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Charles H. Davis

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CONSTITUTIONAL LAW: TAXATION OF CONTRABAND AND EXPANSION OF THE DOUBLE JEOPARDY CLAUSE

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

*Charles H. Davis****

Respondents, the first target[1] of a new Dangerous Drug Tax Act,[2] were assessed a tax pursuant to the Act.[3] Respondents filed Bankruptcy, and Petitioner filed a Proof of Claim for the amount of the tax.[4] The bankruptcy court denied the claim, discharged the debt, and ruled that the assessments were "arbitrary and capricious" and violated the Double Jeopardy Clause.[5] Petitioner appealed, and the U.S. District Court affirmed, finding that the tax had punished Respondents twice for the same act.[6] On appeal, the Ninth Circuit Court of Appeals affirmed, declining to hold the tax unconstitutional on its face and ruling instead that Petitioner had failed to provide a particularized assessment of the penalty and its purpose.[7] The U.S. Supreme Court granted certiorari, affirmed the decision of the circuit court, and HELD Petitioner's drug tax was a second punishment and the proceeding initiated to collect the tax placed Respondents in jeopardy a second time.[8]

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* *Editor's Note*: This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Spring, 1995.

** To my wife Sharon and my children Arielle, Micah, and Jonathan who sustained me in the effort with love and encouragement.

1. Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1942-43 (1994).

2. MONT. CODE ANN. § 15-25-111 (1993). "[E]ach person possessing or storing dangerous drugs is liable for the tax." *Id.*

3. *Kurth Ranch*, 114 S. Ct. at 1942-43 n.10. The tax with penalties and interest totaled $894,940.99. *Id.* The Kurth family raised grain and livestock on their central Montana farm until 1986, when they began to raise and market marijuana and derivatives of it. *Id.* at 1942. At the time of their arrest the Montana Dangerous Drug Tax had just gone into effect. *Id.* After the arrest, the drugs were inventoried and destroyed. *Id.* at 1948. The Kurths were prosecuted for conspiracy to possess drugs with the intent to sell. *Id.* at 1942. *See* MONT. CODE ANN. § 45-4-102 (1987). Richard and Judith Kurth were sentenced to prison while the other convicted family members received suspended or deferred sentences. *Kurth Ranch*, 114 S. Ct. at 1942.

4. *Kurth Ranch*, 114 S. Ct. at 1943. A total of $864,940.99 reflected a $30,000 payment by respondents. *Id.* Respondents also were the subject of an action for civil forfeiture in which they agreed to turn over some of their equipment and $18,016.83 in cash. *Id.* at 1942.

5. *In re* Kurth Ranch, 145 B.R. 61, 74-76 (Bankr. Mont. 1990).

6. *In re* Kurth Ranch, 1991 WL 365065, at *3 (D. Mont. 1991).

7. *In re* Kurth Ranch, 986 F.2d 1308, 1311 (9th Cir. 1993).

8. *Kurth Ranch*, 114 S. Ct. at 1948.

The Fifth Amendment to the Constitution of the United States provides a criminal defendant protection from twice being placed in "jeopardy of life or limb" for the same offense.[9] Though this constitutional guarantee has existed since antiquity[10] and is thoroughly developed in United States case law,[11] Double Jeopardy remains a source of misunderstanding and frequent litigation.[12] While the Supreme Court has repeatedly outlined three purposes served by the Double Jeopardy Clause,[13] the cases involved are of only two types. Double Jeopardy results from either two prosecutions for the same offense or two punishments for the same offense.[14] Nevertheless, the two types are often confused.

During the late nineteenth century, a line of cases held that all second prosecutions and second punishments were forbidden, whether civil or criminal.[15] In *Helvering v. Mitchell*,[16] the Court departed from these decisions to permit a civil proceeding and the exaction of a civil fine to follow a criminal prosecution.[17] In *Mitchell*, the defendant was charged with a willful attempt to evade or defeat a tax by fraudulently taking a deduction[18] for a loss in violation of the Revenue Act of 1928.[19] After the defendant was acquitted, the Director of Internal Revenue assessed an amount equal to the unpaid tax plus fifty percent.[20] The *Mitchell* Court held that

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9. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

10. Whalen v. United States, 445 U.S. 684, 699-700 (1980) (Rehnquist, J., dissenting). Historians attribute an early reference to Double Jeopardy to the ancient Greek orator Demosthenes. *See id.*

11. *See ex parte* Lange, 18 U.S. (Wall.) 163, 168 (1874); United States v. Halper, 490 U.S. 435, 440 (1989).

