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Fifth Amendment--Double Jeopardy and the Dangerous Drug Tax

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FIFTH AMENDMENT—DOUBLE JEOPARDY AND THE DANGEROUS DRUG TAX

Department of Revenue of Montana v. Kurth Ranch, 114 S.
Ct. 1937 (1994)

I. INTRODUCTION

In *Department of Revenue of Montana v. Kurth Ranch*,¹ the Supreme Court addressed whether the punitive nature of Montana's Dangerous Drug Tax constituted a second punishment for double jeopardy purposes.² The Court held that the standard it announced five years earlier in *United States v. Halper*³ for determining whether a civil penalty constituted a second punishment did not apply in the case of a tax.⁴ Nonetheless, the Court found that Montana's Dangerous Drug Tax violated the prohibition against double jeopardy because the Act had an obvious deterrent purpose and imposed a high tax rate predicated on the commission of a crime based on goods which the taxpayer no longer possessed.⁵

The Court left open the possibility that the State of Montana could assess a tax of the same or even greater magnitude under its statutory scheme if brought in the same proceeding as the criminal sanction.⁶ It further left open the possibility that, if the tax preceded the criminal prosecution, the Double Jeopardy Clause would bar the criminal prosecution.⁷ This particularly unsatisfying result raises the question of whether there is a better analysis to apply than double jeopardy.

This Note explains the confusion surrounding the multiple punishment and multiple prosecution aspects of traditional double jeopardy protection. Then, this Note argues that the Supreme Court inappropriately expanded the scope of the Double Jeopardy Clause by

¹ 114 S. Ct. 1937 (1994).

² *Id.* at 1945.

³ 490 U.S. 435 (1989).

⁴ *Kurth Ranch*, 114 S. Ct. at 1944.

⁵ *Id.* at 1946-48.

⁶ *Id.* at 1945.

⁷ As Justice Scalia noted in his dissent in *Kurth Ranch*, "we are unwilling to take the strong (and not particularly healthful) medicine that we poured out for ourselves in *Halper* . . . [since] many cases . . . will demand much more of us: disallowing criminal punishment because a civil sanction has already been imposed." *Id.* at 1958 (Scalia, J., dissenting).

ignoring the distinction between multiple punishments and prosecutions to compensate for some of the Clause's limitations. This Note then concludes that the Supreme Court did not need to expand double jeopardy protection, because other areas of the Constitution already adequately compensate for these limitations. The Court could have achieved more satisfying and practical results by first acknowledging the limits of Double Jeopardy protection, and then turning to the Excessive Fines Clause for additional protection.

II. BACKGROUND

A. DRUG TAXES GENERALLY

Essentially, a drug tax allows the government to collect from the "taxpayer," in a civil action, an amount which it calculates as a function of the street value of the substances in the taxpayer's possession or a flat fee per unit of the substance. Until 1969, the federal government taxed the transfer of marijuana pursuant to the Federal Marijuana Tax Act.⁸ In *Leary v. United States*,⁹ however, the Supreme Court declared certain provisions of the Act unconstitutional on self-incrimination grounds¹⁰ and set the stage for the Act's repeal in 1970. Many states implemented their own versions of the federal drug tax, but carefully structured their legislation to avoid the self-incrimination problems that led to the downfall of the federal tax.¹¹

At least twenty-six states have, at one time or another, enacted some form of a dangerous drug tax.¹² These tax provisions usually take one of three forms: (1) tax stamps; (2) excise taxes; or (3) licensing fees.

Tax stamps constitute the most popular method of assessing the drug tax. Under this scheme, the dealer must purchase stamps prior

⁸ 26 U.S.C. §§ 4741-4776 (1964) (repealed 1970).

⁹ 395 U.S. 6 (1969).

¹⁰ The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Congress had structured the Federal Marijuana Tax so that dealers had to register their names and places of business with the Internal Revenue Service. The I.R.S., in turn, made such information available to federal and state law enforcement officials. As the Court held in *Leary*, this lack of confidentiality violated the Fifth Amendment. *Leary*, 395 U.S. at 18.

¹¹ But see *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986) (invalidating a drug tax on self-incrimination grounds); *State v. Smith*, 813 P.2d 888 (Idaho 1991) (same); *People v. Duleff*, 515 P.2d 1239 (Colo. 1973) (same).

¹² These states include: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, Texas, Utah, Wisconsin, and Wyoming.

to any sale and affix them to the packaging of the product.¹³ Most systems allow the dealer to make the stamp purchase anonymously.¹⁴ Enforcement actions following non-compliance under these schemes have the potential to raise considerable amounts of revenue.¹⁵

Unlike tax stamps, excise taxes¹⁶ offer no mechanism for advance payment. In fact, one particular state imposes the tax only after the state convicts the drug dealer.¹⁷ Finally, two states have imposed an occupational licensing fee on drug dealers.¹⁸ In addition to the licensing fee, such states also impose a tax. Nevada allows the drug dealer to purchase the license anonymously.¹⁹

B. HISTORY OF DOUBLE JEOPARDY AND ATTACKS AGAINST DRUG TAXES

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy of life or limb."²⁰ The United States Supreme Court has interpreted this clause to prohibit both multiple *prosecutions* and multiple *punishments*.²¹ A multiple prosecutions violation might occur, for example, where after an acquittal for murder, a prosecutor sought to try the same defendant for manslaughter. A multiple punishments violation, on the other hand, might occur where the sentencing court imposed both fine and imprisonment, but the legislature had only authorized one or the other.

¹³ See, e.g., ALA. CODE § 40-17A-10 (1993); COLO. REV. STAT. § 39-28.7-103 (1994); IDAHO CODE § 63-4204 (Supp. 1994); KAN. STAT. ANN. § 79-5203 (1989); MINN. STAT. ANN. § 297D.10 (West 1991); NEV. REV. STAT. ANN. § 372A.090 (Michie Supp. 1991); OKLA. STAT. ANN. tit. 68, § 450.4 (West 1992); R.I. GEN. LAWS § 44-49-11 (Supp. 1994); TEX. TAX CODE ANN. § 159.003 (West 1992); UTAH CODE ANN. § 59-19-104 (1993); WIS. STAT. ANN. § 139.89 (West Supp. 1992).

¹⁴ Despite provisions allowing for anonymity, compliance with tax stamp statutes has been virtually nonexistent in most states. The bulk of the revenue raised by these states comes, not from tax stamp sales, but from non-compliance penalty provisions. See Frank A. Racaniello, *State Drug Taxes: A Tax We Can't Afford*, 23 RUTGERS L.J. 657 (1992) (examining the ability of state drug taxes to raise revenue and the ethical dilemmas associated with imposing a tax where compliance is not expected).

¹⁵ Colorado, for example, imposes a penalty for non-compliance of up to three times the amount of the tax due. COLO. REV. STAT. § 39-28.7-107 (1994).

¹⁶ See, e.g., FLA. STAT. ANN. § 212.0505 (West 1989).

¹⁷ ME. REV. STAT. ANN. tit. 36, § 4434 (West 1990).

¹⁸ ARIZ. REV. STAT. ANN. § 42-1203.01 (1991); NEV. REV. STAT. ANN. § 372A.070 (Michie 1993).

¹⁹ See, eg., NEV. REV. STAT. ANN. § 372A.070 (Michie 1993). But see ARIZ. REV. STAT. ANN. § 42-1203.01(a) (1991) (requiring an application form to accompany the licensing fee).

²⁰ U.S. CONST. amend. V.

²¹ As the commonly quoted language in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), recites, the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.*

Each of these prohibitions protects a distinct interest.²²

The protection against multiple *prosecutions* assures the finality of the first prosecution.²³ As the Court noted in *Green v. United States*,²⁴ the multiple prosecutions prohibition prevents a state from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"²⁵ On the other hand, the prohibition against multiple *punishments* protects the defendant's interest in avoiding multiple penalties by ensuring that the penalty imposed does not exceed that which the legislature has authorized.²⁶

Until recently, the Supreme Court frequently ignored the distinction between these two interests.²⁷ As a result, much of the double jeopardy jurisprudence remains jumbled and haphazard.²⁸ Prior to *Missouri v. Hunter*,²⁹ the Supreme Court applied the test announced in *Blockburger v. United States*³⁰ to both multiple prosecutions and multiple punishment cases. According to this standard, a statute which authorizes a second punishment or prosecution will pass double jeopardy scrutiny only if each statutory provision "requires proof of a fact which the other does not."³¹

In *Hunter*, the Supreme Court first acknowledged that courts must apply separate tests to evaluate each of these interests for double jeopardy purposes.³² The state had charged and sentenced the defendant in *Hunter* in one proceeding with "armed criminal action" and "first-degree robbery."³³ In short, the Supreme Court held that the cumulative punishments did not violate double jeopardy, even though the statutes proscribing this conduct could not pass the *Blockburger* test.³⁴ In announcing a new standard for multiple punish-

²² Elizabeth S. Jahncke, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 115-18 (1991).

