

# Missouri Law Review

---

Volume 61  
Issue 1 *Winter 1996*

Article 12

---

Winter 1996

## Double Jeopardy: Protection against Multiple Punishments

Eric Michael Anielak

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Eric Michael Anielak, *Double Jeopardy: Protection against Multiple Punishments*, 61 MO. L. REV. (1996)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol61/iss1/12>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Double Jeopardy: Protection Against Multiple Punishments

*Department of Revenue v. Kurth Ranch*<sup>1</sup>

## I. INTRODUCTION

In *Department of Revenue v. Kurth Ranch*, the United States Supreme Court found the enforcement of a Montana statute taxing the possession of illegal drugs violated the Double Jeopardy Clause of the sixth amendment.<sup>2</sup> *Kurth* is the third case<sup>3</sup> in what appears to be an increasingly broad interpretation of the clause. This note examines the Court's analysis and questions the necessity of protecting against successive punishments.

## II. FACTS AND HOLDING

In 1986, Montana law enforcement officers raided the Kurth family farm seizing marijuana plants and drug paraphernalia.<sup>4</sup> The State of Montana filed criminal charges against the six members of the Kurth family which resulted in criminal plea agreements.<sup>5</sup> On July 18, 1988, Richard Kurth and Judy Kurth were sentenced to prison while the other members of the family received suspended or deferred criminal sentences.<sup>6</sup>

In addition to the criminal charges, the county attorney filed a civil forfeiture<sup>7</sup> action to recover the cash and equipment used by the Kurths in the marijuana operation.<sup>8</sup> The Kurths agreed to forfeit \$18,016.83 in cash and various items of equipment.<sup>9</sup>

---

1. 114 S. Ct. 1937 (1994).

2. *Id.*

3. *United States v. Halper*, 490 U.S. 435 (1989) and *Austin v. United States*, 113 S. Ct. 2801 (1993), are previous Supreme Court cases enlarging the interpretation of the Double Jeopardy Clause.

4. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1942 (1994).

5. *Id.*

6. *Id.*

7. A civil forfeiture action is separate proceeding in which the state can recover a defendant's property. The purpose of such a statute is to reimburse the state for the expenses of drug enforcement. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 360-66 (1984) (The court found the civil forfeiture action did not violate the Double Jeopardy Clause).

8. *Kurth Ranch*, 114 S. Ct. at 1942.

9. *Id.* at 1943.

Finally, the state filed a third proceeding against the Kurths to assess Montana's tax on dangerous drugs.<sup>10</sup> Montana's Dangerous Drug Tax Act imposed a tax "on the possession and storage of dangerous drugs."<sup>11</sup> Under the statute the taxpayer is not obligated to pay the tax until he is arrested.<sup>12</sup> The tax is either ten percent of the assessed market value of the drugs or a specified amount dependent on the type of drug, whichever is greater.<sup>13</sup> The Montana Department of Revenue determined the Kurths owed almost \$900,000 in taxes on marijuana plants, harvested marijuana, hash tar, hash oil, interest and penalties.<sup>14</sup> The Kurths contested this assessment and filed for bankruptcy under Chapter 11.<sup>15</sup>

At the bankruptcy proceedings, the Kurths challenged the constitutionality of the Montana tax as imposed upon them.<sup>16</sup> The bankruptcy court held that most of the assessed taxes were invalid under state law because they were "arbitrary" and "lacked any basis in fact."<sup>17</sup> However, the tax assessment of \$181,000 on 1,811 ounces of harvested marijuana was found to be proper. Although proper under state law, the bankruptcy court found this assessment on harvested marijuana invalid under the United States Constitution as a form of double jeopardy.<sup>18</sup>

The district court affirmed the bankruptcy court's findings, stating that the Montana Dangerous Drug Tax Act "simply punishes the Kurths a second time for the same criminal conduct."<sup>19</sup> The Court of Appeals for the Ninth Circuit affirmed on narrower grounds.<sup>20</sup> The Ninth Circuit found that the tax was not unconstitutional on its face, but affirmed the decision because the State failed to offer evidence justifying the remedial purpose of the tax.<sup>21</sup>

---

10. *Id.*

11. *Id.* at 1941; MONT. CODE ANN. § 15-25-111 (1993).

12. After being arrested the act provides that, "[a]ll law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such information which the department may require, in a manner and on a form prescribed by the department." MONT. CODE ANN. § 15-25-113(1) (1993).

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

14. *Kurth Ranch*, 114 S. Ct. at 1942-43.