12. *Whalen*, 445 U.S. at 699-700 (Rehnquist, J., dissenting).

13. *See Halper*, 490 U.S. at 440. A defendant is protected from "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." *Id.* (citations omitted).

14. 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 (1991).

15. Andrew Z. Glickman, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 VA. L. REV. 1251, 1255-56 (1990); *see* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 357-58 (1984) (citing Coffey v. United States, 116 U.S. 436, 443 (1886)). When the U.S. Constitution was framed, it was common for legislation to provide a criminal proceeding and a civil proceeding, each imposing sanctions for the same conduct. Marcus v. Hess, 317 U.S. 537, 555 (1943).

16. 303 U.S. 391 (1938).

17. *Id.* at 397.

18. *Id.* at 395. The deduction totalled $2,872,305.50, resulting in an underpayment of $728,709.84 in federal income taxes. *Id.*

19. *Id.* at 392.

20. *Id.* at 395. The Court in *Mitchell* ruled the subsequent civil action was not precluded under res judicata. *Id.* at 397. Failure to prove willful avoidance of payment beyond a reasonable doubt was not proof that Mitchell did not willfully attempt to avoid the tax. *Id.*

acquittal on a criminal charge did not bar a civil action by the Government, even though based on the same facts, as long as the Government was seeking a remedy.[21]

The Court in *Mitchell* reasoned that Congress could impose a civil sanction and a criminal penalty for the same act.[22] The Court reasoned that the prohibition in the Double Jeopardy Clause applied only to a second criminal punishment.[23] Therefore, the *Mitchell* Court developed a "statutory construction" test for determining whether a second prosecution could be characterized as civil and thus be permissible.[24] The Court ruled that the character of the sanction would properly be determined by construction of the statute authorizing the sanction.[25] The *Mitchell* statutory construction test limited the application of Double Jeopardy to successive criminal penalties as determined from the underlying statute.[26]

The rule of statutory construction espoused in *Mitchell* was reaffirmed and extended in *Marcus v. Hess*.[27] In *Hess*, Respondents conspired to rig bids on government contracts in a pattern of collusion that resulted in higher prices for those contracts.[28] Respondents pled nolo contendere[29] to charges of conspiracy to defraud the U.S. government and were subject to penalties including a fine and imprisonment.[30] In a subsequent civil qui tam action[31] arising from the same acts of fraud, the district court exacted double damages and civil forfeitures from Respondents.[32]

Because *Hess* applied to a second prosecution following a conviction, the decision necessarily involved the evaluation of a second penalty.[33] The *Hess* Court applied *Mitchell* and indicated it needed only to determine, by looking at the statute, whether the second sanction imposed was a criminal

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21. *Id.* at 397.
22. *Id.*
23. *Id.*
24. *Id.* at 399.
25. *Id.*
26. *See* Glickman, *supra* note 15, at 1255. When considering whether civil sanctions could be treated as criminal penalties, the *Mitchell* test became the basis on which determinations were made. *Id.*
27. 317 U.S. 537, 548-49 (1943).
28. *Id.* at 540 n.1.
29. Nolo contendere is a plea by which a defendant waives the right to a trial and permits the court to sentence the defendant as if guilty, yet the defendant does not admit guilt. *See* North Carolina v. Alford, 400 U.S. 25, 35 (1970).
30. *Hess*, 317 U.S. at 546, 548.
31. A qui tam action permits a private party to bring a civil action against a party on behalf of the United States Government. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 (1989). Proceeds from any judgment obtained are divided between the private plaintiff and the Government. *Id.*
32. *Hess*, 317 U.S. at 540. The Government exacted a $2000 forfeiture for each of 56 violations ($112,000) and a $203,000 civil fine, for a total of $315,000. *Id.*
33. *Id.* at 540, 548.

penalty.[34] The Court then construed the statute as having amply provided for a civil remedy as well as a criminal punishment and ruled the criminal action was not intended to provide compensation to the Government.[35] The purpose of the second action, in the judgment of the Court, was to seek a remedy.[36] The Court therefore determined that the payment required was a civil sanction.[37] Assured of the remedial nature of the second proceeding and the validity of the Government's injury, the Court ruled that the damages awarded gave Petitioner no more than was due.[38] After characterizing the successive proceeding and the sanction as civil, the *Hess* Court followed *Mitchell* to reach the conclusion that Double Jeopardy did not apply.[39]

