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THE NINTH CIRCUIT RENEGADE—
UNITED STATES v. $405,089.23 U.S. CURRENCY:
FINDING DOUBLE JEOPARDY IN A SINGLE COORDINATED PROSECUTION

INTRODUCTION

It has increasingly become the practice of federal and state prosecutors to seek both criminal and civil sanctions against accused persons for the alleged commission of a single crime.[1] Prosecutors are required to file concurrent, parallel suits alleging civil and criminal causes of action because of the different evidentiary burdens on the prosecution in civil and criminal actions.[2] Beginning with *United States v. Halper*,[3] the Supreme Court's double jeopardy jurisprudence has increasingly protected defendants from civil sanctions following criminal convictions.[4] As a result, defendants facing parallel criminal and civil actions have asserted the constitutional protection against double jeopardy,[5] hoping that courts will extend the protection against subsequent civil suits to concurrent civil suits.[6] One federal court of appeals has led the way.[7] On September 6, 1994, in *United States v. $405,089.23*

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[1] *See, e.g.*, Elkan Abramowitz, *Double Jeopardy and Civil Sanctions*, N.Y.L. J., July 5, 1994, at 3 [hereinafter Abramowitz].

[2] *See, e.g.*, United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

[3] United States v. Halper, 490 U.S. 435 (1989).

[4] *See id.* at 451 ("[T]he [g]overnment may not criminally prosecute a defendant, impose a criminal penalty up on him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the [g]overnment whole.") (footnote omitted); Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty [including a tax] imposed against him for the same offense.").

[5] *See infra* note 14 and accompanying text.

[6] *See, e.g.*, United States v. Pierce, 60 F.3d 886 (1st Cir. 1995), *petition for cert. filed*, (U.S. Oct. 19, 1995) (No. 95-6474); United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994) *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); United States v. Torres, 28 F.3d 1463 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 669 (1994); United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994); United States v. Millan, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). *See also infra* note 21.

[7] Although some state courts have found that the protection against double jeopardy insulates criminally prosecuted defendants from civil prosecutions in separate proceedings, *see* Matt Schwartz, *Court Ruling Likely to Alter War on Drugs; Says Forfeiture of Assets can be Double Jeopardy*, THE HOUSTON POST, July 23, 1994, at A1 (some Texas courts so hold); Russell

U.S. Currency,[8] the United States Court of Appeals for the Ninth Circuit became the first federal court of appeals to hold that the Double Jeopardy Clause bars parallel civil and criminal suits arising from the same offense.[9]

This Note reviews the Supreme Court's double jeopardy jurisprudence in Part I, explains the facts, reasoning, and analysis of *$405,089.23* in Part II, and critiques the Ninth Circuit's logic and purported adherence to precedent in Part III. Part III(A) argues that the Constitution requires, and the Court's "continuing jeopardy" analysis permits, the government to coordinate criminal and civil actions against a defendant in a fictional, single prosecution. Part III(B) elucidates the failure of *$405,089.23* to apply the appropriate test to distinguish punishment from remedial sanctions in double jeopardy claims. This Note's analyses seek to clarify and preserve three Supreme Court precedents—*Jeffers v. United States*,[10] *United States v. Halper*,[11] and *Austin v. United States*[12]—upon which the Ninth Circuit based much of its reasoning, and to demonstrate the Supreme Court's growing awareness of the problem that lower courts must resolve in applying the Double Jeopardy Clause to civil sanctions.[13]

I. BACKGROUND: DOUBLE JEOPARDY JURISPRUDENCE GENERALLY

The Double Jeopardy Clause states, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[14] When the Founders included this provision in the Constitution, the prohibition against trying a person for an offense for which he had already received judgment was "deeply rooted in the law of England, as an indispensable requirement of a civilized criminal procedure, [and thus] was inevitably part of the [American]

Carollo, *Above the Law; New Rulings Complicate Drug Crime Forfeitures*, NEWS TRIBUNE, June 19, 1994, at A7 (Washington Supreme Court so holds), the author limits the scope of this Note to the federal courts of appeals.

[8] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[9] *But see Torres*, 28 F.3d at 1465 (suggesting the same result in dicta).

[10] Jeffers v. United States, 432 U.S. 137 (1977).

[11] United States v. Halper, 490 U.S. 435 (1989).

[12] Austin v. United States, 113 S. Ct. 2801 (1993).

[13] *See* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1955 (1994).

[14] U.S. CONST. amend. V.

legal tradition."[15] Although the First Congress debated the scope of the protection against multiple trials and punishments, "[t]he need for the principle's general protection was undisputed."[16] Over the years, a general understanding of the protection developed.[17]

The Double Jeopardy Clause protects against two basic abuses: successive prosecutions and multiple punishments for the same offense.[18] The policies prohibiting successive prosecutions include the defendant's "valid interest in (1) not being subjected to the embarrassment, stigma, expense, and emotional ordeal of a second criminal prosecution; and (2) not having to live in a continuing state of anxiety, insecurity, and uncertainty at the prospect of being indicted and tried again."[19] The policies prohibiting multiple punishments include fairness and predictability—"ensuring that the total punishment does not exceed that authorized by the legislature."[20]

There are, of course, exceptions to the application of these general constitutional policies.[21] For example, notwithstanding the Double Jeopardy

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[15] United States v. Green, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting).

[16] *Id.* at 201.

[17] *See, e.g., id.* at 187 ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . .").

[18] *See* United States v. Halper, 490 U.S. 435, 440 (1989) (subdividing the protection against successive prosecutions into those including second prosecutions following both acquittals and convictions) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

[19] Elizabeth S. Jahncke, Note, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 136 (1991) [hereinafter Jahncke]; *see also* Rebecca F. Dallet, Comment, *Taking the Ammunition Away From the War on Drugs": A Double Jeopardy Bar to 21 U.S.C. § 881 After* Austin v. United States, 44 CASE W. RES. L. REV. 235, 242 (1993) [hereinafter Dallet] ("The bar against successive prosecution also denies the prosecution an opportunity to perfect their case against the defendant until they successfully convict him or her.").

[20] Jahncke, *supra* note 19, at 134-35; Dallet, *supra* note 19, at 242.

[21] Foremost among the exceptions is that a court may impose multiple punishments in a single proceeding. Ohio v. Johnson, 467 U.S. 493, 500 (1984); Missouri v. Hunter, 459 U.S. 359, 366 (1983); Albernaz v. United States, 450 U.S. 333, 343-44 (1981); Whalen v. United States, 445 U.S. 684, 693 (1980). This suggests that the two protections, although distinct, work in tandem. *See, e.g., Hunter* at 368-69 ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial.").

Despite the codependency of the two protections, circuit court guidance for an eventual Supreme Court resolution has generally dealt with either separate proceedings or multiple punishments, but not both. *See generally, e.g.,* S.E.C. v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994) (resolving only the multiple punishment issue); United States v. Torres, 28 F.3d 1463 (7th Cir. 1994) (expressing an opinion about separate proceedings, but resolving the case on other grounds), *cert. denied*, 115 S. Ct. 669 (1994); United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) (resolving only the multiple punishment issue), *cert. denied*, 115 S. Ct. 574 (1994);

Clause bar to successive prosecutions, the Court has long allowed retrials following successful appeals from convictions infected by trial error.[22] The law allows the second trial, conceiving it as a continuation of jeopardy that "rest[s] on an amalgam of interests—*e.g.*, fairness to society, lack of finality, and limited waiver, among others."[23] As the Court explained the continuing jeopardy rationale in *United States v. Burks*,[24] retrial is permitted following reversals for trial error because "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished."[25] Moreover, the Court noted in *Richardson v. United States*,[26] "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy."[27] This language "suggests that an event which terminates [original] jeopardy is a condition precedent to a defendant's assertion of a double jeopardy claim."[28] Thus, the nonoccurrence of an event terminating original jeopardy leaves a defendant

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United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994) (resolving only the separate proceedings issue for double jeopardy analysis); United States v. Millan, 2 F.3d 17 (2d Cir. 1993) (resolving only the separate proceedings issue), *cert. denied*, 114 S. Ct. 922 (1994).

United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994) *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346) resolves both issues.

[22] *See* Price v. Georgia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957); United States v. Ball, 163 U.S. 662 (1896).

[23] *Green*, 355 U.S. at 329 n.4.

[24] United States v. Burks, 437 U.S. 1 (1978).