²³ *United States v. Scott*, 437 U.S. 82, 92 (1978); *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *United States v. Wilson*, 420 U.S. 332, 343 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971); *Green v. United States*, 355 U.S. 184, 187-88 (1957).

²⁴ 355 U.S. 184 (1957).

²⁵ *Id.* at 187-88.

²⁶ *Missouri v. Hunter*, 459 U.S. 359 (1983).

²⁷ See George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1 (1985).

²⁸ MARTIN L. FRIEDLAND, *DOUBLE JEOPARDY* 199 (1969) (discussing the punishment-prosecution confusion).

²⁹ 459 U.S. 359 (1983).

³⁰ 284 U.S. 299 (1932).

³¹ *Id.* at 304.

³² *Hunter*, 459 U.S. at 366.

³³ *Id.* at 360-62.

³⁴ *Id.* at 368. The statutes proscribing "armed criminal action" and "first-degree rob-

ments, the Court held that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."³⁵ As such, *Blockburger's* blanket prohibition of multiple sentences for the same conduct now supplies nothing more than a rule of statutory construction, which the legislature could eliminate.³⁶ In the wake of *Hunter*, the *Blockburger* standard retained its vitality only for cases involving multiple prosecutions.³⁷

The multiple prosecutions standard differs where the second state action is civil or not overtly criminal in nature.³⁸ Here, a court must first address the question of whether the second proceeding constitutes a second criminal prosecution.³⁹ In *Kennedy v. Mendoza-Martinez*,⁴⁰ the Supreme Court first examined the difference between criminal proceedings—which serve *punitive* purposes—and civil proceedings—which serve other, *non-punitive* interests.⁴¹ Factors relevant to determining when a nominally "civil" proceeding becomes a "criminal" prosecution for double jeopardy purposes include: (1) whether the so-called "civil" proceeding involves an affirmative disability or restraint; (2) whether any sanction through the proceeding has historically been regarded as punishment; (3) whether liability under the proceeding arises only after a finding of scienter; (4) whether the proceeding promotes the traditional aims of punishment—retribution and deterrence; (5) whether the sanction imposed relates to behavior already established as a crime; (6) whether the proceeding has any non-punitive purpose; and (7) whether the proceeding imposes an excessive sanction in relation to its non-punitive purpose.⁴² If a court applies these factors and finds that the civil proceeding constitutes a second criminal action, it must then apply the *Blockburger* rule to evaluate the elements of each proceeding.

The Court later augmented the *Kennedy* standard in *United States v. Ward*⁴³ when it held that, in evaluating multiple prosecution cases, courts must first address a separate threshold question before raising

bery" could not pass the *Blockburger* test because the elements of each offense were substantially the same. *Id.*

³⁵ *Id.* at 366.

³⁶ *Id.* at 366-67 (citing *Whalen v. United States*, 445 U.S. 684, 693 (1980)).

³⁷ See *Brown v. Ohio*, 432 U.S. 161 (1977) (affirming the *Blockburger* rule for successive prosecutions cases).

³⁸ See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

³⁹ *Id.* at 362.

⁴⁰ 372 U.S. 144 (1963).

⁴¹ *Id.* at 168.

⁴² *Id.* at 168-69.

⁴³ 448 U.S. 242 (1980).

the seven *Kennedy* factors.⁴⁴ Specifically, a court must first determine whether the legislature either expressly or impliedly indicated a preference for either the "criminal" or "civil" labels.⁴⁵ If the legislature intended to use the "civil" label, a court should apply the *Kennedy* factors to determine whether the action operates as a criminal prosecution notwithstanding that label.⁴⁶ In evaluating these factors, "only the clearest proof could suffice to establish the unconstitutionality of a statute" for double jeopardy purposes.⁴⁷

C. DOUBLE JEOPARDY APPLIED TO NON-TAX SANCTIONS

Most of the double jeopardy jurisprudence in this area relates not to the constitutionality of a *tax*, but rather to the constitutionality of a *civil penalty*. Thus, the lower federal courts in *Kurth Ranch*⁴⁸ and several state courts⁴⁹ have applied civil penalty double jeopardy analysis, as enunciated in *United States v. Halper*,⁵⁰ to evaluate taxes.

In *Halper*, the Supreme Court announced a standard for determining when a civil penalty constitutes a second punishment for double jeopardy purposes.⁵¹ *Halper* involved violations of the criminal false claims statute,⁵² which imposed criminal sanctions as well as a civil penalty of \$2000 for each violation.⁵³ The United States had charged the defendant with making sixty-five separate claims for reimbursement of twelve dollars from the government for medical services rendered which were, in fact, worth only three dollars.⁵⁴

After the court in the criminal case sentenced the defendant to two years imprisonment and fined him \$5000,⁵⁵ the government insti-

⁴⁴ *Id.* at 248-49.

⁴⁵ *Id.* at 248.

⁴⁶ *Id.* at 248-49. Note that the Court decided both *Ward* and *Kennedy* before it began to recognize the distinction between multiple punishments and multiple prosecutions.

⁴⁷ *Id.* at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

⁴⁸ *Kurth Ranch v. Department of Revenue of the State of Mont.*, 145 B.R. 61 (Bankr. D. Mont. 1990); *Kurth Ranch v. Department of Revenue of the State of Mont.*, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991); *Kurth Ranch v. Department of Revenue of the State of Mont.*, 986 F.2d 1308 (9th Cir. 1993).

⁴⁹ See, e.g., *Sorensen v. State*, 836 P.2d 29, 30 (Mont. 1992); *Rehg v. Illinois Dep't of Revenue*, 152 Ill. 2d 504, 523 (1992).

⁵⁰ 490 U.S. 435 (1989).

⁵¹ *Id.* at 448.

⁵² *Id.* at 437. The False Claims Act, 31 U.S.C. §§ 3729-3731 (1982), imposes a fine on a person who "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." The Act imposes liability in the amount of a \$2000 civil penalty plus an amount equal to two times the damages sustained by the government and costs of the action. *Id.*

⁵³ *Id.* at 437.

⁵⁴ *Id.*

⁵⁵ *Id.*

tuted a separate civil action to collect the \$2000 penalty for each of his sixty-five violations.⁵⁶ On appeal, the Supreme Court held that the \$130,000 aggregate civil penalty constituted an unconstitutional second punishment under the Double Jeopardy Clause.⁵⁷ Because the penalty was more than 220 times greater than the damages suffered by the government, the Court held that the civil penalty lost its characteristics as a remedial sanction and performed the traditional deterrent and retributive functions of punishment.⁵⁸

Arguably, the Court could have reached the same decision in *Halper* by applying the Excessive Fines Clause and without resorting to double jeopardy analysis.⁵⁹ Indeed, as Justice Scalia noted in his dissent in *Kurth Ranch*, the sanction in *Halper* seemed more like an unconstitutional excessive fine than a second jeopardy.⁶⁰

III. FACTS AND PROCEDURAL HISTORY

Six members of the extended Kurth family owned and operated a mixed grain and livestock farm in central Montana.⁶¹ In October of 1987, federal and state law enforcement personnel raided the Kurth farm and seized harvested marijuana, live marijuana plants, and several forms of other marijuana derivatives, including hash tar and hash oil.⁶²

After arresting the Kurths, the State of Montana charged them with criminal offenses, including criminal possession of drugs with in-

⁵⁶ *Id.* at 438.

⁵⁷ *Id.* at 448-49.

⁵⁸ *Id.*

⁵⁹ For an in-depth look at the *Halper* decision and the reasons why excessive fines analysis would have been more appropriate than double jeopardy analysis, see Jahncke, *supra* note 22, at 142-47.

