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SUMMARY

DEPARTMENT OF REVENUE v. KURTH RANCH: THE EXPANSION OF DOUBLE JEOPARDY JURISPRUDENCE INTO CIVIL TAX PROCEEDINGS

From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.¹

[T]he decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.²

I. INTRODUCTION

Before its decision in Department of Revenue v. Kurth

¹. United States v. Sanchez, 340 U.S. 42, 45 (1950) (upholding the Marihuana Tax Act, 26 U.S.C. § 2590(a)(2), now repealed (last codified at 26 U.S.C. § 4741 (1964)), which imposed a federal tax on marijuana at the rate of $100-per-ounce, against a constitutional challenge that the tax was a penalty, rather than a true tax) (quoting Magnano Co. v. Hamilton, 292 U.S. 40, 47 (1934) (upholding against a due process challenge a steep excise tax imposed by the State of Washington on processors of oleomargarine during the Great Depression)).

Ranch, the United States Supreme Court had never subjected a tax statute to double jeopardy scrutiny. In Kurth Ranch, the Supreme Court held that Montana's tax on the possession of illegal drugs, assessed after the state had imposed a criminal penalty for the same conduct, violated the Fifth Amendment prohibition against successive punishments for the same offense. The Court stated that the Montana Dangerous Drug Tax was not the kind of civil sanction that may follow the first punishment of a criminal offense. Moreover, the Court held that the civil proceeding Montana initiated to collect the tax was the "functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time" for the same offense.

This summary first provides a brief overview of the Fifth Amendment's Double Jeopardy Clause. The overview will be followed by an analysis of the Supreme Court's expansion of double jeopardy application in United States v. Halper. The

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4. See id. at 1949 (Rehnquist, C.J., dissenting); see also id. at 1945-46 & n.16. The Kurth Ranch Court explained:

Although we have never held that a tax violated the Double Jeopardy Clause, we have assumed that one might. In Helvering v. Mitchell, 303 U.S. 391 (1938), for example, this Court considered a Revenue Act provision requiring the taxpayer to pay an additional 50 percent of the total amount of any deficiency due to fraud with an intent to evade the tax. The Court assumed such a penalty could trigger double jeopardy protection if it were intended for punishment, but it nevertheless held that the statute was constitutional because the 50 percent addition to the tax was remedial, not punitive. Id., at 398-405. Although the penalty at issue in Mitchell is arguably better characterized as a sanction for fraud than a tax, the Court . . . [made] nothing of the potential import of the distinction.

Id.

5. Id. at 1948.


8. Id.

9. U.S. CONST. amend. V.

10. 490 U.S. 435 (1989) (holding for the first time that a civil fine constitutes
summary will then briefly analyze Montana's Dangerous Drug Tax Act. Finally, the summary will discuss the majority's reasoning in *Kurth Ranch*, and examine the three separate dissenting opinions.

**II. FACTS AND PROCEDURAL HISTORY**

The extended Kurth family owned a ranch in Central Montana. The Kurths' business involved livestock, mixed grain, and marijuana. Their family business grew into the largest known marijuana farming operation in the State of Montana. In October 1987, Montana law enforcement officers raided the ranch, arrested the Kurths, and confiscated 2,155 marijuana plants, 1,811 ounces of harvested marijuana, hash tar and hash oil, equipment, and paraphernalia. The Kurths were convicted and sentenced on various state drug charges.

Montana's Dangerous Drug Tax Act imposes a tax "on the possession and storage of dangerous drugs" on each individual arrested for such possession and storage. In the case of mar-
juana, the tax is ten percent of the market value of the drugs or $100 per ounce, whichever is greater. Pursuant to the Act, the Montana Department of Revenue attempted to collect $900,000 in taxes on the marijuana plants, harvested marijuana, hash tar and hash oil, plus interest and penalties. The Revenue Department initiated the civil tax proceeding about six weeks after the start of the criminal prosecution.

In Chapter 11 bankruptcy proceedings, instituted by the Kurths after the State's attempt to collect tax and forfeiture proceeds, the Kurths objected to the Revenue Department's
claim for unpaid drug taxes and challenged the constitutional-
ity of Montana's Dangerous Drug Tax Act. The Kurths argued, and the bankruptcy court agreed, that the tax constituted a second punishment for the same offense in violation of the Fifth Amendment's Double Jeopardy Clause. The state countered that the tax was not a penalty because it was designed to recover law enforcement costs and was therefore remedial. Relying primarily on United States v. Halper, the bankruptcy court rejected the State's argument, noting that the government failed to provide an accounting of the actual damages or costs it incurred. More importantly, the court reasoned, the punitive character of the tax was evident because the Act promoted the traditional aims of punishment: retribution and deterrence. The district court concurred with the bankruptcy court, holding that the dangerous drug tax constituted a second punishment for the same criminal conduct.

The Court of Appeals for the Ninth Circuit affirmed the district court's decision, largely basing its conclusion on the state's failure to provide an accounting to justify the tax. However, the court refused to hold the tax unconstitutional on its face, instead holding it unconstitutional as applied against the Kurths. Looking first to Halper, the court determined that a disproportionately large civil penalty can be punitive for double jeopardy purposes. Although Halper involved a civil penalty rather than a tax, the court of appeals found no distinction between a fine and the tax at issue in Kurth Ranch. The court determined that the main inquiry under Halper's double jeopardy analysis was whether the sanction imposed was rationally related to the damages the government suf-

29. See id.
30. Id. at 74.
31. 490 U.S. 435 (1989) (holding for the first time that a civil fine constitutes punishment violative of the double jeopardy clause).
32. In re Kurth Ranch, 145 B.R. at 75.
33. Id. at 75-76.
35. In re Kurth Ranch, 986 F.2d 1308, 1312 (9th Cir. 1993).
36. Id.
37. Id. at 1311.
38. See id.
The court of appeals concluded that the Kurths were entitled to an accounting to determine if the Montana tax constituted an impermissible second punishment under the Double Jeopardy Clause. Due to the state's failure to offer any such evidence, the court held the tax unconstitutional as applied to the Kurths.

While Kurth Ranch was pending on appeal to the United States Supreme Court, the Montana Supreme Court, in Sorenson v. State Dept of Revenue, reversed two lower state court decisions that held that the Dangerous Drug Tax was a form of double jeopardy. The Sorenson court found that the legislature had intended to establish a civil, not a criminal, penalty and that the tax had a remedial purpose in addition to promoting retribution and deterrence. Notably, the court found Halper not controlling because that decision involved a civil penalty, not a tax. The Sorenson court concluded that the Montana Dangerous Drug Tax was not excessive and that a tax, unlike a civil sanction, requires no proof of the remedial costs incurred by the government.

