property were sketched to guard against the imposition of an excessive fine. Neither of these cases involved civil tax sanctions, but the breadth of their pronouncements impacted on civil tax proceedings.

Emerging issues about civil tax sanctions are likely to continue, because the power of the Treasury Department is not exclusive to assessing additions to tax. The Treasury Department has powers of distraint, forfeiture, levy, and jeopardy assessment. New federal laws—including the Bank Fraud Act, the money laundering statutes, and RICO—expose the criminal defendant, who is most likely to have unreported income, to serious tax consequences. The operation of these statutes makes it clear that the overlap of sanctions for criminal activities

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9. The concept of piggybacking has been sanctioned by the Internal Revenue Service along with other concepts. For example, nonvoting preferred stock can piggyback the redemption of the common shares, provided the preferred stock is not section 306 stock. See Treas. Reg. § 1.302-3(a) (1995).


12. It was anticipated that the “government [might] . . . see an increase in the use of the double jeopardy defense. It is likely that various civil tax penalties could be the next statutory target for the civil application of double jeopardy protection, especially the civil tax fraud penalty.” Linda S. Eads, Separating Crime from Punishment: The Constitutional Implications of United States v. Halper, 68 WASH. U. L.Q. 929, 958 (1990).
and civil tax violations will have to be tolerated in both fields.¹³

The overlap of the disciplines of criminal and tax law necessitates a legal determination of whether or not the shadows of singular conduct cause the multiplicity of punishment or excessiveness of fines prohibited by the United States Constitution. The distinction between criminal and civil law has been blurred, but acknowledgment of the purpose and context of their respective remedies or redresses provides guidelines that afford protection not only to the criminal defendant, but to each body of jurisprudence as well. The renewed judicial inquiry into the punishment element of civil tax sanctions has not been focused on preserving the integrity of the system of taxation created by the IRC. This Article examines the constitutional right of the criminal to be protected from punishment by the imposition of civil tax sanctions.

The Article begins by tracing the evolution of basic tax statutes in the United States. Whether loosely characterized as subsidy, regulation, or punishment the consequences of the use of tax laws have always been readily apparent. A tax law is a vehicle to many destinations, but initially, the driver must be licensed. For instance, the taxability of the receipt of illegal income for federal income tax purposes was not always clear. The delay in establishing this indisputable rule postponed a detailed evaluation of the civil additions to the income tax. The last section of Part II illustrates that early inquiries were focused primarily on the issue of recognition of income. The rule of definitive taxability was settled by the Supreme Court in *James v. United States.*¹⁴ Taxability having been established, inquiry into the ramifications of the imposition of the federal income tax and its attendant civil tax sanctions commenced.

A cursory examination of the nature of revenue systems, tax policies, and the uniqueness of the self-compliance tax system in the United States follows in Part III. This review is essential in understanding that the tax system is the product of multiple and intricate influences. A portion of the IRC cannot be evaluated by extracting it from its environment, because the tax code has many effects beyond the revenue function. The interpretation of a tax out of its true context, including its "punishment" feature, must be weighed by the disorder which will be created in the tax system. It is analogous to taking an apple out of the

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Part IV outlines the broad reach and harshness of civil tax sanctions imposed by the IRC. In addition, currently assessable civil penalties are discussed, as well as their continual refinement and complexity. It is precisely this refinement and complexity that makes the self-assessed tax system function in the United States.

In Part V, the genesis of the current controversy becomes clear. Criminal activity, which most likely leads to a violation of the tax laws of the United States, is examined. Previous acquiescence to the commingling of criminal prosecution of violators of the law and the imposition of civil tax sanctions was withdrawn by the new orientation in criminal law toward white collar and currency crimes. The commingling has become intermeshing, and the support that the tax law and the criminal law give to one another is undeniable. But is it constitutional?

Principles of constitutional law are considered in Part VI. Tax has always elicited arguments about constitutional protection. Traditional criminal defenses are self-incrimination, illegal search and seizure, and rights to counsel and a speedy trial. The principal concepts of double jeopardy and excessive fines are surveyed, including a review of the recent litigation concerning these constitutional rights.

Finally, Part VII highlights the assessment of civil tax sanctions as punishment. Characteristics unique to punishment are recognizable. They can be used to judge whether a civil tax sanction should be considered a part of sentencing or punishment. Standards have been established to provide a limitation on the amount of a tax exacted from an individual.

This Article’s conclusion is that the constitutional prohibitions against double jeopardy and excessive fines are not violated when civil tax sanctions are imposed as a result of failure to report illegal income. The current civil tax sanctions do not constitute punishment. That is not to say that the issue is nonexistent. Rather, civil tax penalties must be evaluated to prevent punishment. The negative features of a tax system are acceptable. However, there must be a continual analysis of the features of a tax statute to assure that its characteristics are acceptable from the concept of a tax system as a whole and necessarily indivisible from that system. A recommended review of a tax statute and its civil sanctions for certain characteristics is presented, along with suggestions to articulate with more certainty limits to the amount of the exaction.15

15. This analysis is critical in light of the increased interdependence between Congress and the collection of revenue. See Archie Parnell, Congressional Interference in Agency Enforcement: The IRS Experience, 89 YALE L.J. 1360, 1360 (1980).
II. TAXATION: REVENUE RAISING, REFLECTION OF SOCIETY, AND PUNISHMENT?

A. Taxation in the United States: Revenue and Righteousness

The history of most nations evidences conflict caused by taxation. The reasons behind this conflict include the fact that the domination is not only financial. Tax systems involve unwilling participants, rarely give pleasure, and control behavior. This legacy was brought to the Western Hemisphere.

The tax system created in the United States by the youthful federal government was no exception. The imposition of taxes is seen "more as a measure of social discipline than as a source of revenue." The process of taxation invariably leads to controversy. Public expression of discontent can be corporeal. The tax on distilled liquor led to the Whiskey Rebellion in 1793. Objections to taxation can also be academic. A taxpayer has the opportunity to appeal the imposition of a tax he or she considers inequitable, illegal, or unconstitutional.

A protective tariff system, the earliest type of taxation in the United States, uses taxing power as a means to an economic end. The need to generate revenue to operate the government, particularly in times of national or international tension, spawns the imposition of custom receipts and excise taxes on tobacco and liquor. These measures became the major sources of revenue for the federal government in the nineteenth century.

Succession taxes were also utilized to produce revenue. In 1797, deteriorating relations with France created a need for additional sources of revenue. Accordingly, Congress imposed taxes on legacies.

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18. Tariffs have been placed on various types of property. See, e.g., Billings v. United States, 232 U.S. 261 (1914) (foreign built yachts); American Sugar Ref. Co. v. Louisiana, 179 U.S. 89 (1900) (sugar refiners); In re Kollock, 165 U.S. 526 (1897) (oleomargarine); Head Money Cases, 112 U.S. 580 (1884) (importation of alien passengers); Veazie Bank v. Fenno, 75 U.S. 533 (1869) (notes of state banks).

19. Excise taxes were imposed on distilled spirits, carriages, sugar, snuff, property sold at auction, legal instruments, and bonds. The carriage tax was declared constitutional in Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796).

20. These taxes were repealed five years later.
In the formative years of the United States, taxation was checkered.\textsuperscript{21} Federalism had to be firmly established before taxation on a national level became consistent and pervasive. It was not until 1815 that the first income tax was proposed.\textsuperscript{22} However, the end of the War of 1812 eliminated the need for federally imposed taxes, and by 1817, most taxes were repealed.\textsuperscript{23}

To finance the Civil War, Congress once again enacted an inheritance tax.\textsuperscript{24} In 1861, an income tax act was also passed.\textsuperscript{25} This act was superseded by the Income Acts of 1862,\textsuperscript{26} 1864,\textsuperscript{27} and 1870.\textsuperscript{28} None of the income tax statutes actually became effective.

During the 1890s, revenue was needed to finance the encounters with Spain. The federal income tax was reinstated in 1894.\textsuperscript{29} The actual imposition of the tax produced its first assault based on constitutional law grounds. The controversy focused on the Apportionment Clause of the United States Constitution which provides that no direct tax shall be laid unless in proportion to the population.\textsuperscript{30} In Pollock v. Farmers’ Loan & Trust Co.,\textsuperscript{31} the 1894 Income Tax was declared unconstitutional.\textsuperscript{32} A sharply divided United States Supreme Court pronounced the extraction a direct tax. It fell as violative of Article I of the Constitu-

\textsuperscript{23} See \textit{id.}
\textsuperscript{24} An inheritance tax is “imposed . . . upon the privilege of receiving property from a decedent at death as contrasted with an estate tax which is imposed on the privilege of transmitting property at death.” \textit{Black’s Law Dictionary} 783 (6th ed. 1990).
\textsuperscript{26} Act of July 1, 1862, ch. 119, § 90, 12 Stat. 432, 473.
\textsuperscript{28} Act of July 14, 1870, ch. 255, § 6, 16 Stat. 256, 257.
\textsuperscript{29} Act of August 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 (1895). The tax imposed on individuals had a progressive tax rate; corporate rates were proportional.
\textsuperscript{30} See \textit{U.S. Const. art. 1, § 2, cl. 3}. Direct tax apportionment requires the amount of tax raised per person to be the same in each state. A capita tax is a type of tax that lends itself to direct apportionment. The distinction as to whether or not the tax is an indirect tax or a direct tax is not clear and has produced much litigation. For a discussion of this concept, see \textit{infra} note 32 and accompanying text.
\textsuperscript{31} 157 U.S. 429 (1895).
\textsuperscript{32} Upon rehearing, the Court concluded that the tax on income from land was direct and further extended the breadth of its opinion, holding that the act was not severable. The entire statute was declared unconstitutional. The Court’s characterization of the tax as a direct tax was probably incorrect.
Although the rationale of the Court was probably incorrect, the ratification of the Sixteenth Amendment permitting Congress to tax "incomes, from whatever source derived, without apportionment among several States, and without regard to any census or enumeration" did not occur until 1913.  

Enactment and modification of tax statutes are a consequence of changing times. Just as the 1980s produced a proliferation of white collar crime causing a restructuring in the criminal and tax laws, the end of the nineteenth century elicited a response to the Industrial Revolution. The enormous fortunes of John D. Rockefeller, Cornelius Vanderbilt, J. P. Morgan and other industrialists created great disparity between social classes in the United States. Taxation was used to generate revenue, to pay the costs of operating government, as well as to enforce social mores and policies. The use of a transfer tax to prevent the passage of great fortunes and to create a wider range in the distribution of wealth and economic power had widespread appeal. Moreover, social policy supported an inheritance tax.

It is not coincidental that revenues needed for the United States' confrontation with Spain were generated by an inheritance tax which served a dual purpose: raising revenue and social reform. Congress repealed the inheritance tax at the conclusion of the war with Spain. However, the interrelationship between social policymaking and generation of revenue is never again doubted.

In 1913, the Sixteenth Amendment to the United States Constitution was passed. Congress became empowered to impose income taxes without apportionment. Responding to the passage of the constitutional

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33. See Pollock, 157 U.S. at 586.
34. U.S. CONST. amend. XVI.
35. In the United States, the right of inheritance is statutory. See Hodel v. Irving, 481 U.S. 704 (1987). The populists maintained that inheritance benefits a fortunate birth and not industry.
37. In the beginning of the 1900s, President Roosevelt posed a graduated inheritance tax on "'swollen fortunes which it is certainly of no benefit to this country to perpetuate.'" Louis Eisenstein, The Rise and Decline of the Estate Tax, 11 TAX L. REV. 223, 229 (1956) (quoting 17 THE WORKS OF THEODORE ROOSEVELT, SOCIAL JUSTICE AND POPULAR RULE: ESSAYS, ADDRESSES, AND PUBLIC STATEMENTS RELATING TO THE PROGRESSIVE MOVEMENT (1910-1916), at 432-34 (Hermann Hagedom ed., 1926)).
amendment, Congress passed the Revenue Act of 1913, which imposed the first national income tax to be collected in the United States.38

Taxation as a process grew in sophistication. It became apparent to Congress that methods of enforcing tax acts were an integral part of a tax system.39 Provisions for criminal and civil sanctions were provided for in early statutes.40 The tax sanctions had to be complementary to the entire tax system.41

By the conclusion of World War I, the income tax became the prominent source of revenue in the United States. From a government’s perspective, the appeal of an income tax is not only because of the volume of dollars which can be exacted from the taxpayer, but also because it is identified as the central tax in shaping society:

No progressive inheritance tax, or combination of gift and inheritance taxes, can touch this source of economic inequalities among children. On the other hand a progressive income tax can, as one of its effects, help to minimize this form of unequal inheritance. It is income, not wealth, which is the important operative factor here, and by bringing

41. For example, in order to finance the military operations of World War I, Congress enacted an estate tax in 1916. However, it was not repealed at the end of World War I. After World War I, Congress responded to pressures from two groups; one group wanted to retain the estate tax to regulate inherited wealth, and the other wanted to repeal the tax on capital which it felt was socialistic. The tax was not repealed, but the rates were reduced. During the time of the Great Depression, the estate tax was again necessary to generate revenue, and in 1931, Congress doubled the rate of tax.

The dual nature of the tax continued. By the time Franklin Roosevelt became president, the objective of using the estate tax as a method of leveling inherited fortunes was still being recognized. The government continued to raise the rates of the estate tax to finance World War II and also to level the fortunes of the rich.

A gift tax was imposed for the first time in 1919, was repealed in 1926, and was reinstated in 1932. A gift tax has been applied to various types of intervivos transfers since 1932. The imposition of the gift tax as the reciprocal of the estate tax is necessary to effectuate an estate tax. Otherwise, enforcement of the estate tax would be impossible. A decedent taxpayer would simply transfer property immediately before death to avoid the tax. The use of a combination estate and gift tax scheme ensures that intervivos transfers and transfers by decedents are both subject to taxation. The complementary nature of these taxes served to curb great fortunes and shape society. The highest tax bracket of the 1954 IRC was 77% on an estate in excess of $10 million. See Eisenstein, supra note 37, at 224-38.
incomes closer together the tax tends to bring money investments in children closer together.42

Community policies are shaped by social values. From these community policies develop practices, doctrines, and other responses to current societal conditions. Further, they enable an evaluation of alternative policies and anticipate future needs and developments. Previous experience with tax acts has given Congress the knowledge necessary to structure tax schemes that modify social behavior as well as generate revenue.

Tax laws serve dual purposes: they produce revenue and they regulate. Tax laws affect the behavior of the taxpayer. If for no other reason than because of the required contribution of part of their wealth for the use of the public at large, taxpayers, as a class of society, are inherently disadvantaged, and it is their natural response to resist payment. The ability to enforce tax laws is imperative. The use of civil tax sanctions to effect an efficient collection of taxes is an integral part of a well-designed tax system.

B. The Identification of Illegal Gain as Income

Many types of behavior are influenced by taxation. There is no reason to criticize the behavior modification features of taxation simply because a taxable activity is also criminal. The unwitting union of crime and taxation has been a godsend to the federal government in its targeting perpetrators of crimes, most of whom are prompted by the goal of financial reward.

Since the first assessment tax on the receipt of illegal income, there has existed an inescapable connection between the criminal law and the law of taxation. The financial windfall to the criminal is not as great as anticipated because of the understandable unwillingness of the criminal to acknowledge the tax ramifications of his activities. Invariably, the reporting problems of a defendant accused of the illegal receipt of property are compounded by the income tax. Illegal income leads to the detection of the criminal activity, and omission of illegal income from gross income leads to additional tax fraud charges, or, at a minimum, substantial civil tax sanctions.

The definition of income is based on an examination of congression-

42. Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation, 19 U. Chl. L. REV. 417, 503 (1952) (footnotes omitted).
al purposes, administrative goals, tax accounting concepts, and public policy as defined by Congress, courts, and the Treasury Department of the United States. It is now well-settled that income from unlawful activity is taxable.\textsuperscript{43} The finality of that conclusion was not easily reached.\textsuperscript{44} A “consensual recognition” test of nontaxability was established in \textit{James v. United States}.

IRC § 61 broadly defines income for federal tax purposes as “all income from whatever source derived.”\textsuperscript{45} Income includes “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”\textsuperscript{46} An early opinion of the Supreme Court held that the income of a bootlegger was subject to taxation despite its illegality.\textsuperscript{47}

Exclusions from gross income are limited to a return of capital (a receipt for which there is an obligation to repay) and specified statutory exclusions. Borrowed funds are not income because of the obligation to repay. The claim of right doctrine is a substantive non-statutory theory of tax law. It holds that amounts received without restrictions on disposal, use, or enjoyment is taxable to a taxpayer if he or she does not exhibit any obligation to repay.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{46} I.R.C. § 61 (1994) [hereinafter citations to the I.R.C. refer to the 1994 edition unless otherwise indicated]. An early definition of income provided that it consisted of “the gain derived from capital, from labor, or from both combined,” provided it be understood to include profit gained through a sale or conversion of capital assets.” \textit{Eisner v. Macomber}, 252 U.S. 189, 207 (1920) (quoting Doyle v. Mitchell Bros., 247 U.S. 179, 185 (1919)).
\item \textsuperscript{47} \textit{Commissioner v. Glenshaw Glass Co.}, 348 U.S. 426, 431 (1955). \textit{Glenshaw Glass} stated that the definition contained in \textit{Eisner} “was not meant to provide a touchstone to all future gross income questions.” \textit{Id.}
\item \textsuperscript{48} See United States v. Sullivan, 274 U.S. 259, 260 (1927).
\item \textsuperscript{49} See \textit{James}, 366 U.S. at 219.
\end{itemize}
If the taxpayer acknowledges the absence of a right to the property, he or she may be merely in possession of the funds, without being taxed on its receipt. If an individual admits the property belongs to another, the property is not includable in his or her gross income because the claim of right doctrine is not satisfied. However, if a taxpayer fails to acknowledge another’s right to property within a reasonable amount of time, the claim of right doctrine does apply.

Not surprisingly, the early focus of courts when evaluating the taxability of a receipt was the intention of the taxpayer. To avoid taxation, recognition of the obligation to repay must be combined with the intention to do the same. Despite the fact that there may be competing property claims, the property received by a taxpayer under a claim of right is included in income. In North American Oil Consolidated v. Burnet, the taxpayer received contested funds in 1917. It was not until the resolution of litigation in 1922 that the amount was finally determined to belong to the taxpayer. The Supreme Court held that claim of right to the income was asserted in 1917 because any obligation to repay was contingent on the outcome of the litigation. During the course of the litigation, the taxpayers had unrestricted ability to dispose of the funds. The amount was determined to be taxable in 1917.