[25] *Id.* at 15; *see also* United States v. Tateo, 377 U.S. 463, 466 (1963) ("Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction."). *But see Burks*, 437 U.S. at 18 ("[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, [because] the only 'just' remedy available for that court is the direction of a judgment of acquittal.").

[26] Richardson v. United States, 468 U.S. 317 (1984).

[27] *Id.* at 325.

[28] United States v. Ganos, 961 F.2d 1284, 1286 (7th Cir. 1992) (Ripple, J., concurring) (citing United States v. Wood, 958 F.2d 963, 969 (10th Cir. 1992) (noting that *Richardson* "offers little guidance on what events, other than an acquittal, terminate jeopardy")). *But cf.* Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 VA. L. REV. 1381 (1993) [hereinafter Wang] (arguing that the uncertainty regarding what events sufficiently ripen the right to protect one from a second jeopardy diminishes continuing jeopardy's authority, but noting that the Supreme Court currently accepts it).

vulnerable to a second trial,[29] but preserves the policy goals of the Double Jeopardy Clause.[30]

Another kind of second trial allowed despite the protection against double jeopardy is a second governmental prosecution seeking remedial civil sanctions.[31] Historically, the Supreme Court has held that all fines assessed in civil proceedings which follow criminal trials comport with the Double Jeopardy Clause because such sanctions are invariably remedial, and are not punitive.[32]

In *United States v. Ward*,[33] the Court resolved a challenge to the Federal Water Pollution Control Act,[34] which compelled persons "in charge of a vessel or of an onshore facility or an offshore facility" to notify the United States government upon any oil or hazardous substance discharge.[35] Because Congress imposed a "penalty"[36] on those in charge of such vessels or facilities, L.O. Ward, who oversaw a drilling facility near Enid, Oklahoma, sought to persuade the Court that "the Act violated his privilege against compulsory self-incrimination"[37] grounded in the Fifth Amendment's Self-Incrimination Clause.[38] Noting that the statute denominated the penalty as a "civil penalty,"[39] and that the Self-Incrimination Clause applies only to "any criminal case,"[40] the Court rejected Ward's constitutional challenge.[41] In so holding, the Court adopted a presumption of congressional accuracy in

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[29] *See* Wang, *supra* note 28, at 1390.

[30] *See, e.g., Richardson, supra* note 26, at 325 ("[J]eopardy does not terminate when the jury is discharged [merely] because it is unable to agree."); Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984) (holding that a defendant who *elects* to partake in two-tier trial does not terminate original jeopardy after conviction in the first trial).

[31] *See* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994); United States v. Halper, 490 U.S. 435 (1989). See also the discussion *infra* at Part III(B).

[32] *See* Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938). *But see, e.g., Hess*, 317 U.S. at 554 (Frankfurter, J., concurring) (suggesting that a civil penalty becomes punishment when it exceeds reasonable compensation for the government's loss).

[33] United States v. Ward, 448 U.S. 242 (1980).

[34] *See* 33 U.S.C. § 1321 (1988).

[35] *Id.* at § 1321(b)(5).

[36] *Id.* at § 1321(b)(6)(A).

[37] *Ward*, 448 U.S. at 247.

[38] *See* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

[39] 33 U.S.C. § 1321(b)(6)(a) (1988).

[40] U.S. CONST. amend. V.

[41] *Ward*, 448 U.S. at 250-51.

labeling a statute's enforcement purpose as either civil or criminal, for both double jeopardy and self-incrimination analysis.[42]

United States v. One Assortment of 89 Firearms[43] permitted the Supreme Court to hold the *Ward* presumption applicable to the Double Jeopardy Clause. The Court did so by unanimously holding that a claimant's prior criminal trial did not bar the government's subsequent, related civil forfeiture action because Congress intended it to be "a remedial civil sanction."[44] The Court, merely holding what it had already suggested in *Ward*,[45] delivered a unanimous opinion.[46]

Five years later, the Supreme Court changed the applicable test in another unanimous decision.[47] In *United States v. Halper*, the Court held that labels attached by Congress to particular statutory sanctions were no longer presumptive determinants of whether those sanctions constitute punishment, thereby triggering the constitutional protection against double jeopardy.[48] Unfortunately, the test that *Halper* promulgated includes confusing and contradictory language[49] which has indirectly led to the erroneous law of the Ninth Circuit.[50]

II. THE NINTH CIRCUIT: *UNITED STATES v. $405,089.23 U.S. CURRENCY*[51]

A. THE FACTS OF THE CASE

On June 12, 1991, a grand jury indicted James Wren, Charles Arlt, and Payback Mines on various counts of conspiracy and money laundering arising

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[42] *See id.* at 248-251 (cautioning the judiciary to carefully review a statute's construction when determining its sanction's nature or purpose—civil thus remedial, or criminal thus punitive—because of the general procedural implications in affixing the appropriate evidentiary burdens under the Sixth Amendment).

[43] United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

[44] *Id.* at 363.

[45] *See Ward*, 448 U.S. at 248.

[46] *See One Assortment of 89 Firearms*, 465 U.S. at 355.

[47] United States v. Halper, 490 U.S. 435, 436 (1989).

[48] *Id.* at 447.

[49] *See infra* Part III(B).

[50] *See infra* Part II.

[51] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

from illegal drug transactions.[52] Five days later, the United States government filed a civil proceeding seeking to forfeit property worth several hundred thousand dollars.[53] The property included the balances in four bank accounts, over $100,000 in cash, 138 silver bars, bonds, a helicopter, an airplane, two boats, and eleven automobiles.[54] The government claimed two grounds warranted the forfeiture: the goods' status as illegal proceeds of the drug trade under 21 U.S.C. § 881(a)(6),[55] and the goods' status as property used in illegal money laundering under 18 U.S.C. § 981(a)(1)(A).[56] The parties agreed to suspend the civil forfeiture action until after the criminal case was resolved.[57]

Over eight months after the defendants' criminal convictions on March 27, 1992,[58] the government filed a motion for summary judgment in the parallel civil action.[59] The United States District Court for the Central District of California granted this motion and the defendants appealed.[60] In their appeal, the defendants asserted, among other things, that the Double Jeopardy Clause of the Fifth Amendment precluded civil forfeiture of property secured through activities having already resulted in criminal convictions and

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[52] *See id.* at 1214.

[53] *Id.*

[54] *Id.*

[55] 21 U.S.C. § 881(a) (1988) states:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> . . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all money's negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[56] 18 U.S.C. § 981(a)(1) (1988) states:

[T]he following property is subject to forfeiture to the United States:

> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

[57] *$405,089.23*, 33 F.3d at 1214.

[58] *But see* United States v. Arlt, 42 F.3d 516 (9th Cir. 1994) (reversing Charles Arlt's conviction for trial error).

[59] *$405,089.23*, 33 F.3d at 1214.

[60] *Id.* at 1214-15.

punishment.[61] The Ninth Circuit agreed to hear the case on appeal, and on September 6, 1994, rendered judgment in favor of the petitioners in *United States v.$405,089.23 U.S. Currency*.

B. THE NINTH CIRCUIT'S RATIONALE

Writing for a unanimous Ninth Circuit panel, Judge Reinhardt began *$405,089.23* by pointing out that "at its most fundamental level [the Double Jeopardy Clause] protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense."[62] Noting that both the forfeiture at issue and the concluded criminal trial "addressed the identical violations of the identical laws,"[63] Judge Reinhardt determined that the government could and should have sought both forfeiture and conviction without subjecting the defendants to "multiple and successive proceedings."[64] Judge Reinhardt asserted that because "the only difference between the two proceedings was the remedy sought by the government . . . [i]t could have included a criminal forfeiture count in the indictment which led to the claimants' convictions."[65] By not including the criminal forfeiture count, the government raised double jeopardy concerns.[66] Judge Reinhardt then considered the two critical issues of Supreme Court Double Jeopardy jurisprudence:[67] "whether the civil forfeiture action and the claimants' criminal prosecution constituted separate 'proceedings,' and whether civil forfeiture under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitutes 'punishment.'"[68]

1. *The Scope of the Proceeding*

The panel first addressed the question regarding the double jeopardy scope of the criminal proceeding. After acknowledging that the Second and Eleventh Circuits had recently held that separate criminal trials and civil

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[61] *See id.* at 1215.
[62] *Id.*
[63] *Id.* at 1216.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See supra* notes 18-20 and accompanying text.
[68] *$405,089.23*, 33 F.3d at 1216.