⁶⁰ *Department of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 1937, 1958 n.2 (1994) (Scalia, J., dissenting). Justice Scalia suggested that perhaps the reason the Court in *Halper* did not recognize the lurking excessive fines justification for its holding was that it was not until after *Halper* that the Excessive Fines Clause was "rescued from obscurity" in the civil context. *Id.*

⁶¹ *Id.* at 1942. The members of the Kurth family include: Richard M. Kurth, his wife Judith M. Kurth, their son Douglas M. Kurth, their daughter Cindy K. Halley, Douglas' wife Rhonda I. Kurth, and Cindy's husband Clayton H. Halley. *Id.*

⁶² *Id.* Specifically, the Drug Tax Report, compiled after the raid, included:

Item #1: 2155 marijuana plants in various stages of growth,

Item #2: 7 gallons of hash oil,

Item #3: 4 bags of marijuana at two pounds each,

Item #4: 65/one gram vials of hash tar,

Item #5: 14 baby food size jars of hash tar,

Item #6: 7 pint jars of hash tar,

Item #7: 1 bag of marijuana, 1/4 pound,

Item #8: 5 plastic bags marijuana, total 2230 grams,

Item #9: approximately 100 pounds of marijuana stems, leaves, parts, etc.

Id. at 1942 n.7.

tent to sell and conspiracy to possess drugs with intent to sell.⁶³ Each member of the Kurth family eventually pleaded guilty to at least one of these charges as part of a plea agreement.⁶⁴ Concurrently with the criminal prosecutions, the State of Montana also initiated a civil forfeiture action, confiscating cash and equipment totalling approximately \$18,000.⁶⁵

Then, the Montana Department of Revenue (DOR) initiated a separate proceeding to collect a tax assessed pursuant to Montana's Dangerous Drug Tax Act.⁶⁶ The Montana Act allows the DOR to levy a tax on possession or storage of certain dangerous drugs.⁶⁷ According to DOR regulations, promulgated under the Montana Act, the arresting officer must file the drug tax return within seventy-two hours of the arrest.⁶⁸ This return, which the taxpayer may or may not have signed, must contain an itemized list of the quantities and types of drugs seized.⁶⁹

The Montana Act also provides the following formula for calculating the tax:

(2) [t]he tax on possession and storage of dangerous drugs is the greater of:

(a) ten percent of the assessed market value of the drugs as determined by the department; or

(b)(i) \$100.00 per ounce of marijuana, as defined in 50-32-101, or its derivatives, as determined by the aggregate weight of the substance seized;

(ii) \$250.00 per ounce of hashish, as defined in 50-32-101 as determined by the aggregate weight of the substance seized. . . .⁷⁰

Applying this formula, the DOR assessed a tax totalling \$864,940.99

⁶³ *Id.* The State also charged Richard Kurth with criminal sale of dangerous drugs, criminal possession of a dangerous drug with intent to sell, solicitation to commit the offense of criminal possession of a dangerous drug with intent to sell, and criminal possession of dangerous drugs. *Id.* at 1942 n.8.

⁶⁴ *Kurth Ranch v. Department of Revenue of the State of Mont.*, 145 B.R. 61, 64-65 (Bankr. D. Mont. 1990). The State trial court sentenced the members of the Kurth family to the following terms:

Richard Kurth: 20 years imprisonment with 15 years suspended on each of three counts and 5 years on a fourth count,

Judith Kurth: 5 years imprisonment with 4 years suspended,

Douglas Kurth: 20 years imprisonment with all 20 suspended,

Clayton Halley: 10 years imprisonment with all 10 suspended,

Rhonda Kurth and Cindy Halley: sentence deferred.

Id.

⁶⁵ *Kurth Ranch*, 114 S. Ct. at 1942.

⁶⁶ *Id.*

⁶⁷ MONT. CODE ANN. §§ 15-25-101 to -123 (1993).

⁶⁸ *Kurth Ranch*, 114 S. Ct. at 1941-42 (citing MONT. CODE ANN. § 15-25-113(1) (1987)).

⁶⁹ *Id.*

⁷⁰ MONT. CODE ANN. § 15-25-111(2) (1993).

on the harvested marijuana, live plants, hash tar, and hash oil.⁷¹

On 9 September 1988, the Kurths filed a voluntary petition for bankruptcy reorganization.⁷² In response, the DOR filed a claim with the trustee in bankruptcy for the total assessment.⁷³ The Kurths objected to the claim on the basis that (1) the tax calculations were arbitrary and capricious and (2) the tax violated the Fifth Amendment proscription against double jeopardy.⁷⁴

The bankruptcy court disallowed the DOR's claim based on state law and double jeopardy grounds.⁷⁵ The court first invalidated the taxes on hash tar, hash oil, and live plants as a matter of state law because the DOR had no basis for determining the fair market value of these items.⁷⁶ The court held that a tax based on ten percent of an unascertainable market value was arbitrary and capricious.⁷⁷

Second, with respect to the remaining \$181,100 tax on harvested marijuana, the court determined that, while the amount was not arbitrary or capricious,⁷⁸ the tax violated the prohibition against double jeopardy.⁷⁹ In support of this conclusion, the court relied principally on the reasoning in *United States v. Halper*.⁸⁰ The court found that the tax, while purporting to raise revenue, in effect constituted a second criminal punishment.⁸¹ Hence, the Double Jeopardy Clause barred

⁷¹ *Kurth Ranch v. Department of Revenue of the State of Mont.*, 145 B.R. 61, 68 (Bankr. D. Mont. 1990). The total tax of \$864,940.99 consists of the principal amount for harvested marijuana (\$181,100.00), live marijuana plants (\$213,345.00), hash oil (\$224,000.00), hash tar (\$29,500.00), interest (\$145,324.24), and penalties (\$63,591.75 reduced by \$30,000.00 which the State had already collected from the Kurths). These assessments varied from 80% to as much as 800% of the fair market value of the particular type of product. *Id.*

⁷² *Kurth Ranch*, 114 S. Ct. at 1943.

⁷³ *Id.*

⁷⁴ *Kurth Ranch*, 145 B.R. at 69, 73. Thus, the bankruptcy court oddly became the court in which the Kurths challenged the constitutionality of the Montana Drug Tax Act.

⁷⁵ *Id.* at 76.

⁷⁶ *Id.* at 69. Under Montana law, a court reviewing a tax will not substitute its judgment for that of DOR officials in evaluating the tax, but the court "will intercede . . . when it appears that the valuation fixed by the taxing officials is so grossly excessive as to amount to arbitrary action or to be inconsistent with the exercise of an honest judgment." *Id.* at 69 (citing *Danforth v. Livingston*, 23 Mont. 558 (1900); *International Business Mach. Corp. v. Lewis and Clark County*, 111 Mont. 384 (1941); *Investors Sec. Co. v. Moore*, 113 Mont. 400 (1942)).

⁷⁷ *Id.*

⁷⁸ Unlike the hash tar, hash oil, and live plants, for which any assigned market value was speculative at best, the street value of the harvested, saleable marijuana was readily ascertainable and thus, neither arbitrary nor capricious. *Id.* at 72.

⁷⁹ *Id.* at 76.

⁸⁰ 490 U.S. 435 (1989).

⁸¹ *Kurth Ranch*, 145 B.R. at 75 (citing *United States v. Halper*, 490 U.S. 435, 448 (1989)).

its collection.⁸² The court noted that the tax served the traditional goals of punishment—deterrence and retribution—and did not relate to the recovery of the actual costs the government incurred in investigating and prosecuting the Kurths.⁸³

The DOR did not appeal the bankruptcy court's decision that the taxes on hash tar, hash oil, and live marijuana plants were arbitrary and capricious.⁸⁴ It did, however, appeal to the District Court of Montana the decision that the \$181,100 tax on harvested marijuana violated the Kurth's double jeopardy protection.⁸⁵ The district court affirmed the judgment of the bankruptcy court relying on identical reasoning.⁸⁶

On appeal, the Ninth Circuit also affirmed,⁸⁷ but changed the reasoning slightly. The Ninth Circuit held that the penalty was punitive in nature, not because it did not fairly approximate the costs that the government incurred, but only because it served the traditional aims of punishment, namely, retribution and deterrence.⁸⁸ The United States Supreme Court granted certiorari⁸⁹ to determine whether the Montana Dangerous Drug Tax, as applied against the Kurths, constituted an unconstitutional second punishment.⁹⁰

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Justice Stevens, writing for the Court,⁹¹ reached the same conclusion as the lower courts, but departed markedly from their reasoning by rejecting as wholly inappropriate the standard enunciated in *Halper*, while announcing an entirely new standard applicable to a

⁸² *Id.*

⁸³ *Id.* at 75-76. As Justice Stevens later pointed out in his opinion, the Bankruptcy Court impliedly failed to recognize the distinction between a *tax* and a *civil penalty* and subsequently failed to recognize that the two mechanisms have different goals which may require different tests. See *infra* notes 99 to 102 and accompanying text.