In a concurring opinion in *Hess*, Justice Frankfurter described the statutory construction test as reasoning "too subtle" and ill-equipped to protect the "humane interests" insured by the Double Jeopardy Clause.[40] Justice Frankfurter noted the uncertainty that would result from allowing the decision to employ such an important protection to turn on an issue amounting only to terminology.[41] He also urged that a defendant invoking a Double Jeopardy claim ought to be allowed to prove that the imposed civil sanction exceeded compensation for the Government's actual damages.[42]

In *United States v. Halper*,[43] the Court departed[44] from the *Mitchell* test to endorse Justice Frankfurter's reasoning from *Hess* and established a

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34. *Id.* at 549.

35. *Id.* at 548-49.

36. *Id.* at 549. In the reasoning of the Court, it was sufficient to rule the second action was "remedial" and the second sanction was "civil." *Id.*

37. *Id.* The Court in *Hess* reasoned that the Government's right to contract and to possess property was limited if it did not include the right to a protective remedy. *Id.* at 550 (quoting Cotton v. United States, 11 U.S. (How.) 229, 231 (1850)). The power of the U.S. government to deal with crime is not to be confused with the rights of the government as a political body. *Id.* Allowing the government the powers to contract and to own property, while withholding the power to protect those rights with a remedy, is anomalous. *Id.* Eventually, application of the *Mitchell* test to preclude Double Jeopardy would not depend on injury to the government, however. Rex Trailer Co. v. United States, 350 U.S. 148, 150, 152-53 (1956). In *Rex Trailer*, a successive civil penalty was not precluded by Double Jeopardy even though there was no showing on the record of any appreciable injury to the Government. *Id.*

38. *Hess*, 317 U.S. at 549 (citing *Mitchell*, 303 U.S. at 401 (remedy only affords the government complete indemnity for its injuries)). The *Hess* Court noted it had approved state statutes that provided "double or treble or even quadruple damages." *Id.* at 550-51 (citing Missouri Pac. Ry. v. Humes, 115 U.S. 512, 523 (1885)).

39. *Id.* at 549.

40. *Id.* at 554 (Frankfurter, J., concurring).

41. *Id.*

42. *Id.*

43. 490 U.S. 435 (1989).

44. *See* Glickman, *supra* note 15, at 1263 (discounting the Court's claim to have faithfully followed precedent and noting that the *Halper* opinion was, indeed, a "significant departure").

new test for multiple punishment cases.[45] In *Halper*, Respondent was convicted of submitting sixty-five false claims to Medicare and fraudulently collecting a total of $585 on those claims.[46] After Respondent was convicted, the Government brought a separate civil action under the False Claims Act.[47] The U.S. Supreme Court affirmed[48] the trial court's conclusion that $130,000 in damages, the amount sought by the Government, lacked "rational relation" to the costs incurred.[49] In a unanimous opinion,[50] the Court held that a defendant can be the subject of a successive civil sanction only to the extent the sanction is remedial and not retributive.[51]

By means of the "rational relation" test, the *Halper* Court re-examined the circumstances in which a civil penalty could be characterized as punishment under the Double Jeopardy Clause.[52] To be termed a remedy, the civil fine must bear a rational relation to the Government's injury.[53] In *Halper*, the Court looked beyond the statutory interpretation test[54] to evaluate the characteristics of sanctions as they were imposed on the individual by the state.[55] *Halper* abandoned the *Mitchell* test[56] by asserting that a statutorily calculated civil remedy in a civil proceeding may be "so extreme" that it could only be classified as punishment.[57] Diminishing the importance of the terms "civil" and "criminal," the Court focused on the underlying proceeding and stressed evaluation of the purposes actually served

45. *Halper*, 490 U.S. at 441. The question was whether the penalty provided in the statute constituted a second punishment for Double Jeopardy analysis. *Id.*

46. *Id.* at 437.