Realizing that the subtle differences make a distinction for income tax purposes, the Supreme Court ruled that embezzled money was not an accession to wealth. The embezzler did not receive income because he could be compelled to return the property involved. The act of embezzlement creates an immediate liability for repayment.

For a time, courts attempted to make distinctions between the types of criminal activity in order to ascertain whether or not the claim of right of the possessor of a receipt would be challenged by another. For instance, the Court of Appeals for the Third Circuit held that receipts of an extortionist were income. The consent of the victim of extortion creates a claim of right in the extortionist which is considered superior to that of the embezzler.

These fine and somewhat artificial distinctions were eliminated in

50. See United States v. Merrill, 211 F.2d 297, 303 (9th Cir. 1954).
51. See Quinn v. Commissioner, 524 F.2d 617, 622 (7th Cir. 1975).
53. This decision is also in accordance with the concept of open and closed transactions and the desirability to recognize the annual taxing period which had been recently examined in Burnet v. Logan, 283 U.S. 404, 411-13 (1931).
James v. United States.\textsuperscript{56} The Court of Appeals for the Seventh Circuit held unequivocally that gross income includes wealth acquired by illegal means.\textsuperscript{57} It is now irrefutable that the claim of right doctrine includes illegally obtained income. A specific and acknowledged obligation to repay no longer necessarily eliminates a receipt from gross income:

When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."\textsuperscript{58}

To exclude questionable proceeds from gross income, a two-prong test must be satisfied. There must be a lack of consensual recognition and there can be no restriction on the disposition of the proceeds. The consensual recognition test was the issue in Gilbert v. Commissioner,\textsuperscript{59} where corporate funds had been withdrawn without authorization. The taxpayer was not taxed on the receipt of the proceeds because there was a demonstrable and contemporaneous recognition of the obligation to repay them. The taxpayer never intended to personally retain the corporate funds and made a complete accounting to the corporation in a short period of time. It was factually established in the Gilbert case that the taxpayer fully expected, and was able, to repay the amounts.\textsuperscript{60} The facts also reflected that the taxpayer had assigned assets as security for
the amount owed. The record strengthened this taxpayer’s position.61

In *Kreimer v. Commissioner,*62 the taxpayers, engaged in a scheme to obtain loan proceeds, were convicted of obtaining the proceeds under false pretenses and mail fraud even though the lenders were aware that the money had been used for purposes other than those for which the loan was made. The taxpayers exhibited a consensual recognition of the obligation to repay. The intent to repay the fraudulently obtained loans created a creditor/debtor relationship. The taxpayers were the equivalent of borrowers and were not taxable on the proceeds because of their acknowledgment that the capital had to be returned.63

The *James* opinion examined the legislative history of the tax statute. The Income Tax Act of 1913 provided that “the net income of a taxable person shall include gains, profits, and income . . . from . . . the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source [whatsoever].”64 A 1916 amendment to the income tax omitted the word “lawful.” The *James* Court interpreted that omission as evidence of the intention of Congress to tax both legally and illegally obtained receipts,65 thereby establishing all illegally obtained funds as income.66

61. A written promissory note without consensual recognition is not always sufficient to avoid taxation. *See* Buff v. Commissioner, 496 F.2d 847 (2d Cir. 1974); cf. In re Diversified Brokers Co., 487 F.2d 355 (8th Cir. 1973) (receipts from money borrowed did not become taxable income despite the fact that the corporation could never repay the money); Moore v. United States, 412 F.2d 974 (5th Cir. 1969) (holding that in the absence of a consensual agreement, money will be treated as income).
63. *See* id. at 268-69.

One of the bases for the allowance of a deduction of expenses incurred in illegal activity is a policy decision that the denial of the deduction would be based, not on the seriousness of the offense or the sentence, but on the costs associated with the defense against the crime and the defendant’s particular tax bracket. For a discussion of public policy considerations, *see* Stephens, 905 F.2d at 671-72.

The IRC disallows deductions for certain illegal payments such as bribes, kickbacks, and
The Court in *James* also made a policy decision. It was incongruous to tax the increase in wealth of an honest laborer and not tax the gains of the dishonest. Interpretation of tax laws necessarily involves statutory construction, but to the extent possible, a court also interprets a statute from a public policy perspective. The broad rationale of the *James* case is an illustration.

The *James* opinion limits, but does not eliminate, the controversy. The taxation of receipts from illegal activities is now clouded by issues which exist separate and apart from the basic concepts of gross income. Presently, the center of controversy has expanded to the elements of the system of income taxation. To be effective, a system of taxation requires compliance. A typical method utilized to ensure participation is the imposition of sanctions for noncompliance.

Though the *James* case settled the broad issue of the taxability of illegal income, taxation of illegal activity will continue to engender litigation. Not surprisingly, civil tax sanctions are objected to by the

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"any fine or similar penalty paid to a government for the violation of any law." I.R.C. § 162(f); see also id. § 162(c) (illegal bribes and kickbacks are nondeductible). The basis of the disallowance of these deductions is public policy. In addition, deductions are disallowed for expenditures in connection with illegal sales of drugs. See id. § 280(E). Congress's premise in passing these sections was that if taxpayers were permitted to deduct these expenses, it would constitute an endorsement of illegal activity. Additionally, if the deductions were allowed, it would minimize the effectiveness of the sanction because of the tax savings. See Max Sobel Wholesale Liquors v. Commissioner, 69 T.C. 477 (1977), aff'd, 630 F.2d 670 (9th Cir. 1980); Pittsburgh Milk Co. v. Commissioner, 26 T.C. 707 (1956); 26 C.F.R. § 1.162-18(b)(1)-(4) (1995).

I.R.C. § 162(c) was intended to disallow only deductions from gross income and could not be used to prevent adjustments in the computation of gross income itself such as the deduction of cost of goods sold from gross receipts to determine income from operation. See Rev. Rul. 82-149, 1982-2 C.B. 56.

Denial of deductions from gross income because the deductions are the result of illegal activities makes the federal tax law a tax on gross income as opposed to net income. The policy argument behind the disallowance of the deduction is based on the fact that deductions are matters of legislative grace. But see Edmondson v. Commissioner, 42 T.C.M. (CCH) 1533 (1981) (overruled by I.R.C. § 280(E)).

67. The Court in *James* expressly overruled its decision in *Commissioner v. Wilcox*, 327 U.S. 404 (1946), which it had previously refused to do in *Rutkin v. United States*, 343 U.S. 130 (1952).

68. An argument whether the income was in fact received or constructively received may be made. For instance, if a statute provides that title to laundered money vests immediately in the government, the government would have to use a theory of constructive receipt to tax the criminal. See Gambina v. Commissioner, 91 T.C. 826, 828 (1988); see also Ianniello v. Commissioner, 98 T.C. 165, 173 (1992); Vasta v. Commissioner, 58 T.C.M. (CCH) 263, 265 (1989); JB McCombs, *An Historical Review and Analysis of Early United States Tax Policy Scholarship: Definition of Income and Progressive Rates*, 64 ST. JOHN'S L. REV. 471 (1990) (analyzing ideas and reasoning behind tax legislation); Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 46 (1990) (discussing the importance of understanding the concept of income).
criminal defendant with all the challenges he can muster, including invocation of all his constitutional protection. The inherent nature of taxation makes it subject to attack since taxation produces control. A system of taxation invariably makes judgments about whether behavior is to be encouraged or discouraged, and its impact can be startling. Moreover, it can be quantified, which makes evaluation easier. Conduct contemporaneously defined as negative behavior almost always includes tax implications. Taxation's features of control and measurement create standards which are assimilated into the infrastructure of criminal law.

III. CHARACTERISTICS OF A REVENUE SYSTEM

A. Taxpayer Behavior: The Role of Taxation

Taxation is the major source of revenue for the operations of government. Primarily, taxes are and should be levies collected by the government for living or doing business in a jurisdiction. Taxing statutes may seem to impose "punishment," though not as it is defined as a word of art in the criminal law. A statute, labeled or imposed as a tax, performs other functions. Other purposes are recognized as necessary and acceptable:

Revenue raising measures are condemned almost as incessantly as the weather. Reform measures are continually being urged ostensibly to make adjustment for inequities or hardships in the taxing system or, even more boldly, to create favored status for some interests. In recent years, federal administrations have sought to alleviate national economic and social ills by tinkering with the tax laws.

The primary function of our federal tax system should be, and is, to raise revenue. An ancillary function of the tax system is to use financial incentives or disincentives to encourage or discourage specific conduct

69. Governments also raise revenue through the use of obligation bonds and refinancing.
71. See DAVID F. BRADFORD, UNTANGLING THE INCOME TAX (1986) (discussing the logic of the income tax and how it should be reformed); MICHAEL J. MCINTYRE ET AL., READINGS IN FEDERAL TAXATION (2d ed. 1983) (offering proposals for reform of the income tax).
or transactions. An undeniable premise is that the imposition of a tax discourages an activity, and an exemption from taxation encourages it. The decision to promote an activity shifts the cost to the government. On the other hand, tax disincentives are designed to discourage conduct thought to be harmful or inappropriate:

'The federal income tax is far from a neutral, revenue raising device; it has a profound impact on what people do. Whether its regulatory aspects are deliberate or incidental, Congress sometimes uses the carrot and sometimes the stick that brings about a certain result through the use of the taxing power.'

Taxation controls behavior directly and indirectly. Critics condemn its indirect use for such purposes and suggest that the promotion of policies are best enhanced by direct expenditures or regulations. Others disagree and hold that taxation is the most efficient method to control conduct:

It has been suggested that taxes are sometimes a good mechanism for discouraging socially undesirable activities, such as air and water pollution, smoking and consuming alcoholic beverages to excess. Some studies suggest, for example, the teenage consumption of cigarettes can be reduced substantially by increasing their price. In some situations

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75. The 1954 income tax was criticized for containing various economic preferences. At that time, tax experts criticized the fact that income from oil and gas property, interest on state and local securities, and appreciation on capital assets were accorded preferential treatment. The tax law also creates economic distortions. Tax preferred entities are favored relative to others and the tax law, rather than market, becomes the primary force in determining how economic resources are used. The resulting tax—induced distortions in the use of labor and capital and in consumer choices have severe costs in terms of lower productivity, lost production, and reduced customer satisfaction. See Excerpts from the Treasury Report on Tax Simplification for Reform, 1-11 (1986).

76. FREELAND ET AL., supra note 72, at 32.

taxes are a better method of discouraging activity than outright prohibition because they preserve a degree of freedom of choice. Another benefit of levying heavy taxes on such activities are such that enables a state to recover a portion of the social cost incurred as a result of the problems this activity causes.\textsuperscript{78}

Certain social influences controlled by taxation are easy for the layperson to identify, such as combating social ills. Tax incentives and subsidies are also used to overcome market imperfections or to accomplish other economic effects. The proper design of a tax scheme to accomplish this myriad of goals is extremely sophisticated and a learned profession unto itself.\textsuperscript{79}

Behavior is radically altered by economics. Theories of taxation are used to affect the economy which thereby controls behavior. The most difficult concepts involved in designing a tax scheme are economic principles.\textsuperscript{80} Some hypothesize that there should be minimum damage to the economic system of the government through taxation. Others believe that a tax program should be designed to accomplish economic stability with full employment. Early economist Adam Smith taught ethics as a basis for justice as well as a basis for systems of taxation.\textsuperscript{81} Generally, tax policy is dictated by some or all of the listed considerations.\textsuperscript{82} Established economic measures to assess a tax are horizontal

\textsuperscript{78} Freeland et al., supra note 72, at 55-56; see also Thomas F. Pogue, Excise Taxes, in Reforming State Tax Systems 270-72 (Steven D. Gold ed., 1986).

\textsuperscript{79} The complexity leads to criticism:

The U.S. income tax is not used simply to raise revenue. Instead it is used to subsidize a long list of economic activities through exclusions from income subject to tax, adjustments to income, business deductions unrelated to actual expenses, deferral of tax liability, deductions for personal consumption expenditures, tax credits, and preferential tax rates. In some cases, deviations from a comprehensive definition of income originated in incomplete understanding of the concept of income or in outmoded ideas about the proper fiscal relationship between the Federal Government and state and local governments. For whatever its origin, in many cases bad public policy has become accepted — virtually enshrined — as appropriate.


\textsuperscript{81} See Dodge et al., supra note 73, at 17.

\textsuperscript{82} The discipline of substantive tax equity explores criteria by which to judge the fairness of the apportionment of the federal tax burden. Theories of appropriate apportionment include the principles of equal sacrifice, benefit, the standard of living, and the ability to pay. See id. at 19-21; see also Joseph M. Dodge, The Logic of Tax: Federal Income Tax Theory and Policy (West 1989); McIntyre et al., supra note 71, at 31-38; Stephen G. Utz, Tax Policy: An Introduction and Survey of the Principal Debates 24-32, 41-45 (1993).
equity, vertical equity, and neutrality. 83 Horizontal equity requires taxpayers in the same situation to be taxed identically. 84 Vertical equity is used to evaluate how the tax burden changes as income changes. 85 Neutrality is achieved when the economic behavior of the taxpayer is not influenced by the tax. 86

A tax system of neutrality blends with the economy of a free market. Neither encouragement nor discouragement of a particular economic activity occurs—a “level playing field” is required. The theoretical tax system for a free market should be a broad tax base with minimum exemptions and a low tax rate. There should be no penalties, tax incentives, or subsidies. These features are keys to certain economic behaviors.

Neutrality is nonexistent in the United States tax scheme although it was the goal for the 1913 Income Tax Act:

[T]he object of this bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men's moral characters; that is not the object of the bill at all. The tax is not levied for the purpose of restraining people from betting on horse races or upon “futures,” but the tax is framed for the purpose of making a man pay upon his net income, his actual profit during the year. The law does not care where he got it from, so far as the tax is concerned, although the law may

83. See Dodge et al., supra note 73, at 19-22.
84. See id. at 19. Because an income tax is used to influence social behavior, horizontal equity is very difficult to achieve. The measure of a tax for federal income tax purposes is its base, net income. Net income is not normally horizontally equitable.
85. See id. Tax rates are classified as proportional, progressive, or regressive. A proportional tax taxes the same amount of income regardless of the amount of income. A progressive tax taxes an increasing percentage of income as income increases. A regressive tax taxes a decreasing percentage of income as income increases. See id.
86. See id. at 22. The theory of optimal taxation observes that tax preferences and penalties interfere with the free market and are non-neutral only to the extent that behavior is subject to modification. See id. at 23. Associated with this theory is the principal of elasticity. An inelastic item is one that does not have a readily available substitute. Inelastic goods are basic substances such as food, housing fuel, and antibiotics. The consumer is likely to substitute an elastic good if the item is taxed and it becomes more expensive. The more price elastic the demand for an item, the more the demand decreases as the tax is added to its price. Thus, in order to affect behavior, taxes should be heavier on elastic goods and services than on inelastic goods and services. See Dodge, supra note 82, at 288.
very properly care in another way.  

The United States has a very complicated and convoluted tax system. It contains inequities which both benefit and interfere with social and economic behavior. A tax expenditure budget is submitted annually with the financial budget by Congress and the executive branch of the federal government. The tax expenditure budget permits analysis of tax expenditures and how they are being used to implement social policy or economic change. 

The broad influence that a system of taxation has on an individual's life instills a defensive attitude in which the taxpayer attempts to shield himself from its influence. Complexity in the tax law results in an "unlegislated" tax system. Exposure to tax is dependent on the taxpayer's ability to comprehend the statute or his ability to compensate another to decipher it to his best advantage. This complexity can also provide fertile ground for viewing the tax code as being responsible for many ills and injustices. Tax laws do "punish," but their unique structure and objective must be evaluated in the framework of their own system.

Though the primary goal of a system for taxation is to cover the costs of government even a system of taxation operating with a balanced budget and without a deficit is not necessarily a perfect system. 


88. Tax expenditures can take the form of a deduction, a credit, an exclusion from tax, a deferral of tax, an acceleration of the deduction, special rate tax, or a combination of all of these techniques. See Surrrey, supra note 73, at 93.

It has been argued that Congress and the Internal Revenue Service lack expertise and accountability in areas that would be controlled by other committees in the case of direct spending. See Surrrey, supra note 73, at 141-46; Parnell, supra note 15, at 1366-68.

89. It is widely recognized that "[a] high-quality revenue system should not be used as an instrument of social policy to encourage particular activities, although it is appropriate to discourage some actions through tax policy." Principles of a High-Quality State Revenue System, in The Unfinished Agenda for State Tax Reform 47, 50 (Steven D. Gold ed., 1988).

90. A tax proposal should be analyzed by assessing the following qualities: redistribution, equity, efficiency, neutrality, economic growth, revenue impact, simplicity, and administrative convenience.

The other nine basic principles by high quality state revenue systems are as follows:
1) A high-quality revenue system should be composed of elements that function well together as a logical system, including the finances of both local and state governments.
2) A high-quality revenue system should produce revenue in a reliable manner. Reliability involves stability, certainty, and sufficiency.
3) A high-quality revenue system should have substantial diversification of revenue sources over reasonably broad bases.
4) A high-quality revenue system should be equitable. Minimum aspects of a fair system...
A tax system can be evaluated using simple axioms. A good income tax system must be fair, administratively feasible, and have sound economic rationality. Abbreviating the test does not diminish the task. An effective tax scheme is not achieved using singular, nonintegrated rules. In dealing with the meaning and application of an act Congress enacted in the exercise of its plenary power under the Constitution to tax income, "[i]t is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation."

One part of a tax system is administration. Administration of a tax system includes taxpayer compliance. Because the income tax system in the United States is self-assessing, compliance is achieved with reluctance. Enforcement is the keystone of the system. Civil tax sanctions are necessary and effective to enforce the law. They are an essential component of the income tax system.

B. Taxpayer Compliance: The Role of Enforcement

Voluntary compliance with the federal income tax in the United States is largely cultural. The complexity of the IRC, combined with

are that a) it shields genuine subsistence income from taxation, b) it is not regressive, and c) all households with a certain income should pay approximately the same tax. 5) A high-quality revenue system should be understandable, raise revenue efficiently, minimize compliance costs for taxpayers, and be as simple to administer as possible. 6) A high-quality revenue system should have accountability. 7) A high-quality revenue system should be administered professionally and uniformly—both throughout the state and within individual jurisdictions. 8) A high-quality revenue system should result in enough equalization of the resources available to local governments that they are able to provide an adequate level of services. 9) A high-quality revenue system should minimize interstate tax competition and business tax incentives.