⁸⁴ See *Kurth Ranch v. Department of Revenue of the State of Mont.*, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991).

⁸⁵ *Id.* at *1. In addition to the \$181,100 tax on harvested marijuana, the State sought interest and penalties which had accrued on the principal, bringing the total claim against the Kurths to \$208,105. *Kurth Ranch v. Department of Revenue of the State of Mont.*, 986 F.2d 1308, 1310 (9th Cir. 1993).

⁸⁶ *Kurth Ranch*, No. CV-90-084-GF, 1991 WL 365065 at *4.

⁸⁷ *Kurth Ranch*, 986 F.2d 1308.

⁸⁸ *Id.* at 1310-11.

⁸⁹ *Department of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 38 (1993).

⁹⁰ *Department of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 1937, 1944 (1994).

⁹¹ Justices Blackmun, Kennedy, Souter, and Ginsburg joined Justice Stevens to form a majority.

tax.⁹²

1. *Rejecting the Halper Standard*

The Court began with the premise that the government may use criminal fines, civil penalties, civil forfeitures, and even taxes to generate funds, deter certain types of behavior, or impose burdens on individuals.⁹³ However, the Court noted that the particular label that the legislature has attached to each of these mechanisms does not alone determine the sanction's true criminal or civil nature.⁹⁴ For example, the Court recognized that a sanction nominally designated as a civil sanction might effectively impose a criminal punishment.⁹⁵ Therefore, as the Court concluded, it must always focus upon whether the sanction constitutes a *second punishment*, not the label which the legislature has placed upon it.⁹⁶

Justice Stevens began his analysis by describing the standard the Court had articulated five years earlier in *Halper* for determining when a civil penalty may effectively serve as a second punishment for double jeopardy purposes.⁹⁷ According to this standard, a civil penalty may act as a second criminal punishment when it would be unfair to characterize it as remedial.⁹⁸

Relying on the distinction between a civil penalty and a tax, Justice Stevens rejected the *Halper* analysis, because *Halper* involved only a civil penalty and not a tax.⁹⁹ The Court concluded that taxes fundamentally differ from other mechanisms in that they have a revenue-raising purpose.¹⁰⁰ Civil penalties, on the other hand, serve to restore the government to its prior position.¹⁰¹ According to the Court, *Halper's* analysis of the relationships between the costs incurred by the government and the penalty assessed did not address the question of whether a tax may act as a second punishment because, unlike civil penalties, taxes do not serve a remedial purpose.¹⁰²

2. *Formulating a New Standard*

After disposing of the *Halper* line of reasoning, the Court devel-

⁹² *Kurth Ranch*, 114 S. Ct. at 1945-48.

⁹³ *Id.* at 1945.

⁹⁴ *Id.* at 1946.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1945.

⁹⁷ *Id.* (citing *United States v. Halper*, 490 U.S. 435, 448-49 (1989)).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1944.

¹⁰⁰ *Id.* at 1946.

¹⁰¹ *Id.* at 1945.

¹⁰² *Id.*

oped a new test, consisting of four factors, to determine whether a tax may, in effect, become an unconstitutional second punishment.¹⁰³

First, Justice Stevens found the high tax rate of Montana's Dangerous Drug Tax relevant to determining its nature as a second punishment.¹⁰⁴ Montana taxed the various types of marijuana seized from the Kurths at an average rate of 400% of their street value, which the Court found unrivaled when compared to taxes assessed on legal goods.¹⁰⁵ The Court noted that while the tax rate alone did not determine the nature of the tax, the 400% figure was at least consistent with the aims of punishment.¹⁰⁶

Second, the Court found the tax's obvious deterrent purpose consistent with a punitive sanction, but also not solely dispositive.¹⁰⁷ The Court noted that Montana implemented the tax, at least in part, to deter the possession of marijuana and to provide for anticrime initiatives by burdening violators.¹⁰⁸ The DOR argued that governmental bodies properly impose many taxes, such as those on cigarettes or alcohol, to deter certain conduct, criminal or otherwise.¹⁰⁹ To address this argument, the Court drew a distinction between three types of taxes.¹¹⁰ First, the government imposes purely deterrent taxes on illegal activities, such as the possession of marijuana, to control behavior.¹¹¹ Second, the government imposes purely revenue-raising taxes, such as income taxes, despite their effects on behavior to fund general governmental operations.¹¹² Third, the government can establish a "mixed-motive" tax, such as the one imposed on cigarettes, "both to deter behavior and raise money."¹¹³ With respect to this latter category, the government must balance its interest in deterring the disfavored behavior—for example, smoking—against any benefits of the product "such as creating employment, satisfying consumer demand and generating tax revenues" that may outweigh the harm that the product causes.¹¹⁴

According to the Court, the illegality of an activity cannot provide

¹⁰³ *Id.* at 1946-48.

¹⁰⁴ *Id.* at 1946.

¹⁰⁵ *Id.* at 1946 n.17. The State seized saleable marijuana with an estimated street value of \$46,000 and assessed a tax of \$181,000. *Id.*

¹⁰⁶ *Id.* at 1946.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1946 n.18. (citing the preamble to Montana's Dangerous Drug Tax to demonstrate Montana's intent to deter the drug trade).

¹⁰⁹ *Id.* at 1946.

¹¹⁰ *Id.* at 1947.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

the basis for a "mixed-motive tax."¹¹⁵ The "revenue" raising justification vanishes because increasing the amount of the criminal penalty may equally serve the same function.¹¹⁶ Without this justification, the only remaining motive for the tax is deterrence.¹¹⁷

The Court emphasized that the high rate of tax and obvious deterrent purpose do not, by themselves, indicate that the tax assumed a punitive character.¹¹⁸ Because the Court had previously challenged the legitimacy of each of these two factors alone, the Court added two more factors to consider in conjunction with the others.¹¹⁹

As the third factor, the Court noted that when the liability for the tax arises only following the commission of a crime, the tax may amount to punishment.¹²⁰ Applying this factor to Montana's Dangerous Drug Tax, the Court concluded that not only does Montana's statutory scheme predicate liability on criminal activity, but the assessment itself and the obligation to file the tax return do not arise until the state arrests an individual for the very conduct that gives rise to the tax.¹²¹

Fourth, the Court noted that the DOR assesses the tax based on possession or storage of goods which the taxpayer no longer possesses.¹²² Since this method of taxation "departs so far from normal revenue laws" and applies only with respect to criminals, the tax has an "unmistakable punitive character."¹²³

In closing, Justice Stevens reiterated that the *Halper* standard did not apply to the present case because taxes stand apart from civil penalties.¹²⁴ He speculated, however, that even if *Halper* had been appropriate, the tax would still have been considered a second punishment, because Montana presented no evidence of the costs it incurred in investigating, arresting, and prosecuting the Kurths to justify the amount of the tax it imposed upon them.¹²⁵

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1946-47 (citing *United States v. Sanchez*, 340 U.S. 42 (1950) (upholding a harsh \$100 per ounce tax on marijuana); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (holding that a deterrent purpose and high rate of taxation did not necessarily render a \$200 tax on firearms dealers punitive in nature)).

¹²⁰ *Id.* at 1947.