47. *Id.* at 438-39 (citing United States v. Halper, 660 F. Supp. 531, 533-34 (S.D.N.Y. 1987)). The U.S. District Court granted a Government motion for summary judgment, but in its discretion, awarded $2,000 per count (the statutory amount) for only eight of the counts ($16,000), instead of for all 65 counts ($130,000). *Id.*

48. *Id.* at 440. Direct appeal was taken from the district court to the U.S. Supreme Court. *Id.*

49. *Id.* at 439 (quoting *Halper*, 660 F. Supp. at 534).

50. Justice Kennedy wrote a concurring opinion discussing the limits of the holding. *See id.* at 452.

51. *Id.* at 448-49.

52. *Id.* at 446.

53. *See id.* at 439.

54. *Id.* at 447. Statutory interpretation is appropriately used to identify the nature of an underlying proceeding or to determine which constitutional protections must attach in those proceedings. *Id.*

55. *Id.* at 447 n.7. The determination whether a civil sanction constitutes criminal punishment is accomplished by an evaluation of the purposes actually served by the sanction. *Id.* It is not the underlying nature of the proceeding imposing the sanction that must be evaluated. *Id.*

56. The *Halper* Court described interpretation of the statute as only generally useful for identification of the underlying proceeding. *Id.* at 447.

57. *Id.* at 442.

by the sanction.[58] In this way, the Court in *Halper* viewed Double Jeopardy as "intrinsically personal."[59] Narrowing the holding, however, the Court limited *Halper* to a "rule for the rare case," for the "prolific but small-gauge offender," who is punished disproportionately by a fixed-penalty provision.[60]

In the instant case, the U.S. Supreme Court again addressed whether an exaction in a successive proceeding could be characterized as punitive and made subject to the Double Jeopardy Clause.[61] Specifically, the instant Court determined whether a tax could be such a penalty.[62] The Court noted that, although a tax cannot be valid if it compels self-incrimination, the taxation of criminal activity, generally, is not forbidden.[63] Nevertheless, a tax can be punitive,[64] and a tax which is found to be a penalty could violate Double Jeopardy.[65] The Court reaffirmed the personal nature of the protection afforded by the Double Jeopardy Clause while it considered the protection's applicability to a tax.[66]

The Court found the tax in the instant case to be "remarkably high" and that it was intended to deter drug possession.[67] These factors were determined to be consistent with the characterization of the tax as a penalty.[68] The Court further considered that the assessment of the tax only followed the commission of a crime and that only criminals would be numbered among those paying the tax.[69] Additionally, the Court found that because the drugs were destroyed after Respondents were arrested, the tax was assessed on property no longer in the possession of the taxpayer.[70] These combined aspects compelled the Court to conclude the tax was a "concoction of anomalies," rightly characterized as a punishment and subject

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58. *Id.* at 442, 447 n.7. This evaluation is not to be made from the defendant's perspective, from which "even remedial sanctions carry the sting of punishment." *Id.* at 447 n.7 (citing *Hess*, 317 U.S. at 551).

59. *Id.* at 447. This description proceeds from a discussion of Double Jeopardy as a protection of "humane interests" derived from the concurrence in *Hess*. *Id.* (citing *Hess*, 317 U.S. at 554 (Frankfurter, J., concurring)). The *Halper* Court left to trial courts the individual accounting required for proper application of the protection. *Id.* at 450.

60. *Id.* at 449.

61. *Kurth Ranch*, 114 S. Ct. at 1945.

62. *Id.* at 1941.

63. *Id.* at 1945 (citing Marchetti v. United States, 390 U.S. 39, 44 (1968)).

64. *Id.* at 1946 (citing Magnano v. Hamilton, 292 U.S. 40, 44 (1934)).

65. *Id.* at 1945-46 (citing *Mitchell*, 303 U.S. at 391).

66. *Id.* at 1946. *Halper* recognized that the constitutional protection was "intrinsically personal" and that only the characteristics of the sanctions as they apply to the individual defendant can substantiate a possible Double Jeopardy violation. *See Halper*, 490 U.S. at 447.

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

68. *Id.* at 1946 n.17. A total of 1811 ounces of marijuana, with an estimated market value of $46,000 was taxed at $181,000. *Id.*

69. *Id.* at 1947.