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39. Id.
40. In re Kurth Ranch, 986 F.2d at 1312.
41. Id.
42. 836 P.2d 29 (Mont. 1992).
43. Id. at 33.
44. Id. at 31.
45. Id. at 32-33. The Sorenson court stated:

Halper involved a civil sanction and a fixed penalty per offense which was not based on remedial costs. As mentioned, the penalty was $2,000 for each event regardless of how small the dollar amount was in terms of cost to the government. In contrast, the Montana Dangerous Drug Tax is an excise tax based on the quantity of drugs in the taxpayer's possession.

Id. at 33.
46. Id. at 33. The Sorenson court announced:

We note that both District Courts held the tax was excessive and punitive, not remedial, because the DOR failed to provide a summation of the costs of prosecution and societal costs of drug use. However, unlike the civil sanction in Halper where such proof may be required, a tax requires no proof of remedial costs on the part of the state. Commonwealth Edison Co. v. State of Montana (1980), 189 Mont. 191, 615 P.2d 847. In Commonwealth this Court held that the state is not required to defend the validity of an excise tax by offering a summation of
The Montana Supreme Court decision was directly at odds with the Ninth Circuit decision. Consequently, the United States Supreme Court granted **certiorari** to review the decision of the Ninth Circuit Court of Appeals.47

III. BACKGROUND

A. THE DOUBLE JEOPARDY CLAUSE

The Fifth Amendment provides in pertinent part that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."48 Although the text mentions only harms to "life or limb," it is well settled that the Fifth Amendment also covers monetary penalties and imprisonment.49 The Double Jeopardy Clause protects against three possible actions: a second prosecution for the same offense after acquittal;50 a second prosecution for the same offense after conviction;51 and multiple punishments for the same offense.52 The protections of the Double Jeopardy Clause apply to the states through the Fourteenth Amendment.53

The Clause does not prohibit multiple punishments imposed in a single proceeding whether these punishments be a combination of prison plus a fine, consecutive terms of prison, or prison plus a forfeiture.54 Because a legislature may authorize multiple punishments under separate statutes for a single course of conduct, the multiple-punishment issue in the context of a single proceeding focuses solely on ensuring that the total punishment does not exceed legislative authorization.55 Thus,

48. U.S. CONST. amend. V.
51. See, e.g., In re Nielsen, 131 U.S. 176 (1899).
55. E.g., Halper, 490 U.S. at 450-51; Johnson, 467 U.S. at 499-500; Hunter,
legislatively authorized multiple punishments are permissible under double jeopardy if imposed in a single proceeding, but impermissible if imposed in successive proceedings. Additionally, the procedural safeguards of the Double Jeopardy Clause are not triggered by litigation between private parties. However, when the government has imposed a criminal penalty, then seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause prevents the government from seeking the second punishment for fear that it may be motivated by dissatisfaction with the sanction obtained in the first proceeding.

B. THE UNITED STATES V. HALPER PROPORTIONALITY ANALYSIS

Before its decision in United States v. Halper, the Supreme Court had never invalidated a legislatively authorized


The Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.


56. See Hunter, 459 U.S. at 368-69. See also Kurth Ranch, 114 S. Ct. 1937, 1957 n.1 (Scalia, J., joined by Thomas, J., dissenting) (in the context of criminal proceedings); Halper, 490 U.S. at 450 (in the context of civil proceedings).


58. Halper, 490 U.S. at 451 n.10. See also Crist v. Bretz, 437 U.S. 28, 35 (1978) (finding that jeopardy "attaches" at the beginning of a criminal prosecution, when the jury is empaneled and sworn). See generally Annotation, Conviction from which Appeal is Pending as a Bar to Another Prosecution for the Same Offense, 61 A.L.R. 2d 1224 (1958).

successive civil penalty as violative of the Double Jeopardy Clause.\textsuperscript{60} In July 1985, Dr. Irwin Halper was convicted of 65 separate violations of the Criminal False Claims Statute.\textsuperscript{61} Each false claim involved a demand for twelve dollars in reimbursement for medical services worth only three dollars per claim.\textsuperscript{62} Dr. Halper was sentenced to imprisonment for two years and fined $5,000.\textsuperscript{63} In a subsequent civil proceeding under the Civil False Claims Act,\textsuperscript{64} the Government sought to recover a $2,000 civil penalty for each of the 65 violations.\textsuperscript{65} The district court held that a civil penalty more than 220 times greater than the government's accounted loss lacked the necessary "rational relation" to the government's actual damages to justify such a penalty.\textsuperscript{66}

On appeal, the United States Supreme Court rejected the government's contention that the Double Jeopardy Clause only applied to punishment imposed in criminal proceedings.\textsuperscript{67} The Court determined that the labels "criminal" and "civil" were not controlling in a double jeopardy inquiry.\textsuperscript{68} The Court reasoned that while legislative intent is the initial determinant, a civil statute may be punitive in nature even if it is intended to be remedial.\textsuperscript{69} The Court stated that "the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that penalty may fairly be

\begin{itemize}
  \item \textsuperscript{60} See Kurth Ranch, 114 S. Ct. at 1944-45; id. at 1956-57 (Scalia, J., joined by Thomas, J., dissenting).
  \item \textsuperscript{61} 18 U.S.C. § 287 (1988) (which prohibits "mak[ing] or present[ing] . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent.").
  \item \textsuperscript{62} Halper, 490 U.S. at 437. Thus, Dr. Halper submitted 65 false Medicare claims, Dr. Halper overcharged the federal government a total of $585.
  \item \textsuperscript{63} Id. at 437.
  \item \textsuperscript{64} 31 U.S.C. §§ 3729-31 (1982 & Supp. II) (which is violated when "[a] person not a member of an armed forces of the United States . . . (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." Id. § 3729(a)(1)). The Act has since been amended.
  \item \textsuperscript{65} Halper, 490 U.S. at 438 (civil fine totaling $130,000). See also 31 U.S.C. § 3729.
  \item \textsuperscript{66} Halper, 490 U.S. at 439.
  \item \textsuperscript{67} Id. at 441-42.
  \item \textsuperscript{68} Id. at 447.
  \item \textsuperscript{69} Id. at 447-48.
\end{itemize}
said to serve.\textsuperscript{70} Thus, the \textit{Halper} Court concluded that the legislature's description of the Civil False Claims Act as "civil" did not foreclose the possibility that the sanction may be punitive rather than remedial.\textsuperscript{71}

The \textit{Halper} Court then determined that a civil penalty would be remedial in character if it sought to reimburse the government for actual costs arising from the defendant's conduct.\textsuperscript{72} The Court found a "tremendous disparity" between the government's approximated expenses of $16,000 and Dr. Halper's liability of $130,000.\textsuperscript{73} Because the penalty was "overwhelmingly disproportionate" in relation to the government's expenses, the Court reasoned that the penalty bore no rational relation to the goal of compensating the government.\textsuperscript{74} The \textit{Halper} Court concluded that the penalty constituted a multiple punishment in violation of the Double Jeopardy Clause because it crossed the line between remedy and punishment.\textsuperscript{75} The Court, however, declined to transform the penalty into a criminal action with all the attendant constitutional protections.\textsuperscript{76}

\textsuperscript{70} Id. at 448.
\textsuperscript{71} Halper, 490 U.S. at 448.
\textsuperscript{72} Id. at 449-50. Accordingly, the Supreme Court remanded the case to the district court to determine what portion of the penalty ordered pursuant to the Civil False Claims Act (31 U.S.C. §§ 3729-31) could be sustained as bearing a rational relation to the goal of compensating the government for its actual loss. \textit{Id.} at 452.