Id. at 49.

91. The appropriate way to apportion the governmental tax burden includes four principles: (1) the equal sacrifice principle; (2) the principle that persons should sacrifice to the government according to the benefits received from the government; (3) the principle that persons should sacrifice to the government according to their standard of living; and (4) the principle that persons should sacrifice to the government according to their respective ability to pay. See DODGE ET AL., supra note 73, at 19-21.

92. See BORIS I. BITTKER & LAWRENCE M. STONE, FEDERAL INCOME TAXATION 19-43 (5th ed. 1980). It is important that a tax system be simple. The taxpayer should be able to estimate how much tax he will be obligated to pay. This requires a stable tax system.


94. A source of introductory information in income tax systems is which foreign taxes give rise to a credible income tax for purposes of the foreign tax deduction and credit. See I.R.C. §§ 901-
the natural reluctance of citizens to voluntarily relinquish a portion of their wealth to the government, makes methods to secure compliance with the tax code indispensable.95

The income tax system in the United States provides for initial self-assessment.96 The infamous fifteenth of April97 is a highly publicized and dreaded annual event as individuals subject to the income tax submit their computation of the prior year’s income tax liability.

Pure voluntary compliance without a supporting method of redress for noncompliance is likely to be low. Ignorance of the tax law is common. But more often, taxpayers know that the risk of discovery of errors is almost nonexistent. After submitting their tax forms, most taxpayers do not hear from the Internal Revenue Service (“IRS”).98 The

908; see also 2 JOSPEH ISENBERGH, INTERNATIONAL TAXATION: U.S. TAXATION OF FOREIGN TAXPAYERS AND FOREIGN INCOME 453-60 (1990).

Actually, the collection of revenue under our self assessed system is quite remarkable: The United States has long been proud of the “taxpayer morale” of its citizens - the willingness to pay voluntarily the taxes necessary to finance government activities. Taxpayer morale ultimately depends on the belief that taxes are fair. If the basis for this belief comes under suspicion, voluntary compliance for the tax laws is jeopardized. Thus the perceived lack of fairness of the income tax may be as important as actual complexities, economic distortions, and inequities. Taxpayers resent paying substantially more tax than their neighbors who have equal or higher incomes. This is true even if the neighbor reduces taxes through commonly available and perfectly legal exclusions etc . . . or by rather questionable or illegal means . . . . Taxation can be thought to be unfair because the basic tax structure is defective as well as because taxpayers who do not comply with the law are not penalized. The proliferation and publicity of tax shelters has a particularly pernicious effect on taxpayer morale.


95. The Internal Revenue Service has estimated that taxpayers skipped out on paying $200 billion dollars in the last ten years. See Anne Willette, IRS Forms New Strategy for Tax Collections, USA TODAY, Mar. 7, 1996, at lB. Compliance programs are routinely used in business to assure legality in transactions. See Michael L. Goldblatt, Implementing Effective Compliance Programs (with Checklist), PRAc. LAW., Apr. 1992, at 75.

96. Federal income taxes are withheld by employers in accordance with a taxpayer’s declaration of tax allowances. This process permits an involuntary payment of some, or maybe all, of an individual's federal income tax. In 1992, $557,723,156 of individual income taxes were collected. Seventy-three percent of this amount was withheld by the employer. See 1992 I.R.S. ANN. REP. 25; see also Mary A. Bedikian, The Pernicious Reach of 26 U.S.C. Section 6672, 13 VA. TAX REV. 225, 227-28 (1993); David M. Walker, The Section 6672 100% Penalty: How to Avoid Going Down with the Ship, 46 TAX LAW. 801, 810-12 (1993).

97. See I.R.C. § 6072(a).

98. For the fiscal year ending September 30, 1994, the number of individual income tax returns filed was 114,155,419. See ARTHUR H. BOELTER, REPRESENTATION BEFORE THE APPEALS DIVISION
chance of an audit of the return is extremely small.\textsuperscript{99}

A self-assessed tax system must be selective and efficient.\textsuperscript{100} Investigative methods are extremely expensive.\textsuperscript{101} Appropriations by the IRS are inadequate to cover the costs.\textsuperscript{102} The primary enforcement tools are the civil tax sanctions called “additions to taxes.”\textsuperscript{103} The effectiveness of these sanctions is surprising:

The most surprising fact that emerges from the theoretical models and the relevant tax law is that anyone complied with the income tax law in the past decade whenever fraud penalties could have been avoided. The most rudimentary cost-benefit analysis . . . reveals [that] . . . if the sanction structure is to have any deterrent effect, a probability of punishment of less than 100 percent requires that the sanction must be greater than the amount of the cheater’s benefit. During the past decade, while aggregate audit probabilities were typically closer to 2 percent than 100 percent, interest rates on understated tax liabilities were often less than market rates.\textsuperscript{104}

Sanctions are not unique to tax law. Civil laws typically contain statutory provisions which impose a disadvantage for noncompliance. A sanction is usually a payment of a sum of money or a forfeiture of

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  \item \textsuperscript{99} The odds of being audited are so small that taxpayers sometimes omit income, inflate deductions, or do not even attempt to decipher the maze of the tax code. The examination coverage for 1988 was 1.57\%, 1989 was 1.29\%, 1990 was 1.04\%, 1991 was 1.18\%, 1992 was 1.86\%, and 1993 was .92\%. See \textsc{Boelter}, supra note 98, at 17-29.
  \item \textsuperscript{100} See \textsc{McDaniel et al.}, supra note 22, at 41-42.
  \item \textsuperscript{101} In 1980, the operating costs of the IRS were \$2,280,838,622; collections were \$519,375,273,361. In 1985, the operating costs of the IRS was \$3,600,952,523; collections were \$742,871,541,283. In 1990, the operating costs of the IRS were \$5,440,417,630; collections were \$1,056,365,651,631. In 1993, the operating costs of the IRS were \$7,076,898,354; collections were \$1,176,685,625,083. The cost of collecting \$100 was \$0.44 in 1980, \$0.48 in 1985, \$0.52 in 1990, and \$0.60 in 1993. See \textsc{Boelter}, supra note 98, at 75.
  \item \textsuperscript{102} \[I\]n 1982 [the compliance] cost [for state and federal income tax returns] was between \$17 and \$27 billion, or from five to seven percent of the revenue raised by the federal and state income tax systems combined. Between 1.8 and 2.1 billion hours of taxpayer time were spent on filing tax returns, and between \$3.0 and \$3.4 billion was spent on professional tax assistance.
  \item \textsuperscript{103} \textsc{J}oel \textsc{Slemrod} & \textsc{Nikki Sorum}, \textit{The Compliance Cost of the U.S. Individual Income Tax System}, 37 \textsc{Nat’l Tax J.} 461, 461 (1984).
  \item \textsuperscript{104} \textsc{Michael J. Graetz}, \textit{Can the Income Tax Continue to Be the Major Revenue, in Options for Tax Reform} 39, 58 (Joseph A. \textsc{Pechman ed.}, 1984).
\end{itemize}
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assets. But civil tax sanctions are *ad valorem*. They are generally based on the type and amount of the violation. The level of sanction is not calculated with precision; it only roughly compares to the actual cost of enforcement including voluntary taxpayer compliance. The civil tax sanctions are severe, but they have been held to be nonpunitive.

The Constitution empowers Congress to lay and *collect* all taxes. Imposition and enforcement creates a system of taxation. The complex of civil tax sanctions literally covers all aspects of income tax collection and submission of information. The compliance system is a user system supported by those who fail to comply with the tax law. Administratively and financially, calculating the cost to the government of specifically tracing an individual taxpayer’s compliance is impossible. Moreover, absorption of these costs by the public at large

105. Forfeiture is not examined per se in the text of this Article although double jeopardy has been a bar to forfeiture with respect to the acquitted defendant because a penalty rather than a civil administrative sanction was involved. See *Coffey v. United States*, 116 U.S. 436, 442 (1886); cf. *United States v. La France*, 282 U.S. 568 (1931) (holding that the “tax” imposed by section 35 of the National Prohibition Act is punitive and barred by prior conviction).


107. The integrity of the income tax system was recognized shortly after its design. See *McDowell v. Heiner*, 9 F.2d 120 (W.D. Pa. 1925), *aff’d*, 15 F.2d 1015 (3d Cir. 1926).

Accompanying the power given to Congress to levy and collect taxes is the power to enact any laws necessary and proper for the execution of such power. Clearly within such limitations are all laws authorizing administrative officers to assess and collect such taxes, with the power to enforce prompt payment, whether the taxpayer be willfully delinquent or careless and indifferent.

Id. at 122.

The purpose of Congress is beyond doubt. The language of the statutes under which the assessments were made plainly shows that the additions to the tax are intended to be assessed by the Commissioner, and to be collected by the collector, in the same manner in which taxes are assessed and collected . . . .

Id. at 121.

108. On March 6, 1996, Rep. Stephen Horn, R-Cal., Chairman of the Management, Information and Technology Panel of the Government Reform and Oversight Committee, expressed concern over the taxpayer’s trust in the tax compliance system. See *Willette*, supra note 95, at 1B. The IRS was unable to match the $1.3 trillion it collected in 1994 with individual taxpayers. See *id.* In May 1996, the IRS began a new program utilizing private debt collectors. See *James J. Hall*, *U.S. House
through a tax rate increase or a change in the substantive law is unfair
and unacceptable to those who do comply with the law.

Increases in noncompliance motivated Congress to restructure the
civil tax sanctions in the early 1980s. Investigative surveys revealed
that ten to fifteen percent of income was unreported. In 1981 and
1983, Congress passed new withholding, audit, and information return
requirements. The National Academy of Sciences and the American
Bar Association examined tax noncompliance in 1984, and in that
year, congressional action further refined the civil tax sanctions in the
IRC.

One of the objectives of the 1986 Tax Reform Act was to reduce
compliance costs. Another was to eliminate opportunities to evade the
income tax. Substantial understatement of tax penalties were
strengthened. Other IRC sections were amended that year to facilitate

109. See generally Dubin et al., supra note 94.
110. A 1984 study completed by the IRS showed that one person in five admitted to cheating
on taxes. One in three condoned such cheating. See Michael J. Graetz, Federal Income

The IRS has estimated that revenues lost as a result of unreported legal income grew from
$29 billion in 1973, to $91 billion in 1985, and without the assistance of the new compliance
provisions of the 1982 tax legislation it would have amounted to $120 billion in 1985. See M.
Bernard Aidinoff et al., Report and Recommendations on Taxpayer Compliance, 41 Tax Law. 329,

111. These included new penalties for substantial understatement of tax liabilities. See I.R.C.
§ 6661 (repealed 1989) (aiding and abetting understatement of tax liability); I.R.C. § 6701 (filing
of frivolous returns); I.R.C. § 6676(a) (repealed 1989) (failure to file certain information in returns);
I.R.C. §§ 6652, 6686; I.R.C. § 6678 (repealed 1986); I.R.C. § 6651 (failure to file tax returns or to
pay taxes). In addition, criminal fines were increased, see I.R.C. §§ 7201, 7203, 7206-7207, and
additional reporting requirements were authorized, see I.R.C. §§ 6041A, 6059, 6050E, 6053(c), 6678
(repealed 1986).

Compliance measures were estimated to produce one-third of the total revenues expected to
be raised by the 1982 Tax Equity and Fiscal Responsibility Act. See Graeme S. Cooper, Analyzing

112. See Cooper, supra note 111, at 152.
directed at tax shelter investments are found at I.R.C. §§ 6111-6112, 6700, 6707-6708, 7408.
Additional requirements for third party reporting of information were implemented. See id. §§ 3406,
6045, 6050E, 6050H-K, 6693; Graetz, supra note 110, at 94-95. The provisions for payment of
interest were also amended.

115. The 1986 Tax Reform Act added new information reporting requirements. See I.R.C.
§§ 6045, 6050M, 6050N, 6109. The Act also revised penalties for failure to file information returns,
for failure to pay taxes due, for negligence, and fraud. See I.R.C. §§ 6721, 6722, 6723, 6676
(repealed 1989); I.R.C. §§ 6651, 6653. The penalty for substantial understatement of tax was
these objectives. The goal was to assign enforcement costs to the violator. For those taxpayers in compliance with the law, tax liability was reduced as tax rates moderated.

The substantive changes and the amendments to civil tax sanctions coincided with the fast development of federal statutory enactments covering currency crimes. Cash transactions are a known mechanism for illegal transactions and avoiding taxes. The war against white collar crime in this nation was a dual engagement. The criminal and tax laws invariably were linked in an effort to deter acts of financial wrongdoing. Often, the tax violations are more difficult to prove. The burden in detecting tax deficiencies has been acknowledged: "Perhaps technology will develop a way to detect tax understatements, as well as cocaine, in the urine."

Civil tax sanctions are complicated, harsh, and comprehensive. The sanctions are criticized for being cumulative and imperfect. The seemingly inadvertent blending of criminal and tax law in the 1980s prompted the criminal defendant to piggyback the civil tax sanctions onto the criminal justice system. Further stacking of these civil tax sanctions with sentences can make sanctions shocking and arbitrary.

IV. THE ADDITIONS TO TAX—CIVIL TAX SANCTIONS: JUST REWARD OR PUNISHMENT?

A. The Development of Civil Tax Sanctions

After passage of the IRC in 1954, there were only fourteen IRC sections dealing with additions to tax. By 1988, the number increased to more than 150.

The number of assessments of civil tax sanctions has increased from ten to twenty-five percent. See I.R.C. § 6661 (repealed 1989).

116. For instance, many deductions were eliminated and the standard deduction was broadened. See S. REP. NO. 99-313, at 4 (1986).

117. The theory that lower marginal tax rates yield greater compliance has yet to be proven.

118. Other methods of avoiding taxes include barter programs, see Rev. Rul. 79-24, 1979-1 C.B. 60, and imputed income transactions, see Dean v. Commissioner, 187 F.2d 1019, 1020 (3d Cir. 1951).


120. See ROBERT E. MCKENZIE ET AL., REPRESENTING THE AUDITED TAXPAYER BEFORE THE IRS (1990). Civil tax penalties are also called ad valorem civil penalties.

tremendously. Civil tax sanctions are not only numerous, but they also reflect the intricate but muddled style of the law of which they are a part. Sanctions were added to the Code sporadically and for various purposes. There are inconsistencies and a lack of full integration among the provisions.

Civil tax sanctions must operate in tandem with the substantive tax sections in order to implement the tax code. Their necessity is absolute to our income tax system, and they must be harsh in order to prevent repeated taxpayer misconduct. The costs incurred by the failure to correctly report income must be recovered, and the honest taxpayer must believe that the system works.

Critics have argued that the rapid increase of penalties in the tax legislation of the 1980s has increased the vulnerability of taxpayers and their representatives. Whether this penalty structure makes sense in terms of culpability to either taxpayers or representatives is a question that must now be resolved.

Allegations of overreaching of the civil tax sanctions prompted the Commissioner of the IRS to establish a task force in November 1987 to study them. Its proposals were passed in the Omnibus Budget Reconciliation Act, enacted on December 19, 1989. The Improved Penalty Administration and Compliance Tax Act of 1989 ("IMPACT")
repealed some penalty sections while others were consolidated.129

The reform was not timely. Contemporaneous with Congress’s attempt to reform the civil tax sanctions of the IRC, the Supreme Court issued its opinion in *United States v. Halper.*130 The constitutional rights of a criminal defendant charged with financially related crimes were re-examined, as were the civil tax sanctions of the IRC. Predictably, both occurred in 1989.

The alliance between criminal and tax law was fortified. The exhaustive new criminal provisions spawn from the advance of technology and more sophisticated financial transactions involving huge sums of money. White collar crimes, particularly those involving currency transactions, often result in income tax assessments that include civil sanctions.

**B. The Additions to Tax**

The IMPACT simplified the civil tax sanction structure. However, some of the sections still overlapped and could have been applied simultaneously.131 The Omnibus Budget Reconciliation Act of 1990 amended a number of penalty provisions.132 A new super penalty133 imposes a twenty percent penalty on five types of violations of the IRC.134 In order to avoid harshness, the super penalty prohibits the stacking of penalties.135 If a return is filed late with a fraudulent intention, a penalty of fifteen percent a month, up to a maximum rate of seventy-five percent of the underpayment, is imposed.136 Reasonable

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129. The provisions apply to returns with a due date after December 31, 1989.
131. Taxpayers do have the opportunity to appeal penalties. See L. Paige Marvel, *A Checklist for Litigating the Civil Fraud Penalty Case,* 4 PRAC. LITIG. 71, 76 (1993). But see Edward J. Carroll, *III, Federal Tax Law—Mullikin v. United States: “Big Brother” Is Still Watching; the IRS Can Assess Penalties at Any Time,* 16 W. NEW ENG. L. REV. 181 (1994) (The Supreme Court has held that in the absence of legislation, the statute of limitations does not limit the time it has to collect tax related penalties.).
132. All civil penalties are contained in I.R.C. subtit. F, ch. 68, and are labeled “Additions to the Tax, Additional Amounts, and Assessable Penalties.”
133. See I.R.C. § 6662.
134. The super penalty applies to negligence or disregard of tax code rules or regulations, substantial understatement of income tax, valuation misstatement, substantial overstatement of pension liabilities, and substantial estate or gift tax valuation understatement. See id. § 6662(b)(1)-(5).
135. This means that if the taxpayer has two I.R.C. § 6662 infractions, only one 20% penalty is imposed.
136. See id. § 6651(f). The IRS must establish fraud by clear and convincing evidence. The taxpayer must then establish that all or a portion of the underpayment was not fraudulent by a
cause and good faith are defenses to the imposition of the super and
fraud penalties.\footnote{137}

In theory, profit is not to be generated by imposing civil tax
sanctions,\footnote{138} rather the receipts should pay for the costs of taxpayers’
compliance.\footnote{139} Moreover, information return penalties are now im-
posed.\footnote{140} There are tax practitioner penalties,\footnote{141} along with penalties
related to the preparation of tax returns.\footnote{142}

The policy of the IRS is that civil tax sanctions are imposed only
to ensure voluntary compliance. The objectives of the IRS compliance
system are to: (1) help taxpayers understand that noncompliant behavior
is inappropriate; (2) impose a cost on noncompliant behavior; and (3)
establish the fairness of the tax system by justly redressing noncompliant
taxpayers.\footnote{143} Despite the IRS’ stated policy, the broadness of these
objectives, the number of penalties which can be imposed, and their
overlapping structure invite controversy over whether the provisions are
effective in realizing their stated purpose.