70. *Id.* at 1948.

to invalidation as to Double Jeopardy.[71] Because the tax was a penalty assessed subsequent to a criminal conviction for the same offense, the instant Court held that it violated the Double Jeopardy Clause.[72]

The instant Court did not rely on the rational relation test to reach its result.[73] The majority and three of the four Justices in dissent agreed it would be inappropriate to apply the test to a tax.[74] Justice O'Connor, writing alone in a separate dissent, however, found the tax in the instant case to be constitutionally indistinguishable from a fine.[75] Noting the "vast sums" expended to control drugs,[76] Justice O'Connor employed the rational relation test[77] and concluded that Respondents had not shown that the drug tax did not meet it.[78] Justice O'Connor interpreted the test to require a two-part approach preceded by Respondent's entitlement to an accounting of the Government's damages.[79] Respondent could have challenged that accounting by showing the lack of a rational relationship between the sanction imposed and the Government's damages.[80] The Government then would have had the burden of justifying the sanction in Respondent's case.[81]

At first glance, the instant case seemed to provide the "rare case" envisioned in *Halper*.[82] Certainly, the question[83] in the instant case might

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71. *Id.*

72. *Id.*

73. *Id.*; *see Halper*, 490 U.S. at 441.

74. *See Kurth Ranch*, 114 S. Ct. at 1948-49, 1958. Though the lower courts assumed the instant case was controlled by *Halper*, by a margin of eight to one, the instant Court decided that it was not. *Id.* at 1948. The majority and three dissenting Justices for different reasons concluded that Double Jeopardy should not apply. *See id.* at 1948-49, 1958. Chief Justice Rehnquist was unwilling to apply any Double Jeopardy analysis to a tax. *Id.* at 1949. Justices Scalia and Thomas, seeing unintended consequences, were ready to abandon *Halper* altogether. *Id.* at 1958.

75. *Id.* at 1953.

76. *Id.*

77. *Id.* at 1954.

78. *Id.* at 1955. Justice O'Connor urged remand to allow Respondents to make that argument and to allow Petitioners to make a showing of rational relation. *Id.* The treatment of the instant case below at every stage reveals it was assumed Respondents had made such a claim and that Petitioners failed to carry their burden to refute it. *See In re Kurth Ranch*, 145 B.R. at 74; *In re Kurth Ranch*, 1991 WL 365065 at 3-4; *In re Kurth Ranch*, 986 F.2d at 1312.

79. *Kurth Ranch*, 114 S. Ct. at 1954.

80. *Id.*

81. *Id.*

82. *See id.* at 1943-44. The Bankruptcy court relied on *Halper*, after assuming a showing that the tax was disproportionate, and ruled it was a penalty. *In re Kurth Ranch*, 145 B.R. at 74. The Ninth Circuit Court applied *Halper* to show that any "labels affixed" were inconclusive and that the word "tax" was "not dispositive." *In re Kurth Ranch*, 986 F.2d at 1310.

83. *Kurth Ranch*, 114 S. Ct. at 1941. The question in the instant case was whether a tax on illegal drug possession, imposed after criminal conviction and sentencing, is a successive punishment. *Id.*

have been answered by the majority using the rational relation test.[84] In so doing, the Court could have succeeded in clarifying and solidifying an obscure and amorphous area of constitutional law.[85] Instead, the Court, once unanimous in this area,[86] fragmented itself and retreated from the bold but clear path it had embarked on in *Halper*.[87]

Undeniably, the Court may have had some difficulty treating the instant case as if *Halper* was controlling.[88] Although the tax was statutorily imposed and Respondents were "prolific," they were hardly "small-gauge offenders."[89] Nevertheless, the readiness of the majority to recognize an incongruity between the value of the marijuana seized and the size of the assessment[90] attests to the facility[91] and applicability of the *Halper* test.[92] Moreover, notwithstanding the instant Court's ultimate refusal to employ the rational relation test, a thorough analysis of *Halper* comprised a significant portion of the opinion.[93] Indeed, the majority indulged in a limited invocation of *Halper* that nearly rose to the level of following it as precedent.[94] The instant Court used *Halper* for the essential elements of its reasoning, and that reasoning was, ultimately, not appreciably different from *Halper*.[95] Furthermore, to the extent it departed from *Halper* and attempted to justify the instant result without the rational relation test, the instant Court's reasoning was weakened.[96]

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84. *See id.* at 1953-54 (O'Connor, J., dissenting). Under the *Halper* test: (1) "readily available statistics" show the cost of detecting, investigating, and prosecuting drug cases; (2) approximations of a defendant's appropriate contribution should suffice because an exact measurement for each defendant would be too complex; therefore, (3) the tax has a rational relation to the goal of compensating the government. *Id.*

85. *See id.* at 1945 n.15.