"It should be noted that \textit{Halper}'s disproportionality analysis is required only in those [civil] cases where there has been a separate criminal conviction." \textit{In re Kurth Ranch}, 986 F.2d 1308, 1311 (1993).

\textsuperscript{73} Halper, 490 U.S. at 452.
\textsuperscript{74} Id. at 449.
\textsuperscript{75} See \textit{id.} at 450. The Court remanded the case to permit the government to demonstrate that the district court's assessment of its injuries was in error. \textit{Id.} at 453.

\textsuperscript{76} See \textit{id.} at 447. It appears that the Court has drawn a fine line between when a "civil" penalty constitutes punishment for double jeopardy purposes and when a penalty is so punitive that the proceeding necessitates the same constitutional safeguards provided for defendants in traditional prosecutions. For instance, a criminal defendant has a privilege against self-incrimination and a right to an indictment by a grand jury. U.S. \textit{Const.} amend. V. Under the Sixth Amendment, the criminal defendant has the right "to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process . . . , and to have the assistance of counsel for his defence." U.S. \textit{Const.} amend. VI.
Thus, *Halper* requires that if a sanction serves only the goals of punishment, namely retribution and deterrence, that sanction should be characterized as punishment for purposes of a double jeopardy analysis.\(^7\) Although the Supreme Court qualified its ruling as “a rule for the rare case,” *Halper* signified a substantial shift in the Court’s application of double jeopardy jurisprudence.\(^7\)

C. MONTANA’S DANGEROUS DRUG TAX ACT

Montana’s Dangerous Drug Tax Act\(^7\) (hereinafter “the Act”) imposes a tax “on the possession and storage of dangerous drugs.”\(^8\) The tax is collected only after any state or federal fines or forfeitures have been satisfied.\(^8\) The tax is either ten percent of the assessed market value of the drugs, or a specified amount depending on the drug, whichever is great-

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\(^7\) *Halper*, 490 U.S. at 448. See also *Austin v. United States*, 113 S. Ct. 2801, 2810 n.12 (1993). *Austin* broadened the *Halper* test by incorporating *Halper’s* dicta, rather than its holding, into its analysis. The explicit holding of *Halper* was as follows:

[w]e therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

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

However, the *Austin* Court broadened *Halper* by emphasizing *Halper’s* dicta:

“it follows 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 . . .” *Id.* at 448 (emphasis added). See generally Robin M. Sackett, Comment, The Impact of *Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings, 24 *Golden Gate* U. L. Rev. 495 (1994).

\(^7\) *Halper*, 490 U.S. at 449. The *Halper* Court stated: “[w]hat we announce now is a rule for the rare case, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.” *Id.*

\(^7\) Dangerous Drug Tax Act, ch. 563 1987 Mont. Laws 1416 (codified at MONT. CODE ANN. §§ 15-25-101 to -123 (1987)). The Kurth Ranch Court’s opinion refers only to the 1987 edition of the Montana Code, the version in effect at the time of the Kurths’ arrest.

\(^8\) *Id.* § 15-25-111(1).

\(^8\) *Id.* § 15-25-111(3). This section has since been amended at § 15-25-111(1) (1993). A 1989 amendment substituted “may be collected before” for “must be collected only after,” referring to when the tax can be collected in relation to the satisfaction of federal fines and forfeitures.
er. The Act gives the Montana Department of Revenue authority to assess the market value of the drug at issue. The Montana legislature determined that the specified amount of tax shall be $100 per ounce for marijuana and $250 per ounce for hashish. At least twenty-six other states tax marijuana at approximately the same rate. Funds collected from the Montana Tax are earmarked for youth evaluations, chemical abuse assessment and aftercare, juvenile detention facilities, and funding for drug enforcement agencies.

According to the Act’s preamble, the Montana legislature recognized “the existence in Montana of a large and profitable dangerous drug industry . . . .” While not endorsing illegal

82. Id. § -111(2)(a), (b)(i).
83. Id. § -111(2)(a); id. § -102(2). “There is no unconstitutional delegation of legislative powers to the [Department of Revenue] to make a determination of market value.” In re Kurth Ranch, 145 B.R. 61, 76 (Bankr. D. Mont. 1990).

The supreme courts of Florida, Idaho, and South Dakota have found their states’ drug taxing statute to be unconstitutional on their face. See, e.g., State Dep’t of Revenue v. Herre, 634 So. 2d 618, 621 (Fla. 1994) (holding that the Florida statute providing for a sales tax on transactions involving marijuana and controlled substances (Fla. Stat. § 212.0505 (1991) violates the Fifth Amendment privilege against self-incrimination); State v. Smith, 813 P.2d 929, 930 (Idaho 1991) (holding that the 1989 version of Idaho’s Illegal Drug Stamp Tax Act (Idaho Code § 63-4201 et seq. (1989) violates the Fifth Amendment privilege against self-incrimination; but the Smith court noted that the 1990 amended version of the Act, which added § 63-4206, cured the constitutional deficiency); State v. Roberts, 384 N.W.2d 688, 691 (S.D. 1986) (holding that South Dakota’s Luxury Tax on Controlled Substances and Marijuana (S.D. Codified Laws Ann. ch. 10-50A (1985) violates the Fifth Amendment privilege against self-incrimination).