¹²¹ *Id.*

¹²² *Id.* at 1948. Indeed, as the Court noted, the goods presumably have been destroyed by the time the DOR assesses the tax. *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* According to the *Halper* standard, the purpose of a civil sanction is to allow the government to recover the costs it incurred as a result of investigating and prosecuting the activity. Since it may be difficult if not impossible to estimate these costs, the government

B. CHIEF JUSTICE REHNQUIST'S DISSENT

In his dissent, Chief Justice Rehnquist agreed that the *Halper* line of reasoning did not apply to a tax statute.¹²⁶ Chief Justice Rehnquist also agreed that the proper inquiry is whether the tax has the effect of imposing a second punishment for double jeopardy purposes.¹²⁷ He objected, however, to the "hodgepodge of criteria—many of which have been squarely rejected by our previous decisions"—that the Court employed to evaluate the tax's punitive character.¹²⁸

Specifically, Chief Justice Rehnquist argued that the high rate of taxation or obvious deterrent purpose do not lend any support to the conclusion that the tax is punitive in nature.¹²⁹ He cited cases, which the Court mentioned only in passing, to indicate that the unlawfulness of an activity does not prevent its taxation and to show affirmatively that the Court has upheld taxes with purely deterrent purposes in the past.¹³⁰ Chief Justice Rehnquist cited precedent which contradicted the Court's proposition that a tax on illegal activities cannot exist as a "mixed-motive tax."¹³¹

Next, Chief Justice Rehnquist disputed the Court's conclusion that Montana conditions tax liability on the commission of a crime.¹³² He claimed that the requirement that the arresting officer file the tax return within seventy-two hours of an individual's arrest "merely acknowledges the practical realities involved in taxing an illegal activity."¹³³ Chief Justice Rehnquist further argued against the relevance of the final factor of the Court's standard—that the taxpayer no longer possesses the goods being taxed: "[s]urely the Court is not suggesting that the State must permit the Kurths to keep the contraband in order to tax its possession."¹³⁴

may attempt to exact liquidated damages in the absence of a showing of actual damages. Given the great deference given to legislatures, this method of cost recovery has been referred to as "rough remedial justice." *United States v. Halper*, 490 U.S. 435, 446 (1989). Where the amount of penalty bears no rational relationship to these costs, the penalty may lose its non-punitive characteristic—cost recovery—and perform the functions of punishment. *Id.*

¹²⁶ *Kurth Ranch*, 114 S. Ct. at 1949 (Rehnquist, C.J., dissenting).

¹²⁷ *Id.* at 1950 (Rehnquist, C.J., dissenting).

¹²⁸ *Id.* at 1949 (Rehnquist, C.J., dissenting).

¹²⁹ *Id.* at 1950 (Rehnquist, C.J., dissenting).

¹³⁰ *Id.* (Rehnquist, C.J., dissenting) (citing *Marchetti v. United States*, 390 U.S. 39, 44 (1968); *United States v. Constantine*, 296 U.S. 287, 293 (1935)).

¹³¹ *Id.* (Rehnquist, C.J., dissenting) (citing *United States v. Sanchez*, 340 U.S. 42, 44 (1950), where the Supreme Court upheld a tax on marijuana as a "mixed-motive tax" reasoning that "a tax does not cease to be valid merely because it regulates, discourages or even definitely deters the activity taxed").

¹³² *Id.* (Rehnquist, C.J., dissenting).

¹³³ *Id.* (Rehnquist, C.J., dissenting).

¹³⁴ *Id.* at 1951 (Rehnquist, C.J., dissenting).

Finally, Chief Justice Rehnquist attacked the Court's conclusion that the tax rate is "unrivaled" by other taxes.¹³⁵ In comparison to cigarette taxes, for example, the 400% rate is not that extraordinary given the traditional deference to the state legislatures in the area of taxation and the fact that large portions of the illegal drug trade will escape taxation.¹³⁶

C. JUSTICE O'CONNOR'S DISSENT

In a separate dissenting opinion, Justice O'Connor dismissed the distinction the Court and Chief Justice Rehnquist made between a civil penalty and a tax.¹³⁷ In the absence of such a distinction, Justice O'Connor applied an analysis similar to that in *Halper*.¹³⁸

Justice O'Connor agreed with Justice Scalia's dissent that a "civil proceeding following a criminal prosecution simply is not a second 'jeopardy,'" but recognized that a state may try to mask a criminal punishment under the guise of a civil sanction to circumvent protections afforded in the Bill of Rights.¹³⁹ As such, double jeopardy scrutiny may apply to any civil sanction if it exacts a punishment.¹⁴⁰

Justice O'Connor adopted the standard that both the lower courts and the Court in *Halper* used—that the sanction may become punitive when the amount of the tax is "overwhelmingly disproportionate" to the costs incurred by the government as a result of the unlawful behavior.¹⁴¹ Justice O'Connor reached the opposite result, however, by finding the amount of tax in the instant case reasonable in light of the huge costs that the state incurs to detect, investigate, and prosecute drug offenders.¹⁴² Justice O'Connor introduced "readily available statistics" from the Bureau of Justice Statistics and the Montana Board of Crime Control to show that the state and federal governments spent approximately \$27 billion in 1991 for drug enforcement and that Montana could directly attribute at least \$120,000 to the "apprehension, prosecution, and incarceration" of the Kurths alone.¹⁴³

¹³⁵ *Id.* at 1952 (Rehnquist, C.J., dissenting).

¹³⁶ *Id.* (Rehnquist, C.J., dissenting).

¹³⁷ *Id.* at 1953 (O'Connor, J., dissenting).

¹³⁸ *Id.* (O'Connor, J., dissenting).

¹³⁹ *Id.* (O'Connor, J., dissenting).

¹⁴⁰ *Id.* (O'Connor, J., dissenting).

¹⁴¹ *Id.* (O'Connor, J., dissenting) (quoting *United States v. Halper*, 490 U.S. 435, 449 (1989)).

¹⁴² *Id.* (O'Connor, J., dissenting).

¹⁴³ *Id.* at 1953-54 (O'Connor, J., dissenting). Justice O'Connor, however, fails to explain why these "readily available statistics" were not available to the lower courts or why the DOR never argued them.

Justice O'Connor posited that, given the impracticability of attempting to determine the exact costs attributable to each drug-related offense, the Court should allow Montana to exact liquidated damages.¹⁴⁴ The Montana Dangerous Drug Tax performs precisely this function.¹⁴⁵ Montana's legislature has established \$100 per ounce of marijuana as its reasonable estimate of the amount of damages the State may suffer.¹⁴⁶ Justice O'Connor also justified the reasonableness of this amount by pointing out that twenty-two other states have chosen the same dollar value as their estimate of liquidated damages in their drug tax statutes.¹⁴⁷

Justice O'Connor explained that her application of the *Halper* standard produced a different result from the lower courts because those courts misplaced the burden of demonstrating that the tax approximated costs incurred by the State.¹⁴⁸ The Ninth Circuit held that "allowing the state to impose this tax, without any showing of some rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits."¹⁴⁹ Justice O'Connor argued that this standard prematurely places the burden of proof on the State to justify its tax.¹⁵⁰ According to the holding in *Halper*, the defendant must first make some showing that no rational relationship exists between the amount of the sanction and the costs incurred by the government.¹⁵¹ If the defendant meets this requirement, the burden then shifts to the State to justify the amount of the sanction.¹⁵² Justice O'Connor concluded that, since the Kurths had made no showing that the tax did not relate to Montana's non-punitive objectives, the State had no obligation to present any evidence supporting its tax.¹⁵³

D. JUSTICE SCALIA'S DISSENT

Justice Scalia's dissent¹⁵⁴ questioned the very nature of the Double Jeopardy Clause and concluded that "jeopardy" refers not to a criminal *punishment*, but only to a criminal *prosecution*.¹⁵⁵

¹⁴⁴ *Id.* at 1954 (O'Connor, J., dissenting).

¹⁴⁵ *Id.* (O'Connor, J., dissenting).

¹⁴⁶ *Id.* (O'Connor, J., dissenting).

¹⁴⁷ *Id.* (O'Connor, J., dissenting).

¹⁴⁸ *Id.* (O'Connor, J., dissenting).

¹⁴⁹ *Id.* (O'Connor, J., dissenting).

¹⁵⁰ *Id.* (O'Connor, J., dissenting).

¹⁵¹ *Id.* (O'Connor, J., dissenting) In essence, there is a presumption in favor of the state that a tax statute is constitutional. *Id.*

¹⁵² *Id.* at 1954-55 (O'Connor, J., dissenting).

¹⁵³ *Id.* (O'Connor, J., dissenting).

¹⁵⁴ Justice Thomas joined this dissent.

¹⁵⁵ *Id.* at 1955 (Scalia, J., dissenting).