86. *See Halper*, 490 U.S. 435.

87. *See* Albernaz v. United States, 450 U.S. 333, 343 (1981). Justice Rehnquist described Double Jeopardy jurisprudence as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Id.*; *Whalen*, 445 U.S. at 699 (Rehnquist, J., dissenting). *But see* Jahncke, *supra* note 14, at 115 n.33 (criticizing the *Halper* decision for continuing the "confused legacy of Double Jeopardy law by conflating the two protections").

88. *See Kurth Ranch*, 114 S. Ct. at 1952 (O'Connor, J., dissenting).

89. *See id.* In fact, Respondents may have been the largest marijuana producer in the state. *In re Kurth Ranch*, 145 B.R. at 66; *see Halper*, 490 U.S. at 449; *see also Kurth Ranch*, 114 S. Ct. at 1942 n.7 (itemizing inventory of contraband seized at time of Respondents' arrest).

90. *Kurth Ranch*, 114 S. Ct. at 1943-44. The lower courts noted the disparity and readily employed *Halper*. *See id.*

91. *See* United States v. DiFrancesco, 449 U.S. 117, 127, 129 (1980) (application of Double Jeopardy neither facile nor routine).

92. *See Kurth Ranch*, 114 U.S. at 1943-44.

93. *Id.* at 1944-45.

94. *See id.* at 1946-48.

95. *See id.*

96. *See id.* at 1949 (Rehnquist, J. dissenting). The Chief Justice accused the Court of going "astray" and employing "rejected criteria." *Id.*

The Court relied on *Halper* for propositions that the term "tax" is not dispositive in the instant case and that labels are not conclusive in a Double Jeopardy analysis.[97] At the same time, the Court asserted that *Halper* did not apply to a tax.[98] Consistent with their unwillingness to apply the rational relation test to a tax, the instant Court considered it improper even to permit the state to show that the assessment was approximately equal to its costs.[99] On the other hand, the Court noted that the state's formula for the assessment was computed without reference to the state's harm.[100] This finding was followed immediately by the conclusion that the tax was not remedial and thus was a second punishment.[101] This essentially amounted to an employment of the rational relation test without properly ascribing the authority for it to its source.[102]

The instant Court also relied on *Halper* to support its individualized evaluation[103] of the particular application of the tax and characterized it as punitive.[104] This reasoning, straight from *Halper*,[105] led to the ultimate conclusion that the tax was, in fact, a penalty and precluded by Double Jeopardy.[106] Again, the Court was apparently controlled by *Halper* without announcing it.[107] In the instant case, evaluation of the drug tax under *Halper* could have proceeded along comparable lines to the same result, but with far-reaching benefit to Double Jeopardy jurisprudence. Had it done so, the instant Court would not have been compelled to engage in its disingenuous reasoning.[108]

A straightforward application of *Halper* in the instant case would have eliminated the need for the other elements of the Court's argument which are of questionable merit.[109] The instant Court employed a logical fallacy to determine that, because its imposition was conditioned on a crime, the exaction could not be a tax.[110] The Court also challenged the assessment as a tax on goods after "confiscation."[111] The instant Court mused that a

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97. *Id.* at 1946.
98. *Id.* at 1948.
99. *Id.*
100. *Id.*
101. *Id.*
102. *See Halper*, 490 U.S. at 447-48.
103. *Kurth Ranch*, 114 S. Ct. at 1946.
104. *Id.*
105. *See Halper*, 490 U.S. at 439-40. This reasoning derives from Justice Frankfurter's concurring opinion in *Hess*. *Id.* at 439; *see Hess*, 317 U.S. at 554.
106. *Kurth Ranch*, 114 S. Ct. at 1946.
107. *See id.* at 1948.
108. *See id.*
109. *See id.* at 1948-49 (Rehnquist, C.J., dissenting).
110. *See id.* at 1947 n.20 (citing United States v. Sanchez, 340 U.S. 42 (1950)). If ~C then T; C; therefore ~T: This fallacy is termed "denying the antecedent."
111. *Id.* at 1948.