87. Id. (preamble).
drug enterprises, the legislature concluded that in light of the economic impact such illegal business has on Montana, "[i]t is appropriate] . . . to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anti-crime initiatives without burdening law abiding taxpayers." 88 Additionally, the Act authorized the Department of Revenue to adopt rules to administer and enforce the tax. 89 Acknowledging the practical realities involved in taxing an illegal activity, the Revenue Department noted that the taxpayer has no obligation to file a return or to pay any tax unless and until he or she is arrested. 90

IV. THE COURT'S ANALYSIS

A. MAJORITY

1. Halper's Proportionality Test is Inapplicable to Tax Statutes

In Department of Revenue v. Kurth Ranch, 91 the United States Supreme Court rejected the Ninth Circuit's application of the Halper analysis to the civil tax proceeding instituted against the Kurths. 92 The Court recognized that in Halper it

88. Id.
89. Dangerous Drug Tax Act, ch. 563 1987 Mont. Laws 1416 § 105-25-113(2). For example, Mont. Admin. R. 42.34.102(1) (1988) provides that the taxpayers must file a return within 72 hours of their arrest. The rule also provides that law enforcement personnel shall complete the form and give the taxpayer an opportunity to sign it. Id. R. 42.34.102(3). If the taxpayer refuses to provide a signature, the rule requires the officer to file the form within 72 hours of the arrest. Id. The Montana Department of Revenue justifies this expedited process because of the criminal nature of the assessment. See id. R. 42.34.103(3).
90. Kurth Ranch, 114 S. Ct. at 1941-42. Some of the difficulties of taxing illegal activities include the fact that the taxpayer will not voluntarily identify himself as subject to the tax due to the illegal nature of the activity. Moreover, hinging the Montana drug tax on an arrest is necessary to protect the taxpayer's Fifth Amendment privilege against self-incrimination. Mont. Admin. R. 42.34.102(1) (1988), which provides that the tax return "shall be filed within 72 hours of . . . arrest," works to protect the taxpayers Fifth Amendment privilege against self-incrimination. Other taxing schemes, such as purchasing tax stamps, compel the taxpayer to voluntarily incriminate himself in violation of the Fifth Amendment. See Kurth Ranch, 114 S. Ct. 1937, 1950-51 (Rehnquist, C.J., dissenting).
92. See id. at 1943-45. The Kurth Ranch Court determined that tax statutes, unlike civil sanctions, are intended to raise revenue and deter conduct, not to reimburse the government for costs incurred it. See id. at 1945-46.
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determined that a civil penalty may constitute punishment for the purpose of double jeopardy analysis. 93 However, the Supreme Court found a constitutional distinction between a fine and a tax. 94

The Court observed that civil penalties, criminal fines, civil forfeitures, and taxes all share certain features which are subject to constitutional constraints: the raising of government revenues, imposition of fiscal burdens on individuals, and the deterrence of certain behavior. 95 However, the Court determined that while penalties, fines, and forfeitures are normally characterized as sanctions, taxes are distinguishable because they are generally motivated by revenue-raising rather than punitive purposes. 96 Tax statutes, unlike civil penalty statutes, need not equate with the government's proven remedial costs. 97 In light of the unique standing of tax statutes, the Supreme Court maintained that the proper inquiry in Kurth Ranch was whether the drug tax had punitive characteristics that would subject it to the constraints of the Fifth Amendment's Double Jeopardy Clause. 98

2. Montana's Drug Tax is not Immune from Double Jeopardy Scrutiny

The Supreme Court began its double jeopardy inquiry by

93. Id. at 1945.
94. Id. at 1945-46. Unlike the civil sanction in Halper, which was intended to reimburse the government for costs it incurred, tax statutes are intended to raise revenue and deter conduct. Thus, the Court reasoned, Halper's proportionality analysis was inapplicable to a tax statute. Id. at 1944-46.
95. Id. at 1945-46. See Halper, 490 U.S. 435 (1989) (holding a defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding). See also, Marchetti v. United States, 390 U.S. 39 (1968) (reasoning that a statute imposing a tax on unlawful conduct may be invalid because its reporting requirements compel taxpayers to incriminate themselves); In re Winship, 397 U.S. 358 (1970) (holding a government may not impose criminal fines without first establishing guilt by proof beyond a reasonable doubt); Austin v. United States, 113 S. Ct. 2801 (1993) (holding a civil forfeiture may violate the Eighth Amendment's prescription against excessive fines).
97. See id.
acknowledging that a State may legitimately tax criminal activities. The Court noted that, although no double jeopardy challenge was at issue, it had previously upheld a $100-per-ounce federal tax on marijuana in United States v. Sanchez. The Kurth Ranch Court suggested that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction."

The Court recalled that in Magnano Co. v. Hamilton, it recognized that "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 Kurth Ranch Court then explained that its comment in Magnano Co., when considered in light of Halper's statement that labels are not controlling in a double jeopardy inquiry, "indicates that a tax is not immune from double jeopardy scrutiny simply because it is a tax."

3. Montana's Drug Tax is Punitive in Nature

The Supreme Court acknowledged that neither a high tax rate, nor a deterrent purpose, would automatically label the marijuana tax as punishment. The majority noted that a


100. Kurth Ranch, 114 S. Ct. at 1946-47. See United States v. Sanchez, 340 U.S. 42 (1950) (upholding the Marijuana Tax Act, 26 U.S.C. § 2590(a)(2), now repealed (last codified at 26 U.S.C. § 4741 (1964)), which imposed a federal tax on marijuana at the rate of $100-per-ounce, against a constitutional challenge that the tax was a penalty, rather than a true tax). The tax at issue was later held to be unconstitutional in Leary v. United States, 395 U.S. 6, 29 (1969), on the grounds that it violated the Fifth Amendment privilege against self-incrimination.

101. Id.


104. Id.

portion of the assessment against the Kurths was eight times the drug's market value. Finding this to be a "remarkably high tax" which "appears to be unrivaled," the Court analyzed the Act's preamble, observing that the legislature apparently intended the drug tax to deter the possession of marijuana. However, aware that it had previously sustained a $100-per-ounce federal marijuana tax, and that many valid taxes "are also both high and motivated to some extent by an interest in deterrence," the Court held that these features alone did not render the drug tax punitive.

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See also United States v. Sanchez, 340 U.S. 42, 44 (1950).

106. *Kurth Ranch*, 114 S. Ct. at 1946. This portion was the lower-grade marijuana ("shake"). The Revenue Department attempted to tax 100 pounds of shake at $100-per-ounce for a total tax of $160,000. The Deputy Sheriff's Drug Tax Report valued the shake at $200-per-pound wholesale market value, resulting in a tax eight times its market value. *In re* Kurth Ranch, 145 B.R. 61, 72 (Bankr. D. Mont. 1990).


108. *Id.* at 1946 & n.18. Specifically, the *Kurth Ranch* Court emphasized the last section of the preamble which provides:

THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anticrime initiatives without burdening law abiding taxpayers.

*Id.*

109. *Kurth Ranch*, 114 S. Ct. at 1946-47. The *Kurth Ranch* Court stated: although the Act's preamble evinces a clear motivation to raise revenue, it also indicates that the tax will provide for anticrime initiatives by 'burdening' violators of the law instead of 'law abiding taxpayers'; that use of dangerous drugs is not acceptable; and that the Act is not intended to 'give credence' to any notion that manufacturing, selling, or using drugs is legal or proper.

*Id.* at n.18.