Justice Scalia noted that legislation that imposes two sanctions for the same conduct has been common throughout American history, including the period when the drafters of the Fifth Amendment submitted it for ratification.¹⁵⁶ Justice Scalia found it implausible that the drafters of the Double Jeopardy Clause would prohibit second punishments as they simultaneously enacted legislation authorizing those types of sanctions.¹⁵⁷

Justice Scalia traced the long-standing, mistaken belief, relied upon by the Court, that the Double Jeopardy Clause protects against second punishments to *Ex Parte Lange*.¹⁵⁸ The Supreme Court decided that case, which involved both a prison term and a fine for theft of mail bags, not on double jeopardy grounds, but purely based on statutory construction.¹⁵⁹ The statute in *Lange* authorized a maximum prison sentence of two years *or* a maximum fine of \$2000.¹⁶⁰ Since the lower court had imposed *both*, the sanctions violated the letter of the statutory authorization.¹⁶¹ Due process assures that a sentencing court may impose punishment only to the extent the legislature authorized it.¹⁶² While the decision in *Lange* addressed both the common law and double jeopardy arguments in dicta, "[i]t is clear that the Due Process Clause alone suffices to support the decision."¹⁶³ Justice Scalia argued that the Court erroneously repeated this dicta as a holding in *North Carolina v. Pearce*,¹⁶⁴ a frequently cited case regarding the types of protections the Double Jeopardy Clause affords.¹⁶⁵

Justice Scalia reasoned that, since it does not matter whether the government imposes the punishment through a criminal or civil forum, the Double Jeopardy Clause, as employed in *Halper*, merely duplicates other constitutional protections.¹⁶⁶ Justice Scalia argued

¹⁵⁶ *Id.* at 1955-56 (Scalia, J., dissenting) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 555-56 (1943) (Frankfurter, J., concurring)).

¹⁵⁷ *Id.* at 1956 (Scalia, J., dissenting) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 555-56 (1943) (Frankfurter, J., concurring)).

¹⁵⁸ *Id.* (Scalia, J., dissenting) (citing *Ex Parte Lange*, 21 L. Ed. 872 (1874)).

¹⁵⁹ *Id.* (Scalia, J., dissenting).

¹⁶⁰ *Id.* (Scalia, J., dissenting).

¹⁶¹ *Id.* (Scalia, J., dissenting).

¹⁶² *Id.* (Scalia, J., dissenting).

¹⁶³ *Id.* (Scalia, J., dissenting). Since the sentencing court in *Lange* imposed both forms of punishment where the legislature had authorized only prison or fine, it violated the defendant's due process. Therefore, no double jeopardy inquiry was necessary to hold *Lange*'s sentence unconstitutional. *Id.* (Scalia, J., dissenting).

¹⁶⁴ 395 U.S. 711, 717 (1969). For cases citing *Pearce* to support the proposition that double jeopardy protects against multiple punishments, see *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Wilson*, 420 U.S. 332, 342-43 (1975).

¹⁶⁵ *Kurth Ranch*, 114 S. Ct. at 1956. (Scalia, J., dissenting).

¹⁶⁶ *Id.* at 1957. (Scalia, J., dissenting).

that where a sanction has the effect of a punishment, the Due Process Clause requires that the punishment lie within the legislatively authorized bounds.¹⁶⁷ The Cruel and Unusual Punishments Clause and the Excessive Fines Clause ensure that the legislature does not authorize unreasonable bounds.¹⁶⁸ Thus, the Double Jeopardy Clause affords no *punishment* protection which these clauses of the Constitution do not already adequately provide.¹⁶⁹ Double jeopardy merely prevents a prosecutor from bringing additional charges in a later proceeding.¹⁷⁰

Justice Scalia found the misconception that double jeopardy protects against a second punishment particularly problematic, because the sequence of the punishments should not matter.¹⁷¹ Under this misconception, where a governmental body had already imposed a civil punishment, the Double Jeopardy Clause would certainly bar future *criminal* proceedings.¹⁷² By relying instead on the Due Process Clause, Justice Scalia avoided this problem.¹⁷³ He concluded that once a court determines that a state imposed a criminal tax through a civil proceeding, such assessment would violate all of the criminal procedure protections¹⁷⁴ of the Fifth and Sixth Amendments, including the Due Process and Double Jeopardy Clauses.¹⁷⁵ On this basis, the Court would invalidate the tax irrespective of whether it had followed a criminal prosecution, without relying on double jeopardy analysis.¹⁷⁶

V. ANALYSIS

The Court's analysis in *Kurth Ranch* confuses multiple punishments with multiple prosecution.¹⁷⁷ The double jeopardy confusion

¹⁶⁷ *Id.* at 1959 (Scalia, J., dissenting).

¹⁶⁸ *Id.* (Scalia, J., dissenting).

¹⁶⁹ *Id.* (Scalia, J., dissenting).

¹⁷⁰ *Id.* at 1957 (Scalia, J., dissenting) (citing *Whalen v. United States*, 445 U.S. 684, 687 (1980)).

¹⁷¹ *Id.* at 1958 (Scalia, J., dissenting).

¹⁷² *Id.* (Scalia, J., dissenting).

¹⁷³ *Id.* at 1960 (Scalia, J., dissenting).

¹⁷⁴ In *Helvering v. Mitchell*, 303 U.S. 391, 402-03 (1938), for example, the Court noted that the following criminal procedure guarantees could be violated by bringing a criminal action in a civil forum:

(1) In a criminal trial, liability must be determined by a jury, not by administrative agency;

(2) In a criminal trial, the court may not direct a verdict against the defendant;

(3) In a criminal trial, the government must prove guilt beyond a reasonable doubt;

(4) In a criminal trial, the government may not appeal from an adverse decision.

Id. (citations omitted).

¹⁷⁵ *Id.* (Scalia, J., dissenting).

¹⁷⁶ *Id.* (Scalia, J., dissenting).

¹⁷⁷ Justice Scalia's position that the Double Jeopardy Clause protects only multiple prosecutions, while the Due Process Clause protects multiple punishments is defensible, but unnecessary to determine the outcome of this case. For arguments in accord with Scalia's

perpetuated by the *Halper* decision and stemming from the punishment/prosecution misunderstanding explains in part the Court's decision. This Note argues that if the Court had separately applied the *Hunter* multiple punishments rule and the *Kennedy-Ward* rule for multiple prosecutions, it would have reached a different conclusion on the double jeopardy issue. Instead, by confusing the two doctrines, the Court attempted to merge the two rules into a hybrid multiple punishment rule that selectively incorporated elements of the *Kennedy* test into punishment analysis. This type of jurisprudence, also employed in *Halper*, has clouded the double jeopardy issue further and obscured the punishment-prosecution distinction.¹⁷⁸

This Note further argues that the Court could have applied the Excessive Fines Clause of the Eighth Amendment to supply the additional protection not afforded by the Double Jeopardy Clause. Under Excessive Fines analysis, the Court could still have invalidated the tax assessed against the Kurths.

A. MULTIPLE PUNISHMENT PROTECTION

The Court's analysis centers almost entirely on multiple punishment.¹⁷⁹ The Court goes to great lengths to examine the nature of the tax and the possible deterrent or retributive effects it may have. This type of analysis flies directly in the face of the multiple punishments rule spelled out in *Hunter*. That rule allows multiple punishments to the extent that the legislature authorizes them, despite any possible deterrent or retributive effects.¹⁸⁰ As such, the Court should have limited its punishments inquiry to determining whether the criminal punishment imposed against the Kurths and the tax assessed

view, see *Simpson v. United States*, 435 U.S. 6, 19 (1978); Walter T. Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 UCLA L. REV. 81, 86-87 (1967). Under either the Double Jeopardy Clause or the Due Process Clause, the same rule applies in a multiple punishment inquiry: a consecutive punishment is permissible if the legislature authorizes it. By separating punishments from prosecutions in such a dramatic fashion, however, Scalia may be attempting to give some much needed clarity to double jeopardy jurisprudence.

¹⁷⁸ As Justice Scalia remarks in his dissent, "[i]t is time to put the *Halper* genie back in the bottle," by once and for all separating multiple punishment analysis from multiple prosecutions analysis to avoid further muddying of the double jeopardy waters. *Kurth Ranch*, 114 S. Ct. at 1959 (Scalia, J., dissenting).

¹⁷⁹ The majority addressed the prosecution issue only by asserting the naked conclusion that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time." *Id.* at 1948. As Justice Scalia noted in his dissent, this conclusion must rest on the premise that any action which gives rise to a sanction which may be construed as punitive is criminal. In light of the *Kennedy-Ward* test, this premise is false. *Id.* at 1959 (Scalia, J., dissenting).

¹⁸⁰ See *supra* note 35 and accompanying text.

by the Department of Revenue, in fact, exceeded that which Montana's legislature had authorized.

Applying this analysis, the Court would have concluded that the legislature had authorized both punishments and that therefore, the tax did not violate the prohibition against multiple punishments. Under the standard announced in *Hunter*, the Court's double jeopardy inquiry would go no further than whether the tax exceeded that which Montana's legislature had duly prescribed.¹⁸¹ The preamble to Montana's Dangerous Drug tax clearly indicates that the State's legislature intended to simultaneously allow both the criminal sanctions and the tax.¹⁸² The preamble indicates that while the State of Montana does not wish to condone the illicit drug trade, it acknowledges that the trade otherwise escapes taxation.¹⁸³ Given the burdens the trade has on the State's economy, Montana considers it appropriate that those involved in the drug trade should bear some of these burdens.¹⁸⁴ Thus, Montana wishes to assess a tax on participants in the drug trade *in addition to* the criminal sanctions already in place.