15. *Id.* at 1943.

16. *Id.*

17. *Id.* The manner in which the sheriff's department estimated the weight and value of the marijuana plants "lack[ed] credible basis." *Kurth Ranch v. Department of Revenue*, 145 B.R. 61, 69 (D. Mont. 1990).

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

19. *Id.* (quoting *In re Kurth Ranch*, 1991 WL 365065 (D. Mont. 1991)).

20. *Id.*

21. *Id.* The court found that the record lacked any evidence of proportionality in order for the sanction to be characterized as remedial. *In re Kurth Ranch*, 986 F.2d

While the instant case was pending appeal, the Montana Supreme Court reversed two lower state court decisions that held the Dangerous Drug tax unconstitutional.<sup>22</sup> The Montana Supreme Court held that the state legislature intended to create a civil, not criminal, penalty, and the tax had a remedial purpose.<sup>23</sup>

The United States Supreme Court granted certiorari to review the Ninth Circuit's decision which was directly contrary to the decision of the Montana Supreme Court.<sup>24</sup> The five member majority found that the Montana tax was a second punishment in violation of constitutional protection.<sup>25</sup> The Court held that the tax was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time for the same offense.<sup>26</sup>

### III. LEGAL BACKGROUND

The Double Jeopardy Clause<sup>27</sup> protects against three abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.<sup>28</sup> The third protection is the one at issue in *Kurth*.

The Double Jeopardy Clause does not bar the state from imposing both a remedial civil sanction and a criminal punitive penalty upon a defendant for the same offense or imposing both a criminal and civil sanction in the same proceeding.<sup>29</sup> The Double Jeopardy Clause only protects against two punishments given in separate proceedings. In theory, civil sanctions are not designed to punish. For example, civil forfeiture laws and drug taxes

---

1308, 1312 (9th Cir. 1993).

22. *Kurth Ranch*, 114 S. Ct. at 1944.

23. *Id.* The Montana Supreme Court looked to the intent of the state legislature and found "the intent of the Montana legislature to enact a revenue producing tax on drugs is clear." *Sorenson v. Department of Revenue*, 836 P.2d 29, 31 (1992). This statutory construction test was the historical test to determine if a statute was civil or criminal. *See infra* notes 27-49.

24. *Kurth Ranch*, 114 S. Ct. at 1944.

25. *Id.*

26. *Id.* at 1948.

27. The Fifth Amendment provides that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

28. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Some will argue that protection against multiple punishments does not exist. *See infra* notes 100-113 and accompanying text.

29. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

historically have not been punishments.<sup>30</sup> These procedures are in place to reimburse the state for the expensive task of enforcing anti-drug provisions.<sup>31</sup> When the government, however, seeks to impose, in addition to a criminal sanction, a punitive sanction—in the guise of a civil proceeding—the Double Jeopardy Clause is violated.<sup>32</sup> The vital inquiry, therefore, is what is a true civil sanction and what factors should be included in this determination.

The Supreme Court first addressed this issue in *Helvering v. Mitchell*.<sup>33</sup> The Court deferred to the congressional label in its determination of what should be considered a remedial or civil penalty.<sup>34</sup> The Court, as a matter of statutory construction, reasoned that because Congress authorized a civil proceeding—thus labeling the action civil—the purpose was remedial rather than punitive.<sup>35</sup> The court conceded that a civil action in the form of a tax could be considered a second punishment in violation of Double Jeopardy.<sup>36</sup> However, the Court made reaching this conclusion difficult by deferring to congressional intent. This established the Court's traditional willingness to defer to the congressional label, language and procedures when determining whether a sanction is civil or penal.<sup>37</sup>

The Supreme Court continued to provide little protection against double jeopardy in civil proceedings when it decided *United States ex rel. Marcus v. Hess*<sup>38</sup> and *Rex Trailer Co. v. United States*.<sup>39</sup> The Court re-enforced its previous holdings by deferring to Congress in defining a civil sanction.

30. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L. J. 1325 (1991).

31. See Cynthia Sherrill Wood, *Asset Forfeiture and the Excessive Fines Clause: An Epilogue to Austin v. United States*, 29 WAKE FOREST L. REV. 1357, 1358 (1994); *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1941 n.4 (1994).

32. See *United States v. Halper*, 490 U.S. 435, 448 (1989); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994); *Quinones-ruiz v. United States*, 864 F. Supp. 983 (S.D.Cal. 1994); *Gainer v. United States*, 904 F. Supp. 1234 (D. Kan. 1995).