110. *Id.* at 1946-47. *Sanchez*, 340 U.S. at 44. The *Sanchez* Court noted that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed." *Id.*

111. *Kurth Ranch*, 114 S. Ct. at 1946. The *Kurth Ranch* Court referred specifically to taxes on cigarettes and alcohol. For example, the Court acknowledged that the current 24-cent-per-pack federal tax on cigarettes could, under a new health plan, be constitutionally increased to 99 cents, resulting in a total tax burden which surpasses the 80 percent rate that Montana imposed on the higher grade marijuana. *Id.* at 1946 n.17.

112. *Id.* at 1946-47.
Continuing its double jeopardy inquiry, the Supreme Court considered the Act's "other unusual features" which set it apart from other taxes. The Court noted first that the Montana tax was conditioned on the commission of a crime, evincing a penal rather than a revenue-raising intent. The Kurth Ranch Court then emphasized that the Montana tax was exacted only after the defendant was arrested for the same conduct which gave rise to the tax. Thus, the entire class of taxpayers subject to the Montana tax is comprised of those who have been arrested for possessing marijuana.

The Court then addressed the Revenue Department's argument that the Montana drug tax is similar to the mixed-motive "sin" taxes regularly imposed on cigarettes and alcohol. In distinguishing these taxes from the one at bar, the Court asserted that sin taxes are justified because the products' benefit to society outweigh the products' harm. This high benefit-to-harm ratio justifies permitting the manufacture of such products as long as those who buy and sell them pay high taxes that reduce consumption and bolster government revenues. However, the Court maintained that the justifica-

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113. Id. at 1947. The Kurth Ranch Court concluded that the drug tax constituted punishment because it hinged on the commission of a crime and was levied on goods the taxpayer never lawfully possessed. Id. at 1947-48.

114. Id. at 1947. The Court emphasized that "this condition is 'significant of penal and prohibitory intent rather than the gathering of revenue.'" (citing United States v. Constantine, 296 U.S. 287, 295 (1935) (concluding that a tax was motivated by penal instead of revenue-raising intent in part because the taxpayer had to pay an additional sum based on his illegal conduct)). See also Sanchez, 340 U.S. at 45. The Kurth Ranch Court referred to Sanchez as a case in which the absence of such a condition supported its conclusion that the federal marijuana tax was a civil rather than criminal sanction. Kurth Ranch, 114 S. Ct. at 1947. The Federal Marihuana Tax Act, 26 U.S.C. § 2590(a)(2), now repealed (last codified at 26 U.S.C. §§ 4741), taxed the transfer of marijuana to a person who has not paid a special tax and registered. Under the statute, the transferee's liability arose when the transferee failed to pay the tax. The Sanchez Court reasoned that "[a]lthough his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction." Sanchez, 340 U.S. at 45.


116. Id.

117. Id.

118. Id. The Kurth Ranch Court recognized benefits such as creating employment, satisfying consumer demand, and providing tax revenues.

119. Id. The Kurth Ranch Court did not specify the types of harm products such as alcohol and cigarettes inflict on society.

tions for sin taxes "vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction."121

Lastly, the Supreme Court found the Montana tax unusual because although it purported to be a tax on "the possession and storage of dangerous drugs," it was levied on goods the taxpayer never lawfully possessed.122 Because statutes which amount to a confiscation of property have been held unconstitutional,123 the Court reasoned that "a tax on previously confiscated goods is at least questionable."124

Concluding its analysis, the Supreme Court found Montana's Dangerous Drug Tax to be "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis."125 The Court therefore held that the tax constituted a second punishment in violation of the Double Jeopardy Clause and "must be imposed during the first prosecution or not at all."126 The Court added that the civil tax proceeding initiated by Montana against the Kurths was the "functional equivalent" of a second criminal prosecution in violation of the Double Jeopardy Clause.127

121. Id.
122. Id. at 1948.
123. Id. See Heiner v. Donnan, 285 U.S. 312, 326 (1932) (holding a federal gift tax to be so "arbitrary and capricious" as to cause it to violate the Fifth Amendment Due Process Clause); see also Nichols v. Coolidge, 274 U.S. 531, 542 (1927) (holding a federal estate tax to be "arbitrary and capricious" and thus violative of the Due Process Clause of the Fifth Amendment).
124. Kurth Ranch, 114 S. Ct. at 1948. Noting that the State destroyed the marijuana crop before assessing the tax against the Kurths, the Court determined that the tax had a definite punitive character. The Kurth Ranch Court stated: "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment." Id.
125. Id.
126. Id.
127. Id. The Kurth Ranch Court did not expand on this statement, nor did it clarify whether the Montana drug tax proceeding, regardless of when initiated, required all of the criminal-procedure guarantees of the Fifth and Sixth Amendments. The Courts' statement that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpay-
B. DISSENT

1. Chief Justice Rehnquist

In dissent, Chief Justice Rehnquist emphasized that Kurth Ranch represents the first time the Court subjected a tax statute to a double jeopardy inquiry. The Chief Justice supported the Court's decision to abandon the Ninth Circuit's application of the Halper mode of analysis to the Montana drug tax. However, the Chief Justice maintained that after properly refuting the Halper analysis, the Court then implemented "a hodgepodge of criteria — many of which have been squarely rejected by our previous decisions — to be used in deciding whether a tax statute qualifies as 'punishment.'" Chief Justice Rehnquist also disagreed with the Court's presumption that a high tax rate combined with a deterrent purpose "lend support" to the view of the drug tax as punishment. Citing Magnano Co. v. Hamilton, Sonzinsky v. United States, and United States v. Sanchez, the Chief

er for the same offense . . . ," when contrasted with the Court's statement that the drug tax "was the functional equivalent of a successive criminal prosecution . . . ," only exacerbates this uncertainty. Id. at 1945, 1948.


129. Id. at 1949 (Rehnquist, C.J., dissenting).

130. Id. In agreement with the majority, Chief Justice Rehnquist maintained that the Supreme Court's opinion in United States v. Halper "says nothing about the possible double jeopardy concerns of a tax, as opposed to a civil fine. . . ." Id.


133. 292 U.S. 40 (1934) (upholding against a due process challenge a steep excise tax imposed by the State of Washington on processors of oleomargarine during the Great Depression).

134. 300 U.S. 506 (1937) (upholding an annual federal firearms tax as a valid exercise of the taxing power of Congress). The Sonzinsky Court noted that "it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." Id. at 513.