forfeitures arising from the same offense constitute a single, coordinated prosecution for double jeopardy analysis,[69] Judge Reinhardt stated that such a position "contradicts controlling Supreme Court precedent as well as common sense."[70] Appealing first to common sense, Judge Reinhardt indicated that the government obtains an unfair and possibly unlawful advantage if it can persuade the district court to follow the customary practice of holding the civil forfeiture action "in abeyance pending the outcome of the criminal prosecution."[71] If the government succeeds in obtaining a conviction, it can use that result to prevail in the civil trial with a summary judgment.[72] If the government obtains an acquittal, it can still seek the forfeiture by urging that the civil action's more lenient rules and evidentiary burdens should apply.[73]

Next, Judge Reinhardt revived a seventeen year old Supreme Court case, *Jeffers v. United States*,[74] to assert that the protection against double jeopardy prohibits separate, albeit concurrent, proceedings that potentially result in separate punishments of imprisonment and financial sanctions.[75] In *Jeffers*, the government sought to prosecute the defendant for two related criminal offenses: conspiring to distribute controlled substances and participating in a continuing criminal enterprise to violate drug laws.[76] Jeffers opposed joining the offenses for trial and thus forced the government to prosecute the actions consecutively.[77] He then moved to dismiss the second count on double jeopardy grounds after the district court convicted him on the first.[78] The Supreme Court, in a divided judgment, narrowly affirmed the Seventh Circuit's rejection of Jeffers' double jeopardy argument.[79] A four Justice plurality held that "although a defendant is normally entitled to have [multi-

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[69] *Id.* (citing United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994); United States v. Millan, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994)).

[70] *$405,089.23*, 33 F.3d at 1216 & n.4 (clarifying that the panel expressed no opinion on the double jeopardy implications of a defendant's consent to separate trials, or when the same fact-finder and judicial officer preside over bifurcated proceedings).

[71] *Id.* at 1217.

[72] *Id.* (citing 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 10.01, at 10-4 to 10-5 (1993)).

[73] *$405,089.23*, 33 F.3d at 1217.

[74] Jeffers v. United States, 432 U.S. 137 (1977).

[75] *$405,089.23*, 33 F.3d at 1217.

[76] *Jeffers*, 432 U.S. at 140-41.

[77] *Id.* at 142-43.

[78] *Id.* at 144.

[79] *Id.* at 158.

ple] charges . . . resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses *tried separately*."[80] In dissent, four Justices noted, "The Court's disposition is especially troubling because eight Justices agree that petitioner's constitutional right was violated and only four are persuaded that he waived his double jeopardy objection."[81] Following the four dissenters' line of reasoning, the panel in *$405,089.23* concluded that "the decisions of eight of the nine [J]ustices in *Jeffers* rested on the common sense proposition that two parallel criminal cases, which unquestionably were brought as a part of a 'single, coordinated prosecution,' constituted 'separate proceedings' for double jeopardy purposes."[82]

2. *The Test for Punishment*

Having resolved the first critical issue, the panel proceeded to determine whether the forfeiture that the government sought to impose constituted punishment.[83] First, Judge Reinhardt explicated a recent history of the Supreme Court's characterization of particular sanctions as punishment.[84] As recently as 1984, observed Judge Reinhardt, the Supreme Court applied a double jeopardy test that focused on the congressional label attached to particular sanctions—civil or criminal—to conclude that "Congress intended for forfeiture to be 'a remedial civil sanction.'"[85] However, the Supreme Court retreated from that position in *United States v. Halper*,[86] holding that congressional intent was no longer controlling.[87] Noting that the Court had recently changed the law in *Halper*, Judge Reinhardt explained that civil

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[80] *Id.* at 152 (emphasis added).

[81] *Id.* at 160 n.7 (Stevens, J., dissenting in part, and concurring in the judgment in part).

[82] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[83] *Id.*

[84] *Id.*

[85] *Id.* (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984)); *see also* United States v. Ward, 448 U.S. 242, 248 (1980) (promulgating the *Ward* test, which deferred the status of a sanction as either punitive or remedial to the congressional label—criminal or civil—attached to the sanction).

[86] United States v. Halper, 490 U.S. 435, 447 (1989) (holding that the congressional labels attached to a sanction do not determine whether it constitutes punishment for double jeopardy purposes).

[87] *Id.*

sanctions which exceed purely remedial purposes[88] now constitute punishment for double jeopardy analysis.[89]

Bolstering support for the finding that civil forfeitures constitute punishment for double jeopardy analysis, Judge Reinhardt restated the Supreme Court's Eighth Amendment analysis in *Austin v. United States*.[90] There, according to Judge Reinhardt, the Court employed the *Halper* test to apply the Eighth Amendment's Excessive Fines Clause[91] to civil forfeitures arising under 21 U.S.C. §§ 881(a)(4) and (a)(7).[92] Reasoning by analogy that the *Halper* test consistently evaluates a sanction's status regardless of the constitutional clause challenging it, Judge Reinhardt found "inescapable [the conclusion] that civil forfeiture under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) constitutes 'punishment.'"[93]

Although the panel in *$405,089.23* acknowledged that the Fifth Circuit had recently characterized a similar forfeiture of property arising from illegal proceeds as entirely remedial,[94] it rejected that conclusion because it failed to comport with *Austin* on three grounds.[95] First, noting *Austin*'s reference to the history of forfeiture statutes "serving not simply remedial goals but also those of punishment and deterrence,"[96] Judge Reinhardt reasoned that a "categorical approach to 'punishment' determinations in the forfeiture context," rather than a case-by-case analysis, requires a court to focus on the characteristics of the relevant forfeiture statute as a whole.[97] Second, the panel reasoned that those forfeiture statutes which expressly provide defenses for property owners lacking culpability must serve "at least in part to deter

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[88] *E.g.*, *id.* at 439 ("In the [d]istrict [c]ourt's view, the authorized recovery of more than $130,000 bore no 'rational relation' to the sum of the [g]overnment's $585 actual loss plus its costs in investigating and prosecuting Halper's false claims.") (citation omitted).

[89] *$405,089.23*, 33 F.3d at 1218-19 (citing Halper, 490 U.S. at 448 (1989)).

[90] Austin v. United States, 113 S. Ct. 2801 (1993).

[91] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required *nor excessive fines imposed*, nor cruel and unusual punishments inflicted.") (emphasis added).

[92] *Austin*, 113 S. Ct. at 2806.

[93] *$405,089.23*, 33 F.3d at 1219.

[94] United States v. Tilley, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994); *Compare Tilley*, 18 F.3d at 299 ("[T]he relationship between the amount of the proceeds and the resulting governmental and societal costs [of illegal drug sales] would not exhibit the excessive quality found in *Halper*. . . .") *with id.* at 300 ("When . . . the property taken by the government [is] not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him."). See the discussion *infra* at Part III(B).

[95] *$405,089.23*, 33 F.3d at 1220-21.

[96] *Austin*, 113 S. Ct. at 2812 n.14.

[97] *$405,089.23*, 33 F.3d at 1220.

and punish guilty conduct."[98] Third, the panel concluded, "[W]here Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law."[99] Thus, these three *Austin* principles led Judge Reinhardt to conclude that 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) "operate at least in part to punish and deter."[100]

Additionally, the panel rejected the notion that the statutes relied upon by the government were solely remedial because they forfeited property only arising from illegal drug proceeds.[101] On the contrary, "[r]ather than rendering only the *profits* of drug dealers subject to forfeiture, [21 U.S.C. § 881(a)(6)] applies to nearly any money that is involved in a narcotics transaction in some fashion."[102] Similarly, 18 U.S.C. § 981(a)(1)(A) "applies to any property which is 'involved in' an illegal money laundering transaction."[103] Thus, finding that "the forfeiture statutes at issue here do not serve *solely* a remedial purpose," the Ninth Circuit barred the government's civil action as a violation of the Double Jeopardy Clause.[104]

In sum, the Ninth Circuit relied on three Supreme Court precedents to reach a conclusion, contrary to those conclusions reached by the Second, Fifth, and Eleventh Circuits: that a civil forfeiture contemporaneously filed with—and arising from an offense resulting in a criminal conviction—violates the Double Jeopardy Clause. Because the Ninth Circuit was the first court of appeals to reach this result,[105] and because the Supreme Court has yet to certify the issue, the Ninth Circuit is a renegade. It remains unresolved whether Judge Reinhardt's panel is ahead of its time, or has simply disregarded the law.