33. 303 U.S. 391 (1938). In *Helvering*, the defendant fraudulently submitted a false tax return. The defendant was acquitted of the criminal charges, but the government pursued its claim to collect its losses in a civil proceeding. *Id.* at 396-397.

34. *Id.*

35. *Id.* The court reasoned that: 1) the statute established a civil proceeding. *Id.* at 397. 2) the penalty provision was under the heading "Interest and Additions to the Tax" rather than under the heading "Penalties." *Id.* at 398-99. 3) such penalties have traditionally been recognized as civil. *Id.* at 405-06.

36. *Id.*

37. *Id.*

38. 317 U.S. 537 (1943).

39. 350 U.S. 148 (1956).

In *Marcus Hess*, the defendants were convicted of defrauding the government by collusively bidding on public works projects. A statute at that time allowed the government to bring a civil action to collect \$2,000 for each violation.<sup>40</sup> The defendants violated the statute on fifty-six occasions and thus owed \$112,000 in the civil proceeding.<sup>41</sup> The Court found that because the purpose of the statute was to protect the government from financial loss, and not intended to vindicate public justice, the penalty imposed on the defendant was civil rather than punitive.<sup>42</sup>

In *Rex*, the defendant defrauded the government on five occasions and was subject to the same \$2,000 per violation civil penalty as Marcus Hess. Again, the Court found the recovery civil in nature because Congress enforced the statute through a civil proceeding.<sup>43</sup>

In *Rex* and *Marcus Hess*, the Court did not state a specific test to find that a civil sanction for restitution was so punishing that it was, in reality, a fine that punished. The Court recognized the inherent difficulty of choosing a proper sum which would give full restitution and, therefore, deferred to the decision of Congress.<sup>44</sup> The combined teaching of these case is that the "government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis."<sup>45</sup>

The Supreme Court added a second prong to the statutory interpretation test in *United States v. Ward*.<sup>46</sup> If the intent of Congress was to create a civil remedy, the Court would defer to this characterization unless the practical application of the statute was punitive. The Supreme Court declared that "whether a penalty was civil or criminal rested on 1) whether Congress . . . indicated expressly or impliedly a preference for one label or the other and 2) if Congress indicated a civil penalty whether the penalty was so punitive to negate the intention."<sup>47</sup> The Court found that a sanction which bears "absolutely no correlation to any damages sustained by society or the cost of

40. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

41. *Id.* at 540.

42. *Id.* at 548.

43. *Rex Trailer Co., Inc. v. United States*, 350 U.S. 148, 151-52 (1956) (stating that "[the statutory fines] were recognized as civil remedies by Congress before this bill was passed and the conclusion is inescapable").

44. *Id.* at 152.

45. *United States v. Halper*, 490 U.S. 435, 446 (1989).

46. 448 U.S. 242 (1980).

47. *Id.* at 254.

enforcing the law" is punitive.<sup>48</sup> The Court, however, required clear proof to overcome the civil or criminal label.<sup>49</sup> This requirement effectively eliminated even reaching the second prong, thus the main focus remained on the legislative label.

The Supreme Court reversed its previous position when it rejected reliance on legislative labels in *Halper v. United States*.<sup>50</sup> In *Halper*, the defendant was convicted on sixty-five counts under the criminal false claims statute.<sup>51</sup> The government then instituted a separate proceeding under the civil False Claims Act.<sup>52</sup> This statute made the defendant liable "to the United States government for a civil penalty of \$2,000, an amount equal to two times the amount of damages the Government sustain[ed] because of the act of that person, and costs of the civil action."<sup>53</sup> The defendant had violated the act sixty-five times and thus was subject to a statutory penalty of over \$130,000.<sup>54</sup> The Court found this civil penalty was punitive despite the civil label, and, therefore, a second punishment violated the Double Jeopardy Clause.<sup>55</sup>

In reaching this conclusion, the Court, in a unanimous decision, found its previous emphasis on statutory language, structure, and intent was not "well suited to the context of the 'human interests' safeguarded by the Double Jeopardy Clause."<sup>56</sup> Furthermore, the Court abandoned the labels civil and criminal, stating they are not of "paramount importance."<sup>57</sup> In place of the legislative labels, the *Halper* court made its determination of punishment "rest on a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve."<sup>58</sup> The Court concluded that the Double Jeopardy Clause protects a defendant who was punished in a criminal prosecution from an additional civil sanction, to the extent the civil sanction serves not to remedy the government, but only to deter or serve as retribution.<sup>59</sup>

---

48. *Id.*

49. *Id.*

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

51. *Id.*; 18 U.S.C. § 287 (1988).