135. 340 U.S. 42 (1950). The Sanchez Court stated that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed." Id. at 44.
Justice concluded that it is firmly established that a burdensomely high tax rate or outright deterrent purpose are not fatal to a tax's validity.\textsuperscript{136}

Next, the Chief Justice criticized the discussion of “other unusual features” of the Montana drug tax.\textsuperscript{137} The majority noted that the Montana tax was conditioned on the commission of a crime and exacted only after arrest.\textsuperscript{138} The Chief Justice argued that this characteristic merely reflected the practical realities involved in the process of taxing illegal drug enterprises.\textsuperscript{139} The illegal status of the taxed activity prevents taxpayers from voluntarily identifying themselves as subject to the tax.\textsuperscript{140}

Chief Justice Rehnquist then considered the majority's statement that the justifications for mixed-motive “sin” taxes vanished when the taxed activity was illegal.\textsuperscript{141} The Chief Justice found that statement contradicted the findings in \textit{Marchetti v. United States},\textsuperscript{142} \textit{United States v. Constantine},\textsuperscript{143} and \textit{James v. United States}.\textsuperscript{144} According to Chief Justice

\begin{itemize}
    \item \textsuperscript{136} \textit{Kurth Ranch}, 114 S. Ct. 1937, 1950 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist then asserted that this case law applied to the Montana drug statute because under \textit{Marchetti} and \textit{Constantine} illegal activity may be taxed. \textit{Id.} (citing \textit{Marchetti}, 390 U.S. at 44 (holding that an activities unlawfulness does not prevent its taxation)); \textit{Constantine}, 296 U.S. at 293 (holding that illegal activity may be taxed). The \textit{Constantine} Court explained that “[t]he burden of [a] tax may be imposed alike on the just and the unjust. It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law.” \textit{Id.}
    \item \textsuperscript{137} \textit{Kurth Ranch}, 114 S. Ct. 1937, 1950 (Rehnquist, C.J., dissenting).
    \item \textsuperscript{138} \textit{Id.} at 1947.
    \item \textsuperscript{139} \textit{Id.} at 1950. Some of the difficulties of taxing illegal activities include the fact that the taxpayer will not voluntarily identify himself as subject to the tax due to the illegal nature of the activity. Moreover, hinging the Montana drug tax on an arrest is necessary to protect the taxpayer’s Fifth Amendment privilege against self-incrimination. Other taxing schemes, such as purchasing tax stamps, compel the taxpayer to voluntarily incriminate himself in violation of the Fifth Amendment. \textit{See id} at 1950-51 (Rehnquist, C.J., dissenting).
    \item \textsuperscript{140} \textit{Id.} at 1950 n.2. It should be added that Mont. Admin. R. 42.34.102(1) (1988), which provides that the tax return “shall be filed within 72 hours of . . . arrest,” works to protect the taxpayers Fifth Amendment privilege against self-incrimination.
    \item \textsuperscript{141} \textit{Kurth Ranch}, 114 S. Ct. 1937, 1950-51 (Rehnquist, C.J., dissenting).
    \item \textsuperscript{142} 390 U.S. 39 (1968) (holding that an activities unlawfulness does not prevent its taxation).
    \item \textsuperscript{143} 296 U.S. 287 (1935) (holding that illegal activity may be taxed).
    \item \textsuperscript{144} 366 U.S. 213 (1961) (holding that any monetary gain from illegal activity
\end{itemize}
Rehnquist, the majority overemphasized the fact that the portion of the assessment imposed on the lower-grade marijuana was eight times the drug’s market value,\textsuperscript{145} when the tax imposed on the higher grade marijuana amounted to only 80 percent of its market value.\textsuperscript{146} The Chief Justice stressed that the relevant inquiry in \textit{Kurth Ranch} should be whether the tax rate is so high that it can only be characterized as serving a punitive purpose.\textsuperscript{147} Chief Justice Rehnquist then compared the Montana drug tax with sin taxes on legal products such as alcohol and cigarettes, arguing the respective tax rates are not so dissimilar as to invalidate the drug tax.\textsuperscript{148} The Chief Justice indicated that the difference was justified because the drug tax was the only tax collected from individuals engaged in the illegal drug business, and the vast majority of the profitable underground drug enterprises would escape taxation altogether.\textsuperscript{149}

Lastly, Chief Justice Rehnquist examined the majority’s finding that the Montana drug tax was “unusual” because it was assessed on drugs that the Kurths neither owned nor possessed at the time of taxation.\textsuperscript{150} He found it inconceivable that in order to tax the Kurths it would be necessary to return the illegal drugs to their possession.\textsuperscript{151} In analyzing the pre-

\textsuperscript{145} \textit{Kurth Ranch}, 114 S. Ct. 1937, 1951-52 (Rehnquist, C.J., dissenting).
\textsuperscript{146} \textit{Id.} at 1951-52.
\textsuperscript{147} \textit{Id.} at 1951.
\textsuperscript{148} \textit{Id.} For example, Chief Justice Rehnquist looked at the current 24-cents-per-pack federal tax on cigarettes under 26 U.S.C. § 5701(b) (1994). Chief Justice Rehnquist argued that “[w]hile this does not exceed the cost of a pack of cigarettes, the current proposal to boost the cigarette tax to 99 cents per pack could lead to a total tax on cigarettes in some jurisdictions at a rate higher than the 80% rate utilized in this case for the marijuana bud.” \textit{Kurth Ranch}, 114 S. Ct. 1937, 1952 n.5 (Rehnquist, C.J., dissenting).
\textsuperscript{149} \textit{Kurth Ranch}, 114 S. Ct. at 1952 (Rehnquist, C.J., dissenting).
\textsuperscript{150} \textit{Id.} at 1951.
\textsuperscript{151} \textit{Id. Cf. Constantine}, 296 U.S. at 293, stating “[i]t would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law.”
amble to the Montana Dangerous Drug Tax Act, the Chief Justice looked beyond its description as a tax on “storage and possession,” and determined that the Act was passed for the legitimate purpose of raising revenue from the illicit drug industry.

Although he conceded that an assessment denominated a “tax” could, “under some conceivable circumstances, constitute ‘punishment’” under the Double Jeopardy Clause, Chief Justice Rehnquist reasoned that such was not the case in this context. The Chief Justice concluded that because Montana’s Dangerous Drug Tax had the legitimate non-penal purpose of increasing government revenue, and the valid purpose of deterring criminal conduct, it did not violate double jeopardy.

2. Justice O’Connor

In dissent, Justice O’Connor felt that Montana’s Dangerous Drug Tax should be subject to double jeopardy scrutiny. However, unlike the majority, Justice O’Connor agreed with the Ninth Circuit’s finding that the Halper proportionality analysis controlled. She reasoned there was no “constitutional distinction” between a civil penalty and a tax.

In light of the Halper decision Justice O’Connor determined that the central inquiry was whether Montana’s drug

153. Kurth Ranch, 114 S. Ct. 1937, 1951-52 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist made this determination “after reviewing the structure and language [as well as the purpose and effect] of the tax provision and comparing the rate of taxation with similar types of sin taxes imposed on lawful products ...” Id. at 1952.
154. Id. at 1951.
155. Id.
156. Id. at 1952. Thus, Chief Justice Rehnquist determined that the tax was nonpunitive in nature and therefore not an independent “jeopardy.” Id.
158. Id. at 1953-55. Although Justice O’Connor agreed with the Ninth Circuit’s application of the Halper proportionality analysis, she argued that the Ninth Circuit misapplied Halper’s analysis.
159. Id. at 1953.
Applying the Halper analysis, she maintained that the Kurths must first have shown that the amount of the assessment bore no rational relationship to the state's nonpunitive objectives. If the Kurths met this requirement, the burden would shift to the state to justify the tax by way of an accounting of its actual loss. Justice O'Connor therefore concluded that the Ninth Circuit Court of Appeals improperly placed the burden of an accounting on the state before the Kurths had shown a lack of a rational relationship between the amount of the tax and the state's nonpunitive objectives.