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[98] *Id.* at 1221.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*; *see also id.* ("[T]he statute renders forfeitable money that someone *intends* to use to purchase drugs, or even money that someone *intends* to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.").

[103] *Id.*

[104] *Id.* at 1222.

[105] *But see* United States v. Ursery, 59 F.3d 568, 575 (6th Cir. 1995) (attaching double jeopardy because the record revealed no governmental intent to attempt a single coordinated prosecution), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345).

III. DISCUSSION

Although the Ninth Circuit's analysis seems persuasive,[106] and has been followed by the Northern District of Illinois in the Seventh Circuit,[107] this Note argues that *$405,089.23* was wrongly decided. This Part of the Note follows the same structural analysis of the *$405,089.23* decision. Part III(A) evaluates whether a civil forfeiture and a criminal prosecution arising from the same offense constitute a single proceeding for double jeopardy analysis. This examination includes a review of the Ninth Circuit's proclaimed "common sense," and its ostensibly faithful adherence to *Jeffers v. United States*,[108] in its rejection of the alternative analysis shared by the Second and Eleventh Circuits.[109] Part III(B) evaluates whether the sanctions provided for by 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitute punishments. It scrutinizes the Ninth Circuit's gloss on *United States v. Halper*[110] and *Austin v. United States*,[111] and its decision to reject the Fifth Circuit's alternative approach.[112] Moreover, Part III(B) indicates that the Fifth Amendment's required double jeopardy analysis of civil forfeiture differs from that for the Eighth Amendment's excessive fines analysis, notwithstanding *Austin*'s claimed application of the *Halper* test.[113] This exposes the Ninth Circuit's cumulative error in *$405,089.23* in its application of *Austin*'s equivocal version of *Halper*'s duplicitous punishment standard.[114]

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[106] *See* United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 496 (9th Cir. 1994) (Rymer, J., concurring) ("I concur . . . only because I am constrained to follow *United States v. $405,089.23 in* [sic] *U.S. Currency*. . . . The result I feel obliged to reach . . . may have other consequences for parallel civil and criminal proceedings which I find it difficult to believe that either the Congress or the Court had in mind.") (citations omitted).

[107] United States v. 4204 Thorndale Ave., No. 92 C 3744, 1994 WL 687628, at *10 (N.D. Ill. Dec. 7, 1994).

[108] Jeffers v. United States, 432 U.S. 137 (1977).

[109] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994), *aff'd as modified en banc*. 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[110] United States v. Halper, 490 U.S. 435 (1989).

[111] Austin v. United States, 113 S. Ct. 2801 (1993).

[112] *$405,089.23*, 33 F.3d at 1218-22.

[113] *See infra* Part III(B).

[114] *See infra* Part III(B).

A. SCOPE: SEPARATE TRIALS, OR A SINGLE COORDINATED PROCEEDING?

After concluding that it should review the claimant's double jeopardy argument,[115] the Ninth Circuit made a crucial analytical mistake in its reasoning. The panel found that "the *only* difference between the [civil forfeiture and criminal] proceedings was the remedy sought by the government."[116] As a result, the panel held that there was "no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action."[117] It was wrong to reject the notion that contemporaneous civil and criminal actions can enforce multiple punishments for a single offense without violating the Double Jeopardy Clause. Contrary to the position of the Ninth Circuit, there are *strong* countervailing rationales for considering a criminal prosecution and a civil forfeiture action for a single offense as one constitutional jeopardy.

1. *Overlooking Constitutionally Required Procedure*

In *United States v. Millan*,[118] the Second Circuit held that coordinated civil and criminal proceedings may arise contemporaneously without violating the Double Jeopardy Clause because the Constitution requires that the actions proceed separately.[119] Faced with coordinated civil and criminal actions arising from a Drug Enforcement Administration investigation of heroin distribution by the Bottone family,[120] the panel framed the issue to resolve "whether the civil forfeiture suit . . . was part of a single, coordinated prosecution of persons involved in alleged criminal activity."[121] Answering this question affirmatively, the panel noted,

> Civil and criminal suits, by virtue of our federal system of procedure, *must* be filed and docketed separately. Therefore, courts must look past the procedural requirements and examine the essence of the

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[115] *$405,089.23*, 33 F.3d at 1215.
[116] *Id.* at 1216 (emphasis added).
[117] *Id.* at 1218.
[118] United States v. Millan, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).
[119] *See Millan*, 2 F.3d at 20.
[120] *Id.* at 17 (including among the defendant-appellants Alfred V. Bottone, Sr. (a.k.a. Fat Al), Anthony Bottone, Alfred Bottone (a.k.a. Alfie), and Eric Millan).
[121] *Id.* at 20.

> actions at hand by determining when, how, and why the civil and criminal actions were initiated. . . . [Here the two actions arose] as part of an effort to put an end to an extensive narcotics conspiracy. We therefore must conclude that the civil forfeiture suit and the criminal prosecution at issue here constituted a single prosecution against the [defendants].[122]

The Eleventh Circuit adopted the Second Circuit's rationale to resolve a double jeopardy challenge to the civil forfeiture of a home coordinated with a criminal action, when defendants allegedly used the home to further illegal gambling activities.[123] Without rigorous analysis, the panel seemed to suggest that the American federal system of procedure[124] and the constitutional right to a fair trial[125] require that where the legislature authorizes multiple punishments for a single offense, "the *simultaneous* pursuit by the government of criminal and civil sanctions" shall transpire in different proceedings.[126] The Eleventh Circuit properly characterized this practice as a "single, coordinated prosecution,"[127] because it differs from *consecutive* attempts by the government to punish an alleged offender of the law for double jeopardy purposes.[128]

Despite the promulgation of this reasonable proposition, the panel in *$405,089.23* stated that "[a] forfeiture case and a criminal prosecution would

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[122] *Id.* (emphasis added).

[123] United States v. One Single Family Residence, 13 F.3d 1493, 1494, 1499 (11th Cir. 1994).

[124] *See, e.g.,* FED. R. CIV. P. 1 (noting governance over all federal civil suits); FED. R. CRIM. P. 2 (noting governance over all federal criminal actions).

[125] *See* AM. JUR. 2D *Criminal Law* § 649 (1981) (footnote omitted):

[D]ue process requires that there be a regular course of judicial proceedings and that a criminal trial proceed according to the established procedure or rules of practice applicable to all such cases. . . . [Due process] guarantee[s] procedural standards adequate and appropriate . . . to protect at all times persons charged with or suspected of crime . . . .

[126] *One Single Family Residence,* 13 F.3d at 1499 (emphasis added); *see* AM. JUR. 2D *Criminal Law* § 632 (1981) ("The defendant in a criminal prosecution is entitled to assert a number of constitutional and statutory guaranties [unavailable to a defendant in a civil suit]."); *see, e.g.,* United States v. Regan, 232 U.S. 37, 47-48 (noting that persuasion beyond a reasonable doubt is an evidentiary standard required only in criminal cases), *cited in* United States v. Ward, 448 U.S. 242, 248 (1980).

[127] *One Single Family Residence,* 13 F.3d at 1499.

[128] *See* United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993) ("[W]e are cognizant that one of the *Halper* Court's concerns was that the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action. That problem is obviously not present in the instant case, because the civil and criminal actions were contemporaneous and not consecutive.") (citation omitted) *cert. denied,* 114 S. Ct. 922 (1994).

constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time."[129] Yet the Ninth Circuit did not suggest how one could accomplish this and adhere to both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. *Halper*, discussed below,[130] suggested criminal and civil actions could be joined in the same proceeding, but offered no guidance on the method by which to join them. [131] This silence by the judiciary is no accident. Many problems hinder implementing a plan that would allow a person to combine criminal and civil actions in a true, single proceeding—not the least of which is negotiating the application of significantly different burdens of proof. One commentator has clearly explained these problems:

> Using a criminal standard for the entire case might be workable except for the comparative advantage received by the defendant; the government would have to prove any claim against the defendant beyond a reasonable doubt, rather than by a lesser civil standard such as preponderance of the evidence. Additionally, the scope of the discovery is relatively limited in criminal cases. Although prosecutors in criminal cases must turn over exculpatory evidence to the defense, the defense's discovery rights are, on the whole fairly limited. In a civil discovery however, the defendant is entitled to anything "'reasonably calculated to lead to the discovery of admissible evidence.'" The availability and use of depositions also differs between civil and criminal cases. Choosing civil procedure to govern the combined proceeding, however, is not an alternative since it could seriously jeopardize the defendant's [F]ourth and [F]ifth [A]mendment rights.[132]

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[129] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346); *cf. id.* at 1216 n.4 (suggesting the legitimacy of bifurcated proceedings "conducted before the same fact-finder and presiding judicial officer").