52. 31 U.S.C. §§ 3729-3731 (1988).

53. *Halper*, 490 U.S. at 437; 31 U.S.C. §§ 3729 (1982 Supp. II).

54. *Halper*, 490 U.S. at 437.

55. *Id.* at 452. The Court found a "tremendous disparity" between the government's expenses of \$6,000 and Dr. Halper's \$130,000 liability. *Id.*

56. *Id.* at 447 (emphasis in original).

57. *Id.*

58. *Id.* at 448.

59. *Id.* at 448-49.

In determining whether a civil penalty in any given situation is remedial or punitive in character, the Court offered the following rule:

The rule is one of reason: where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceedings bears no rational relation to the goal of compensating the Government for its loss but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.<sup>60</sup>

The Supreme Court continued to expand the protection under the Double Jeopardy Clause in *Austin v. United States*.<sup>61</sup> The *Austin* Court was asked to define punishment for the purposes of the Eighth Amendment when the government sought forfeiture of property under the Federal controlled substance forfeiture statute.<sup>62</sup> The *Austin* Court found that forfeitures, and particularly in rem forfeitures, have historically served, in part, to punish.<sup>63</sup>

The Court concluded that the forfeiture statute did not serve solely a remedial purpose and, therefore, this forfeiture constituted punishment.<sup>64</sup>

The Court held that a sanction denominated as civil which is designed even in part to deter or punish, will constitute punishment, regardless of whether it also has a remedial purpose. The *Austin* Court explicitly reaffirmed the holding of *Halper*, stating,

[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law . . . . A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.<sup>65</sup>

Taken together, *Halper* and *Austin* bring analysis of civil sanction statutes into a new light. No longer will the labels civil and criminal be credited with

60. *Id.* at 449.

61. 113 S. Ct. 2801 (1993).

62. Under 21 U.S.C. §§ 801-971 (1988 & Supp. V. 1993), the government has the right to petition for a forfeiture of all property which facilitated or was intended to facilitate drug trafficking. *See Wood, supra* note 31, at 1363-64.

63. *Austin*, 113 S. Ct. at 2809 n.19.

64. *Id.* at 2812. The court found the statute unconstitutional under the Eighth Amendment excessive fine provision. They had to reach the civil versus criminal question because the provision only applies to punishments. *See Wood, supra* note 31, at 1376.

65. *Austin*, 113 S. Ct. at 2805-06.



determinative weight. Courts will now look to the purpose of the civil action and the extent to which it is designed as punishment or purely a reimbursement for the government's expenses. The importance of *Halper* and *Austin* is exemplified by *Kurth Ranch*. The practical significance of *Kurth* is that defendants may be able to avoid a true criminal punishment if the state first imposes a sanction it believes is criminal. *Kurth* marks the first time the Supreme Court has found the imposition of a tax amounted to punishment for double jeopardy purposes.<sup>66</sup>

#### IV. INSTANT DECISION

##### A. *The Majority Opinion*

In *Department of Revenue v. Kurth Ranch*,<sup>67</sup> the five member majority began its analysis by distinguishing this case from *Halper*. Unlike *Halper*, where the purpose of the asset forfeiture statute was to reimburse the state, the purpose of the Montana tax statute was to raise revenue. Because the purposes of taxes and asset forfeitures are different the analysis of *Halper* is inapplicable in deciding whether a tax is a punishment.<sup>68</sup>

In classifying the purpose of Montana's tax, the court noted that taxes, fines, forfeitures, and penalties have historically been designed to "generate revenues, impose fiscal burdens on individuals, and deter certain behavior."<sup>69</sup> These legislative goals, however, are insufficient when the tax loses its fiscal features and "becomes a mere penalty with the characteristics of regulation and punishment."<sup>70</sup>

In determining the "character of the actual sanction,"<sup>71</sup> the Court stated that a high rate of taxation or a clearly deterrent purpose would not be determinative to the classification of the tax as punishment.<sup>72</sup> However, these factors are considered "consistent with a punitive character."<sup>73</sup>

In setting Montana's tax on dangerous drugs apart from other taxes, the Court emphasized that the tax is only triggered on the commission of a

---

66. See David B. Byrne, Jr., Wilbur G. Silberman, and Deborah Alley Smith, Recent Decisions, *Supreme Court of the United States-Criminal*, 55 ALA. LAW. 313 (1994).