Justice O'Connor noted that the majority avoided the issue of the Ninth Circuit's error by holding the Halper proportionality analysis inapplicable to taxes. The Montana drug tax should be viewed as a rough remedial surrogate for the costs of apprehending, prosecuting, and incarcerating the Kurths.

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160. Id. For Justice O'Connor, if imposition of the tax was a punishment, the tax assessment would require a second criminal proceeding prohibited by the Fifth Amendment. That is, if the tax proceeding truly inflicted punishment in the traditional sense, the proceeding would require the criminal procedural protections provided to defendants in criminal prosecutions. (It does not appear that Justice O'Connor distinguished between punishment violative of double jeopardy and punishment which necessitates a criminal proceeding with all the attendant constitutional safeguards). See Harv. L. Rev., supra note 18, at 175 n.37.


[W]hether an exaction is punitive entails a two-part inquiry: . . . [1] the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives; [2] the burden then shifts to the government to justify the sanction with reference to the particular case.

Id.

162. Id. at 1954-55.

163. Id. at 1954.

164. Id. at 1954-55. Justice O'Connor stated that every state statute is entitled to a presumption of constitutionality. Therefore, in the double jeopardy context, "a sanction denominated as civil must be presumed to be nonpunitive. This presumption would be rendered nugatory if the government were required to prove that the sanction is in fact nonpunitive before imposing it in a particular case." Id.

165. Id. at 1955.


The consequences of this decision are astounding. The State of Montana—along with about half of the other States—is now precluded from ever imposing the drug tax on a person who has been punished for a possessory drug offense. A defendant who is arrested, tried, and convicted
Finally, Justice O'Connor urged that the majority's decision was "entirely unnecessary to preserve individual liberty," because the Eighth Amendment's Excessive Fines Clause limits the extent of legislated punishments.

3. Justice Scalia (joined by Justice Thomas)

In dissent, Justice Scalia disputed the majority's "belief that there is a multiple-punishments component of the Double Jeopardy Clause." While acknowledging that many cases have stated that the clause protects against successive punishments for the same criminal offense, Justice Scalia countered that "the repetition of a dictum does not turn it into a holding." Justice Scalia asserted that the Double Jeopardy for possession of one ounce of marijuana cannot be taxed $100 therefore, even though the State's law enforcement costs in such a case average more than $4,000.

Id. at 1955.

Justice O'Connor emphasized that "[t]he State and Federal Governments spend vast sums on drug control activities . . . (approximately $27 billion in fiscal year 1991). The Kurths are directly responsible for some of these expenditures . . . apprehension, prosecution, and incarceration of the Kurths will cost the State of Montana at least $120,000." Id. at 1953-54 (parenthetical in original). Justice O'Connor concluded that "today's decision will be felt acutely by law-abiding taxpayers, because it will seriously undermine the ability of the State and Federal Governments to collect recompense for the immense costs criminals impose on our society." Id. at 1955. See also United States v. Tilley, 18 F.3d 295, 299 (5th Cir. 1994) (summarizing various sources which estimate that illegal drug sales produce approximately $80 to $100 billion per year while exacting $60 to $120 billion per year in costs to the government and society).

167. U.S. CONST. amend. VIII.


171. Kurth Ranch, 114 S. Ct. 1937, 1956 (Scalia, J., joined by Thomas, J., dissenting). In his dissent in Kurth Ranch, Justice Scalia argued that the Supreme Court's decision in United States v. Halper, 490 U.S. 435 (1989) (holding that a defendant convicted and punished for an offense may not have a nonremedial civil
Clause as first put forth by the Framers of the Fifth Amendment did not contemplate the prohibition of multiple punishments.\(^{172}\) In Justice Scalia's view: "'[t]o be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions."\(^{173}\) According to Justice Scalia, the reliance on a no-multiple-punishments rule must derive solely from the due process requirement that cumulative punishments be authorized by the legislature.\(^{174}\) In support of this contention

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\(^{174}\) Id. at 1955-56. Justice Scalia traced "[t]he belief that there is a multiple-punishments component of the Double Jeopardy Clause" to Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874). Kurth Ranch, 114 S. Ct. 1937, 1956 (Scalia, J., joined by Thomas, J., dissenting).

In that case, the lower court sentenced Lange to both one year of imprisonment and a $200 fine for stealing mail bags from the Post Office, under a statute that authorized a maximum sentence of one year of imprisonment or a fine not to exceed $200. The Court, acknowledging that the sentence was in excess of statutory authorization, issued a writ of habeas corpus. Lange has since been cited as though it were decided exclusively on the basis of the Double Jeopardy Clause, see, e.g., North Carolina v. Pearce, 395 U.S. 711, 717, and n.11; in fact, Justice Miller's opinion for the Court rested the decision on ... both the Due Process and Double Jeopardy Clauses of the Fifth Amendment. See Lange, 18 Wall. at 170, 176, 178. The opinion went out of its way not to rely exclusively on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving 'life or limb.' See id. at 170. It is clear that the Due Process Clause alone suffices to support the decision,
Justice Scalia noted that until Halper the Court had never struck down a legislatively authorized successive punish­ment.\textsuperscript{175}

Before Halper, Justice Scalia explained, the validity of the no-multiple-punishments rule was of little importance because the Double Jeopardy Clause's ban on successive criminal prose­cutions rendered irrelevant any consideration of successive punishments.\textsuperscript{176} In addition, he argued that the Cruel and Unusual Punishments and Excessive Fines Clauses have been available to protect criminals from unrestricted multiple punish­ment.\textsuperscript{177} Furthermore, civil proceedings subsequent to criminal prosecutions were not barred by the Double Jeopardy Clause even if they had the potential to impose penalties.\textsuperscript{178} Justice Scalia noted that when the Halper Court extended the no-multiple-punishments restriction to civil penalties, the rule experienced an unwarranted expansion.\textsuperscript{179}
Justice Scalia also criticized the majority's statement that the tax proceeding initiated by Montana was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time" for the same offense.\textsuperscript{180} Justice Scalia criticized that statement for its implicit assumption that any proceeding that inflicts punishment, in the context of the Double Jeopardy Clause, is a criminal prosecution.\textsuperscript{181} Justice Scalia reasoned that if the Court accurately costs of following "the fictional, Halper-created multiple-punishments prohibition," such as offenders avoiding criminal punishment because a civil penalty has already been imposed on them. \textit{Id.} at 1958-59. Justice Scalia reasoned that "if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." \textit{Id.} at 1958. Since Justice Scalia wrote his dissent in Kurth Ranch, a number of courts have grappled with the notion of disallowing criminal punishment because a civil sanction has already been imposed. In the recent United States District Court case, United States v. McCaslin, 863 F. Supp. 1299 (W.D. Wash. 1994), for example, defendant McCaslin's criminal sentence was vacated on double jeopardy grounds. The Court held that because the government had already completed a civil forfeiture of McCaslin's residence, his criminal sentence constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. \textit{Id.} at 1307.