V. CRIMINAL VIOLATIONS

The compliance rate of taxpayers reporting criminally generated
income is understandably low.\footnote{144} The failure to report illegal income
has resulted in the conviction of some of the most notorious criminals in
the United States. The federal government does not hesitate to utilize the
penal statutes in the IRC when the lack of evidence or the expiration of
the statute of limitations prevents prosecution under a criminal statute.

\footnote{137}{See id. § 6663(b).}
\footnote{138}{See id. § 6664(c)(1).}
\footnote{139}{See 1 Int. Rev. Man. (CCH) P-1-18 (1992).}
\footnote{140}{See id. § 6664(c)(1).}
\footnote{141}{See 6 Int. Rev. Man. (CCH) § 121, 123 (1992).}
\footnote{142}{See 6 Int. Rev. Man. (CCH) §§ 121, 123 (1992).}
\footnote{143}{See 6 Int. Rev. Man. (CCH) § 121.}
\footnote{144}{It has been estimated to be five percent. See S. REP. NO. 97-494, at 251 (1982).}
Gangster Al Capone was convicted of tax evasion in 1931. After Bugsy Segal's death, his companion, Virginia Hill, fled to Europe to escape pending tax evasion allegations. G. Gordon Liddy failed to report $45,630 he received as a director of the intelligence operation engaged in acquiring information on democratic opponents to President Richard M. Nixon. Spiro Agnew was forced to resign as Vice President of the United States upon entering a plea nolo contendere to the criminal tax charge of failure to report income from kickbacks. More recently, Heidi Fleiss was prosecuted for failure to report income from the "wages of sin."

A. The Tax Crimes

The primary criminal offense under the IRC is the felony of tax evasion. To make out a prima facie case for tax evasion, three elements must be shown: (1) the existence of a tax deficiency; (2) an affirmative act constituting any evasion or attempted evasion of the tax; and (3) the willingness to do the act. In Cheek v. United States, the defendant was convicted of tax fraud. Resolving a conflict among the circuit courts, the Supreme Court held that the credibility of a defendant's assertion of misunderstanding the law is a decision for the

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145. See Calder v. IRS, 890 F.2d 781, 783-84 (5th Cir. 1989) (discussing the difficulty of obtaining information from tax investigations of Capone).

146. See Liddy v. Commissioner, 808 F.2d 312, 313 (4th Cir. 1986).


149. See I.R.C. § 7201. Upon conviction of tax evasion, the defendant may be fined, imprisoned for no more than five years, or both. Recoupment for the cost of prosecution and any special assessments from the defendant is permitted. For offenses committed before September 4, 1982, the maximum fine is $10,000; for offenses committed from September 4, 1982, through December 31, 1984, the maximum fine is $100,000 for individuals and $500,000 for corporations. See id.; see also 18 U.S.C. § 3571 (1994) (applying to offenses committed from November 1, 1987 to the present). The current maximum fine is $250,000 for individuals and $500,000 for corporations. See id.


151. 498 U.S. 192 (1991); see also Mark C. Winings, Comment, Ignorance Is Bliss, Especially for the Tax Evader, 84 J. CRIM. L. & CRIMINOLOGY 575 (1993) (proposing that Cheek created a tax loophole by recognizing that one owes no taxes regardless of how unreasonable that belief may be).

152. The defendant was also convicted of the I.R.C. § 7203 offense for failing to file a return, which is a misdemeanor. See Cheek, 498 U.S. at 194.
fact-finder and need not be objectively reasonable. The broadening scope of a criminal defendant's protection against tax fraud prosecution is consistent with a larger trend reflecting liberalism for safekeeping of the rights of the criminal defendant.

Fraud is very narrowly defined. Criminal tax fraud is used only "to punish highly culpable conduct . . . [in] cases generally involv[ing] large amounts of income and deficiencies, patterns of conduct stretching over several years, and particularly reprehensible forms of concealment." Civil tax sanctions for fraud are imposed only in cases of highly flagrant behavior.

Other criminal offenses found in the IRC include: willful failure to collect or pay over tax; willful failure to file a return, supply information, or pay a tax; submission of false returns; and submission or preparation of false documents.

That civil penalties will be asserted against a defendant in tax prosecution is a certainty and not only of recent practice. In most cases, the IRS defers civil proceedings and isolates civil issues from a criminal tax investigation and prosecution. A taxpayer's conviction of certain crimes is binding in civil tax cases. If the government is

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153. The Supreme Court rejected the defendant's defense argument that the tax laws are unconstitutional as applied to him. The Court held that defendant's assertion with regard to the constitutionality of the provisions of the tax code did not result from "innocent mistakes caused by the complexity of the [IRC]. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable." Id. at 205-06.

The defendant's rights are not limitless. On remand, the circuit court warned:

Tax evaders who persist in their frivolous beliefs (such as that wages are not income or that Federal Reserve Notes do not constitute cash or income) should not be encouraged by the Court's decision in Cheek or our decision today. While a defendant is now permitted to argue that his failure to file tax returns and to pay his income taxes was the result of his incredible misunderstanding of the tax law's applicability, the government remains free to present evidence demonstrating that he knew what the law required but simply chose to disregard those duties.

United States v. Cheek, 931 F.2d 1206, 1208-09 (7th Cir. 1991).


155. See Asimow, supra note 154, at 644. There is no statute of limitations within which civil fraud penalties must be sought. See I.R.C. § 6501(c)(2).

156. See id. §§ 7202-7203, 7206-7207. The statute of limitations is six years from the commission of the offense for most tax crimes. See id. § 6531.


158. See Fontneau v. United States, 654 F.2d 8, 10 (1st Cir. 1981); Tomlinson v. Lefkowitz, 334 F.2d 262, 266 (5th Cir. 1964).
unable to sustain the greater burden of proof in criminal cases of guilty beyond a reasonable doubt, it still may be able to proceed to prove the taxpayer’s civil fraud by the lesser clear and convincing standard. Proficient tax practitioners will advise clients to plead to those charges that have the least effect on civil tax liability.

Simultaneous prosecution for tax code violations and affiliated crimes is not novel. But recent expansion in criminal law removed any doubt of the interdependence. For instance, RICO makes it unlawful for any person to use money derived from a pattern of racketeering activity to invest in or acquire control or operate an enterprise through the pattern of racketeering activities. The broad scope of RICO makes it the statute of choice for prosecuting mafia activities and other white collar crime. A violation of the IRC may be a predicate act under RICO. Tax fraud itself does not constitute a crime under RICO. However, the mailing of a fraudulent tax return would constitute mail fraud under its provisions.

The position of the United States Department of Justice is clear; that is, the prosecution of tax crimes should, to the extent possible, be independent of violations of RICO and other crimes:


159. See Helvering v. Mitchell, 303 U.S. 391, 397 (1938); see also Nederland v. Commissioner, 424 F.2d 639, 642 (2d Cir. 1970) (the Commissioner may attempt to show fraud in a civil case against a defendant by a fair preponderance of the evidence, even if the same defendant was acquitted of fraud in a criminal case, because of the different burdens of proof).

160. The government will oppose such a pleading. See 1 Crim. Tax Man. (U.S. Dep’t of Justice) § 5.11(1) (1994). The U.S. Justice Department is very rigid in its position that a guilty plea on a charge have the maximum impact on future civil tax cases. See id. § 5.11(3).


162. Id. §§ 1961-1968.


165. See United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987).

166. The Department of Justice offers the following position: Tax offenses are not predicates for RICO offenses—a deliberate congressional decision—and charging a tax offense as a mail fraud charge could be viewed as circumventing congressional intent unless unique circumstances justifying the use of a mail fraud charge are present. However, once a decision has been made by the Tax Division to authorize mail fraud charges, the decision whether to authorize a RICO charge in turn based on these mail fraud charges is one for the Criminal Division to make.
It is the position of the Tax Division [of the Department of Justice] that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed.

Under certain narrowly defined circumstances... a mail fraud prosecution predicated on a mailing of an internal revenue form or document, or where the scheme involved is essentially a tax fraud scheme, might be appropriate in addition to, but never in lieu of, applicable substantive tax charges.167

The sanctity of the tax law, as a system unto itself, has been confirmed. But the United States Department of Justice will continue to experience attempts by tax code violators to utilize features of tax provisions as a part of their defense in nontax criminal prosecutions.


The increasing sophistication of technology and proliferation of drug use changed the complexion of crime. Crimes involving financial schemes, such as money laundering, involve enormous amounts of money and sensational publicity. Unlike the IRC, the expansion of currency crimes has been a catalyst for the statutes in prosecuting notorious crime figures.

The notion that “cash has become more important as a medium of exchange in illegal transactions than in legal transactions” prompted the passage of legislation designed to detect and prosecute currency crimes. 168 A study of the Federal Reserve found that “in 1986 as in 1984, a large percentage of the U.S. currency stock was apparently held in unreported hoards, ‘underground’ for illegitimate purposes, or offshore.”169

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167. Id. at 2-16 (citations omitted); see also United States v. Henderson, 386 F. Supp. 1048, 1052-53 (S.D.N.Y. 1974).
The types of currency crimes and prosecutorial power are increasing. The acquisition of substantial income is characteristic of many new criminal offenses found in RICO, the Currency and Foreign Transactions Reporting Act, the Comprehensive Forfeiture Act of 1984, the Controlled Substances Act (1970), the Controlled Substances Penalties Amendments Act of 1984, and the Comprehensive Crime Control Act of 1984. The overlap of these criminal prosecutions and the prosecution or the assessment of civil sanctions for understatement of income is inevitable.

The Bank Records and Foreign Transactions Act, of which the Bank Secrecy Act is a part, was passed to curtail the use of foreign banks to "launder" proceeds of illegal activity to evade federal income tax. Activities involving money laundering are criminal per se. The statute provides punishment for BSA violations. Separate

171. See Stephen E. Silver, IRS Likely to Increase Use of Money Laundering and Related Statutes, 73 J. TAX’N 286 (1990) (noting an increasing use of money laundering and criminal and civil forfeiture statutes against taxpayers, evidenced by the increasing number of such cases being handled by the IRS).
180. See Rusch, supra note 168, at 467 n.8.
183. See 31 U.S.C. § 5322(a) (providing that a person who willfully violates provision of the BSA commits a felony and is liable to imprisonment for up to five years and/or a fine of up to
prosecution is provided for structuring transactions or cash conversion schemes called "smurfing."" Enhanced punishment is provided for individuals who violate a regulation under the BSA while violating another federal law or are part of a pattern of certain illegal activity.

Statutory provisions of the BSA contain extensive compliance requirements which are similar to those in the IRC. Enhanced civil penalties are provided for failure to report certain importing and exporting monetary instruments. The failure to submit required information may subject the individual to civil sanctions. The Anti-Drug Abuse Act of 1986 contains the provisions of the Money Laundering Control Act of 1986. New offenses include monetary instrument laundering and engaging in monetary transactions involving property derived from specified unlawful activities.

$250,000).

184. Some courts have held that parties are not required to inform financial institutions of their currency transactions where the individual transactions are less than $10,000 per financial institution, even though the aggregate of these transactions exceeds $10,000. See United States v. Varbel, 780 F.2d 758 (9th Cir. 1986); United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985). Other courts have adopted a "substance-over-form" approach and have held that disclosure of currency transactions is required in cases where a party schemes to circumvent financial institutions' reporting requirements by structuring a single transaction exceeding $10,000 into multiple smaller transactions, each less than $10,000. See United States v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983); United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979).

185. A person who willfully violates a provision of, or a regulation under, the BSA, except the foreign currency reporting requirements of 31 U.S.C. §§ 5315, 5324, while violating another law of the United States or as a part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, commits a felony and may be imprisoned for up to ten years or fined up to $500,000, or both. See 31 U.S.C. § 5322(b).

186. See 31 U.S.C. §§ 5316, 5317(c), 5321(a)(2).

187. See id. § 5321; see also NORMAN ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 546, 551-52, 576-81 (1986).


190. Criminal and/or civil liability will fall on individuals who knowingly conduct financial transactions with proceeds of specific unlawful activity either (a) with intent to promote illegal activity, or (b) knowing the transaction is designed (1) to conceal the source, ownership, or control of the illegal activity, or (2) to avoid the transaction reporting requirements under state or federal law. See 18 U.S.C. § 1956(a)(1) (1994); see also Silver, supra note 171; Gary R. McBride, Money Laundering Provisions of the 1986 Anti-Drug Abuse Act, 91, 98-99 (IRS Nov. 17, 1986).

The transportation of money laundering instruments, 18 U.S.C. § 1956(a)(2), occurs when a person transports monetary instruments into or out of the United States either with the intent to promote a specified unlawful activity or when a person has knowledge that the funds represent the proceeds of an unlawful activity, knowing that the transportation is designed (a) to conceal the source, ownership or control of the proceeds of the specified unlawful activity, or (b) to avoid a transaction reporting requirement under state or federal law. See id.

Financial transportation money laundering occurs when an individual deposits, withdraws...
The Money Laundering Control Act also contains civil penalties. The broadening of the statute in 1988 indicates the federal government's intention to increase money laundering prosecutions in an effort to curtail currency crimes.

Complementing the civil penalties are criminal forfeiture sentencing alternatives. The court may order forfeiture of property belonging to individuals convicted of money laundering or violations of the domestic currency reporting requirement of the BSA. Civil forfeiture is a favored technique with law enforcement agencies because it is faster to administer, it has a lower burden of proof, and the value of the forfeited property may be more than the amount of tax and additions due.

The IRC was also amended in response to financial crimes. Currency crime prosecutions are now augmented by the summons provisions of the IRC. The Deficit Reduction Act of 1984 added § 6050I, imposing a currency reporting requirement on all persons who receive $10,000 in cash in one transaction or in two or more “related transactions” in the course of a trade or business. This reporting requirement is supported by additional criminal penalties imposed on violators.

As the substantive definitions of the currency crimes broadened, the number of prosecutions have increased. Integration of these laws is pervasive, but not necessarily refined. Congress has created a web of

or exchanges more than $10,000 with a financial institution, knowing that the funds represent the proceeds of a specified unlawful activity. See id. §§ 1956(a), 1957.

Engaging in monetary transactions involving property derived from certain unlawful activities is also prohibited. See id. §§ 1956(a)(3), 1957(f)(1).

191. The Act provides: “Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3) [of § 1956] ... is liable to the United States for a civil penalty of not more than the greater of— (1) the value of the property, funds, or monetary instruments involved in the transaction; or (2) $10,000.” Id. § 1956(b)(1)-(2).

192. Forfeitures are associated with Title 31 and 18 U.S.C. §§ 1956-1957 violations. Section 981 of 18 U.S.C. provides that “[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of [Title 18] or any property traceable to such property shall be subject to forfeiture.” A special forfeiture rule applies for drug cases. See id. § 982(b).


194. See I.R.C. § 7609.

195. The reporting requirement of I.R.C. § 6050I(a) is fulfilled by the use of Form 8300, an information return, which must be filed by any person engaged in the “trade or business ... who, in the course of such trade or business, receives more than $10,000 in cash [from one or more related transactions].” I.R.C. § 6050I(a).


197. See, e.g., Rusch, supra note 168, at 472.
laws that enables individuals to be examined and prosecuted under various federal statutes. It is almost inevitable that a criminal case involving financial misdealing will be followed by an allegation of understatement of income. Occurrences in the criminal investigations and proceedings may have a significant effect on the civil actions. For example, an individual may be prohibited from proceeding with his burden of proof in the determination of the civil tax liability because there is a necessity to claim the privilege against self-incrimination during the criminal proceeding. Likewise, occurrences in civil actions and proceedings may affect criminal investigations. For instance, BSA violations may result in a variety of criminal actions.

The accumulation of sanctions against an individual for violating more than one area of a singular law or multiple statutes also sets the stage for objections about punishment or excessiveness of fines.

198. As an example, filings required under the BSA are intended to be used in “criminal, tax, or regulatory investigations or proceedings.” 31 U.S.C. § 5311 (1994). The reports required to be filed have been used to cross check if an individual listed filed a tax return or if there has been a tax evasion. See United States v. Kaatz, 705 F.2d 1237, 1244 (10th Cir. 1983).

199. In Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1975), the court made these threats obvious:
The special agent is the unobtrusive fellow casually introduced to you midway in the audit of your income tax return, as the one who is now taking over. If you grasp the significance of his title, you gather your wits together and rush out to hire the ablest criminal lawyer you can obtain, at any cost. You know the prison doors are yawning for your reception.

Id. at 1100.

200. Tax crimes have been discovered from BSA information. In Kaatz, an investigation was instigated when a Currency Transaction Report (CTR) by a bank to the IRS showed the defendant purchasing a $100,000 certificate of deposit by utilizing $96,000 of small currency bills. See Kaatz, 705 F.2d at 1241.

Tax crimes are not the only secondary prosecution that can result from a BSA violation. Criminal prosecution of co-conspirators may also result. See 18 U.S.C. § 371. A violation of the BSA may also be a predicate act for RICO purposes. See id. § 1961(1)(D). For example, a taxpayer who plead guilty to an indictment charging him with a willful and knowing attempt to evade income tax argued that the Fifth Amendment precluded the imposition of civil fraud penalties. The Fifth Amendment offered no protection because the sanction imposed was civil rather than criminal. See Kenney v. Commissioner, 111 F.2d 374, 375-77 (5th Cir. 1940) (citing Helvering v. Mitchell, 303 U.S. 391 (1938)).

201. One of the common inquiries under the combination of punishment is whether the pattern of violation must consist solely of BSA violations. Do violations of the BSA, another illegal activity pattern of similar or related suspicious behavior involving transactions aggregating to the amount of $100,000 suffice? See United States v. Valdes-Guern, 758 F.2d 1411, 1413-14 (11th Cir. 1985); United States v. Dickinson, 706 F.2d 88, 91 (2d Cir. 1983); United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979).

202. The implication of applying criminal sanctions where the substantive tax law is uncertain was examined in the imposition of the civil fraud penalty under I.R.C. § 6653(2). If substantive law
C. The Sentencing Guidelines—The Impact of Probable Incarceration

Another catalyst to the use of atypical defenses to civil tax sanctions is the passage of the Comprehensive Crime Control Act of 1984. This legislation enabled the United States Sentencing Commission to draft sentencing guidelines for all federal criminal prosecutions. The application of the guidelines to a particular defendant depends on the offense involved. Base offense level and offense characteristics, criminal history, sentencing options, and certain other adjustments determine the convicted individual’s sentence.