[130] *See infra* Part III(B)1.

[131] United States v. Halper, 490 U.S. 435, 450 (1989).

[132] Andrew Z. Glickman, Note, *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, 1280 (1990) (footnotes omitted).

Aside from the "serious logistical problems . . . [of] the simultaneous use of different burdens of proof and discovery rules,"[133] different agencies of the government frequently enforce parallel criminal and civil statutes.[134] Moreover, ensuring that the defendant in such proceedings "is afforded the constitutional safeguards of the Fifth and Sixth Amendments" may be impossible.[135] From this rationale, one must conclude the practical difficulties of combining criminal and civil trials in a genuinely single proceeding eliminate its potential for occurring.[136]

2. *The Problematic Resurrection of Jeffers v. United States*[137]

Notwithstanding the rationale for allowing a Second or Eleventh Circuit type of single, coordinated prosecution, *$405,089.23* creatively uses a decision from a sharply divided Supreme Court to validate the requirement for combining proceedings. *Jeffers v. United States*[138] adjudicated the United States government's pursuit of parallel criminal actions against a defendant arising from the same conduct—distributing drugs and conspiring to violate drug laws.[139] The four Justice plurality in *Jeffers* stated that "although a defendant is normally entitled to have charges on [two related offenses] resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately."[140] The four Justice dissent argued that Jeffers had not and could not waive his double jeopardy objection,[141] and that one of the trials should be barred.[142]

The Ninth Circuit interpreted the split decision in *Jeffers* to include a strongly implied holding by eight Justices to protect defendants subjected to prosecutions in parallel criminal trials for the same conduct, from at least one

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[133] Jahncke, *supra* note 19, at 141 n.230.
[134] *Id.*
[135] *Id.*
[136] *See supra* notes 118-29 and accompanying text.
[137] Jeffers v. United States, 432 U.S. 137 (1977).
[138] *Id.*
[139] *See id.* at 139 (plurality) (stating the issue as the "extent of the protection against multiple prosecutions afforded by the Double Jeopardy Clause of the Fifth Amendment, under circumstances in which the defendant *opposes* the Government's efforts to try charges under 21 U.S.C. §§ 846 and 848 in one proceeding.").
[140] *Id.* at 152.
[141] *Id.* at 158 (Stevens, J. dissenting in part, and concurring in the judgment in part).
[142] *Id.* at 158-160.

of those trials on double jeopardy grounds.[143] In reality, even if the Justices of the plurality and the dissent are counted together for an agreed-upon notion, the *Jeffers* court held only that multiple *criminal* proceedings against a defendant should be joined if the crimes charged arise out of the same offense, and the defendant chooses not to wage separate trials.[144] The *Jeffers* decision suggests nothing about procedural requirements where the government charges the accused with both criminal and civil violations arising from the same offense. Moreover, double jeopardy analysis was not extended to civil sanctions until *Halper*, decided twelve years after *Jeffers*. As a result, the *Jeffers* rationale cannot logically be extended to concurrent civil and criminal proceedings.[145]

In sum, the Ninth Circuit panel in *$405,089.23* erred by simply finding that related criminal and civil actions instituted by the government create a double jeopardy violation regardless of any prosecutorial intention to conduct a single, coordinated trial. *$405,089.23* is wrong because it: (1) fails to consider the inherent procedural differences between criminal and civil actions, (2) misstates the holding of *Jeffers*, and (3) arrives at the conclusory position that "the government is forcing an individual to 'run the gantlet' more than once."[146] Rather than following common sense, the Ninth Circuit's position ignores the deeply ingrained principle of continuing jeopardy. Surely, neither legislators nor the Supreme Court agree that a defendant's original jeopardy ceases once he is convicted, but before the proceeds of his illegal activity can be forfeited in a parallel action.[147] Thus, where the government

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[143] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[144] *See Jeffers*, 432 U.S. at 160 n.7 (Stevens, J., dissenting in part, and concurring in the judgment in part) ("[E]ight Justices agree that petitioner's constitutional right was violated and only four are persuaded that he waived his double jeopardy objection.").

[145] *See supra* notes 33-48 and accompanying text.

[146] *$405,089.23*, 33 F.3d at 1217 (quoting Green v. United States, 355 U.S. 184, 190 (1957)).

[147] *Compare* United States v. U.S. Currency, 18 F.3d 73, 76 (2d Cir. 1994) (doubting that Congress or the Constitution requires the application of *Halper* to bar civil forfeitures once related criminal penalties have already been imposed) *with* Oakes v. United States, 872 F. Supp. 817, 827 (E.D. Wash. 1994) (recognizing that where a double jeopardy violation infects related, parallel criminal and civil actions, courts must determine which sanction constitutes the second, prohibited punishment).

Neither Congress nor the Supreme Court could have intended for courts to make such a determination. When a court concludes that it must void one of two parallel proceedings because of double jeopardy, it has no guidance to rely upon to make its choice. Arbitrary and

simultaneously files criminal and civil actions against a defendant for the alleged commission of a single offense, original jeopardy does not terminate until both actions have concluded free from trial error.

B. PUNISHMENT: WHEN IS CIVIL FORFEITURE A CONSTITUTIONAL PUNISHMENT?

The Ninth Circuit's determination that the civil forfeitures authorized by 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitute punishment relies on the development of a test in two Supreme Court cases: *United States v. Halper*[148] and *Austin v. United States.*[149] Because both cases represent marked departures from precedent,[150] one should cautiously accept the viability of each application of their holdings to different fact patterns.[151] Thus, a thoughtful analysis of *$405,089.23* requires a detailed understanding of the facts, language, and scope of the holding in both *Halper* and *Austin.*

1. *United States v. Halper: A Double Standard for Double Jeopardy*

In *Halper*, the government indicted Irwin Halper, a manager of a medical service company in New York City, on sixty-five counts of violating the criminal false-claims statute,[152] for allegedly misrepresenting the services his

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inconsistent application of the law seems a certain result.

[148] United States v. Halper, 490 U.S. 435 (1989).

[149] Austin v. United States, 113 S. Ct. 2801 (1993).

[150] *See* Lauren O. Clapp, Note, United States v. Halper: *Remedial Justice and Double Jeopardy*, 68 N.C. L. REV. 979, 980 (1990) (noting the Court's failure in cases before *Halper* even to consider that, under some circumstances, civil penalties could serve punitive ends); *see also* Dallet, *supra* note 19, at 238 n.16 (noting that *Austin* was only the second time that the Court had considered an application of the Excessive Fines Clause, and on the first occasion had rejected it).

[151] *See Halper*, 490 U.S. at 451 ("[T]he *only* proscription established by our ruling is that the [g]overnment may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the [g]overnment whole."); *see also Austin*, 113 S. Ct. 2801 at 2812 (declining to establish a test to determine excessive forfeitures—despite its clear holding of most forfeitures as punishments—because "[p]rudence dictates that . . . the lower courts . . . consider that question in the first instance").

[152] 18 U.S.C. § 287 (1988). The statute states:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent,

company provided on sixty-five separate occasions between 1982 and 1983.[153] After convicting Halper on all counts, the district court sentenced him to imprisonment for two years and fined him $5000.[154] Following this judgment, the government brought a civil claim against Halper under the False Claims Act.[155] The facts established at Halper's conviction persuaded the district court to grant the government's motion for summary judgment.[156] Because Halper violated the act on sixty-five separate occasions, the court recognized that the statute required fines for Halper exceeding $130,000.[157] The court declined to impose the fines, cursorily reasoning that "this civil remedy, designed to make the government whole, would constitute a second punishment for double jeopardy analysis."[158]

The United States moved for, and was granted, reconsideration of the judgment.[159] Although the district court admitted error, ruling that it did not have to assess the statutory penalty for each count, it recharacterized its evaluation of the penalty as a violation of the Double Jeopardy Clause's prohibition against multiple punishments in separate proceedings.[160] The United States appealed directly to the Supreme Court. In a unanimous decision, the Court held "that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction *to the extent* that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution."[161]

> shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

[153] *Halper*, 490 U.S. at 437.