\textsuperscript{181} Id. Justice Scalia found that the Court's assumption parted with a number of cases, including Halper. \textit{Id.} See, e.g., United States v. Halper, 490 U.S. 435 (1989); United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Helvering v. Mitchell, 303 U.S. 391, 400 (1938), stating that:

\begin{quote}
 forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable [sic] by civil proceedings since the original revenue law of 1789. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.
\end{quote}

\textit{Id.} (citation omitted).

While acknowledging that Kennedy and Ward may appear to support the majority's assumption, Justice Scalia distinguished the case at bar. Kurth Ranch, 114 S. Ct. 1937, 1959-60 (Scalia, J., joined by Thomas, J., dissenting). In Mendoza-Martinez, the Court stated the seven criteria traditionally applied to determine whether a particular Act of Congress is civil or criminal:

\begin{quote}
 whether 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 punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose
\end{quote}
concluded that the civil tax proceeding criminally punished the Kurths, it would not only be proscribed by the Double Jeopardy Clause, but by the criminal procedure protections of the Fifth and Sixth Amendments.\(^{182}\) The proceeding would therefore be struck down whether or not it had been preceded by the criminal prosecution.\(^{183}\) Thus, Justice Scalia concluded, the majority contradicted itself when it asserted both that the tax proceeding would be "lawful in isolation"\(^{184}\) and that the assigned are all relevant to the inquiry . . .

\(^{182}\) Kurth Ranch, 114 S. Ct. 1937, 1960 (Scalia, J., joined by Thomas, J., dissenting). For instance, a criminal defendant has a privilege against self-incrimination and a right to an indictment by a grand jury. U.S. Const. amend. V. Under the Sixth Amendment, the criminal defendant has the right "to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process . . . , and to have the assistance of counsel for his defence." U.S. Const. amend. VI.

\(^{183}\) Kurth Ranch, 114 S. Ct. 1937, 1960 (Scalia, J., joined by Thomas, J., dissenting). Justice Scalia argues that if the tax proceeding was criminal in nature, it would require the constitutional protections afforded a defendant in criminal prosecutions, regardless of the order the proceeding was instituted.

\(^{184}\) Kurth Ranch, 114 S. Ct. 1937, 1960 (Scalia, J., joined by Thomas, J., dissenting). Justice Scalia is referring to the Court's assertion that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had
proceeding was “the functional equivalent”\textsuperscript{185} of a second criminal prosecution.\textsuperscript{188}

Finally, Justice Scalia found that the Kurths were not subjected to a second criminal prosecution.\textsuperscript{187} Because the drug tax and criminal penalties were legislatively authorized, the tax satisfied that principle of due process mistakenly referred to as the multiple-punishments component of the Double Jeopardy Clause.\textsuperscript{188}

V. CONCLUSION

Department of Revenue v. Kurth Ranch\textsuperscript{189} marks an expansion of double jeopardy jurisprudence into civil tax proceedings. In this case of first impression, the Supreme Court considered whether a civil tax proceeding commenced during a criminal prosecution for the same offense, the possession and storage of dangerous drugs, ran afoul of the Fifth Amendment’s Double Jeopardy Clause. In a 5-4 decision, the Court concluded that it did.

The majority concluded that the “unusual” features of Montana’s Dangerous Drug Tax Act set the statute apart from most taxes. Specifically, the majority noted that Montana’s tax hinged on the commission of a crime, was levied on goods the

\begin{itemize}
\item not previously punished the taxpayer for the same offense \ldots . “ Id. at 1945.
\item \textsuperscript{185} Id. at 1948.
\item \textsuperscript{186} Id. at 1960. “In fact, the Court’s conclusion that the Montana tax assessment was the ‘functional equivalent’ of a criminal proceeding may \textit{sub silentio} overrule the more stringent \textit{Kennedy-Ward} test \ldots for determining if a proceeding is criminal.” \textit{Harv. L. Rev.}, \textit{supra} note 19, at 177-78 n.53 (1994) “The majority’s judicial back-pedaling into multiple-prosecutions jurisprudence suggests the Court may be uncomfortable with its own multiple-punishments analysis and is another ‘characteristic sign[] of doctrinal senility.’” Id. at 177-78 (quoting Comment, \textit{Twice in Jeopardy}, 75 YALE L.J. 262, 264 (1965)).
\item \textsuperscript{187} Kurth Ranch, 114 S. Ct. 1937, 1960 (Scalia, J., joined by Thomas, J., dissenting). Justice Scalia came to this conclusion after applying the \textit{Kennedy-Ward} “criminal prosecution” test to the Kurths’ tax proceeding.
\item \textsuperscript{188} Id. Thus, according to Justice Scalia, this ‘legislative authorization’ protection of the Double Jeopardy Clause was originally found only in the Fifth Amendment Due Process Clause. Id. at 1958-60.
\item \textsuperscript{189} Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (per Stevens, J., joined by Blackmun, Kennedy, Souter, and Ginsburg, JJ.; dissenting opinions by Rehnquist, C.J.; O’Connor, J.; and Scalia, J., joined by Thomas, J.).
\end{itemize}
taxpayer never lawfully possessed, was assessed at eight times the market value of the property taxed, and was partly motivated by an interest in deterrence. Given these unusual characteristics, the majority concluded that the tax was properly characterized as punishment and thus violated the Fifth Amendment's prohibition against double jeopardy.

In dissent in *Kurth Ranch*, Chief Justice Rehnquist argued that the majority failed to provide a clear test for determining when a tax constitutes punishment in violation of the Double Jeopardy Clause. The Chief Justice found the factors enunciated by the majority to be "a hodgepodge of criteria — many of which have been squarely rejected by our previous decisions." Justice O'Connor argued in dissent that the *Halper* proportionality analysis should apply to civil tax proceedings, and that under such analysis, the Montana tax should be viewed as remedial. Finally, Justice Scalia, joined by Justice Thomas, argued in dissent that the Fifth Amendment as envisioned by the Framers of the Constitution did not prohibit multiple punishments for the same offense, thus the Montana tax should have been upheld.

*Tad Ravazzini*

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