67. 114 S. Ct. 1937 (1994)

68. *Id.* at 1945.

69. *Id.*

70. *Id.* at 1946 (quoting *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934)).

71. *Halper*, 490 U.S. at 497.

72. *Kurth Ranch*, 114 S. Ct. at 1946.

73. *Id.*; see *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937).

crime.<sup>74</sup> The Court gave no reason for this distinction except that it is "significant of penal and prohibitory intent rather than the gathering of revenue."<sup>75</sup> The Court distinguished the taxing of a legal activity, like cigarettes, from an illegal activity, like possession of illegal narcotics.<sup>76</sup> The Court reasoned that when the legislature taxes a legal activity it has a dual purpose of discouraging such activity and raising revenue.<sup>77</sup> If, however, the taxed activity is already illegal the legislature could accomplish these goals much easier by increasing the fine upon the original conviction.<sup>78</sup> The Court also found it significant that the tax was imposed by the same body that criminalized the behavior.<sup>79</sup>

The punitive nature of the tax was further evidenced by the fact that the Montana tax is levied on goods the "taxpayer neither owns nor possesses when the tax is imposed."<sup>80</sup> In addition, the statute represents itself to be a property tax "on the possession and storage of dangerous drugs."<sup>81</sup> While giving no explanation, the Court determined that "a tax on the 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character."<sup>82</sup>

In its final analysis, the Court found this particular tax "is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."<sup>83</sup> Therefore, the Montana tax is a second punishment that puts the Kurths in jeopardy a second time.<sup>84</sup>

---

74. *Kurth Ranch*, 114 S. Ct. at 1947. Without this fact alone, the Court may not have found the Montana statute violated the Double Jeopardy Clause. See *United States v. Sanchez*, 340 U.S. 42 (1950).

75. *Kurth Ranch*, 114 S. Ct. at 1947; see also *United States v. Constantine*, 296 U.S. 287, 295 (1935); *United States v. La Franca*, 282 U.S. 568, 571 (1931).

76. *Kurth Ranch*, 114 S. Ct. at 1947.

77. *Id.*

78. *Id.*

79. *Id.* at 1947 n.22.

80. *Id.* at 1948.

81. *Id.*

82. *Id.*

83. *Id.* It should also be noted that the majority specifically agreed with the Rehnquist dissent in not applying the analysis of *Halper* to a question regarding a tax. The majority stated that "tax statutes serve a purpose quite different from civil penalties, and Halper's method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.'" *Id.* at 1948. See *United States v. Brennick*, 1995 WL 704367, \*4 (D. Mass. 1995) ("*Kurth Ranch* teaches that a taxation scheme is punishment if it moves so far from ordinary taxation so as to lose its character as a tax. . . .").

84. *Kurth Ranch*, 114 S. Ct. at 1948. However, this decision does not keep the

### B. Justice O'Connor's Dissent

Justice O'Connor agreed that "because the Double Jeopardy Clause prohibits successive criminal proceedings for the same offense, the government may not sanction a defendant for conduct for which he has already been punished insofar as the subsequent sanction is punitive, because to do so would necessitate a criminal proceeding prohibited by the Constitution."<sup>85</sup>

However, unlike the majority, Justice O'Connor applied the test in *Halper* by asking if the "amount of the sanction is 'overwhelmingly disproportionate' to the damages caused by the wrongful conduct and thus is not rationally related to the goal of making the Government whole."<sup>86</sup> Justice O'Connor decided that the amount of the tax was not disproportionate to the costs incurred by the government.<sup>87</sup> Therefore, Justice O'Connor concluded that the imposition of the tax was not a violation of the Double Jeopardy Clause.<sup>88</sup>

### C. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist was critical of what he termed the "hodgepodge of criteria" the majority used in coming to its conclusion that the Montana tax constitutes a second punishment rather than a permissible civil sanction.<sup>89</sup> Chief Justice Rehnquist noted that historically taxes exist primarily to raise revenue or deter specific conduct.<sup>90</sup> The Chief Justice followed previous holdings of the Court that deferred to legislative labels of civil or criminal.

---

sovereign from imposing the tax during the original prosecution, thus avoiding any double jeopardy involvement. For example, if Montana wanted to impose the tax or additional fine during the Kurth's prosecution for possession of marijuana, it could do so. See *United States v. DiFrancesco*, 499 U.S. 117 (1980) (stating that if the punishment is authorized there is no Double Jeopardy violation if assessed in the initial proceeding).

85. *Kurth Ranch*, 114 S. Ct. at 1953 (O'Connor, J., dissenting).