Since the State brought the criminal sanction and the tax in separate proceedings, the Court's analysis should next have addressed whether the DOR's action violated the prohibition against multiple prosecutions.

B. MULTIPLE PROSECUTION PROTECTION

In their dissents, Justices Scalia and O'Connor found no violation of the prohibition against multiple prosecutions by reasoning that a civil action following a criminal action is simply not a second jeopardy. This reasoning arises out of the idea that a civil action, such as the one initiated by the DOR to collect the tax, never jeopardized the Kurths' interest in finality.

¹⁸¹ Of course, it is also the province of the Court to determine whether the legislature may have substantively overstepped its bounds and authorized an unconstitutional punishment. However, such a substantive review falls not within a double jeopardy inquiry, but rather within a due process or excessive fines inquiry. See *infra* notes 217 to 226 and accompanying text.

¹⁸² 1987 Mont. Laws 563. The Preamble states in relevant part:

WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs . . . , but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts. . . .

Id.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

In general, the finality interest represents a defendant's interests in avoiding the stigma and embarrassment of a second criminal trial and in avoiding the anxiety and uncertainty of a potential indictment and trial after an acquittal or conviction.¹⁸⁵ The DOR's action threatened neither of these aspects of the finality interest. The State did not subject the Kurths to the ordeal of a second criminal trial, nor did any prosecutor attempt to reopen their criminal conviction or try to obtain a second criminal conviction. Therefore, in a civil action, by definition, no finality problem arises. Thus, the *Blockburger* multiple prosecution test should not apply since it operates only to protect a finality interest.

However, the complexity of the double jeopardy protection and the potential vagueness of the labels "criminal" and "civil" may require a closer look.¹⁸⁶ While the Court noted that a tax differs fundamentally from other types of sanctions, such as civil penalties or civil forfeitures,¹⁸⁷ the "tax" label does not preclude double jeopardy analysis.¹⁸⁸ As the Supreme Court remarked in *United States v. La Franca*,¹⁸⁹ "if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such."¹⁹⁰

Similarly, the distinction between a tax and a penalty does not render the *Kennedy-Ward* test unworkable for purposes of determining whether the proceeding to collect the tax operates as a civil or criminal action for double jeopardy purposes. Courts employ the *Kennedy-Ward* standard to determine whether a nominally civil sanction acts as a punishment by balancing any punitive and non-punitive purposes of the sanction.¹⁹¹ The Supreme Court originally couched the test in terms of punitive purposes and non-punitive purposes, not in terms of punitive and remedial purposes.¹⁹² In part because courts have largely applied the test only to civil penalties and civil forfeitures, whose non-punitive purpose is remedial, case law applying the test has often erroneously equated the term "non-punitive" with "remedial."¹⁹³

¹⁸⁵ See *supra* notes 20 to 25 and accompanying text.

¹⁸⁶ Indeed, Justice Scalia retreated from his stance that a civil action is simply not a second jeopardy to address the idea that the label "civil" may not be determinative. He recognized, perhaps, that this stark proposition would allow a legislature to effect any multiple prosecution merely by calling it "civil." *Id.*

¹⁸⁷ *Department of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 1937, 1946 (1994).

¹⁸⁸ *Lipke v. Lederer*, 259 U.S. 557, 561 (1922) (stating that "[t]he mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intentment of the term a tax was laid").

¹⁸⁹ 282 U.S. 568 (1931).

¹⁹⁰ *Id.* at 572.

¹⁹¹ See *supra* notes 38 to 42 and accompanying text.

¹⁹² See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

¹⁹³ See, e.g., *Sorensen v. State*, 836 P.2d 29, 32 (Mont. 1992).

A remedial purpose is one type of non-punitive purpose. Another non-punitive purpose, for example, is revenue raising, which is the purpose of a tax.¹⁹⁴ By substituting this purpose into the *Kennedy-Ward* equation, courts can still evaluate the tax proceeding, notwithstanding the objection that the tax itself serves no remedial purpose. Therefore, the *Kennedy-Ward* test also places constraints on a proceeding to collect a tax when it follows a criminal prosecution.

In applying the *Kennedy-Ward* test to determine the nature of the tax, a court must first ask whether the legislature has indicated, either expressly or impliedly, that the label "civil" or "criminal" should apply to the tax. In *Helvering v. Mitchell*,¹⁹⁵ another multiple prosecutions case,¹⁹⁶ the Court addressed this same matter of statutory interpretation.¹⁹⁷ That case involved a civil penalty, assessed for tax fraud pursuant to section 293 of the Revenue Act of 1928, following the taxpayer's acquittal in a criminal fraud case brought pursuant to a separate section of the Revenue Act.¹⁹⁸ The Court found that in enacting section 293, Congress had intended to create a proceeding for the collection of a civil penalty, not a criminal one.¹⁹⁹ As evidence of this intent, the Court noted that Congress had provided for collection of the penalty by distraint, a distinctly civil procedure.²⁰⁰ Similarly, Montana's Dangerous Drug Tax also provides that the DOR may collect the tax by distraint.²⁰¹ The presence of this distinctly civil collection procedure indicates that Montana's legislature intended to use the "civil" label to describe the tax.²⁰²

Next, a court must examine the seven factors enumerated in *Kennedy* to determine whether the nature of the action may negate the implied intention of the legislature.²⁰³ First, the state does not subject

¹⁹⁴ Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1946 (1994). See also United States v. Lipke, 259 U.S. 557, 562 (1922).

¹⁹⁵ 303 U.S. 391 (1938).

¹⁹⁶ The Court's opinion frequently makes use of the terms "punishment" and "sanction," but since Mitchell had been acquitted at the criminal trial, the civil sanction imposed could not have been a second punishment. Instead, the taxpayer argued that the proceeding was an unconstitutional second prosecution. *Id.* at 398-99.

¹⁹⁷ *Id.* at 399.

¹⁹⁸ *Id.* at 395-96.

¹⁹⁹ *Id.* at 401-02.

²⁰⁰ *Id.* In the drug tax context, "distraint" or "distress" refers to a seizure of personal property of the offender as remuneration for wrongful conduct for the benefit of the injured party. BLACK'S LAW DICTIONARY 474 (6th ed. 1990).

²⁰¹ MONT. CODE ANN. § 15-25-115 (1993).

²⁰² For an examination of the Act's Preamble to find that the legislature intended the tax to be "civil," see Sorensen v. State, 836 P.2d 29, 31 (Mont. 1992) (concluding that the Act passed the first part of the *Kennedy-Ward* test).

²⁰³ United States v. Ward, 448 U.S. 242, 248-49 (1980). For a description of the seven *Kennedy* factors, see *supra* note 42 and accompanying text.

the taxpayer to incarceration or other restraint under the provisions of the Dangerous Drug Tax, so it imposes no "affirmative disability or restraint upon the taxpayer."²⁰⁴

Second, although drug taxes are a relatively recent innovation at the state level, courts have not historically regarded them as punishment. As noted, at least twenty-six states have enacted drug taxes of some sort.²⁰⁵ Only two state supreme courts have struck down their states' drug taxes as unconstitutional.²⁰⁶ In both cases, the courts held the taxes invalid, not as second punishments, but rather on self-incrimination grounds.²⁰⁷

Third, Montana does not predicate liability for the tax on a finding of scienter. Indeed, even the underlying crime of criminal possession of dangerous drugs requires no scienter.²⁰⁸

Fourth, the tax obviously serves the traditional retributive and deterrent goals of criminal law. Similarly, the tax applies to behavior which the state already punishes as a crime, namely the possession of dangerous drugs.

Despite serving the retributive and deterrent purposes of punishment, the tax *does* serve a valid non-punitive aim—revenue raising. Whether the tax acts as an excessive sanction in relation to this revenue-raising purpose requires an examination of similar revenue raising taxes. As Justice O'Connor pointed out in her dissent in *Kurth Ranch*, other states have commonly employed the same tax rate in their drug taxing systems.²⁰⁹

Thus, of the seven factors set forth in *Kennedy*, Montana's Dangerous Drug Tax fails only the fourth and fifth factors. This hardly supplies "the clearest of proof" required by *Ward* to find that the tax procedure acts as a criminal prosecution by nature.²¹⁰ Therefore, since the DOR's proceeding to collect the tax does not qualify as a second criminal prosecution, the proceeding did not violate the Kurths' double jeopardy multiple prosecutions protection.²¹¹

²⁰⁴ *Sorensen*, 836 P.2d at 31.