Before the sentencing guidelines, major tax criminals rarely were incarcerated unless they were involved in multiple criminal activities. The Sentencing Commission made the determination that a period of incarceration should be mandatory for most criminal tax prosecutions. The Federal Sentencing Guidelines require a determination of whether incarceration is uncertain, criminal penalties should not be applied. See United States v. Garber, 607 F.2d 92, 97-98 (5th Cir. 1979).

The IRC has already been subject to scrutiny for abuse. The Narcotics Traffickers Program, which utilized the unusual feature of the jeopardy assessment, produced reaction from the Congress in the Tax Reform Act of 1976. Taxpayers now have expressed rights with regard to jeopardy assessments. See I.R.C. §§ 6851, 6861, 6863, 7429; see also Commissioner v. Shapiro, 424 U.S. 614 (1976) (taxpayer is not required to plead specific facts, which if true, would establish that the IRS would not prevail); Laing v. United States, 423 U.S. 161 (1976) (taxpayer has the right to receive notice of deficiency within sixty days after jeopardy assessment and consistent with I.R.C. § 6863, property seized may not be offered for sale until the taxpayer has had the opportunity to litigate this issue in tax court).

205. Part T of the Guidelines pertains to tax crimes: § 2T1.1 (tax evasion); § 2T1.2 (willful failure to file return, supply information or pay tax); § 2T1.3 (fraud and false statements under penalty of perjury); § 2T1.4 (aiding, assisting, procuring, counseling, or advising tax fraud); § 2T1.5 (filing fraudulent returns); § 2T1.6 (failing to collect or account or pay over tax); § 2T1.7 (failing to deposit collected taxes in trust account); § 2T1.8 (offenses related to withholding statements); § 2T1.9 (conspiracy). See UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL §§ 2T1.1-.9 (1995).
206. See id.
207. The commentary noted:
Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. Id. § 2T1.1, cmt. at 216.
the amount of tax evaded to assist in evaluating the severity of the offense. The amounts involved in related tax proceedings impact on the sentence. As a consequence, tacking civil tax sanctions onto the sentence does not seem overtly illogical.\textsuperscript{208} As the stakes become higher, criminal defendants will reach for broader interpretations of their constitutional rights.

VI. CONSTITUTIONAL LAW: UNASSAILABLE TRADITIONAL DEFENSES V. FRAGILE UNCONVENTIONAL DEFENSES

The defendant in a tax prosecution is entitled to all constitutional guarantees and protections. When charged with a tax crime, the defendant is given his or her Miranda rights.\textsuperscript{209} The Fifth Amendment, which provides the right to refuse to incriminate oneself, is a safeguard commonly employed in tax prosecutions.\textsuperscript{210} Other rights commonly asserted by the defense in tax prosecution are the Sixth Amendment's right to counsel\textsuperscript{211} and to a speedy trial,\textsuperscript{212} and the Fourth Amendment's protection from unreasonable searches and seizures.\textsuperscript{213}

To distinguish between civil and criminal fraud,\textsuperscript{214} the IRS describes a civil fraud case as "remedial actions taken by the government to assess the correct tax and to impose civil penalties as an addition to the tax."\textsuperscript{215} Alternatively, a criminal fraud case is designated as "punitive actions with penalties consisting of fines and/or imprisonment."\textsuperscript{216}

\textsuperscript{208} The tax obligation of the defendant is only one of the many factors considered in sentencing. \textit{See id.}

\textsuperscript{209} \textit{See} \textit{Miranda v. Arizona}, 384 U.S. 436 (1966); \textit{see also} Mathis v. United States, 391 U.S. 1, 4 (1968). Although the privilege may be employed in all types of proceedings, it is only permitted to be used when there is a "substantial and real hazard of self-incrimination." United States v. Argomaniz, 925 F.2d 1349, 1353 (11th Cir. 1991) (quoting United States v. Reis, 765 F.2d 1094, 1096 (11th Cir. 1985)); Estate of Fisher v. Commissioner, 905 F.2d 645, 649 (2d Cir. 1990); \textit{see also} Doe v. United States, 487 U.S. 201 (1988); Braswell v. United States, 487 U.S. 99 (1988).

The "Taxpayer Bill of Rights," Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, given to a taxpayer during audit and collection proceedings, does not apply to criminal cases.

\textsuperscript{210} Most litigation centers on the breadth of the privilege, which extends only to individual testimony. \textit{See}, e.g., \textit{Doe}, 487 U.S. at 207; \textit{Braswell}, 487 U.S. at 113.

\textsuperscript{211} The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right... to have the [a]ssistance of [c]ounsel for his defence." \textit{U.S. CONST.} amend. VI.

\textsuperscript{212} \textit{See} United States v. Carini, 562 F.2d 144 (2d Cir. 1977).


\textsuperscript{214} \textit{See} 1 Int. Rev. Man. (CCH) §§ 910-985 (1981).

\textsuperscript{215} \textit{Id.} § 921(1).

\textsuperscript{216} \textit{Id.}
"Civil penalties are assessed and collected administratively as part of the tax. Criminal penalties are enforced only by prosecution, are provided to punish the taxpayer for wrongdoings, and serve as a deterrent to other taxpayers. One offense may result in both civil and criminal penalties."\(^{217}\)

The substantive difference between civil and criminal tax fraud is the element of willfulness. IRS documents minimize the difference in prima facie cases.\(^{218}\) Instead, the IRS documents emphasize the burden of proof.\(^{219}\) This focus may be a red flag indicating that the tax fraud case which cannot be proven beyond a reasonable doubt will be tried as a civil fraud case. The dichotomy between civil and criminal fraud illustrates that the line between a civil and criminal action is often very fine. Halper's achievement was a correction in orientation of these cases by eliminating the criminal/civil terminology.\(^{220}\) The evaluation of a case should be centered on the facts and the elements to be proven.

A. Concepts of Double Jeopardy—The Fifth Amendment

The Fifth Amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."\(^{221}\) Criminal defendants are entitled to a liberal application of their rights.\(^{222}\) As one of our fundamental freedoms, safeguarding against double jeopardy is given broad application\(^{223}\) and requires strong inquiry.\(^{224}\) The constitutional rights of the individual are superior to the detection of civil tax fraud:

[T]hat the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of

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\(^{217}\) *Id.*

\(^{218}\) *See id.* § 921(3).

\(^{219}\) *See id.*

\(^{220}\) The elimination of criminal/civil terminology will eliminate the discussion of burden of proof, which often obscures the proper focus.


\(^{222}\) *See*, e.g., *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (discussing the rights of defendants as paramount when facing possible double jeopardy).

\(^{223}\) *See* Green v. United States, 355 U.S. 184 (1957).

\(^{224}\) *See* Brown v. Ohio, 432 U.S. 161 (1977) (describing tests used to guard against double jeopardy).
the tax against the guilty—a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this court... [which] emphatically declared that such rights were superior to this supposed necessity.\textsuperscript{225}

The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.\textsuperscript{226}

In \textit{Blockburger v. United States},\textsuperscript{227} the petitioner was charged with five counts in violation of the Harrison Narcotics Act.\textsuperscript{228} He was convicted of three counts. Each of these counts charged a sale of drugs to the same purchaser. His sentence was five years imprisonment and a fine of $2000 for each count. The petitioner contended that the three counts for which he was convicted constituted a single offense. The Court concluded that a criminal defendant may perpetrate the same offense within a brief period of time and yet “[e]ach of several successive sales constitutes a distinct offense, however closely they may follow each other.”\textsuperscript{229}

The so-called \textit{Blockburger} test was developed. It is sometimes called the “same offense” test.\textsuperscript{230} In line with rules of statutory construction,
the test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Congressional intent was presumed to preclude punishment under two statutes for the same offense.

In order to fail the Blockburger test, the elements of one crime must include all the elements of another crime. If each distinct offense requires a unique proof of fact, the Blockburger rule is satisfied and double jeopardy does not attach. However, the same act may constitute two statutory offenses. If it is clear that the legislative intent provided for cumulative punishment under two separate statutes, conviction of separate statutory offenses is not violative of the Fifth Amendment.

The landmark opinion in United States v. Halper was published by the Supreme Court in 1989. Halper was manager of a medical care company providing services to Medicare patients. Upon his conviction for mail fraud, he was sentenced to two years in prison and fined $5000. A civil action was subsequently brought against Halper for violations of the False Claims Act. The government was awarded a summary judgment, and Halper was subject to a statutory civil penalty of $130,000. The Supreme Court examined whether the statutory civil payment constituted a second punishment for purposes of double jeopardy analysis. In distinguishing prior case law, the Court held that "a civil as well as a criminal sanction constitutes punishment when

233. See United States v. Smith, 757 F.2d 1161, 1165 (11th Cir. 1985).
234. See Colley v. Sumner, 784 F.2d 984, 989 (9th Cir. 1986); United States v. Cowart, 595 F.2d 1023, 1029 (5th Cir. 1979).
Halper established a three-part test. The test requires: (1) that the purpose served by the civil sanction be ascertained in order to determine whether it constitutes a punishment; (2) that there be a rough calculation to determine whether the size of the sanction can be fairly attributed solely to remedial purposes; and (3) that the amount be proportional in relation to making the government whole.

The modern principle of double jeopardy protection is firmly grounded. The Court made it clear: "This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state."

The Court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."

The foundation of double jeopardy protection in American jurisprudence was established in the mid 1800s. However, former criminal prosecution does not bar a civil action to recover a civil penalty for the same conduct. The "same conduct" is not important to the

240. Halper, 490 U.S. at 448.
241. See id. at 448-49.
242. Id. at 447.
243. Id. at 448.

In United States v. Beszborn, 21 F.3d 62 (5th Cir. 1994), the court stated:

To determine whether the Double Jeopardy Clause has been violated by a successive conspiracy prosecution, the district court must review the entire record in view of five factors: (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the Government or any other description of the offense charged which indicates the nature and scope of the activity which the Government sought to punish in each case, and (5) places where the events alleged as a part of the conspiracy took place.

Id. at 69 (citation omitted).

In Halper, the Court noted that its holding was not meant to preclude the government "from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated." Halper, 490 U.S. at 450. The use of the word "conduct" is unfortunate. Technically, the terminology that should be used is "actions with identical elements."
analysis. Part of the Blockburger test inquiry focuses on the elements of the prima facie case. Only if the elements are identical in each cause of action or case is double jeopardy violated. Halper then requires a case-by-case inquiry of the civil sanctions imposed to test for features of punishment.

B. Concepts of Excessive Fines—The Eighth Amendment

The Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." It also prohibits the imposition of excessive fines.

245. In United States v. Dixon, 509 U.S. 688 (1993), the defendant was a murder suspect released on bail on the condition that he commit no crimes. Having been charged with the possession of cocaine afterwards, he was also convicted of contempt because of the conditions of his parole. It was held that double jeopardy precluded the prosecution for the possession of cocaine. See id. at 712.

In a prior case, Grady v. Corbin, 495 U.S. 508 (1990), the Court attempted to add an additional prong to the Blockburger test. In addition to satisfying Blockburger, it suggested that the "same conduct" prong must be met. See Grady, 495 U.S. at 522. The Court tried to separate the "second punishment" aspect of the Fifth Amendment from the "second prosecution" aspect. The Court held that a "subsequent prosecution must do more than merely survive the Blockburger test." Id. at 521. This meant that the government would have to prove different conduct. The actual holding stated that if in an effort "to establish an essential element of an offense charged in that prosecution, [the government proves] conduct that constitute[d] an offense for which the defendant has already been prosecuted," a second prosecution may not be had. Id.

The Court in Dixon emphatically rejected its prior holding in Grady. Grady was overruled "because [it] contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and has produced 'confusion.'" Dixon, 509 U.S. at 711 (quoting Solorio v. United States, 483 U.S. 435, 439, 442, 450 (1987)).

246. The Blockburger test was recently applied in State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996). The issue presented was whether the assessment of a tax pursuant to the drug tax statutes and the charge of possession of drugs constituted the same offense for purposes of double jeopardy. The court held that double jeopardy was not implicated because the elements of proof were different. See id. at 748.

247. Both of these steps require construing the constitutional protection of a person's right of life, liberty, and property in favor of the individual. See Dorman v. State, 34 Ala. 216, 238-39 (1859); see also 4 WILLIAM BLACKSTONE, COMMENTARIES *329 (addressing individualistic freedom in his overview of English criminal law).


249. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

"The [E]ighth [A]mendment is addressed to courts of the United States exercising criminal jurisdiction and is doubtless mandatory to them and a limitation upon their discretion." Ex parte Watkins, 32 U.S. 568, 573-74 (1833).

The Excessive Fines Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).

For a history of excessive fines, see Calvin R. Massey, The Excessive Fines Clause and
Historically, analysis of the Cruel and Unusual Punishment Clause has engendered more controversy than the Excessive Fines Clause. Consequently, very little guidance in applying the Excessive Fines Clause has been given by the Supreme Court.

Patrick Henry, during the debates on the Federal Constitution, orated: "What says our [Virginia] bill of rights? — 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control?"

In Weems v. United States, the principles embodied in the Eighth Amendment expressed the Anglo-American heritage of distrust of power:

And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history.

The holding of Weems first articulated the proportionality principle: punishment cannot be grossly disproportionate to the crime.

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250. Blackstone asserted that the protection applied only to criminal proceedings. See 4 WILLIAM BLACKSTONE, COMMENTARIES *448. For case law holding the Eighth Amendment does not apply to civil crimes, see Milazzo v. United States, 578 F. Supp. 248, 253 (S.D. Cal. 1984).

251. Two early cases held that the principles of excessive fines must be applied to include money recovered in a civil suit, which was paid to the government. See Hanscomb v. Russell, 77 Mass. 373, 375 (1858); Gosselink v. Campbell, 4 Iowa 296, 300-01 (1856); see also Gerald W. Boston, Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause, 5 COOLEY L. REV. 667 (1988); 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 (1991); Lyndon F. Bittle, Comment, Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness, 75 CAL. L. REV. 1433 (1987).

252. Ingraham, 430 U.S. at 666 (quoting Patrick Henry) (citation omitted).


254. Id. at 373.

255. See id. at 366-67.

The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured.

Ingraham, 430 U.S. at 665 (citing Weems, 217 U.S. at 371-73).
The first major United States Supreme Court case specifically examining excessive fines was Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. The Eighth Amendment's relationship to the modern convention of punitive damages was the issue in the case: "Despite this recognition of civil exemplary damages as punitive in nature, the Eighth Amendment did not expressly include it within its scope. Rather, as we earlier have noted, the text of the Amendment points to an intent to deal only with the prosecutorial powers of government." Though the Court held that private civil actions do not engage Eighth Amendment protection, the opinion contains general tenets on the excessiveness of damages.

To determine whether a fine is so excessive as to be unconstitutional, inquiry must be made of the object designed to be accomplished, the significance of the public interest at issue, the circumstances and nature of the act for which it is being imposed, and the preventive

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256. 492 U.S. 257 (1989). The Court recognized the lack of interest in the Eighth Amendment, noting that "[t]he Eighth Amendment received little debate in the First Congress, and the Excessive Fines Clause received even less attention." Id. at 264 (citation omitted).

The Court concluded that "[w]hile we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties." Id. at 275.

Dissenting in part, Justices O'Connor and Stevens presented the following structure for analysis: (1) Does the Excessive Fines Clause apply to the states through the Due Process Clause of the Fourteenth Amendment?; (2) Is a corporation (such as BFI) protected by the Excessive Fines Clause?; (3) Is the Excessive Fines Clause applicable to punitive damages?; and (4) Are the damages awarded excessive? See id. at 282, 285, 299.

257. Id. at 274-75. The Court summarized that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power." Id. at 266. In its analysis, the Court concluded that "the Framers of the Eighth Amendment did not expressly intend it to apply to damages awards made by civil juries." Id. at 273.

258. To determine whether a particular award of punitive damages is excessive, the Court's analysis is the same as that used in evaluating civil forfeiture proceedings under RICO as outlined in Solem v. Helm, 463 U.S. 277 (1983). The factors are as follows: (a) an examination of the gravity of defendant's conduct and harshness of the award of punitive damages; (b) a comparison of sentences in the same jurisdiction; and (c) a comparison of sentences in other jurisdictions. See id. at 290-92.

Scholars have concluded that the prohibition against excessive fines should apply to punitive damages. See Boston, supra note 251, at 732-46; Massey, supra note 249, at 1269-74; John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 147-51; Andrew M. Kenefick, Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 MICH. L. REV. 1699, 1719-26 (1987).

259. See State v. Lubee, 45 A. 520, 521 (Me. 1899).

260. See id.

effect upon the commission of the particular type of crime. Generally, wide latitude is given to the discretion of the legislature, and only in a very clear case will the amount be determined to be excessive.

The amount of a fine is either in the discretion of the judicial system or is stated in a statute. Generally, a fine is not excessive unless it is grossly disproportionate to the offense. Reasonable people must conclude that the amount is right and proper under the circumstances. The fine is excessive if it is clearly so unusual as to shock public sentiment.

In 1994, the Supreme Court held that the Eighth Amendment's prohibition against excessive fines applied to civil forfeiture proceedings. In *Austin v. United States*, in rem civil forfeiture proceedings were brought against the petitioner pursuant to the provisions of the Comprehensive Drug Abuse Prevention and Control Act. Paralleling the rationale in *Halper*, the Court held that the Eighth Amendment's

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264. See Commonwealth v. French, 114 S.W. 255, 256 (Ky. Ct. App. 1908); Murphy v. State, 250 P. 834, 835 (Or. 1926). See generally Bergman v. State, 60 F.2d 699 (Wash. 1936) (stating that where there is no statute on point that would enable a court to determine a particular issue, the court may use its own discretion, including whether to take secondary authority into account).

The financial inability of the defendant to pay is not a factor. See United States v. Altamirano, 11 F.3d 52, 53 (5th Cir. 1993).
265. For example, a fine of $145,000 for violation of the currency reporting statute was held not to be unconstitutionally excessive because the fine increased proportionately to the amount at issue. See United States v. United States Currency in the Amount of $145,139.00, 18 F.3d 73 (2d Cir. 1994).
266. "The phrase 'excessive fine,' if it is to mean anything, must apply to any fine which notably exceeds in amount that which is reasonable, usual, proper or just." People v. Saffore, 218 N.E.2d 686, 688 (N.Y. 1966).