86. *Id.*

87. *Id.* at 1953-54 (O'Connor, J., dissenting). See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, (1995).

88. *Kurth Ranch*, 114 S. Ct. at 1955 (O'Connor, J., dissenting).

89. *Id.* at 1949 (Rehnquist, J., dissenting). See *The Supreme Court-Leading Cases*, 108 HARV. L. REV. 159, 172 (1994) ("[T]he Court failed to present a reasoned analysis of why the Double Jeopardy Clause prohibits multiple punishments. This failure led the Court to establish a deeply flawed subjective test that offers little guidance to lower courts or to state legislatures.").

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

He supported this position by arguing 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."<sup>91</sup> Chief Justice Rehnquist criticized the majority's position that taxing drugs that are neither owned or possessed by the defendant is an "unusual feature".<sup>92</sup> He cited the preamble to the act which supports the claim that the purpose of the act is to raise revenue from the lucrative drug trade.<sup>93</sup>

While Chief Justice Rehnquist did not dispute the possibility a tax could be so punitive that it amounted to a form of punishment, he did not believe the factors necessary for such a conclusion existed here.<sup>94</sup> The critical feature, according to the Chief Justice, was the amount of the tax and its proportionality to the market value of the drug.<sup>95</sup> For example, in *United States v. Constantine*<sup>96</sup> an excise tax of \$1,000 which was forty times the value of the taxable item was held to be an unlawful penalty rather than a civil sanction.<sup>97</sup> Chief Justice Rehnquist noted that Montana's tax was only four times market value, on average.<sup>98</sup> This factor, along with the stated purpose behind the statute, led Chief Justice Rehnquist to conclude that the "tax has a non-penal purpose of raising revenue, as well as the legitimate purpose of deterring conduct, such that it should be regarded as a genuine tax for double jeopardy purposes."<sup>99</sup>

#### D. Justice Scalia's Dissent<sup>100</sup>

Justice Scalia attacked the fundamental assumption that the constitution protects against multiple punishments. He argued the Double Jeopardy Clause only protects against multiple prosecutions, not multiple punishments.<sup>101</sup> In support, Justice Scalia examined the text of the Double Jeopardy Clause and

---

91. *Id.* (quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

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

93. *Id.*

94. *Id.*

95. *Id.* "[T]he proper inquiry is not whether the tax rate is 'unrivaled,' but whether it is so high that it can only be explained as serving a punitive purpose." *Id.* at 1952 (Rehnquist, C.J., dissenting).

96. 296 U.S. 287 (1935).

97. *Id.* at 295.

98. *Kurth Ranch*, 114 S. Ct. at 1951-52 (Rehnquist, C.J., dissenting).

99. *Id.*

100. *Id.* at 1955 (Scalia, J., dissenting) (joined by Justice Thomas).

101. *Id.* at 1956 (Scalia, J., dissenting).

the proposed constitutional provisions.<sup>102</sup> In addition, Justice Scalia examined the line of cases stating that the Double Jeopardy Clause protects against successive punishments.<sup>103</sup> Justice Scalia identified *Ex Parte Lange*<sup>104</sup> as the original source of the belief that there is a multiple-punishments component to the Double Jeopardy Clause. Justice Scalia attacked reliance on this opinion as unfounded,<sup>105</sup> because the court in *Lange* went out of its way not to "rely exclusively on the Double Jeopardy Clause."<sup>106</sup> Instead of prohibiting successive punishments, Justice Scalia argued the Double Jeopardy Clause only ensures against charging the defendant with more than is legislatively authorized.<sup>107</sup>

Reliance on the continuously repeated dictum that the Double Jeopardy Clause protects against multiple punishments has not been important until *Halper*, which was the Court's first invalidation of legislatively authorized successive punishments.<sup>108</sup> Justice Scalia advocated reversing *Halper* and holding that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment."<sup>109</sup>

While the majority stated that Montana's collection of the tax was the equivalent of a successive criminal prosecution, Justice Scalia argued that the test for a criminal prosecution is more stringent than the Court's test for multiple punishments.<sup>110</sup> Justice Scalia followed the test established in

---

102. *Id.* at 1955 (Scalia, J., dissenting); see 1 ANNALS OF CONG. 434, 753, 767 (Joseph Gales ed., 1789); 1 SENATE JOURNAL 105, 119, 130 (1789) (showing that proposed language stated "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense.").

103. *Kurth Ranch*, 114 S. Ct. at 1955 (Scalia, J., dissenting).