[154] *Id.*

[155] *Id.* at 438. The False Claims Act, 31 U.S.C. §§ 3729-3731 (1982 & Supp. II 1985) states:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action if the person . . . .
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

[156] *Halper*, 490 U.S. at 438.

[157] *Id.*

[158] *Id.* at 438-439 (citing United States v. Halper, 660 F. Supp. 531, 533 (S.D.N.Y. 1987), *modified*, 664 F. Supp. 852 (S.D.N.Y. 1987), *vacated*, 490 U.S. 435 (1989)).

[159] *Id.*

[160] *Id.* (citing United States v. Halper, 664 F. Supp. 852, 853-54 (S.D.N.Y. 1987), *modifying* 660 F. Supp. 531 (S.D.N.Y. 1987), *vacated*, 490 U.S. 435 (1989)).

[161] *Id.* at 448-49 (emphasis added).

Thus, Halper's "liability of $130,000 for false claims amounting to $585, constitutes a second 'punishment' for the purpose of double jeopardy analysis."[162]

Halper's specific holding includes two elements. First, it precludes the initiation of a civil action by the government resulting in the imposition of a civil penalty following a criminal punishment for the same offense.[163] Second, it defines as punishment those civil sanctions that "may not fairly be characterized as remedial, but *only* as a deterrent or retribution."[164] The practical corollaries of these directives are that multiple punishments adjudged during one's original jeopardy and civil sanctions, which include *any* remedial purpose, remain constitutionally viable.[165] Despite this, some language in the opinion obscures and diminishes the precedential value of these precepts. In particular, immediately preceding the Court's "hold[ing] that *under the Double Jeopardy Clause* a defendant who already has been punished . . . may not be subjected to an additional civil sanction . . . that . . . may not fairly be characterized as remedial, but *only* as a *deterrent* or *retribution*,"[166] the Court stated "that a civil sanction that cannot fairly be said *solely* to serve a *remedial* purpose . . . is punishment."[167] The Court seemingly lurches from one extreme to another. First, the Court defines punishment as any sanction merely *including* deterrent or retributive ends; then it limits punishment under the Double Jeopardy Clause to any sanction serving *only* deterrent or retributive ends. This duplicitous language, combined with the Court's later decision in *Austin*—purportedly applying the true *Halper* test—has formed a confusing and random amalgam of ideas constituting a primordial soup in which the Ninth Circuit's flawed ideas spawned and developed.

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[162] *Id.* at 441; *see also id.* at 452.

[163] *Id.* at 451.

[164] *Id.* at 449 (emphasis added).

[165] *See id.* at 451 n.10 ("[T]he multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment."); *see also id.* at 449-50 ("Where . . . the civil penalty . . . bears *no rational relation* to the goal of compensating the [g]overnment 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 . . . to determine if the penalty sought in fact constitutes a second punishment.") (emphasis added).

[166] *Id.* at 448-49 (emphasis added).

[167] *Id.* at 448 (emphasis added).

2. *Austin v. United States: The Court Equivocates on Halper's Test*

The *Austin* Court ostensibly applied the *Halper* test to hold that civil forfeitures constitute punishment for Excessive Fines Clause[168] analysis.[169] In this case, the government indicted Richard Lyle Austin in August 1990, for violating South Dakota drug laws by, among other things, possessing cocaine with the intent to distribute it.[170] Subsequent to Austin's guilty plea, the United States filed an *in rem* civil action to forfeit Austin's trailer and auto body shop.[171] Austin challenged this action, arguing that the Excessive Fines Clause prohibits the government from forfeiting such property in a civil action.[172]

The *Austin* case afforded the Court only its second occasion to consider the Excessive Fines Clause.[173] Without significant precedent, the Court achieved a unanimous judgment.[174] Holding that the Excessive Fines Clause applies to civil forfeiture under 21 U.S.C. § 881(a),[175] the Court remanded the case to determine whether the clause prohibited forfeiture in this instance.[176] Despite this unanimous decision to remand, the Justices divided over the rationale explaining why the Court could test Austin's fine for exceeding constitutional limits.[177]

The five-Justice majority opinion lacks a consistent rationale to buttress its result, and instead contains contradictory statements similar to and actually building upon those found in *Halper*.[178] First, the majority stated that the purpose of the Excessive Fines Clause is "to prevent *the government* from

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[168] See the second clause within U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
[169] Austin v. United States, 113 S. Ct. 2801, 2812 (1993).
[170] *Id.* at 2803.
[171] *Id.*
[172] *Id.* The action was based on 21 U.S.C. § 881(a).
[173] *Id.* at 2804 (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)).
[174] *Id.* at 2802.
[175] *Id.* at 2812 & n.14.
[176] *See id.* ("The [c]lause prohibits only the imposition of 'excessive' fines . . . .").
[177] *See id.* at 2813 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he Court's opinion . . needlessly attempts to derive from our sparse caselaw on the subject of *in rem* forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy."); *id.* at 2815 (Kennedy, J., concurring in part and concurring in the judgment) ("[I]n its eagerness to discover a unified theory of forfeitures, [the Court] recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest.").
[178] *See id.* at 2805-12.

abusing its power to punish."[179] Second, the majority stated that "the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion."[180] This statement seemingly invalidates all civil forfeitures for double jeopardy purposes because "forfeiture [always] serves, at least in part, to punish the owner"[181] as a result of its "'punitive and deterrent purposes,' and 'impos[ition of] an economic penalty.'"[182] Thus, the Court stated two different standards. The first standard creates a relatively high threshold where a given forfeiture is an abuse of the government's power to punish. The second standard creates a relatively low threshold where a given forfeiture merely has the effect of punishing.

To compound this duality, the Court injected a new distinction into the *Halper* test. The Court stated:

> [I]t appears to make little practical difference whether the Excessive Fines Clause *applies* to all forfeitures . . . or only to those that cannot be characterized as purely remedial. The Clause *prohibits* only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.[183]

Thus, whether forfeiture always serves to punish or not, the relevant query for the Excessive Fines Clause is whether those forfeitures that do punish, punish excessively. The Excessive Fines Clause can apply to mitigate a forfeiture, without barring it. Thus, the Court's test in *Austin* lacks a clear standard to apply outside of the excessive fines context[184] because its test for

[179] *Id.* at 2804 (second emphasis added).

[180] *Id.* at 2810 n.12.

[181] *Id.* at 2810; *see also id.* at 2813 n.* (Scalia, J., concurring in part and concurring in the judgment) ("[T]he statutory forfeiture must *always* be at least 'partly punitive,' or else it is not a fine.").

[182] *Id.* at 2810 (quoting Calero-Toledo v. Pearsom Yacht Leasing Co., 416 U.S. 663, 686, 687 (1974)) (citations omitted).

[183] *Id.* at 2812 n.14 (emphasis added).

[184] *See* Jahncke, *supra* note 19 (suggesting that the Excessive Fines Clause, rather than the Double Jeopardy Clause, should apply to and potentially bar civil punishments, because the Excessive Fines Clause is unburdened by the confused mass of case law distorting double jeopardy jurisprudence).

excessive fines analysis differs significantly from the double jeopardy analysis of *Halper.*[185]

3. *The Ninth Circuit's Cumulative Error*

Despite the limited and confusing guidance that *Halper* and *Austin* offer, the Ninth Circuit decision in *$405,089.23* relies exclusively on these cases to find that civil forfeitures authorized by 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitute punishment.[186] The opinion states that "[i]n *Austin*, the Court specifically applied the *Halper* test to determine whether a civil forfeiture . . . constituted 'punishment' . . . ."[187] This is superficially correct. *Austin* does state, "Under [*Halper*] the question is whether forfeiture serves *in part* to punish."[188] However, *Austin* addressed the Excessive Fines Clause, not the Double Jeopardy clause. Because of the nature of the excessive fines analysis,[189] *Austin* sheds little light on double jeopardy claims.

Recall the holding of *Halper*:

> [U]nder the Double Jeopardy Clause a defendant who al- ready has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.[190]

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[185] *See infra* notes 191-203 and accompanying text. *But see* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1953 (1994) (O'Connor, J., dissenting) ("To hold . . . that [a civil sanction] is not *exempt* from scrutiny under the Double Jeopardy Clause says nothing about whether imposition of the tax is unconstitutional.") (emphasis added).

[186] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218-22 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[187] *Id.* at 1219.

[188] Austin v. United States, 113 S. Ct. 2801, 2810 n.12 (1993).