The Supreme Court recently held that in rem forfeiture proceedings following a criminal prosecution are not "punitive" and therefore do not implicate double jeopardy. See United States v. Usery, 116 S. Ct. 2135, 2137 (1996). But see Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194 (1991) (arguing that forfeitures should be evaluated according to their effects, rather than a legal fiction).

The Court recently held that forfeiture of the property interest of an innocent joint tenant is constitutional. The opinion examined the Due Process Clauses of the Fifth and Fourteenth Amendments. See Bennis v. Michigan, 116 S. Ct. 994 (1996).
Excessive Fines Clause applied to both criminal and civil forfeitures. The determination to be made is whether the forfeiture is punishment or partly punishment.270

_Austin_ did not establish any standards limiting forfeitures under the Excessive Fines Clause of the Eighth Amendment.271 In the future, the Court may place substantive limits on forfeitures under the Excessive Fines Clause. Courts recently have found violations of excessive fines principles in forfeiture cases. For example, the court in _United States v. Shelly's Riverside Heights Lot X_272 held that marijuana cultivating did not warrant seizure of cabin and ten acres of land.273 In another case, the forfeiture of a home with a value of $150,000 was held to be a violation.274

Undoubtedly, a defendant in a civil forfeiture proceeding will claim that he is being subject to a criminal proceeding which guarantees all constitutional limitations.

VII. JUDICIAL SCRUTINY OF TAX LAWS AS PUNISHMENT

_A. The Evaluation of Statutes: Taxes and Punishment_

The federal government has broad power to tax.275 The only type of tax explicitly prohibited by the United States Constitution is a "[t]ax or [d]uty . . . laid on [a]rticles exported from any State."276 The Uniformity and Apportionment Clauses impose conditions on taxes imposed by the federal government. The Uniformity Clause requires that excise taxes be uniform throughout the United States,277 while the

270. See W. David George, _Finally, an Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States_, 46 BAYLOR L. REV. 509 (1994); Lieske, _supra_ note 249, at 289; Massey, _supra_ note 249, at 1233.


273. See _id._ at 638.

274. See _United States v. 18755 N. Bay Rd., 13 F.3d_ 1493-94, 1499 (11th Cir. 1994).

275. See _U.S. CONST._ art. 1, § 8, cl. 1.

276. _U.S. CONST._ art. 1, § 9, cl. 5. This provision applies only to exports from the United States.

Apportionment Clause requires that direct taxes be apportioned with respect to population.\textsuperscript{278}

Despite the appearance of few constitutional limitations, tax laws have been the subject of active litigation. Inquiries not only address the technical correctness of a tax but the incentive behind its passage.

The initial constitutional challenges to taxing statutes in the United States were based on the freedoms of speech and exercise of religion.\textsuperscript{279} Currently, disputes regarding constitutionality are usually grounded on a denial of due process or equal protection.\textsuperscript{280} The Supreme Court in Halper examined a civil sanction to determine whether its imposition was a second punishment.\textsuperscript{281} The characteristics of the


A high rate of tax is not per se unconstitutional. See Flint v. Stone Tracy Co., 220 U.S. 107, 153-54 (1911); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869).


\textsuperscript{280} The Fifth Amendment prohibits discrimination that may be so unjustifiable as to be violative of due process. See U.S. Const. amend. V. Technically, the equal protection arguments are not valid because the Fourteenth Amendment is not applicable to the federal government.

The base of the tax was the basis for declaring unconstitutional the imposition of an estate tax on the transfer of property made within two years of the death of the decedent. See Heiner v. Donnan, 285 U.S. 312, 331-32 (1932). The selection of the class of gifts made within two years of death was considered to be so remote from the permissible policy of taxing transfers at death or so unrelated to it that it was deemed arbitrary and unreasonable. The Court held that the tax had a base which had no relationship to the gift and that there was no relationship between the taxpayer and the transfer which was the subject of the tax. See id. at 332. The statute did not compensate for the evil to be eliminated and did not accomplish its purpose.

The Court relied on Schlesinger v. Wisconsin, 270 U.S. 230 (1926). The Schlesinger case examined the classification of gifts selected for taxation under a state statute and determined it to be so arbitrary as to violate the Equal Protection Clause of the Fourteenth Amendment. See id. at 240. The identical reason made it so arbitrary and capricious as to violate the due process clause of the Fifth Amendment. See Heiner, 285 U.S. at 324-26; see also Hooper v. Tax Comm'n, 284 U.S. 206, 218 (1913); Tyler v. United States, 281 U.S. 497, 504 (1930); Nichols v. Coolidge, 274 U.S. 531, 542 (1927); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24-25 (1916). However, to be deemed unconstitutional, the line of taxation has to be drawn so wide of its mark as to have no relationship to the end sought.

Dissenting Justice Holmes recognized that adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the states under the Equal Protection Clause, much less Congress under the more general requirement of due process of the law in taxation. See Schlesinger, 270 U.S. at 241-42; see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Barclay & Co. v. Edwards, 267 U.S. 442, 450 (1924); Flint, 220 U.S. at 158; Treat v. White, 181 U.S. 264, 269 (1901).

\textsuperscript{281} See 490 U.S. 435 (1989); see also supra Part VI.A.
The civil sanction, coupled with the defendant's criminal sentence, violated double jeopardy.

Allegations that civil tax sanctions constitute punishment are not contemporary with *Halper*. In 1881, the Court in *United States v. Chouteau* foreshadowed its decision in *Halper*, stating:

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.

The identical elements in a legal action as the basis for both the criminal and civil sanctions will invariably raise issues of double jeopardy and excessive fines. The *Halper* opinion should not have ignited a major challenge to civil tax penalties. Distorting the holding in *Halper* can be "a base for vaulting into the tax arena." A close examination of elements required for the imposition of civil tax sanctions indicates that they do not mirror the elements of a crime.

Until the opinion in *James v. United States* was rendered in 1961, it was unclear whether all types of illegal income constituted income for federal tax purposes. However, the analysis of substantive tax law and additions to taxes for features of punishment began with a line of cases 120 years ago. The major decisions in this string of cases serve to elucidate the factors to weigh when evaluating a statute imposing a civil tax sanction for features of punishment.

Courts have been quick to strike down the most simplistic penalty features of a tax if it is considered duplicative or excessive. Statutory construction is the keystone of the inquiry. In 1875, a tax upon deposits and capital imposed each month on persons and corporations engaged in the business of banking was coupled with a penalty imposed for refusing or neglecting to make return or payment of the tax. Construction of the statute revealed that it authorized recovery of only one penalty for

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282. 102 U.S. 603 (1880).
283. *Id.* at 611.
"all failures prior to the commencement of the action." The tax was declared unconstitutional.

Double jeopardy is often utilized as the grounds for invalidating a tax statute. In United States v. McKee, the defendant was convicted and punished for conspiracy to defraud the United States for the removal of liquor without the payment of tax. The defendant's conviction precluded his obligation to pay double the amount of taxes for failure to pay under the civil liquor tax law. The conviction of the defendant led to both the civil and criminal penalties and resulted in the defendant being punished twice for the same crime.

Attaching a sanction to a civil tax statute will not insulate its penal nature. Most relevant to establishing that civil tax sanctions rarely constitute a second punishment are a series of cases holding that double jeopardy does not bar the imposition of the fifty percent addition to tax.

The additions to tax have traditionally been regarded as a safeguard for the protection of revenue and to reimburse government for the heavy expense of investigation and the loss resulting from the taxpayers' fraud.

In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations.

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287. 26 F. Cas. 1116 (1877) (No. 15,688).
291. See Passavant v. United States, 148 U.S. 214, 221 (1893); Dorsheimer v. United States, 74 U.S. (7 Wall.) 166, 173 (1868); Cliquot's Champagne, 70 U.S. (3 Wall.) 114, 145 (1865); Bartlett v. Kane, 57 U.S. (16 How.) 263, 274 (1853); Taylor v. United States, 44 U.S. (3 How.) 197, 210 (1845); cf. McDowell v. Heiner, 9 F.2d 120 (W.D. Pa. 1925) (Congress has authorized the Commissioner of the IRS to assess additional taxes of 100 percent for a fraudulent return); Doll v. Evans, 7 F. Cas. 855 (C.C.E.D. Pa. 1872) (No. 3969) (upholding the constitutionality of assessing a tax of 100 percent as a penalty); Steams v. United States, 61 F. Supp. 664 (D. Mass. 1945); see also Stockwell v. United States, 80 U.S. (13 Wall.) 531, 547, 551 (1871).
and sanction their enforcement by reasonable money penalties, giving
to executive officers the power to enforce such penalties without the
necessity of invoking the judicial power.\textsuperscript{292}

The broad discretion of Congress in passing tax statutes has been
acknowledged by the Supreme Court. Moreover, overt recognition that
taxation could be utilized to control social behavior occurred in the early
twentieth century, and the Supreme Court held that encouragement of
certain economic activity through use of a taxing statute was constitution-
al.\textsuperscript{293} Concepts of morality advanced in taxing statutes are custom-
ary.\textsuperscript{294}

The ancillary attributes of the income tax system were not
universally embraced as unequivocally rational or legal.\textsuperscript{295} A tax
imposed in 1918 on the profits of child labor employers provides an
example.\textsuperscript{296} A federal statute passed in 1919, the Child Labor Law, did
not prohibit child labor but assessed an excise tax, payable by certain
employers of children. The amount of the tax was equal to ten percent
of the profit from the enterprise.\textsuperscript{297} The Supreme Court held that the
act was unconstitutional because it was a federal attempt to regulate
behavior reserved to the state: "[T]he so-called tax is a penalty to coerce
people of a State to act as Congress wishes them to act in respect of a

\begin{thebibliography}{9}
\bibitem{293} See McCray v. United States, 195 U.S. 27 (1904).
\bibitem{294} Constitutional taxes have been imposed on dealers in narcotic drugs, liquor, and lottery
tickets. See, e.g., United States v. Doremus, 249 U.S. 86 (1919) (narcotic drugs); License Tax Cases,
72 U.S. (5 Wall.) 462 (1866) (liquor and lottery tickets).
\bibitem{295} See supra Part III.A.
\bibitem{296} See Child Labor Tax Case, 259 U.S. 20 (1922) (discussing the constitutionality of the
Child Labor Tax Law).
\bibitem{297} The "Tax on Employment of Child Labor" provided the following:
\begin{quote}
Every person . . . operating (a) any mine or quarry situated in the United States in
which children under the age of sixteen years have been employed or permitted to work
during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or
manufacturing establishment situated in the United States in which children under the age
of fourteen years have been employed or permitted to work, or children between the ages
of fourteen and sixteen have been employed or permitted to work more than eight hours
in any day or more than six days in any week, or after the hour of seven o'clock post
meridian, or before the hour of six o'clock ante meridian, during any portion of the
taxable year, shall pay for each taxable year, in addition to all other taxes imposed by
law, an excise equivalent to 10 per centum of the entire net profits received or accrued
for such year from the sale or disposition of the product of such mine, quarry, mill,
cannery, workshop, factory, or manufacturing establishment.
\end{quote}
\end{thebibliography}
matter completely the business of the state government under the Federal Constitution.  

Though the case may be legally distinguishable from measures issued under proper authority of the federal law, it is representative of the early attempt to distinguish a true tax from a regulation or punishment. If the extraction provides for the imposition of a heavy burden to those who fail to conduct themselves with a particular course of action, a feature of punishment emerges:

Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.

The Child Labor statute provides an opportunity to evaluate a statute which lacks the characteristics of a tax. As always, the examination begins with statutory construction. The statute must be subjected to the following inquiry: "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?" The primary motive of a tax act is to raise revenue. The primary purpose of an addition to tax is to reimburse the government.

The use of certain labels or technical terms such as "tax" or "addition to the deficiency" to describe the exaction or collection is not controlling. Although the penalty provision of the Child Labor Law

299. The Child Labor Law was an attempt by the federal government to impose a tax to control behavior the regulation of which rests in the states. The production of revenue must be attributed to the authority in which its regulatory incidents rests. See id. at 38.
300. See id.
301. Id.
302. See Murphy v. United States, 272 U.S. 630, 632 (1926).
304. See Murphy, 272 U.S. at 632; United States v. La Franca, 282 U.S. 568, 572 (1931).
305. The level or rate of the levy is immaterial. See Child Labor Tax Case, 259 U.S. at 40 (citing Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869)).
306. See id. at 38. Labeling a statute a tax does not end the double jeopardy scrutiny because "at some point, an exaction labeled as a tax approaches punishment." Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994); see also Hicks v. Feiock, 485 U.S. 624, 631 (1988) (the method by which a court ascertains whether a relief is civil or criminal will indicate if it is punitive.
was labeled a tax, the statute was facially penal. It characterized certain and specific activity as wrongdoing while imposing a penalty.\textsuperscript{307} Incidental restraints and regulations always attach to taxation. But these characteristics should be secondary and not for the regulation of particular activity in the guise of the tax.\textsuperscript{308}

The tax law must be construed in its proper context, and an examination of exemptions is required. If a lack of knowledge on the part of the taxpayer with respect to a violation of the act exempts the taxpayer, then the statute has a flavor of punishment.\textsuperscript{309} Scieler is a concept long associated with the infliction of punishment.\textsuperscript{310} In determining the reasonableness of the tax which is levied in lieu of another, the consideration of all statutes affecting the subject matter is a necessity.\textsuperscript{311}

or not).

This is also consistent with the Halper analysis eliminating the need to examine whether the proceeding is civil or criminal. See Halper, 490 U.S. at 447-48.

\textsuperscript{307} See Child Labor Tax Case, 259 U.S. at 36-37; see also McCray v. United States, 195 U.S. 27, 61 (1904) (holding that Congress's imposition of an excise tax on artificially colored oleomargarine and not on natural butter artificially colored was constitutional).

\textsuperscript{308} See Child Labor Tax Case, 259 U.S. at 36.

\textsuperscript{309} Section 1203(a) relieves from liability anyone who employs a child, believing him to be of proper age, relying on a certificate to this effect issued by persons prescribed by a Board consisting of the Secretary of the Treasury, the Commissioner of the IRS and the Secretary of Labor, or issued by state authorities. See The Revenue Act of Feb. 24, 1919, ch. 18, tit. XII, § 1203, 40 Stat. 1138, 1139. The Act continues:

The tax . . . shall not be imposed in the case of any person who employs a child, believing him to be of proper age, relying on a certificate to this effect issued by persons prescribed by a Board consisting of the Secretary of the Treasury, the Commissioner of the IRS and the Secretary of Labor, or issued by state authorities. See The Revenue Act of Feb. 24, 1919, ch. 18, tit. XII, § 1203, 40 Stat. 1138, 1139. The Act continues:

\textsuperscript{Id.} § 1203(b).


In United States v. La Franca, the defendant was convicted and fined under the National Prohibition Act, ch. 85, § 35, tit. 2, 41 Stat. 305 (1920), charged with the sale of intoxicating liquor. He paid a retail liquor dealers tax under I.R.S. § 3244 which was doubled under the National Prohibition Act. A penalty for failure to make a return as retail liquor dealer as a special tax for engaging in the business of retail liquor contrary to state law was also doubled. See La Franca, 282 U.S. at 571.

The tax was imposed by the Revenue Act of 1924, ch. 234, § 701, ¶ 9. A similar tax had been passed in 1918 and repealed in 1921. The Court held that the 1924 tax was, in effect, imposed in 1918, followed by the passage of the National Prohibition Act in 1920. The Court concluded that all four exactions were penalties despite the fact that two were called taxes:

A tax is an enforced contribution to provide for the support of the government; a penalty, . . . is an exaction imposed . . . as punishment for an unlawful act. The two words are not interchangeable, one for the other. . . . If an exaction be clearly a penalty
The type of tax being imposed must be determined. The statute must reflect the usual attributes of that class of tax. The Court in the *Child Labor Tax Case* made the determination that the tax was an excise tax.\(^2\) The base of an excise tax should relate to the type of privilege being enjoyed.\(^3\) It should also be proportional to the level of the privilege exercised in degree or frequency.\(^4\) A flat levy imposed on a particular activity which does not vary with the amount of activity subject to tax has more attributes of a penalty than an excise tax.\(^5\)

Finally, the Court in the *Child Labor Tax Case* looked to the authority of the sovereign. Limitations on constitutional authority must be respected. If the government imposing the tax has the authority to impose both taxes and penalties, the difference between revenue production and mere regulation is often immaterial.\(^6\)

The Supreme Court, as it deemed appropriate, continued to recharacterize as regulations levies labeled as taxes. A first domestic processing tax on commercial farm commodities in 1936 was determined to be primarily regulatory.\(^7\) The Court determined that Congress had no power to force farmers to reduce their production and that "it may not indirectly accomplish those ends by taxing and spending to purchase compliance."\(^8\)

A broader national acceptance of economic regulations then shifted the Supreme Court's perspective. Taxation was overtly acknowledged as a process to structure society as well as to raise revenue. In 1940, the Court upheld a tax on coal producers who refused to join a code

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\(\underline{\text{La Franca,}}\) 282 U.S. at 572; see also *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 391-92 (1922) (drawing distinction between a tax and a penalty); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (holding that regardless of the use of the word "tax," where the nature of the imposition is that of a penalty, it must be so regarded); cf. *Murphy v. United States*, 272 U.S. 630, 631-32 (1926) (recognizing that both a tax and a penalty inflict a detriment, and that at times it is difficult to determine how such a detriment is to be regarded); *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 328 (1926) (looking to the nature of the imposition in assessing the tax/penalty distinction).

312. See *Child Labor Tax Case*, 259 U.S. at 42-43. "Excise taxes are levies on an activity or event, or the exercise of a specific right in property, or on a privilege granted." JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION, CASES AND MATERIALS 29 (4th ed. 1978).

313. See HELLERSTEIN & HELLERSTEIN, supra note 312, at 30-31.

314. See id.

315. A special revenue tax, a flat tax, is constitutional in limited instances. See id. (listing fixed or flat sums among the more prevalent measures of taxes in the country).