104. 85 U.S. (18 Wall.) 163 (1873). In *Lange*, the defendant was sentenced to 1 year in prison and a \$200 fine. The statute under which the defendant was prosecuted only provided for a maximum of 1 year in prison or a \$200 fine. The Court relied on various theories to overturn the conviction, including the double jeopardy and due process provisions of the 5th amendment. *Id.* at 164.

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

106. *Lange*, 85 U.S. at 170.

107. *Kurth Ranch*, 114 S. Ct. at 1956 (Scalia, J., dissenting). See *Whalen v. United States*, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring in judgment) (stating the "only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended."); *Missouri v. Hunter*, 459 U.S. 359, 364 (finding that the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended)).

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

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

110. *Id.*; see *United States v. Ward*, 448 U.S. 242 (1980).

*United States v. Ward*<sup>111</sup> to determine if a proceeding is criminal or civil.<sup>112</sup>

Additionally, if the majority's holding was that the civil tax proceeding was a criminal prosecution, Scalia argued the tax would not only violate the Double Jeopardy Clause, but also all of the criminal protections in the Fifth and Sixth Amendments.<sup>113</sup>

## V. COMMENT

Thousands of courts, federal and state alike, have analyzed the double jeopardy protection under the assumption that it protects against multiple punishments. In fact, this statement has repeatedly been stated as law. However, as Justice Scalia explained, the protection against multiple punishments has a loose legal footing, at best.<sup>114</sup>

The majority in *Kurth* failed to offer a specific reply to Justice Scalia's charge doubting the existence of a multiple punishment prong of the Double Jeopardy Clause.<sup>115</sup> The Majority only cites to *Halper* as support that a protection against multiple punishments exists. In *Halper*, the Court attempted to buttress its recognition of the multiple punishment protection of the double jeopardy clause by citing James Madison: "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."<sup>116</sup>

Beyond this language, the *Halper* court focused on *Lange*—or cases that rely on *Lange*—to justify the existence of a multiple punishment aspect of the Double Jeopardy Clause.<sup>117</sup> While the dicta in *Lange* supports the existence of a multiple punishment facet,<sup>118</sup> the application of *Lange's* facts only

111. 448 U.S. 242 (1980).

112. The *Ward* test is a two tier approach requiring the court to first consider the "whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* at 248. Second, when the legislative body has indicated a preference the court determines "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49. Justice Scalia found that under the *Ward* test the *Kurth's* were not subject to a second prosecution. *Kurth Ranch*, 114 S. Ct. at 1960 (Scalia, J., dissenting).

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

114. See *supra* notes 19-109 and accompanying text. See also *Witte v. United States*, 115 S. Ct. 2199 (1995) (Scalia, J., dissenting).

115. *The Supreme Court-Leading Cases*, *supra* note 89, at 175.

116. *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing 1 ANNALS OF CONG. 434 (1789-1791) (J. Gales ed. 1834)).

117. *Id.*

118. *Lange*, 85 U.S. at 168. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same

supports Justice Scalia's view that the purpose of the protection against multiple punishments only ensures that a court cannot punish more than is statutorily authorized.<sup>119</sup>

In addition, the text of the constitution would not appear to sanction a protection against multiple punishments. As Justice Scalia stated, "[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."<sup>120</sup> Moreover, excluding *Halper* and *Kurth*, the Supreme Court has interpreted the Double Jeopardy Clause to not preclude two punishments, but only to protect against successive prosecutions.<sup>121</sup>

Not only are the legal justifications for a protection against multiple punishments weak, but the policies behind such a liberty are insufficient to warrant its extension. The primary purpose to protect against multiple punishments is to prevent a court, who after prosecuting an individual and then sentencing him to three months in jail, from deciding two months into the jail term that it wants to sentence the defendant to an additional three months in jail. Once the government has imposed a criminal penalty, a second penalty implies "the government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding."<sup>122</sup>

In addition, multiple punishments upset the defendant's legitimate expectations in finality.<sup>123</sup> A defendant has a reasonable right to expect that once he has been sentenced he cannot continually be assessed penalties weeks or months later. These justifications for keeping the multiple punishment prong of the Double Jeopardy Clause are essentially designed to protect the timing of additional punishments.<sup>124</sup>

offence . . . [No one can be twice punished for the same crime or misdemeanor . . . The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.]" *Id.*

119. *Id.* at 177-78 (stating that the court condemned more than it could because the punishment exceeded the maximum amount authorized by statute).