[189] *See supra* note 185 and accompanying text.

[190] United States v. Halper, 490 U.S. 435, 448-449 (1989) (emphasis added); *see also id.* at 449 ("What we announce now is a rule for the rare case . . . . The rule is one of reason: Where . . . the civil penalty . . . 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 [a determination of whether the second penalty is in fact a second punishment].") (emphasis added).

The Court's holding in *Halper* implies a threshold beyond which a civil sanction becomes wholly punitive and does not rationally serve to compensate the government, even in part.[191] Reaching this brink is a condition precedent to the inclusion of a civil sanction in double jeopardy analysis.[192] Although *Halper* recognizes that determining when a fine crosses this threshold is "difficult if not impossible,"[193] the opinion emphasizes "the process of affixing a sanction that compensates the government for all its costs inevitably involves an element of rough justice"[194]—including "the ordinary case fixed-penalty-plus-double-damages provisions."[195] Essentially, the *Halper* protection "is a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[196] As such, it does not apply in *Austin*, regardless of its citation there.

Rather, *Austin* created a standard peculiar to excessive fines claims,[197] and thus holds only that the Excessive Fines Clause applies to forfeitures.[198] Recall, the Court stated that it does not matter "whether the Excessive Fines Clause *applies* to all forfeitures . . . or only to those that cannot be characterized as purely remedial. The Clause *prohibits* only the imposition of 'excessive' fines . . . ."[199] Under this standard, the application of the Excessive Fines Clause to a forfeiture does not require its prohibition. Thus, *Austin* regards fines that punish as commonalties, although few fines punish excessively.[200]

This removes civil sanctions that punish appropriately from the "rare case" that *Halper* describes for double jeopardy analysis. In one Judge's opinion, it "transforms the 'rare case' where *Halper* contemplates that double

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[191] *See id.* at 449 ("[The] rare case . . . [is] where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.").

[192] *Cf. supra* note 28 and accompanying text.

[193] *Halper*, 490 U.S. at 449.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] Austin v. United States, 113 S.Ct. 2801, 2812 (1993).

[198] *Id.* at 2812 n.14 (remanding the case to determine whether the forfeiture of Austin's mobile home constituted an *excessive* punishment, in violation of the Excessive Fines Clause).

[199] *Id.*

[200] *Id.* at 2812-13 (Scalia, J., concurring in part and concurring in the judgment) (noting that *all* fines are payments to the government as punishment).

jeopardy will apply to civil proceedings into a commonplace occurrence, and may have . . . consequences for parallel civil and criminal proceedings which I find it difficult to believe that either the Congress or the Court had in mind."[201] Considering the *Halper* Court's statement that "[n]othing in today's ruling precludes the government from seeking the full civil penalty against a defendant who *previously* has not been punished for the same conduct, *even if* the civil sanction imposed is punitive,"[202] it is difficult to argue otherwise.

By ignoring the difference between the standards used to determine a particular sanction's applicability under the Double Jeopardy Clause and the Excessive Fines Clause, and the significance of 21 U.S.C. § 881(a)(6), which unlike 21 U.S.C. §§ 881(a)(4) and 881(a)(7),[203] deals with the forfeiture of illegal proceeds from drug sales, the Ninth Circuit resolved the issue inappropriately. This failure to apply the proper test for punishment by relying improperly upon *Austin* is especially apparent in the Ninth Circuit's rejection of the Fifth Circuit's position in *United States v. Tilley*.[204] In that case, the Tilley and Anderson couples sought a dismissal of their criminal indictment for selling illegal drugs because it followed an allegedly punitive, civil forfeiture for the same conduct, thereby violating the bar against double jeopardy.[205] The Fifth Circuit panel held that "the forfeiture of [the defendants'] unlawful proceeds of illegal drug sales does not constitute punishment."[206] Two independent reasons support this position. First,

> The forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combating the allure of illegal

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[201] United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 496 (9th Cir. 1994) (Rymer, J., concurring).
[202] United States v. Halper, 490 U.S. 435, 450 (1989).
[203] The statutory provisions applicable in *Austin*.
[204] United States v. Tilley, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994).
[205] *Tilley, 18 F.3d* at 296.
[206] *Id.*

drugs, caring for the victims of the criminal trade when preventive efforts prove unsuccessful, lost productivity, etc.[207]

Second, the forfeiture of illegally derived proceeds "does not punish the defendant because it exacts no price in liberty or *lawfully derived* property from him."[208]

Despite these compelling reasons, the Ninth Circuit rejected the Fifth Circuit's position, arguing that the *Austin* Court "explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes 'punishment.'"[209] However, *Austin*'s equivocation on the word "punishment,"[210]—transforming *Halper*'s rare case into a common, perhaps even categorical occurrence[211]—does not extend from the Excessive Fines Clause analysis to a Double Jeopardy Clause analysis. Further, *Halper* gave a specific policy rationale for its proscription, which cannot implicitly be undermined by *Austin*'s equivocation: "when the [g]overnment *already* has imposed a criminal penalty and *seeks* to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the [g]overnment is seeking the second punishment *because* it is dissatisfied with the sanction obtained in the first proceeding."[212] Such is not the case where the government files both actions contemporaneously. Instead, parallel criminal and civil actions authorized by statute are "a coordinated effort to put an end to [particular criminal activities]."[213] Therefore, *Halper* and *Austin* should not prevent concurrent civil and criminal trials because,

[207] *Id.* at 299 (citations omitted); *see also id.* ("Various sources estimate that illegal drug sales produce approximately $80 to $100 billion per year while exacting $60 to $120 billion per year in costs to the government and society. Clearly, the above overlapping estimates of proceeds and resulting costs are not 'overwhelmingly disproportionate' on a national level . . . .") (citations and footnote omitted); *accord* S.E.C. v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994).

[208] *Tilley*, 18 F.3d at 300 (emphasis added); *see also id.* ("[T]he forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property.").

[209] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1220 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[210] *See supra* notes 179-86 and accompanying text.

[211] *$405,089.23*, 33 F.3d at 1220.

[212] United States v. Halper, 490 U.S. 435, 451 n.10 (1989) (emphasis added).

[213] United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

when combined as "a single, coordinated prosecution,"[214] they constitute the same jeopardy.

4. *The Supreme Court's Increasing Awareness of its Poor Guidance*

Before the Ninth Circuit wrote *$405,089.23*, the Supreme Court had an opportunity to clarify its double jeopardy analysis in *Department of Revenue of Montana v. Kurth Ranch.*[215] In that case, the Court reviewed the validity of Montana's tax on the possession and storage of illegal drugs at the Kurth family ranch, following two separate proceedings for the same offense—a settled civil forfeiture and a criminal prosecution.[216] The Court held that the tax violated the Double Jeopardy Clause for two reasons. First, Montana levied the tax on goods which "no longer exist[ed] and that the taxpayer never lawfully possessed has an unmistakabl[y] punitive character."[217] Because the tax imposed equaled "more than eight times the drug's market value,"[218] it could "'not fairly be characterized as remedial, but only as a deterrent or retribution.'"[219] Second, "The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution."[220] Although the Court forcefully divided, with four Justices delivering three dissenting opinions, statements in each separate

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[214] United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994).

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

[216] *Id.* at 1941-42; *cf. infra* text accompanying note 227.

[217] *Kurth Ranch*, 114 S. Ct. at 1948.

[218] *Id.* at 1946.

[219] *Id.* at 1945 (quoting United States v. Halper, 490 U.S. 435, 448-49 (1989)). The Court also considered that the tax was "conditioned on the commission of a crime" as a factor in its determination. *Id.* at 1947.

[220] *Kurth Ranch*, 114 S. Ct. at 1948. The Court never explained how it reached this opinion. Whether the tax proceeding followed or paralleled the criminal prosecution is subject to differing opinions. *See* United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994) ("In *Kurth Ranch* itself the tax proceeding was begun at the same time as the criminal prosecution; the Supreme Court did not think the fact that the two were pending contemporaneously mattered."). *But see In re* Kurth Ranch, 145 B.R. 61, 63-66 (Bankr. D. Mont. 1990) (noting that between the start of the criminal prosecution on October 18, 1987 and the initial tax assessment on December 8, 1987, the new tax regulations were unavailable to calculate the assessment until November 13, 1987), *aff'd*, No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd*, 986 F.2d 1308 (9th Cir. 1993), *aff'd*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994). However, it seems more likely that the Bankruptcy Court for the District of Montana familiarized itself with the facts in *Kurth Ranch* to a greater degree than the Seventh Circuit.

opinion should have guided the Ninth Circuit toward a different conclusion than the one arrived at in *$405,089.23*.