tax on confiscated goods is "at least questionable" because a confiscatory statute is unconstitutional.[112] The Court thus implied that an evidentiary seizure of contraband pursuant to arrest is unconstitutionally confiscatory.[113] A purposeful employment of *Halper* in the instant case would have avoided both a formless, confusing rationale and the divergent results almost certain to follow in the lower courts.[114]

After *Mitchell*, subsequent civil sanctions, fines, taxes, and seizures were limited only by the Eighth Amendment[115] and by construction of an underlying statute as having imposed a criminal penalty.[116] The *Halper* Court, realizing Justice Frankfurter's vision in *Hess*, demanded a rational relation between the damages and the injury.[117] In the instant case, society would have benefited by a broadening of the rational relation test.[118] The Court should have expanded the test not just to include a tax assessment but to extend to the universe of Double Jeopardy cases.[119]

Fears of unintended consequences[120] should have been allayed by Justice O'Connor's dissent in the instant case.[121] The two-step process she described would have assured a fair application in the instant case of the "personal" protection afforded by the Double Jeopardy Clause.[122] By applying *Halper*, the instant Court could have consolidated Double Jeopardy analysis in the same way the *Hess* Court did by applying *Mitchell*.[123] Seeing the instant case as a parallel to *Halper* would have taken the case-by-case evaluation of sanctions and the rational relation test from successive punishment after conviction to successive prosecution.[124] The instant Court

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112. *Id.* (citing Heiner v. Donan, 285 U.S. 312, 326 (1932); Nichols v. Coolidge, 274 U.S. 531 (1927)).

113. *See id.*

114. *See id.* at 1944, 1958.

115. U.S. CONST. amend. VIII; *see* Austin v. United States, 113 S. Ct. 2801 (1993) (stating that the Excessive Fines Clause applies to successive proceedings).

116. *See* Glickman, *supra* note 15, at 1258; Jahncke, *supra* note 14, at 126, 143.

117. *Halper*, 490 U.S. at 452.

118. *But see* Glickman, *supra* note 15, at 1268 (asserting that a narrow application of *Halper* was intended).

119. *But see id.* at 1265-66 (warning *Halper* would create "havoc").

120. *Kurth Ranch*, 114 S. Ct. at 1958 (Scalia, J., dissenting) (expecting "further enigmas" because of *Halper*); *see* Glickman, *supra* note 15, at 1267-68.

121. *See Kurth Ranch*, 114 S. Ct. at 1952-55 (O'Connor, J. dissenting) (reaching an opposite result following *Halper*).

122. *See id.* at 1954-55.

123. *See* Jahncke, *supra* note 14, at 124-25; Glickman, *supra* note 15, at 1258. The *Hess* Court applied the test from *Mitchell*, a successive prosecution case after acquittal, to successive punishment cases after conviction. *See id.*

124. By its own terms, *Halper* did not address successive prosecution, though it surely could have, as effectively as in the instant case. *Halper*, 490 U.S. at 441. The civil False Claims suit in *Halper* was as much a successive prosecution as a motion in the voluntary bankruptcy proceeding in the instant case. *See In re Kurth Ranch*, 145 B.R. at 74-76.

could have taken this step explicitly and reduced the impact of the ambiguity that results from the several ways these terms are employed.[125]

The Court's stated motivation for granting certiorari in the instant case was to reconcile disparate conclusions between the Ninth Circuit and a state supreme court, regarding *Halper*.[126] The instant case hardly seems to have reconciled anything. Far from settling Double Jeopardy issues, the instant case goes a long way toward upsetting them. Explicitly following *Halper* would have left lower courts with a clearer picture of the rational relation test and greater certainty in an area chronically plagued by confusion.[127] The Court denied that the instant case was controlled by *Halper*, yet employed a nearly identical, but inferior, pattern of reasoning. In the wake of the instant decision, lower courts retain only the diffused authority of the *Halper* test with increased uncertainty as to when it applies. Society is ill-served by such obfuscation in an area of constitutional law that needs an infusion of clear direction.

125. *See* Jahncke, *supra* note 14, at 115 n.33.

126. *See Kurth Ranch*, 114 S. Ct. at 1944.

127. *See Albernaz*, 450 U.S. at 343 (Double Jeopardy jurisprudence, a "veritable Sargasso Sea"); *see also* Jahncke, *supra* note 14, at 114 (describing the legacy of Double Jeopardy law as "confused").