²⁰⁵ See *supra* note 12 and accompanying text.

²⁰⁶ *State v. Roberts*, 384 N.W.2d 688 (S.D. 1986); *State v. Smith*, 813 P.2d 888 (Idaho 1991). For federal case law upholding drug taxes, see *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (holding that "a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed").

²⁰⁷ *Roberts*, 384 N.W.2d at 691; *Smith*, 813 P.2d at 890.

²⁰⁸ *Sorensen*, 836 P.2d at 32.

²⁰⁹ Department of Revenue of Mont. v. *Kurth Ranch*, 114 S. Ct. 1937, 1954 (1994) (O'Connor, J., dissenting).

²¹⁰ *United States v. Ward*, 448 U.S. 242, 249 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

²¹¹ Justice Scalia reached the conclusion in *Kurth Ranch* that the tax proceeding was not a criminal prosecution, although he did so without examining the *Kennedy* factors in detail.

C. CONSTITUTIONAL PROTECTION BEYOND DOUBLE JEOPARDY

Rather than addressing separately the rules related to multiple punishments and multiple prosecutions, the Court further obscured the punishment-prosecution distinction and conflated the rules governing each. Finding the stringent multiple prosecutions test insurmountable, the Court pursued only the multiple punishments issue. However, the letter of the *Hunter* analysis protects against multiple punishments only insofar as they exceed that which the legislature has authorized. The Court found this level of protection too low for its purposes and thus set out to enhance the scope of the *Hunter* test by selectively including among its ranks the fourth,²¹² fifth,²¹³ and seventh²¹⁴ factors of the *Kennedy-Ward* multiple prosecutions standard.

The Court correctly noted the lack of protection afforded to multiple punishments through the Double Jeopardy Clause and the *Hunter* test. This perception does not, however, justify the reconstructive surgery it has performed on *Hunter*, since other Constitutional protections augment the multiple punishment protection.

For example, the Due Process Clause, like the *Hunter* rule, assures that sentencing courts may only impose sentences which the legislature has authorized.²¹⁵ Also, the Cruel and Unusual Punishments and Excessive Fines Clauses of the Eighth Amendment place limits on the substance of what punishments the legislature may authorize.²¹⁶

Statutes similar to Montana's drug tax provisions have been attacked as violations of the Eighth Amendment's prohibition against excessive fines.²¹⁷ Recently, courts have referred to the Excessive

Kurth Ranch, 114 S. Ct. at 1960 (Scalia, J., dissenting).

²¹² Whether the proceeding promotes the traditional aims of criminal law may indicate that the purported civil action is criminal in nature. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

²¹³ Whether the proceeding applies to behavior that the state has already criminalized may indicate that the purported civil proceeding is criminal in nature. *Id.*

²¹⁴ Whether the proceeding acts as an excessive sanction in relation to its non-punitive purpose may indicate that the nominally civil proceeding is criminal in nature. *Id.* at 169.

²¹⁵ *Whalen v. United States*, 445 U.S. 684, 689-90 n.4 (1980) (noting that "[t]he Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.").

²¹⁶ *Austin v. United States*, 113 S. Ct. 2801 (1993); *Browning-Ferris Indus. of Vt. v. Kelco Disposal*, 492 U.S. 257 (1989). The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

²¹⁷ In *Austin*, the government initiated a civil forfeiture action after the defendant had pleaded guilty to drug offenses. *Austin*, 113 S. Ct. at 2803. The Court held that the Excessive Fines Clause applied to the civil forfeiture suit, but declined to formulate a standard for determining excessiveness. *Id.* at 2812. The Court instead relied on the judgement of the trial court. *Id.* But see *Browning-Ferris*, 492 U.S. at 268 (limiting the application of the

Fines Clause more frequently with respect to civil fines and penalties.²¹⁸ In *Browning-Ferris Industry of Vermont v. Kelco Disposal*,²¹⁹ the Supreme Court examined the nature of the Eighth Amendment's protection and concluded that its overall purpose is to limit the government's power to punish.²²⁰ More specifically, the Excessive Fines Clause is supposed to limit the government's ability to extract payments as punishment for an offense.²²¹

Justice O'Connor has suggested a standard for the application of the Excessive Fines Clause in the civil context which parallels the standard used in a cruel and unusual punishment analysis in the criminal setting.²²² According to Justice O'Connor, in deciding whether a sanction violated the Excessive Fines Clause, a court must first give great deference to the legislature which authorized the sanction.²²³ Second, the court should examine the gravity of the conduct in relation to the harshness of the sanction.²²⁴ Finally, the court should compare similar civil and criminal sanctions imposed in the same jurisdiction for different conduct and the sanctions imposed in other jurisdictions for the same conduct.²²⁵

As in *Halper*, the sheer magnanimity of the tax that the DOR imposed on the Kurths disturbed the Court. Rather than applying the Excessive Fines Clause to address the proportionality of the tax, the Court continued the distortion of the Double Jeopardy Clause which it had begun in *Halper* to find the tax unconstitutional. By adopting Justice O'Connor's excessive fines analysis, the Court would have been able to weigh the magnanimity of the offense against that of the sanction to reach a more satisfying result.²²⁶

Excessive Fines Clause to "those fines directly imposed by, and payable to, the government" and not to a private party as punitive damages).

²¹⁸ While historically, courts have applied the Eighth Amendment only in the criminal context, the Court's holding in *Halper*, that the labels "criminal" or "civil" may not be dispositive, seems to extend the Excessive Fines Clause to the civil arena. See also *Austin*, 113 S. Ct. at 2804-05 (noting that the text of the Eighth Amendment, unlike the Fifth Amendment's Self-Incrimination Clause and the protections provided by the Sixth Amendment, contains no language limiting its application to the criminal context).

²¹⁹ 492 U.S. 257 (1989).

²²⁰ *Id.* at 275.

²²¹ *Id.* at 265 (quoted in *Austin*, 113 S. Ct. at 2805).

²²² *Id.* at 300-01 (O'Connor, J., dissenting).

²²³ *Id.* at 301 (O'Connor, J., dissenting).

²²⁴ *Id.* (O'Connor, J., dissenting).

²²⁵ *Id.* (O'Connor, J., dissenting).

²²⁶ The Bankruptcy Court had summarily dismissed the Kurths' excessive fines arguments because the DOR had not assessed the tax in a criminal proceeding. *Kurth Ranch v. Department of Revenue of the State of Mont.*, 145 B.R. 61, 76 (Bankr. D. Mont. 1990). However, the court erroneously emphasized the form over the substance of the proceeding by relying entirely on the "civil" label to determine the nature of the action, without examining its underlying goals. See *United States v. Halper*, 490 U.S. 435, 446-47 (1989) (hold-

VI. CONCLUSION

The Court evaluated the Dangerous Drug Tax's obvious deterrent purpose and its high tax rate assessed following arrest on goods the taxpayer no longer owns to conclude that the tax violated the prohibition against double jeopardy. Had the Court resorted to excessive fines analysis, it would have reached the same result. The major flaw with the Court's application of double jeopardy analysis is that it left open the possibility that taxes of the same magnitude could have been constitutional if only the state had assessed them in the same action as the criminal prosecution.²²⁷ Similarly, the Court's analysis could lead to the invalidation of a criminal sentence where the state had already imposed a civil tax.²²⁸ Application of the Excessive Fines Clause avoids both of these problems. Regardless of the timing of the action under which the state assesses the tax, and regardless of whether there had been a criminal prosecution, the tax would fail if excessive in relation to the offensive conduct. As seen in this light, the *Kurth Ranch* decision compounded the confusion initiated by *Halper* and laid the groundwork for future Supreme Court headaches.

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ing that, in making the assessment of whether a civil penalty may constitute a criminal punishment, "the labels 'criminal' and 'civil' are not of paramount importance"). Given that a state legislature could attempt to mask any criminal action behind a "civil" label, the excessive fines analysis should still apply.

²²⁷ See *Department of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 1937, 1958 (1994) (Scalia, J., dissenting).

²²⁸ *Id.* (Scalia, J., dissenting).