316. See id. at 38.


318. Id. at 74.
established by the Bituminous Coal Commission:

Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. It is so utilized here.319

The seminal opinion recognizing the uniqueness of a civil tax assessment and its attendant additions in contrast to criminal punishment was Helvering v. Mitchell.320 Subsequent to the defendant's acquittal of a willful attempt to evade and defeat the income tax, a non-criminal proceeding to recover the additions to the tax provided for "civil incidents of the assessment and collection of the income tax."321 The defendant unsuccessfully argued that his acquittal in the criminal action was a bar to the imposition of the fifty percent penalty.322 The government contended that there were different issues in the two proceedings although the same transactions and similar facts gave rise to the criminal and the civil suits.323 The elements of the crime and the basis for the

319. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940) (citations omitted).
320. 303 U.S. 391 (1938).
321. Id. at 405. The same title of the IRC makes it a crime for any person who willfully attempts in any manner to evade taxes. The Mitchell Court noted that civil sanctions may be of various types. The revocation of a privilege voluntarily granted is an example of a civil sanction. See Id. at 399. Civil sanction also includes deportation of aliens, see United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 154 (1923); Fong Yue Ting v. United States, 149 U.S. 698, 729-30 (1893), and the disbarment of an attorney, see Ex parte Wall, 107 U.S. 265, 288 (1883).
322. Since the nature of the proceeding was different, the only basis for objection on the theory of res judicata was that the issues had been determined in the criminal proceeding. There was a conflict in the circuits. See United States v. LaFrancia, 282 U.S. 568, 575 (1931) (holding that the imposition of a "tax," where punitive in nature, was to be barred by prior adjudication of the same facts); Coffey v. United States, 116 U.S. 436, 442 (1886) (holding that acquittal barred subsequent civil suit on same facts). The Court had previously held that the acquittal on a criminal charge is not a bar for civil action by the government arising out of the same facts on which the criminal proceeding was based. See Mitchell, 303 U.S. at 397 (citing Stone v. United States, 167 U.S. 178, 188 (1897); Murphy v. United States, 272 U.S. 630, 631-32 (1926)); cf. Chantangco v. Abaroa, 218 U.S. 476 (1910) (the law in the Philippine Islands is that once acquitted in a penal case, exemption from civil liability follows).
323. The Court did not rule on the government's position. See Mitchell, 303 U.S. at 398.
imposition of the addition to the tax differed. The distinguishing element was willfulness.\textsuperscript{324}

The Supreme Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."\textsuperscript{325} The Court appropriately examined the statutory language imposing the tax sanction and concluded that it was a civil incident of the assessment, not criminal.\textsuperscript{326} Remedial sanctions differ in that additions to tax are primarily "safeguard[s] for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."\textsuperscript{327} Their purpose is not punishment. It is the interference with the government right that causes the addition to the tax.\textsuperscript{328} The need for enforcement of the tax laws serves as the unique justification for the imposition of additions to taxes and is the basis for sustaining their viability, separate and apart from punishment.

The Supreme Court, having examined the statutory framework of the IRC, found that the penalty provision crimes are contained in one chapter of the IRC, while the civil sanction providing for the fifty percent

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\item \textsuperscript{324} The Court did not regard the acquittal as binding on the civil proceeding on the basis of the differing burden of proof. Specifically with regard to \textit{Mitchell}, there had to be a willful attempt to evade or to defeat the tax. In contrast, the civil action required only a determination of fraud. \textit{See Mitchell}, 303 U.S. at 398; \textit{see also United States v. Scharton}, 285 U.S. 518, 521 (1932) (tax evasion implicitly suggests fraud); \textit{cf. United States v. Murdock}, 290 U.S. 389, 397 (1933) (discussing willfulness as a possible factor). The \textit{Mitchell} Court further held that: "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely... an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" \textit{Mitchell}, 303 U.S. at 397 (quoting \textit{Lewis v. Frick}, 233 U.S. 291, 302 (1914)). It failed to determine that Mitchell had not willfully attempted to evade the tax. "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." \textit{Id.}

This portion of the opinion leads to a criminal/civil dichotomy. It is somewhat unfortunate that the Court used the broad concept of burden of proof in assessing the distinction for purposes of res judicata. The use of the concept is now somewhat misleading in light of the opinion in \textit{Halper}.

\item \textsuperscript{325} \textit{United States v. Halper}, 490 U.S. 435, 448-49 (1989).
\item \textsuperscript{326} \textit{See Mitchell}, 303 U.S. at 400.
\item \textsuperscript{327} \textit{Id.} at 401.
\item \textsuperscript{328} \textit{See id.; see also Kenney v. Commissioner}, 111 F.2d 374, 375-76 (5th Cir. 1940); \textit{Hoefe v. Commissioner}, 114 F.2d 713 (6th Cir. 1940); \textit{Mauch v. Commissioner}, 113 F.2d 555 (3d Cir. 1940); \textit{Davidson v. Commissioner}, 43 B.T.A. 342 (1941).\end{itemize}
addition was located under the heading "Additions to the Tax." The structure of the code provisions of the Revenue Act of 1928 further evidenced congressional intent. A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof.

That civil tax sanctions were nonpenal was settled law for many years. The increasing number and complexity of the civil tax sanctions, combined with the increase in currency crimes, renewed the viability of the issue. It was inevitable that the issue would be re-examined. Reconsideration occurred in United States v. Halper.

The Supreme Court in Halper openly acknowledged that "civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." The broadest interpretation of the Halper "rule

330. The Court noted that collection of the 50% addition might be "by distraint' as well as 'by proceeding in court.'" Id. at 402. Distraint is a civil proceeding. It would be unconstitutional in a criminal proceeding. The fact that Congress provided a civil procedure for the collection of the additional 50% was evidence of congressional intent to impose a civil, not criminal sanction. See id.
331. Id. at 404 n.14 (quoting Mitchell, 32 B.T.A. at 1136). In Wood v. United States, 863 F.2d 417 (5th Cir. 1989), proceeds which had been forfeited to the government were taxed. "The legal test for taxable income is dominion and control, and that test in its terms excludes consideration of what happens to income after it flows from the taxpayer's hands." Id. at 419. Wood exercised complete dominion and control over the proceeds of his drug activities. The fact that all right and title vested in the government as soon as the money was earned by operation of law was irrelevant. See id. at 419. Federal tax laws are not bound by other legal determinations. See Burnet v. Harmel, 287 U.S. 103, 110 (1932). It is not an error to impose a separate penalty on each individual taxpayer for participating in the sale of any tax shelter and making or furnishing gross valuation overstatement as to any material matter. Each defendant may be required to pay the amount cumulatively. See Johnson v. United States, 677 F. Supp. 529 (E.D. Mich. 1988). But see Bond v. United States, 872 F.2d 898 (9th Cir. 1989) (holding that penalties for the sale of abusive tax shelters are not based on the number of individual sales transactions, but rather on the gross income derived from the abusive tax shelter).
333. See supra Part VI.A.
334. Halper, 490 U.S. at 447. In United States v. Ward, 448 U.S. 242 (1980), the Supreme Court established a two-part test for determining whether statutory sanctions constituted criminal or civil punishment:

Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other [i.e., civil
of reason" test in assessing the nature of a civil sanction as punishment requires the sanction to serve solely remedial purposes. The holding offers the criminal defendant the opportunity to argue double jeopardy in a broader universe.

Much of the legal community overreacted to the breadth of the holding in Halper. The actual requirements of the holding are minimal. The purpose of the exaction must be established and distinguished from punishment. Only sanctions which are overwhelmingly disproportionate to the government's damages and expenses are considered punishment. Then the burden of accounting for its damages and costs falls upon the government. Computations must indicate a rough justice. A violation of double jeopardy requires that

or criminal]. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." Id. at 248-49 (citations omitted) (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

335. See United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir. 1992).
336. Cases continue to consider the application of the decision. In Karpa v. Commissioner, 909 F.2d 784 (4th Cir. 1990), the court held that the retroactive imposition of a tax penalty for substantial understatement of tax liability did not violate the Ex Post Facto Clause of the Constitution. The court discussed Halper and ruled that the tax penalty was a civil sanction not implicating ex post facto. See id. at 788. For further discussion of the implications of the Halper decision, see Eads, supra note 12; Lauren Orchard Clapp, Note, United States v. Halper: Remedial Justice and Double Jeopardy, 68 N.C. L. Rev. 979 (1990); Glickman, supra note 332; Lynn C. Hall, Note, Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper, 109 S. Ct. 1892 (1989), 65 WASH. L. REV. 437 (1990); Jahncke, supra note 251; Elkan Abramowitz, Double Jeopardy and Civil Sanctions, 212 N.Y. L.J. 3 (1994).
337. The Court in Halper held that deciding whether a civil sanction constitutes punishment for double jeopardy purposes "requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." 490 U.S. at 448 (emphasis added). The Court adopted the following standard: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Id. (emphasis added).
339. See id. The precise amount of damages and cost to the government is not required to be established. See id. at 446.
340. See id. at 446, 449; see also 38 Whalers Cove Drive, 954 F.2d at 34-35. The Court in Halper stated:

[T]he Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. . . . [T]he problem [is] . . . when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, and

http://scholarlycommons.law.hofstra.edu/hlr/vol25/iss1/3
the punishment must be totally divorced from the reality of what the government suffered in damages and expenses. 341

Examination of the issues created by the Halper opinion began immediately. 342 The application of the Halper case has been limited in part by prior holdings. 343 But the integrity of the income tax system has not been violated. Cases subsequent to Halper examining civil tax sanctions sustained their imposition despite the constitutional challenges. 344 A collage of cases does not serve to undermine the "wall of tax cases" holding that a petitioner is barred from using these (double jeopardy and excessive fines) defenses. 345

Review of defendants' constitutional rights continued. Punishment has the potential of violating the Eighth Amendment's Excessive Fines Clause. 346 Austin v. United States 347 held forfeiture to be a form of monetary punishment. 348 The opinion follows Halper. Whether the

rough justice becomes clear injustice.

490 U.S. at 446.

341. See id. at 442.


344. Halper has been held not to apply to forfeiture gains. See United States v. Torres, 28 F.3d 1463, 1465-66 (7th Cir. 1994); United States v. United States Currency in the Amount of $145,139, 18 F.3d 73, 74-76 (2d Cir.), cert. denied, 115 S. Ct. 72 (1994). But see United States v. $405,089.23 United States Currency, 33 F.3d 1210, 1219-20 (9th Cir. 1994) (applying the Halper test to determine whether a forfeiture constituted punishment).

Halper has been held not to apply to civil contempt fines. See United States v. Mongelli, 2 F.3d 29, 30 (2d Cir. 1993); see also United States v. Newby, 11 F.3d 1143, 1145-46 (3d Cir. 1993) (holding that Halper does not apply to prison disciplining sanctions). But see United States v. Hernandez-Fundora, 49 F.3d 848, 851-52 (2d Cir. 1995) (using Halper's disproportionate rule).

345. See, e.g., McNichols v. Commissioner, 13 F.3d 432, 434 (1st Cir. 1993).

346. The Court in Austin v. United States observed:

The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense." "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." 509 U.S. 602, 609-10 (1993) (citation omitted) (quoting Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

Thus, the Court concluded that "the question is not . . . whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment." Id. at 610.


348. See Austin, 509 U.S. at 606-22. The Court held that the civil in rem may have constituted a constitutionally impermissible excessive fine because the statutory provision focused on the culpability of the owner of the property and because the provision is designed to effect both a deterrent and retributive purpose. See id. at 621-22.
A proceeding is civil or criminal is not determinative of the issue.\textsuperscript{349} A remedial purpose does not preclude punishment. But if a part of the remedial purpose is punishment, the constitutional protection has been violated.\textsuperscript{350} The Court held that forfeiture may constitute punishment but refused to establish a brightline test to determine excessiveness.\textsuperscript{351}

In \textit{McNichols v. Commissioner},\textsuperscript{352} the defendant was a convicted drug dealer who pleaded guilty to distributing marijuana, various violations of RICO,\textsuperscript{353} conspiracy to defraud the United States, and subscribing to false tax returns.\textsuperscript{354} The plea agreement provided for the forfeiture of all property described in the indictment which was worth approximately $1.2 million. The following year, McNichols was assessed civil tax deficiencies including additions to the tax. That amount equaled $1,169,699.\textsuperscript{355}

McNichols argued the assessment was unconstitutional. The court rejected the McNichols’ argument, relying on the overwhelming weight of authorities which has rejected claims of punishment when an addition to tax is assessed.\textsuperscript{356} The court held that \textit{Austin} was not controlling; it limited the holding in \textit{Austin} to forfeiture cases\textsuperscript{357} and held that the determination of whether an individual defendant is exposed to punishment under the Eighth Amendment’s Excessive Fines Clause is a determination for the trier of fact.\textsuperscript{358}

The court used the time-tested \textit{James} and \textit{Mitchell} cases as controlling, holding that the additions to the tax were permissible. \textit{Austin} is not a “springboard” to attack additions to tax.\textsuperscript{359} Moreover, \textit{Halper} was “inapposite” precedent because it involved a specific statutory penalty and “[t]o use \textit{Halper} as a base for vaulting into the tax arena would be to misapply the case and distort its holding.”\textsuperscript{360}

\begin{itemize}
\item \textsuperscript{349} See \textit{Austin}, 509 U.S. at 610; \textit{Halper}, 490 U.S. at 447.
\item \textsuperscript{350} See \textit{Halper}, 490 U.S. at 448-49.
\item \textsuperscript{351} See \textit{Austin}, 509 U.S. at 622.
\item \textsuperscript{352} 13 F.3d 432 (1st Cir. 1993).
\item \textsuperscript{354} See \textit{McNichols}, 13 F.3d at 432.
\item \textsuperscript{355} See id. at 434.
\item \textsuperscript{356} See id. at 435-36 (relying on \textit{James v. United States}, 366 U.S. 213 (1961); Helvering v. \textit{Mitchell}, 303 U.S. 391 (1938); \textit{Kappa v. Commissioner}, 909 F.2d 784 (4th Cir. 1990); \textit{Traficant v. Commissioner}, 884 F.2d 258 (6th Cir. 1989); \textit{Wood v. United States}, 863 F.2d 417 (5th Cir. 1989); \textit{Kennedy v. Commissioner}, 111 F.2d 374 (5th Cir. 1940)).
\item \textsuperscript{357} See \textit{McNichols}, 13 F.3d at 434.
\item \textsuperscript{358} See id.
\item \textsuperscript{359} See id.
\item \textsuperscript{360} Id. at 435.
\end{itemize}
A rare tax may be determined to be retribution. A criminal defendant should present his individual total package of punishment and civil sanctions to the attention of the court. For example, in *Department of Revenue v. Kurth Ranch*, the state of Montana imposed a tax on drug possession which was also punishable by imprisonment and forfeiture. The tax was invalid because it exposed the defendants to double jeopardy. It constituted an impermissible second punishment which was not rationally related to damages suffered by the government. The sanction did more than merely compensate the government for its damages and costs.

The tax in *Kurth Ranch* was clearly punishment. It automatically applied to those who committed the crime. Clearly, the Court was correct in its determination that the application of the criminal and civil tax statutes required identical elements to be proven.

The recent case of *Thomas v. Commissioner* examined the constitutional rights of a defendant who pled guilty to cocaine conspiracy. As in the normal course, Thomas was assessed additions to a tax assessment. The court held that the criminal charge and the failure to report income were separate actions. The additions were characterized as remedial rather than punitive. Allegations of violations of either the Fifth or Eighth Amendment were dismissed. The court summarily distinguished *Halper* as inappropriate precedent. In *United States v. Alt*, federal civil tax penalties were imposed for understating taxes, fraud, and negligence. Although Alt had pled guilty to income tax crimes and was imprisoned, assessment of the civil tax penalties was not considered punishment. Their purpose was remedial and intended to

362. See id. at 1948.
364. The opinion is unique, and may be of limited value because it involves a state statute.
365. 62 F.3d 97 (4th Cir. 1995).
367. 83 F.3d 779 (6th Cir. 1996).
recover the government's cost of detecting and collecting unpaid
taxes. These opinions properly analyzed the legal issues and seem-
ingly put to rest the notion that additions to tax possess an element of
punishment.

B. The Ceiling on Remedial Sanctions—Determining Rough Justice

Retribution and deterrence are only proper for punishment. A civil sanction must be solely remedial. Remedial
principles also figure predominantly in tort law. Damages in tort
actions are often described in compensatory terms. These damages may
be larger than the amount necessary to reimburse the actual monetary
loss sustained or anticipated by the plaintiff. Redress of intangible
elements of the injury that are not immediately ascertainable in amount
is important. A remedial amount may exceed reimbursement for actual costs.

After an initial determination that a civil tax sanction is not for

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368. See id. at 782.
369. The test is:

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

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted); see United States
v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir. 1992).

by assessing fiscal sanctions is extremely difficult. "The value of money itself changes from a
thousand cases; and, at all events, what is ruin to one man's fortune may be a matter of indifference
..." 4 BLACKSTONE, supra note 247, at *448.

371. See W. PAGE KEATON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 584-615 (5th

372. See Molzof v. United States, 502 U.S. 301, 310 (1992); see also DAN B. DOBBS,

In accounting for the injury, justification exists for damages to be recovered not only for lost
wages, medical expenses, and diminished future earning capacity, but also for emotional distress. See
Threlkeld v. Commissioner, 87 T.C. 1294, 1300 (1986); see also DOBBS, supra, at 540-51; cf. Gertz
v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (any award must be supported by sufficient
evidence).

Controversy does exist with regard to the amount of the award of punitive damages.
"[S]ettled principle of Anglo-American justice" prohibits monetary penalties that "threaten the
defendant's economic viability." Jeffries, supra note 258, at 154; see also Bittle, supra note 251, at
1439.
purposes of deterrence or retribution, it must be further examined for reasonableness. Halper defines a civil sanction as punitive when it is overwhelmingly disproportionate to the damage caused to the government. In United States v. Morgan, the defendant asserted his constitutional right against twice being put in jeopardy for the same offense. Morgan was indicted after signing a consent order requiring a $1.5 million restitution payment. The opinion further develops Halper's rough justice requirement for measuring civil sanctions. Halper suggested that a civil sanction may constitute punishment for double jeopardy purposes where the sanction is "overwhelmingly disproportionate" to the damages the defendant caused. The test is whether the civil sanction has so little relationship to making the government whole as to shock the conscience of the court. An extremely high threshold is required to invalidate a sanction on the basis of its amount.

In United States v. Alt, the total amount of civil tax penalties, $1,331,781, due on assessed taxes of $1,644,027 was not "outrageous." The court issued a caveat: "[A] simple comparison of the size of the civil penalty to the amount of probable financial damage will not resolve every case under Halper. Other factors, such as Congress's stated purpose and historical ideas about particular remedies, are relevant in determining when someone is 'punished' by a particular law."