The majority in *Kurth Ranch* indicated that civil actions which result in secondary punishments and proceed contemporaneously with criminal prosecutions do *not* violate the Double Jeopardy Clause. First, the Court characterized the challenged sanction—a punitive tax following settled criminal and civil trials—as a "separate sanction imposed in [a] *successive* proceeding."[221] Barring this tariff implies nothing about the validity of sanctions imposed in *parallel* proceedings that the American rules of procedure require.[222] Second, the Court noted that taxes "serve a purpose quite different from [other] civil penalties, and [thus] *Halper's* method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.'"[223] Tax statutes should serve two purposes: pure revenue-raising, or revenue-raising coupled with deterrence of disfavored, but legal, activities.[224] Although "a civil penalty may be imposed as a remedy for actual costs to the State that are attributable to the defendant's conduct,"[225] a tax cannot because its primary function is to raise revenue, not to compensate the government or society.[226] Finally, the Court's silent acquiescence to the defendants' settlement of the coordinated criminal and civil trials preceding the tax assessment, suggests that the government could conceivably hold such contemporaneous trials where the legislature authorizes it to do so.[227]

Justice O'Connor dissented over a disagreement about when *Halper* analysis should apply.[228] Among her criticisms, the Justice noted that "[holding] that Montana's drug tax is not exempt from scrutiny under the Double Jeopardy Clause says nothing about whether the imposition of the tax is unconstitutional."[229] Justice O'Connor rebuked the majority for finding

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[221] *Kurth Ranch*, 114 S. Ct. at 1947 n.21 (emphasis added); *see supra* note 220.

[222] *See supra* text accompanying notes 118-29.

[223] *Kurth Ranch*, 114 S. Ct. at 1948 (quoting *id.* at 1950 (Rehnquist, C.J., dissenting)); *see also id.* at 1947 ("Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed *despite* their adverse effect on the taxed activity.").

[224] *Id.*

[225] *Id.* at 1948.

[226] *Id.*

[227] *Id.* at 1942. *But see* United States v. Ursery, 59 F.3d 568, 575 (1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345).

[228] *See Kurth Ranch*, 114 S. Ct. at 1952-55 (O'Connor, J., dissenting).

[229] *Id.* at 1953; *cf. supra* notes 184-86 and accompanying text.

that a "drug tax is *always* punitive" by finding that step "entirely unnecessary to preserve individual liberty."[230]

Chief Justice Rehnquist dissented separately and raised concerns about the abuse of the *Halper* analysis.[231] Unlike Justice O'Connor, the Chief Justice agreed with the majority's superficial rejection of *Halper*'s application to the Montana tax;[232] but he argued that the majority did not truly reject *Halper*'s application to taxes.[233] Each of these opinions reveal its author's desire to limit *Halper*'s reach more so than the majority's holding.

The most compelling statements, however, were made by Justice Scalia, with whom Justice Thomas joined in dissent:

> [T]he repetition of a dictum does not turn it into a holding, and an examination of the cases discussing the prohibition against multiple punishments demonstrates that, until *Halper*, the Court never invalidated a *legislatively* authorized successive punishment. The dispositions were entirely consistent with the proposition that the restriction derived exclusively from the due-process requirement of legislative authorization.[234]

Thus, at least two Justices believe that "*Halper* [itself] was in error,"[235] and that courts can resolve all multiple punishment problems without even addressing claims of double jeopardy. Rather, legislative due process answers the problems of multiple punishment by requiring "prior legislative authorization for whatever punishment is imposed."[236] As one commentator suggested three years before *Kurth Ranch*, "In such a proceeding, the multiple punishment inquiry would be limited to ensuring that the total punishment does not exceed that authorized by the legislature."[237]

Justice Scalia's dissent also acknowledged that "until *Halper* was decided, extending the 'no-double-punishments' rule to *civil* penalties, it did

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[230] *Id.* at 1955 (emphasis added).
[231] *See id.* at 1949-52 (Rehnquist, C.J., dissenting).
[232] *Id.* at 1949.
[233] *Id.* ("[T]he Court then goes astray and the end result of its decision is a hodgepodge of criteria . . . .")
[234] *Id.* at 1956 (Scalia J., dissenting).
[235] *Id.* at 1958.
[236] *Id.* at 1956.
[237] Jahncke, *supra* note 19, at 134-35.

not much matter whether that rule was a free-standing constitutional prohibition implicit in the Double Jeopardy Clause or . . . merely an aspect of the Due Process Clause requirement of legislative authorization."[238] Justice Scalia continued, writing:

> [B]rief experience with the new regime . . . [demonstrates] that the erroneous holding [of *Halper*] produces results too strange for judges to endure, and regularly demands judgments of the most problematic sort. And to the latter: We dodged the bullet in *Halper*—or perhaps a more precise metaphor would be that we thrust our lower-court colleagues between us and the bullet—by leaving it to the lower courts to determine at what particular dollar level the civil fine exceeded the [g]overnment's "legitimate nonpunitive governmental objective" and thus became a penalty.[239]

Ultimately, the legacy of *Halper* remains somewhat uncertain.[240] At least one Justice who joined the *Halper* majority now finds it erroneous.[241] Moreover, there is sharp disagreement concerning its point of application, and whether its application always effects a prohibition of a challenged sanction. Perhaps most important is that the Court could now overrule the 5-4 decision in *Kurth Ranch* because the Court's newest member, Justice Breyer, has replaced one of the Justices who joined in the *Kurth Ranch* majority.[242] Regardless, *Kurth Ranch* may be used to bar only the rare tax that is both intended solely to punish an accused, and is levied subsequent to the termination of other governmental proceedings against a defendant. Thus, while the

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[238] *Kurth Ranch*, 114 S. Ct. at 1957 (Scalia, J., dissenting).

[239] *Id.* at 1958 (quoting United States v. Halper, 490 U.S. 435, 452 (1989)); *see also* United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 496 (9th Cir. 1994) (Rymer, J., concurring) ("The result I feel obligated to reach [because of our holding in *$405,089.23*] effectively transforms the 'rare case' where *Halper* contemplates that double jeopardy will apply to civil proceedings . . . into a commonplace occurrence, and may have other consequences for parallel civil and criminal proceedings which I find it difficult to believe that either the Congress or the Court had in mind.") (citation omitted).

[240] *See* Abramowitz, *supra* note 1, at 3 (considering whether the Court will revisit *Halper* to limit or overrule the decision).

[241] *See* Department of Rev. of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1958 (Scalia, J., dissenting) ("*Halper* was in error . . . .").

[242] Justice Breyer replaced Justice Blackmun beginning in the 1994-95 Term. *See generally, e.g.*, Martel v. Fridovich, 14 F.3d 1 (1st Cir. 1993) (offering little guidance regarding Justice Breyer's disposition of the *Halper* test while sitting as the First Circuit's Chief Judge).

Kurth Ranch Court has retreated from a liberal application of the *Halper* test, the Ninth Circuit has erroneously extended it.

CONCLUSION

The decision of the Ninth Circuit in *$405,089.23* is persuasive, but erroneous. The court ignores an important distinction between the facts that it faced and the facts before the *Jeffers* Court when it states that "parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes."[243] Because there are significant differences between federal criminal and civil procedure, prosecutors cannot join such actions and fairly consider them single, coordinated prosecutions.[244] *$405,089.23* also ignores the narrow holding of *Halper*, reexamined and reiterated by the Court recently in *Kurth Ranch* by both the dissenters and the majority. Finally, *$405,089.23* misreads and misapplies the holding in *Austin* despite the well-reasoned guidance offered by the Fifth Circuit in *Tilley*. In the end, the Supreme Court may have to resolve this attractive misapplication of law. Until it does so, the Ninth Circuit remains a renegade,[245] and will dissimilarly treat similarly situated persons who violate the law in other jurisdictions.

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[243] United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1217 (9th Cir. 1994), *aff'd as modified en banc*, 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).

[244] *See* United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994); United States v. Millan, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

[245] *See, e.g.*, United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489 (9th Cir. 1994) (following *$405,089.23*); United States v. Real Property Located at Incline Village, 47 F.3d 1511 (9th Cir. 1995) (same).