120. *Kurth Ranch*, 114 S. Ct. at 1955 (Scalia, J., dissenting).

121. See *Spencer v. Texas*, 385 U.S. 554, 559 (1967); *Schiro v. Farley*, 114 S. Ct. 783, 789 (1994); *Ball v. United States*, 163 U.S. 662, 669 (1896) ("The prohibition is not against being twice punished, but against being twice put in jeopardy."); *United States v. Baird*, 63 F.2d 1213, 1216 (3rd. Cir. 1995) (finding that recent Supreme court decisions, including *Kurth*, have given the no multiple punishments rule a broader meaning than ever before).

122. *Halper*, 490 U.S. at 451 n.10.

123. See *Jones v. Thomas*, 491 U.S. 376, 385 (1989); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (stating that Double Jeopardy serves as a constitutional policy of finality for the defendant's benefit).

124. *United States v. DiFrancesco*, 449 U.S. 117, 137-39 (1980).

In *Kurth Ranch*, however, timing is not a problem. Under the statute, the taxpayer has no obligation to pay a tax until he is arrested.<sup>125</sup> More importantly, under the statute the defendant must file a tax return within seventy-two hours of his arrest. Under the Montana statute, the policy justifications necessitating protection against multiple punishments are not present, because the defendant expects and knows he is going to be punished more than once. The extension of multiple punishment protection was therefore unnecessary.<sup>126</sup>

The court could have avoided extending the double jeopardy protection by ruling that the tax was assessed simultaneously with the criminal prosecution.<sup>127</sup> This would allow states to keep their civil remedies separate from criminal prosecutions, while not implicating the Double Jeopardy Clause. When the gap in time between punishments becomes unreasonable there may be need for constitutional protection. This protection, however, was unnecessary in *Kurth Ranch*.

*Kurth Ranch* is the first time the Supreme Court subjected a tax statute to double jeopardy scrutiny.<sup>128</sup> The practical effect of the Majority's opinion will be to force states to bring all of their sanctions during the original proceeding.<sup>129</sup> This will require different departments to coordinate their efforts to administer all penalties simultaneously.<sup>130</sup> If they fail to do so, a tax issued before a criminal penalty will trigger the Double Jeopardy Clause to prohibit a criminal penalty from being imposed.<sup>131</sup>

The more important ramification of the majority's opinion in *Kurth* is the Court's continued willingness to look beyond legislative labels when determining whether a civil action is punitive. This may have applicability to

125. See *supra* note 74 and accompanying text.

126. *DiFrancesco*, 449 U.S. at 137 (stating that "the Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be").

127. *The Supreme Court—Leading Cases*, *supra* note 89, at 172.

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

129. See *United States v. Halper*, 490 U.S. 435, 450 (1989) (stating that the Government can seek and obtain both a full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding); *United States v. Rodriguez*, 612 F.2d 906, 924 (5th Cir. 1980) (en banc) (finding that the double jeopardy clause imposes no limits on Congress' power to define the allowable unit of prosecution and punishment); *Albernaz v. United States*, 450 U.S. 333, 334 (1981) (the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed.).

130. *United States v. Ursery*, 59 F.2d 568, (6th Cir. 1995).

131. See F. Anthony Payanelli, *Constitutional Analysis of Indiana's Controlled Substance Excise Tax*, 70 IND. L. J. 1301, 1330 (1995).



other situations when the state attempts to impose a criminal and civil remedy.<sup>132</sup> With the Supreme Court's new found willingness to invalidate civil proceedings due to their punitive nature, states must be careful in the creation and enforcement of civil actions imposed in addition to criminal prosecutions.<sup>133</sup>

ERIC MICHAEL ANIELAK

---

132. See *Ursery*, 59 F.3d at 576 (reversing a criminal conviction on double jeopardy grounds because defendant had already been punished by civil forfeiture proceedings); *United States v. Emmons*, 1995 WL 7670306 (D.C. Kan.) (holding the multiple punishments prong of the Double Jeopardy Clause was violated when assets were forfeited, even though the multiple prosecutions prong of the Double Jeopardy Clause was never violated).

133. See John Witaker, *Wrongful Death and Double Jeopardy*, 26 CUMB. L. REV. 231 (questioning the Constitutionality of the Alabama Wrongful Death statute in light of *Kurth Ranch*.) "The goal sought by the wrongful death statute is clearly to punish those who wrongfully bring about the death of another. This being the case, a wrongful death action could be considered a punishment for the purposes of Double Jeopardy analysis." *Id.* at 243.