The actual expenses incurred by the government when an individual omits income or violates another provision of the IRC are generally not

373. A defendant must make a threshold showing of punishment before a court undertakes a double jeopardy analysis. See United States v. Mangelli, 2 F.3d 29, 30 (2d Cir. 1993).
374. See 490 U.S. 435, 448-49. Halper's test for assessing the nature of civil sanctions is a rule of reason. Injuries include the costs of detection and investigation litigation, and other "ancillary costs." Id. at 445; see also 38 Whalers Cove Drive, 954 F.2d at 37.
376. See id. at 1111. The defendant also argued that since the consent order labelled one portion of the payment to correct alleged conditions, the additional payment, termed his "personal obligation," must be punitive. The court would not recognize labels as controlling as to any issue in the case. See id. at 1115.
377. 490 U.S. at 449.
378. The court examined various ways to measure the harm suffered by the government. It rejected the defendant's contention that the bank, rather than the government, suffered a loss in excess of over $2,275,000 and that the figure was immaterial in determining the damage caused by the government. See Morgan, 51 F.3d at 1115. The court held that the designated figure constituted a reasonable measure of the damages suffered by the government. See id.
379. See id. at 1108.
380. 85 F.3d 779 (6th Cir. 1996).
381. Id. at 782-83.
382. Id. at 783 (citing Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994)).
identifiable. Only with great expense are costs ever traceable. When estimating the damage and costs suffered by the government, only rough justice must be served.383 A civil tax penalty exceeding the costs of making the government whole may still serve a remedial goal:384 "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoing, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."385

Another area of the civil tax law that employs limitations equivalent to rough justice is state taxation. The Commerce Clause provides a limit to a state's ability to tax interstate commerce.386 A part of the established test requires apportionment of a tax base. Apportionment is designed to distribute the tax base roughly proportionally to the taxable activities of the taxpayer in states that have jurisdiction to tax. Use of separate accounting is not effective and is unacceptable for state tax purposes.387 Interpretation of the Commerce Clause has invalidated an


In a case where such disproportion is shown, the government bears the burden of accounting for its damages and cost.

The proof of criminal tax fraud charges may require the use of assumptions. While direct methods of proof of tax fraud charges are the most effective, indirect methods are also utilized to establish a prima facie case of fraud. The methods are: (1) the net worth method, which compares a taxpayer's worth at two points in time, and analyzes whether reported income can explain the increase in net worth; (2) the cash expenditure method, which compares the taxpayer's expenditures to an amount of income reported received during a certain period; and the (3) bank deposit method, which involves an analysis of the taxpayer's bank records used in connection with other means of proof. 15 Jacob Mertens, Jr., The Law of Federal Income Taxation § 55A.01, at 11 (1996).


386. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), establishes a four-prong test for Commerce Clause purposes: (1) nexus; (2) apportionment; (3) no discrimination; and (4) relation to the services provided by the state. See id. at 279.


In Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931), the Supreme Court determined that the method of accounting used by the state of North Carolina resulted in taxation of the company out of proportion to its business transactions within the state. The taxpayer had evidence of the source of the profits pertaining to its buying, manufacturing, and selling operations. A 250% error in apportionment by the state was deemed unacceptable. (There is some question as to whether the evidence was actually introduced in the case. The taxpayer made
apportionment formula that has a “grossly distorted result.” A method of apportionment that provides a fair approximation based on the best information available is acceptable.


The Court in Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996), held that the apportionment requirement of the Complete Auto analysis requires that “the tax on interstate commerce . . . be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce.” Id. at 854 (quoting Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1352 (1994)). The Court noted that the judiciary is “poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.” Id. at 859 (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 589-90 (1983)).

Rough justice is all that is required in state tax apportionment, given “the impossibility of allocating specifically the profits earned by the processes conducted within [state] borders.” Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 121 (1920).

Related to the determination of the costs of compliance which should be recoverable by the user of the tax system is the fourth prong of the Commerce Clause test for state tax purposes. The tax must be “fairly related to the services provided by the [s]tate.” Japan Line, Ltd. v. County of L.A., 441 U.S. 434, 444-45 (1979) (quoting Complete Auto, 430 U.S. at 279)). This language does not require a detailed factual investigation into the benefits provided to the taxpayer by the state. The state only has to provide the taxpayer with “the benefits of a trained work force and the advantages of a civilized society.” Japan Line, 441 U.S. at 445.

In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), Montana’s coal severance tax was challenged. The fairly related test was viewed as “"a means of distributing the burden of the cost of government."” Id. at 623 (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521-23 (1937)). The tax in Edison was assessed in proportion to the taxpayer’s mining activities within the state and was measured as a percentage of the value of coal taken in the state. It was therefore reasonably related to the services provided by the state.

The fair relation part of the Complete Auto test requires no detailed accounting of the services provided to the taxpayer in relation to the activities being taxed. A state is not limited to offsetting public costs created by the taxed activity. There must be a contribution to the cost of providing all governmental services, including those services from which it arguably receives no direct benefits. See Goldberg v. Sweet, 488 U.S. 252, 266-67 (1989).

Apportioning the tax in relation to the taxpayer’s activities in the state makes the taxpayer shoulder his or her fair share of supporting state provisions of “police and fire protection, the benefit of a trained work force, and “the advantages of a civilized society.”” Exxon Corp. v. Wisconsin Dept’ of Revenue, 447 U.S. 207, 228 (1980) (quoting Japan Line, 441 U.S. at 445).
The prohibition against disproportionate punishment is rooted in both the common law and in constitutional law. The Eighth Amendment of the Constitution provides only a “substantive ceiling.” The United States Supreme Court first endorsed the principle of proportionality as a constitutional limit in Weems v. United States. In United States v. Busher, the defendant was convicted for violating RICO. He was also charged with tax evasion and submitting false income tax returns. Busher was sentenced to four years in prison on the RICO charges. The sentence was to be served concurrently with two years for the tax charges and two years for the false statements claims and mail fraud charges. Forfeiture of the entire interest in two corporations and real estate located in Nevada was determined to be disproportionate and in violation of the Eighth Amendment.

Civil tax sanctions are generally expressed as a percentage of the amount of tax deficiency. There is no definitive test of disproportionality or rough justice. Challenging the amount of a civil tax sanction is extremely difficult. Even punitive damages, often considered purely penal in nature, are unlikely to be judged excessive. Aside from capital punishment cases, successful challenges to the proportionality of particular sentences are exceedingly rare.

Principles of tort law and state tax law provide valuable insight in establishing guidelines for the limits on civil tax sanctions. The sanctions


In judging cruel and unusual punishment, the Eighth Amendment “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.” Solem v. Helm, 463 U.S. 277, 284 (1983). The Solem rule considers: the seriousness of the offense in relation to the harshness of the penalty; the sentences other criminals received in the same jurisdiction; and the sentences imposed by other jurisdictions for the commission of the same crime. See id. at 290-92. In identifying the relevant civil penalties, the court should consider not only the amount of the awards of punitive damages but also civil statutory sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions but also any possible prison term. See id.

391. 217 U.S. 349 (1910); see also Jeffries, supra note 258, at 154.
392. 817 F.2d 1409 (9th Cir. 1987).
394. The case was remanded to the lower court to ascertain whether or not the sanctions were excessive. See Busher, 817 F.2d at 1416.
395. For a discussion of ad valorem penalties, see supra Part IV.B.
should include not only the costs attributed to the enforcement and collection programs of the IRS, but also for other direct and indirect governmental programs to be supported by those who fail to comply with the tax system.

Civil tax sanctions should continue to be proportional.\(^{397}\) A seemingly high amount, in monetary terms, of civil tax sanction is unlikely to be challengeable. The appropriate ceiling on civil tax sanctions should be resolved through the legislative system in establishing the proper percentage.

VIII. CONCLUSION

The proscription against multiple fines and double jeopardy protection may be a defense to a penal tax exaction. In determining whether a sanction is penal, the United States Supreme Court scrutinizes several factors: (1) whether it involves an affirmative disability; (2) whether it has historically been regarded as punishment; (3) whether it comes into play on a finding of scienter; (4) whether its operation will promote retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether there is an alternative purpose for it; and (7) whether it is excessive in relation to the alternative purpose assigned.\(^{398}\)

The many objectives of the tax laws are legitimate and have long been recognized.\(^ {399}\) It is perfectly acceptable for taxes to be levied for a variety of fiscal, social, economic, or moral reasons. A tax act cannot be declared invalid just because an ancillary motive might contribute to its passage.\(^ {400}\) A provision can be an adjunct of the general scheme of taxation of which it is a part and can be considered entirely appropriate


\(^{399}\) The taxpayer is not without recourse if a remedial sanction is incorrectly or inequitably computed. In Conforte v. Commissioner, 692 F.2d 587 (9th Cir. 1982), the court permitted the taxpayer to credit the acknowledged tax against the penalties which had been computed to the entire amount of the tax she claimed to be owing. The failure to give the taxpayer credit would result in application of fraud penalties to conduct that could not be characterized as fraudulent and would impose no risk to the federal fiscal situation. See id. at 590-91.

\(^{400}\) See United States v. Doremus, 249 U.S. 86, 93 (1919).
as a means to that end.\textsuperscript{401}

It is important for Congress to consider the risks and benefits of a particular statutory provision by relating it in a broad sense to other areas of the law. The need for remedial civil sanctions is well accepted. The tax law is its own statute. The purpose of the provisions and their meaning have long been interpreted within their own forum. They should be unaffected by specifically applied principles in other areas of the law.

The civil tax sanctions, or additions to tax, are an essential part of the tax system in the United States.\textsuperscript{402} Without these provisions, the system would be exceedingly difficult to administer and enforce. They are also necessary to secure compliance. The integrity of a system of taxation should not be jeopardized by taking a part of the tax scheme and coupling it with other provisions of American jurisprudence.

Taxes that are suspect to scrutiny for features of punishment include: (1) taxes not intending to raise revenue, but meant primarily to suppress a certain kind of conduct; (2) grossly disproportional exactions; and (3) a tax levied upon a particular act requiring scienter. Merging the taxing powers in the IRC with punishment for currency crimes has made civil tax sanctions suspect to the violations of double jeopardy and excessive fines.\textsuperscript{403} Halper teaches that a civil sanction must serve a solely remedial purpose.\textsuperscript{404}

\textit{James v. United States}\textsuperscript{405} holds that receipt of illegal income is taxable.\textsuperscript{406} Failure to report the income will result in the imposition of civil tax penalties. Failure to report may be viewed as a component part of a singular act. The component parts of an act can be joined in a variety of ways to produce different perceptions. The evaluation depends on the standards being applied. The component parts of an act can constitute a crime or a tort and have substantial tax consequences. Various implications in different areas of the law are effectuated. Each area of the law has its own remedies to serve the purposes of the

\textsuperscript{401} See id. at 94; see also Taft v. Bowers, 278 U.S. 470, 482 (1929); Reinecke v. Northern Trust Co., 278 U.S. 339, 346 (1929).
\textsuperscript{402} Civil tax sanctions are treated as a tax. See I.R.C. § 6665(a). They are assessed and collected in the same manner as taxes. See id.; see also Walker, supra note 96, at 823.
\textsuperscript{403} The defendant in \textit{United States v. Busher}, 817 F.2d 1409 (9th Cir. 1987), argued that RICO was being used to convert simple IRS violations into racketeering charges. See id. at 1411. Congress lists predicate acts that give rise to RICO violations in 18 U.S.C. § 1961 (1994). The charges against the petitioner were not considered predicate acts of racketeering under RICO.
\textsuperscript{404} See 490 U.S. at 448-49; see also United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir. 1992).
\textsuperscript{405} 366 U.S. 213 (1961).
\textsuperscript{406} See id. at 240.
collective statutes of the particular field.

Constitutional law and case law generally hold that each separate cause of action requires proof of a distinguishing element. This distinguishing element provides for a unique effect. The focus cannot be on a collective basis. Each evaluation must be administered individually. To piggyback civil tax sanctions with criminal sanctions is inconsistent and constitutes an attempt to compare different genre.

The seemingly multiple effect caused by a confluence of evaluations is not a structural evil that flows from any sanction individually. It is an incident of being subject to factors used to judge different areas of the law.

A final analogy illustrates the uniqueness of different fields of the law. In the commission of a criminal act, the taxpayer receives illegal income that he fails to report. As a result, he is assessed civil tax sanctions. During the same criminal act, a tortious act is committed. Punitive damages are assessed in the civil tort action. The plaintiff in the civil suit omits these proceeds from income. Both taxpayers have omitted gross income, and both should be subject to similar civil tax sanctions. For the criminal defendant to have these sanctions reduced or eliminated because he is also subject to criminal punishment creates a benefit for the tax violator.

Tax law is a law unto itself. Take, for example, the differing treatment of a gift in the law of estate and gift tax as compared with its treatment in the law of property. For estate and gift taxes, a gift occurs when there is a transfer of property without consideration. In property law, a gift is completed when there is an intention to make a gift, delivery of the property, and acceptance by the donee. Each legal inquiry is unique.

The lack of substantial identity of action in the criminal and civil tax proceedings is the key to maintaining what are seemingly cumulative remedies. The receipt of illegal income in itself does not automati-

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408. See I.R.C. § 2512(b).


410. See Traficant v. Commissioner, 884 F.2d 258, 262 (6th Cir. 1989) (upholding the tax ruling that the prior acquittal on a criminal charge of bribery did not preclude the Tax Court’s finding that the taxpayer took bribes). The Tax Court correctly ruled that double jeopardy did not foreclose such
cally impose civil tax sanctions. It is only after the law establishes that the taxpayer has violated a provision of the IRC that the civil sanctions apply.\textsuperscript{411}

Burden of proof is not a relevant inquiry. The opinion in \textit{United States v. Mitchell} could have been more instructive. Burden of proof differs because of the different elements in the causes of action.\textsuperscript{412} If the elements of an action comprise a crime, the burden will be beyond a reasonable doubt. Proving a civil action generally requires only a preponderance of the evidence. Only after identifying the elements of a cause of action as constituting a crime or civil law violation does the burden of proof assign.

Constitutional interpretation, case law, a full understanding of the tax system, and the evolution of the civil tax sanctions produce a five-step assessment to examine a tax statute or a statutory tax provision for features of punishment:

(1) What is the primary purpose of the statute?\textsuperscript{413}

(2) Does the conduct applicability of the statute depend on a unique element of conduct?\textsuperscript{414}

\textsuperscript{411} The results which follow in the two cases are wholly distinct and different in their purpose. One is a criminal action instituted by the sovereign power for the punishment of crime, after indictment, trial, and conviction. The other is to enforce the collection of the taxes imposed. As stated by Justice Grier in \textit{Dorsheimer v. United States}, 74 U.S. (7 Wall.) 166 (1868): "The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act in \textit{terrorem} upon parties whose conscientious scruples are not sufficient to balance their hopes of profit." \textit{Id.} at 173.

"It is one thing to charge a party with a crime. It is a wholly different thing to charge the existence of facts as the basis for the enforcement of a penalty by civil suit, or by the action of administrative officers, although such facts may constitute a crime." McDowell v. Heiner, 9 F.2d 120, 122 (W.D. Pa. 1925), aff'd, 15 F.2d 1015 (3d Cir. 1926).

\textsuperscript{412} The \textit{Halper} case caused much fervor because many concluded that the case abolished the distinction between the criminal and civil law. What the Court proposed is far less reaching. The Court's use of the term "burden of proof" did not adequately address the true concern. The elements of the crime and the conduct giving rise to the civil actions must be identical. If they are, a violation of constitutional principles has occurred. See discussion \textit{infra} p. 105.

\textsuperscript{413} Statutory interpretation of the tax provision in its proper context should show a primary purpose of raising revenue or assessing costs to the user. The statute should have only ancillary regulatory purposes. The statute should not be facially penal (identifying wrongful behavior while imposing a punishment). If the statute is not facially penal, an intention to punish may be proven by the absence of a legitimate nonpunitive governmental purpose. See \textit{Bell v. Wolfish}, 441 U.S. 520 (1979). The motive of Congress in passing a tax has been considered irrelevant. See \textit{Tyler v. United States}, 281 U.S. 497, 505 (1930).

\textsuperscript{414} If so, identify a unique element of conduct which is needed for its applicability.
(3) Is scienter required?\(^{415}\)

(4) Does the statute exhibit the normal features of its genre of tax?\(^ {416} \)

(5) Has there been a calculation of the level of the infraction to enable assurance that the sanction roughly corresponds to a remedial purpose?\(^ {417} \)

If there appears to be a problem with the amount of a civil tax sanction, it may be in the level of the exaction.\(^ {418} \) The level is set by Congress. Double production of revenue does not make an exaction equivalent to punishment.\(^ {419} \) Specific accounting is generally impossible, but parameters should be established. Guidance in establishing "rough justice" is needed. Stability in application is essential.

*Halper* as applied to civil tax penalties is wrong in principle. The IRC is a facet of American law. Its complexity is undeniable. The policy considerations and many other factors analyzed in the creation and evolution of a tax system are a discipline unto itself. A brief examination of that discipline convinces one that taxes and additions to taxes should not be shredded and evaluated in inappropriate contexts. Understandably, "[t]his conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does."\(^ {419} \)

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415. Scienter, or willfulness, generally results in punishment.

416. Taxes are generally classified as (1) capitation or poll, (2) property, (3) excise, or (4) income. See 1 THOMAS M. COOLEY, THE LAW OF TAXATION §§ 38, 49 (Clark A. Nichols ed., 4th ed. 1924); see also, NEIL H. JACOBY, RETAIL SALES TAXATION 3 (CCH 1938).

The classification of a tax is often not clear. "Income is something derived from property, labor, skill, ingenuity or sound judgment, or from two or more in combination. It is not commonly thought of as property but as gain derived from property, or some other productive source." Stony Brook R. Corp. v. Boston & M. R. R., 157 N.E. 607, 610 (Mass. 1927). "'[I]ncome'... in common parlance and in [the] law [is used] in contradistinction to... 'property.'" 31 C.J. Income § 2 (1923) (footnotes omitted).

"The term 'property,' as used in reference to taxation, means the corpus of an estate or investment, as distinguished from the annual gain or revenue from it. Hence a man's income is not 'property' within the meaning of a constitutional requirement that taxes shall be laid equally and uniformly upon all property within the State."

Featherstone v. Norman, 153 S.E. 58, 65 (Ga. 1930) (quoting HENRY CAMPBELL BLACK, INCOME AND OTHER FEDERAL TAXES § 44 (3d ed. 1918)).

417. Proportionality is generally a requirement.


419. See Regal Drug Corp. v. Wardell, 260 U.S. 386, 392 (1922).
